

Social Authority, Legal Discourse, and Women's Voices

Joan Brockman*

In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.¹

I. INTRODUCTION

IT HAS BEEN OVER 100 years since James Bradley Thayer made his comment on the role which assumed facts play in judicial reasoning. Nine years earlier, Oliver Wendell Holmes had touched on this aspect of judicial reasoning in his oft-quoted comment that "the life of law has not been logic: it has been experience."² Although Holmes was commenting on the development of the common law, his statement is equally applicable to the interpretation of the law, whether it be found in legislation or constitutional documents. The elaboration following his popular quote reads:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.³

Thayer's notion that judicial reasoning included factual assumptions was expanded upon by the realists in the United States. The law

* Assistant Professor, School of Criminology, Simon Fraser University; Member of the Law Societies of British Columbia and Alberta. This is a substantially revised version of a paper presented at the American Society of Criminology Meetings, 8 November 1989 at Reno, Nevada. I would like to thank Anita Braha for her comments on an earlier version of this paper.

¹ J.B. Thayer, "Judicial Notice and the Law of Evidence" (1890) 3 Harv. L. Rev. 285 at 287-88. Thayer, however, was also of the view that "questions of law" were choices between competing rules and were quite distinct from all other questions which he referred to as questions of fact. See C. Morris, "Law and Fact" (1942) 55 Harv. L. Rev. 1303 at 1315 where he writes, Thayer's "was a time when the creative aspects of judges' work was depreciated. ... To call problems that are transitory and particular 'questions of fact' prevented embarrassment of the permanency and generality of the law."

² *The Common Law* (Cambridge: Harvard University Press, 1881, reprinted 1963) at 1.

³ *Ibid.* at 1.

was not a self-contained system, rather the sources which judges used to interpret or "find" the law went far beyond the traditional legal sources to include what might be considered facts from the realm of social science. Louis Brandeis and Jerome Frank were two realists and judges who did much to further the use of social science research in the courtroom. Brandeis, as a lawyer and before he was appointed to the bench, presented one of the first social science briefs in an American courtroom.⁴ Frank, as a judge, actually carried out his own social science research.⁵

In 1942, Davis⁶ developed the distinction between adjudicative and legislative facts in order to clarify the conceptual confusion which existed surrounding the use of social science research as evidence in the courtroom. He called the facts which were in dispute between the parties adjudicative facts,⁷ in order to distinguish them from legislative facts.⁸ Legislative facts were those which extended beyond the facts of the case, and were used to interpret the law and decide questions of policy. But the distinction was not always clear.⁹

According to Monahan and Walker, Davis's two categories, while useful when first introduced, have led to problems with the use of social science research in the courtroom, and his model has "outlived

⁴ *Muller v. Oregon*, 208 U.S. 412 (1908).

⁵ J.R. Acker, "Social Sciences and the Criminal Law" (1985) 21 Crim. L. Bull. 434 at 445 quotes Judge Frank in the Triangle Publications case in which he describes his research as follows: "I have questioned some adolescent girls and their mothers and sisters, persons I have chosen at random. I have been told uniformly by my questionees that no one could reasonably believe that any relationship existed between plaintiff's magazine [Miss Seventeen] and defendant's girdles [Miss Seventeen Foundations]. I admit that my method of obtaining such data is not satisfactory. But it does serve better than anything in this record to illuminate the pivotal fact."

⁶ K.C. Davis, "An Approach to Problems of Evidence in the Administration Process" (1942) 55 Harv. L. Rev. 364 at 402-403.

⁷ These are also referred to by some authors as "case" or "historical" facts. See *supra*, note 5; and G.S. Perry & G.B. Melton, "Precedential Value of Judicial Notice of Social Facts" (1983-84) J. Fam. L. 633.

⁸ Legislative facts have also been referred to as "social" facts and "constitutional" facts. See *supra*, note 5; and Perry and Melton, *ibid.* However, since Monahan and Walker use the term "social fact" in a different manner, the term "legislative fact" is used here.

⁹ J. Monahan & L. Walker, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law" (1986) 134 U. Pa. L. Rev. 477 at 484 n. 25 cite commentators who have questioned the usefulness of the distinction. This view is shared by K. Swinton, "What do the Courts Want From the Social Sciences?" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 189 n. 6.

its usefulness."¹⁰ They refer to "acrimonious debates,"¹¹ the "mélange of indirection,"¹² and the "Byzantine farrago of rules"¹³ which interfere with the efficient and fair use of social science research in the courts.

Monahan and Walker present a new paradigm¹⁴ for the use of social science research in the courtroom based in part on the fact that such research, which is used to establish what the law is (traditionally treated as fact), also has characteristics in common with law. Social science research and law are both experienced-based,¹⁵ but they are also characterized by generality in that they "produce principles applicable beyond particular instances."¹⁶ Monahan and Walker suggest that when social science research is used to establish or interpret the law, it is more practical, more efficient, and more fair to treat it as authority in the same way judges treat legal precedents.¹⁷ They propose to call such social science material "social *authority*" rather

¹⁰ J. Monahan & L. Walker, "Social Science Research in Law" (1988) 43 Am. Psychologist 465 at 465.

¹¹ *Ibid.* at 469.

¹² *Ibid.* at 467.

¹³ *Ibid.* at 465.

¹⁴ The entire paradigm is set out by Monahan & Walker, *ibid.* The authors classify the uses of social science research in law into three categories: social authority, social fact and social framework. This paper is concerned with social science research as social authority. The authors elaborate on this category in an earlier article, *supra*, note 9. Social facts are discussed in more detail in L. Walker & J. Monahan, "Social Facts: Scientific Methodology as Legal Precedent" (1988) 76 Calif. L. Rev. 877 and social framework evidence is discussed in L. Walker & J. Monahan, "Social Frameworks: A New Use of Social Science in Law" (1987) 73 Va. L. Rev. 559.

¹⁵ Monahan & Walker, *supra*, note 9 at 493 illustrate this point by showing how custom had an impact on the development of "law merchant," commercial law, and international law.

¹⁶ *Supra*, note 10 at 467.

¹⁷ Monahan and Walker write, "We make no claim that jurisprudential principles compel our conclusion." Rather, since social science research has characteristics in common with both fact and law they have chosen the characterization which is most useful, *supra*, note 9 at 488-489.

than legislative or social *facts*.¹⁸ They note that some of the first courts to consider social science research hinted at this approach.¹⁹

Monahan and Walker's paradigm is useful in providing a more efficient means of introducing social science research as evidence into the courtroom. For example, they suggest that empirical research should be presented in written briefs rather than through witnesses, and judges should be permitted to locate social science research on their own. However, treating social science research as social authority rather than as social fact to some extent undermines what Thayer and Holmes were trying to establish many years ago. That is, assumptions of fact permeate conclusions of law. Treating social science research as authority may undermine its use in correcting the unarticulated facts inherent in the abstract nature of judicial reasoning. The unintended effect might be to disguise or mask the assumptions of fact underlying conclusions of law.

Law and fact are not only similar, they also influence one another. Legal constructs have a significant impact on how facts are viewed, and facts (often assumed, and sometimes incorrectly) will influence decisions on what the law is. As Walker and Monahan paraphrase Holmes, "what begins as questions of fact often become, in time, questions of law."²⁰ Treating social science research as social authority may have the unintended effect of supporting traditional legal reasoning which involves taking a case out of its context to a level of abstraction which disguises its underlying factual basis.²¹ Holmes wrote that "prejudices which judges share with their *fellow-men*" [emphasis added] have more to do with interpreting the law than logic. Law is based on the experience of judges, which includes assumed facts from their own worlds. Given the population from which judges are appointed,²² this is a somewhat narrow world.

¹⁸ *Ibid.* at 489.

¹⁹ For example the United States Supreme Court in the case of *Muller v. Oregon*, *supra*, note 4, in commenting on the social science material which was provided as evidence of the effect of long hours of work on women, stated that the material "may not be, technically speaking, authorities" (quoted in Monahan & Walker, *ibid.* at 480).

²⁰ "Social Facts: Scientific Methodology as Legal Precedent", *supra*, note 14 at 896.

²¹ See for example, M. Mandel, *The Charter and the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1989).

²² See for example, P. McCormick & I. Greene, *Judges and Judging* (Toronto: James Lorimer & Company, 1990) c. 3 in which the authors report that minority ethnicities are underrepresented in the Canadian judiciary, and that in 1990 only 7.5% of federally appointed judges and 6% of provincially appointed judges were women. In terms of

Strategies used by groups such as the Legal Education and Action Fund (LEAF), which try to achieve equality for women through litigation, include flooding the courts with women's stories²³ so that judges are given little opportunity to rely on their own stereotypes about women.²⁴ Boyle notes that lawyers' arguments involve appealing to a perception of the world which they share with judges. She writes that a problem arises when:

... an argument would strike a chord in one sex, but not in the other — areas where there is a divergence in how women and men experience reality. In other words, what happens when the sense is not common? What if women think that being kissed against their will is really bad and men think it is just a little fun? This problem has usually been resolved by choosing the male perspective.²⁵

Monahan and Walker further suggest that social science research which is used as social authority should be evaluated by judges along dimensions which are similar to those used to evaluate case law:

[C]ourts should place confidence in social science research to the extent that the research (a) has survived the critical review of the scientific community, (b) has used valid research methods, (c) is generalizable to the legal question at issue, and (d) is supported by a body of other research.²⁶

The evaluative criteria suggested by Monahan and Walker may be very useful to judges in circumstances where they are called upon to assess the merits of social science research which is establishing or refuting a statistical relationship between, for example, the use of capital punishment and deterrence, or the relationship between the exclusion of evidence and the behaviour of police. However, their criteria imposes an unfair and additional burden on women litigants who are simply trying to inform judges about the "prejudices which

social class, "[i]n Alberta, 46 percent of the fathers of Provincial Court judges were businessmen, lawyers, or other professionals, compared with 9 per cent of Alberta males in 1931 (which is around the time when most of these judges were born). Conversely 35 per cent of Alberta judges had fathers who were labourers or farmers, compared with 87 per cent of the men in the province when the judges were children," at 66.

²³ See for example, S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 24 and 81.

²⁴ *Ibid.* at 69.

²⁵ C. Boyle, "Sexual Assault and the Feminist Judge" (1985) 1 C.J.W.L. 91.

²⁶ *Supra*, note 10 at 467-68.

judges share with their fellow-men." The voices of women need to be heard by the judiciary, and these voices very often do not fit the mould of "valid research methods,"²⁷ nor are they admissible under present rules of legal discourse.²⁸ This additional burden on women is not one shared by men, who for the most part have their assumptions (or prejudices) overrepresented in the courts.²⁹

This paper demonstrates how traditional legal discourse (with an emphasis on abstraction) generally excludes the voices of women, and how social authority could place an additional unfair burden on women in litigating issues of equality. A case study of the factums filed in the Manitoba Court of Appeal and the Supreme Court of Canada,³⁰ along with the judicial reasoning of the judges on the issue of whether sexual harassment was discrimination on the basis of sex, is used as an illustration. It provides an interesting example because in the end Chief Justice Dickson of the Supreme Court of Canada decided that sexual harassment *was* discrimination on the basis of sex. In doing so he strayed from traditional legal discourse and listened to the voices of women. He did so without imposing evaluative criteria such as that suggested by Monahan and Walker. Had he imposed such criteria, he would have excluded much of the evidence which he relied on in his decision.

The judgments by the two Manitoba Court of Appeal judges are examined in detail to illustrate how traditional legal discourse can allow judges to ignore the contextualized reality of the world of victims of harassment. The factums filed by the complainants' lawyer and LEAF³¹ in the Supreme Court of Canada illustrate the contrast between the traditional legal approach to issues and one which allows for a contextualization of harassment without imposing stringent social science criteria. The paper concludes with some of the dangers

²⁷ Monahan & Walker, *supra*, note 9 at 504 write, "The intensive analysis of a specific case illustration, often used in journalism and biography, is close to useless as a method for drawing any valid conclusions."

²⁸ *Supra*, note 23.

²⁹ This is not to say that women or men are of one voice. However, there are areas of law which are predominately androcentric and which would have to fundamentally change in order to reflect women's perspectives. The recognition of harassment as a violation of human rights is one area in which women have been successful.

³⁰ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39, rev'g [1987] 1 W.W.R. 385 (Man. C.A.), rev'g [1986] 2 W.W.R. 273 (Q.B.), vary'g (1985), 6 C.H.R.R. D/2735 (Bd. of Adjud.) [hereinafter *Janzen*, cited to W.W.R.].

³¹ LEAF was granted status as an Intervenor before the Supreme Court of Canada.

of treating social science research as social authority for certain kinds of factual information, and speculates as to the problems which women will face if — having finally found a means by which their voices can be heard — they are now told that their voices have to be tested by yet another androcentric system.

II. LAYING THE GROUNDWORK: THE MEANING OF DISCRIMINATION

PRIOR TO THE *JANZEN* case, the Supreme Court of Canada had made it clear that the purpose of human rights legislation was to prevent or remedy discriminatory practices, not to punish wrongdoers. In determining whether a policy or practice was discriminatory, it was the *effect* of the policy or practice, not the intention of the party, which was relevant.³² The Supreme Court of Canada had also decided that “adverse effect discrimination,” even if the policy or practice was neutral on its face, was also discrimination.³³ Both of these decisions were available to and cited by the Manitoba Court of Appeal.

III. THE CASE OF JANZEN AND GOVEREAU

JANZEN AND GOVEREAU, THE complainants, were two waitresses at a restaurant owned and operated by Platy Enterprises Ltd., one of the respondents. Phillip, the president of the corporation, managed the restaurant and cooked during the morning shift. Grammas, the other respondent in the action, was an officer of the corporation with no ownership interest. He was the cook during the evening shift. While Grammas had no authority to fire waitresses, he and Phillip made representations to the waitresses that he had such authority. The harassment complained of included grabbing, kissing, touching various parts of the waitresses' bodies, including stomach and breasts. Verbal harassment and unco-operative and threatening behaviour continued after the physical aggression ceased.

Janzen and Govereau filed an action under the *Human Rights Act* which at that time stated:

³² *Re Ontario Human Rights Commission and Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.).

³³ *Re Bhinder and C.N.R. Co.* (1985), 23 D.L.R. (4th) 481 (S.C.C.).

Every person has the right of equality of opportunity, ... and ... no employer or person acting on behalf of an employer, shall ... discriminate against that person in respect of employment or any terms or employment ... because of ... [the] sex of that person.³⁴

The issue of whether sexual harassment was discrimination on the basis of sex was not raised before the Board of Adjudication under the human rights legislation. The adjudicator cited six cases which held that sexual harassment was discrimination on the basis of sex and followed those decisions. When the issue was raised at the first appeal, the Manitoba Court of Queen's Bench upheld the Board of Adjudication decision that sexual harassment was discrimination on the basis of sex, and that the restaurant was jointly liable with Grammas for his actions.

In November, 1986 the Manitoba Court of Appeal held that sexual harassment was not discrimination on the basis of sex, reversed the Manitoba Court of Queen's Bench decision, and allowed the appeal of Platy Enterprises.³⁵ In May, 1989 the Supreme Court of Canada held that sexual harassment was discrimination on the basis of sex under provincial (Manitoba) human rights legislation,³⁶ reversed the Manitoba Court of Appeal's decision, and held that Platy Enterprises was liable for the harassment jointly with its employee Grammas.

A. The Facts Filed in the Manitoba Court of Appeal

Given the Supreme Court of Canada's earlier statements about the importance of the *effect* of behaviour in determining discrimination rather than the state of mind of the perpetrator, one might expect that the factum filed on behalf of the complainants in the Manitoba Court of Appeal would emphasize the effects that sexual harassment had on the complainants, and treat the state of mind of the respondents as

³⁴ S.M. 1974, c. 65, C.C.S.M. c. H175, s. 6(1). Amendments to the legislation in 1987 prohibited harassment, including sexual harassment, as a form of discrimination. However, the case, which the Supreme Court of Canada addressed in 1989, had occurred in 1982. The Supreme Court noted that Ontario and Newfoundland, through their human rights legislation, and the federal government, through its labour code, prohibited sexual harassment, whereas there was no specific prohibition in Manitoba's human rights legislation, *Janzen*, *supra*, note 30 at 62-63.

³⁵ Grammas' employment was terminated before the hearings and he did not participate in any of the proceedings. See *Janzen*, *ibid.* at 45.

³⁶ *Ibid.* The Court had earlier decided that an employer was liable for the sexual harassment carried out by one of its employees against another employee, see *Robichaud v. Brennan*, [1987] S.C.R. 84. The question of whether sexual harassment was discriminatory was not raised before the Supreme Court in that case.

irrelevant. It did not. Rather, the factum provided details of the mind-frame of the owner/manager of the restaurant where the harassment took place.³⁷

Phillip told her that she was too uptight because she was in university; that she shouldn't let Tommy do those things to her; and that she "needed a fuck anyway."³⁸ ... not only did he [Phillip] appear not to take her allegations seriously at all, but in fact quite clearly blamed her for it and that if in fact acts of sexual harassment did happen, she was the one who permitted it to happen or should have taken the initiative to stop it, more so than she did.³⁹

Descriptions of the effect of sexual harassment on the complainants were mostly left for the judges to find in the transcripts. The factum read:

During her employment and after, Janzen became extremely upset and physically ill as a result of the treatment she had received from Grammas and Phillip.⁴⁰

The effect of the harassment had a substantial psychological impact on Govereau, the details of which were described by her throughout her evidence and in particular at pages 178–179 of the Transcript and page 191.⁴¹

The respondent Platy Enterprises' factum concentrated on the issue of corporate liability and the argument that sexual harassment was not discrimination on the basis of sex, but rather was based on the attractiveness of the complainants.

B. The Manitoba Court of Appeal⁴²

The opening paragraphs of Mr. Justice Huband's decision set the tone for the approach which both judges at the Manitoba Court of Appeal took to the issue. Huband, J.A. began by expressing his amazement that the case was even before him.

I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex. I think they are entirely different concepts. ... Assuming sexual

³⁷ Part of this might be explained by the fact that corporate liability was in issue, but this only further demonstrates how legal discourse provides a distraction from the issue.

³⁸ Complainants (Respondents) Factum in the Manitoba Court of Appeal at 2.

³⁹ *Ibid.* at 3.

⁴⁰ *Ibid.* at 3.

⁴¹ *Ibid.* at 5.

⁴² There were only two decisions at the Manitoba Court of Appeal. Mr. Justice Matas died between the appeal hearing and the judgment.

harassment to be a form of sexual discrimination, I am amazed to think that an employer could be held ... responsible for that form of discrimination on the part of an employee.⁴³

He went on to say that while it is "within the power of a legislative body to say that black is white, or that day is night, or that harassment is discrimination"⁴⁴ it had not done so in this case.

In deciding that sexual harassment was not discrimination on the basis of sex, Huband ignored the effects of harassment on the complainants and on women in general. He relied heavily on dictionary definitions of the words "discriminate" and "harass" and his understanding of the "intention" of the legislative body when it enacted the legislation. "Sexual harassment involved vexing or troubling a person with respect to sexual matters such as repeatedly touching or making suggestions, or threats" whereas "discriminate ... means an unjustified differentiation or distinction."⁴⁵

Huband dismissed previous decisions on the issue by stating that adjudicators had approached their task with "Messianic zeal" and had justified their "strained interpretation of the law" on the basis that "sexual harassment is a naughty thing."⁴⁶ He relied on a comment from an earlier human rights inquiry where an adjudicator stated that it took "creative interpretation" to fit sexual harassment within the concept of discrimination.⁴⁷ Huband also rejected the U.S. cases because they "represented a complete volte-face in the development of jurisprudence in the subject."⁴⁸

Although at one point in his judgment he used the words from one adjudicator that sexual harassment was an abuse of economic power and authority, it is clear throughout his judgment that he assumed sexual harassment was not an abuse of power but that it was a sexual encounter. He began with a description of the "whole affair,"⁴⁹ and

⁴³ *Supra*, note 30 at 390.

⁴⁴ *Ibid.* at 396.

⁴⁵ *Ibid.* at 395.

⁴⁶ *Ibid.* at 402.

⁴⁷ *Ibid.* at 402. Huband writes, "The problem is that their "creative interpretations" have gone too far in stretching the meaning of discrimination as it is used in the statute in order to make a 'penetration into the workplace'."

⁴⁸ *Ibid.* at 404.

⁴⁹ *Ibid.* at 390.

refers to the "cook's aberrant amorous conduct,"⁵⁰ "inappropriate sexual aggression,"⁵¹ "strange amorous pursuits"⁵² and the fact that "sexual harassment is a naughty thing."⁵³ His descriptions ignored the *effects* of the abuse of power on its victims and concentrated on the inappropriate behaviour of the perpetrator.

Mr. Justice Twaddle, following in Mr. Justice Huband's footsteps, made use of dictionaries and his interpretation of the "intention" of the legislators in reaching the same conclusion that sexual harassment was not discrimination on the basis of sex. While he made reference to the point that intent was not an essential element of discrimination and quoted from earlier decisions by the Supreme Court of Canada to this effect, he gave examples of how sexual harassment might be considered discrimination which involved intent.

We are concerned with the effective cause of the harassment, be it a random selection, the conduct, or a particular characteristic, of the victim, a wish on the part of the aggressor to discourage women from seeking or continuing in a position of employment or a contempt for women. Only in the last two instances is harassment a manifestation of discrimination.⁵⁴

According to Twaddle, sexual harassment was discrimination on the basis of sex if it was done for the purpose of discouraging women from remaining in a workplace, but not if it was done for other reasons. For Twaddle, the key to discrimination was the *intent* of the perpetrator.

Neither of the judges looked at the effects which sexual harassment had on the complainants or women in general; neither used sources outside the traditional legal approach to address the issue. Neither looked at it from the perspective of the victims. Both recognized that sexual harassment was not socially acceptable but the examples they gave illustrate their orientation to the perpetrators of sexual harassment, not the victim.

[If an employer] decides to make working conditions so miserable for the women that they will resign[, then h]is tactic is to use sexual harassment to achieve his discriminatory purpose ...

⁵⁰ *Ibid.* at 391.

⁵¹ *Ibid.* at 406.

⁵² *Ibid.* at 405.

⁵³ *Ibid.* at 402.

⁵⁴ *Ibid.* at 423.

When a schoolboy steals kisses from a female classmate, one might well say that he is harassing her. He is troubling her; vexing her; harrying her — but he surely is not discriminating against her.⁵⁵

If the cook dumped too much pepper in the soup, he would clearly be acting in the course of his employment. ... If the cook, contrary to instruction, was smoking on the job, and as a result caused a gas explosion in the kitchen, it would be arguable that he was still acting in the course of his employment in the sense that he was trying to fulfil his responsibilities as a cook. But what has patting the buttocks of a waitress to do with fulfilling the responsibilities as a cook?⁵⁶

In attempting to show that sexual harassment was not discrimination, Twaddle, within two brief paragraphs (14 lines) referred to the victim as being “chosen” or “selected” eight times,⁵⁷ and he assumed that victims of sexual harassment are “chosen” because of their sexual attractiveness.⁵⁸ This victim-blaming approach ignores the *effects* which sexual harassment has on its victims.

How can one find that a particular activity is not discrimination without ever examining the effects of such activities on its victims? Both members of the Court of Appeal concentrated on the activities of the harasser and what they assumed his intentions were: they totally ignored the effects of such activities. Evidence of the effects of the sexual harassment was in the transcripts. However, it was not even considered sufficiently important by the lawyers for the complainants to reproduce it in their factum. The effects of sexual harassment on women and the voices of women have to be heard in the courtroom.⁵⁹ Such was the case in the factum presented by LEAF (intervenor before the Supreme Court of Canada), but again not by the factum filed for the complainants.⁶⁰

⁵⁵ *Ibid.* at 395.

⁵⁶ *Ibid.* at 411.

⁵⁷ *Ibid.* at 422.

⁵⁸ *Ibid.* at 422-425.

⁵⁹ Another possible way is to appoint judges who are more likely to understand the effects of, for example, harassment of women.

⁶⁰ The Respondents did not file a factum or appear at the Supreme Court of Canada level, and the factum for the Complainant (Respondents) was filed by the Deputy-Attorney General of Manitoba. This was an action brought by the Human Rights Commission, so lawyers for the Human Rights Commission acted on behalf of the complainants.

C. The Factums Filed in the Supreme Court of Canada

Given the Supreme Court's earlier statements about the importance of the *effect* of behaviour in determining discrimination rather than the state of mind of the offender, one might expect that the Statement of Facts in the factum filed on behalf of the complainants in the Supreme Court would emphasize the effects of sexual harassment on the complainants, and treat the state of mind of the respondents as irrelevant. Again, this was not the case. Rather, the factum spelled out the state of mind of the offender and left the judges to look up the details of the effects of the harassment. The following quotes from the complainants' factum illustrate this position:

Phillip implied to her that she shared blame for what was happening. He told her that she shouldn't "let" Tommy do these things to her, that she was "too uptight" because she was going to university, and that she "needed a fuck anyway."⁶¹

[Phillips] did admit that he thought Janzen was "overreaching."⁶²

Effects were described as follows:

Govereau had a difficult time in obtaining new employment ... The physical harassment of Grammas, and the subsequent verbal harassment by both Grammas and Phillip had a substantial negative psychological affect upon her, the details of which were described throughout her evidence.⁶³

She [Janzen] found the incidents themselves, and management's response to them very upsetting.⁶⁴

The factum also isolated the complainants as individuals. Paragraph 20 reads, "human rights legislation is *not* group-oriented, but focuses on the individual." This was in response to Mr. Justice Huband's position that sex discrimination had to attack women as a group. However, in the next paragraph the factum quotes from an article by Kadar that sexual harassment as "women's most serious occupational hazard," thus recognizing that it is not an individual woman's problem, and that it does have negative effects on women.

In contrast, the factum filed by LEAF emphasized the effect which sexual harassment had on the complainants and other women as a group. In terms of the complainants, LEAF's factum stated:

⁶¹ Appellants' Factum filed in the Supreme Court of Canada, para. 4.

⁶² *Ibid.* para. 5.

⁶³ *Ibid.* para. 15.

⁶⁴ *Ibid.* para. 6.

(a) Diana Janzen testified that the physical and emotional consequences of the harassment she endured included insomnia, vomiting, inability to concentrate. The Adjudicator accepted the evidence "Totally."

(b) The Adjudicator found that the harassment of Tracy Govereau by Tommy and Phillip was "devastating" to her. In this regard, Govereau testified that she "felt dirty, wasn't relaxed, couldn't sleep or concentrate in class." ...

(c) The Adjudicator found that the acts of Tommy and Phillip created a "poisoned work environment" for both complainants.⁶⁵

There was no reference to the intent, motives or mind set of the perpetrator of the harassment.

LEAF also spelled out the effects of harassment on women in general. Sexual harassment "mirrors and reinforces a fundamental imbalance of power between men and women in the workplace and in society."⁶⁶ It "utilizes economic dominance to effect sexual coercion and sexual domination to effect economic coercion;"⁶⁷ and it is a "tool for maintaining dominance and reminding women of their dependent, vulnerable, and precarious status in the workplace."⁶⁸ Sexual harassment deprives [women] of their physical and mental health.⁶⁹

The LEAF factum made reference to three books and an article in a legal periodical which discussed the extent and effects of harassment on women. All of these sources were referred to by Chief Justice Dickson of the Supreme Court of Canada in his judgment which completely rejected the Manitoba Court of Appeal's approach to the issue.

D. The Supreme Court of Canada's Decision

In overturning the Manitoba Court of Appeal's decision that sexual harassment was not a form of discrimination based on sex, the Chief Justice quoted from American and Canadian cases, as one might expect; but without making a distinction with regard to his sources, he also quoted from three books and one journal article cited in the LEAF factum. Although all but one of the five authors were lawyers, one might say that all of the works make reference to social science research. Arjun Aggarwal's book *Sexual Harassment in the Work-*

⁶⁵ LEAF's Factum in the Supreme Court of Canada, para. 1.

⁶⁶ *Ibid.* para. 10 at 6.

⁶⁷ *Ibid.* para. 11 at 6.

⁶⁸ *Ibid.* para. 15 at 8.

⁶⁹ *Ibid.* para. 20 at 9.

place⁷⁰ is a legal textbook on the issue, which summarizes the legal developments in the United States and some of the social science research that has been done. *The Secret Oppression: Sexual Harassment of Working Women*⁷¹ was written by two Canadian journalists, one is also a lawyer (Backhouse) and the other has a Master's degree in political science (Cohen). Chapter 1 gives seven descriptive stories from women who had been sexually harassed at their places of employment. Chapter 2 summarizes a number of surveys which examine the extent and form of sexual harassment. It also summarizes a *Redbook* magazine survey which asked about the effects of harassment. The third book by C.M. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*,⁷² is again a mixture of legal commentary and social science research. MacKinnon conducted in depth interviews with ten women, examined written personal accounts by five other women, and through a court action examined the experiences of about 50 women in the academic world.⁷³ The article, by M.A. Hickling,⁷⁴ was a critique by a lawyer of the Manitoba Court of Appeal's decision which was the subject of appeal to the Supreme Court of Canada. The article also summarizes some of the social science research on sexual harassment. These sources were treated very much like social authority in the sense that they were introduced to the Supreme Court of Canada through factums.

In using these sources to arrive at the conclusion that sexual harassment was discrimination on the basis of sex, Chief Justice Dickson used definitions from them which were often wrapped up in the consequences or effects of sexual harassment on women. He used MacKinnon's definition: "the unwanted imposition of sexual requirements in the context of a relationship of unequal power;"⁷⁵ Aggar-

⁷⁰ (Toronto: Butterworths, 1987).

⁷¹ C. Backhouse & L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan of Canada, 1978).

⁷² (New Haven: Yale University Press, 1979).

⁷³ *Ibid.* at 248. In the preface to her book she asks the question: "How valid and generalizable are such data?" She concludes that her data is "more than anecdotal or illustrative." Rather, "the factors that explain and comprise the experience of sexual harassment characterize all women's situation in one way or another, not only that of direct victims of the practice, at xii-xiii.

⁷⁴ "Employer's Liability for Sexual Harassment" (1988) 17 Man. L.J. 124.

⁷⁵ *Supra*, note 30 at 61.

wal's definition: "any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity;"⁷⁶ and Backhouse and Cohen's definition: "any sexually-oriented practice that endangers a woman's job — that undermines her job performance and threatens her economic livelihood."⁷⁷

He expanded on the nature, extent, and consequences of sexual harassment by quoting from both Aggarwal and Backhouse and Cohen.

Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society. Sexual harassment is not confined to any one level, class, or profession. It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or both. Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person.⁷⁸

Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her senses of personal dignity. Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include sexual innuendos, and propositions for dates or sexual favours.⁷⁹

Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.⁸⁰

The Chief Justice was also of the view that the distinction between sexual harassment which results in tangible loss of benefits and that which creates a hostile working environment, was not "particularly helpful."⁸¹ He concluded:

sexual harassment ... is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment ... [It] is a demeaning practice, one that constitutes a

⁷⁶ *Ibid.* at 61.

⁷⁷ *Ibid.* at 62.

⁷⁸ Aggarwal, *supra*, note 70 quoted in Janzen, *supra*, note 30 at 61.

⁷⁹ Janzen, *ibid.*

⁸⁰ *Supra*, note 71 quoted in *ibid.* at 62.

⁸¹ *Ibid.*

profound affront to the dignity of the employees forced to endure it ... [It] attacks the dignity and self-respect of the victim both as an employee and as a human being.⁸²

With regard to whether the discrimination was based on sex, Dickson concluded that while men may be the victims of sexual harassment it is more likely that women will be the victims. He relied on Hickling's summary of a study which was commissioned by the Canadian Human Rights Commission Research and Special Studies Branch which was conducted in 1981.⁸³ It showed that women reported more unwanted sexual attention than men, and that women at the lower end of the economic scale experienced more sexual harassment than those who were not as economically vulnerable.

III. SOCIAL AUTHORITY

IN TERMS OF OBTAINING social science research, Dickson followed the model suggested by Monahan and Walker. He did not hear witnesses or rely solely on facts established at the trial level.⁸⁴ Instead he examined the social science material which was referred to the court through briefs which had been submitted by the parties and intervenors.

In reaching the decision that sexual harassment was a form of discrimination based on sex, Dickson departed from the traditional legalistic approach adopted by the Manitoba Court of Appeal. Rather than examining dictionary definitions and interpreting the intention of the legislators, he listened to evidence of the effects of sexual harassment on women, the facts underlying his conclusion of law. Had he completely ignored these facts, he would still have made his decision on facts; however, it is unlikely that these facts would have reflected the reality of women's lives. Rather he would have used legal terms and rules of interpretation which would have either disguised his assumed facts, or he too might have assumed that harassment was a sexual encounter based on the attractiveness of a woman, and had little to do with discrimination and the daily lives of women.

⁸² *Ibid.* at 64-65.

⁸³ *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians* (Ottawa: Canadian Human Rights Commission Research and Special Studies Branch, 1983):

⁸⁴ It would have been very unusual for the Supreme Court of Canada to hear witnesses, but in this case it was referring to social science material which had not been introduced at the initial hearing.

In terms of evaluating research presented in court, Dickson did not follow Monahan and Walker's model. If one were to apply Monahan and Walker's evaluative criteria to the information used by Dickson, only the Human Rights Commission's survey, regarding the prevalence and form of sexual harassment, might pass their test. However, the questions asked in that survey were largely about the effects of harassment on the respondents' work. Evidence of the consequences of harassment on the respondents themselves, in the work of MacKinnon and that of Backhouse and Cohen, was mostly qualitative interview data.⁸⁵ They also relied on a survey conducted by *Redbook* magazine in 1976. MacKinnon comments that the most serious drawback of that study was the self-selection of the respondents; however, she was of the view that the questions were "perceptively designed to elicit impressionistic data," and when this is kept in mind, "the study is highly valuable."⁸⁶

Monahan and Walker's approach to evaluating social science research suggests that there is some uniform strategy to such research. However, whether it is carried out by those with training in law, the social sciences, or a combination of the two, such research is not a homogeneous exercise.

Monahan and Walker's first requirement, surviving critical review of the scientific community, ignores the controversy surrounding who gains entrance into, and recognition in, the "scientific community." Efforts to marginalize women in law schools have been, by and large, successful. Men still dominate, and women are being subjected to a backlash because of their perspectives.⁸⁷

⁸⁵ This is not to say that the effects of harassment cannot be quantified. See J. Brockman & D. Phillippe, "The Task Force Approach to Studying Gender Bias in the Courts: A Consideration of Feminist Methods and Perspectives" (1991) 16 *Atlantis* 32 at 43-44.

⁸⁶ MacKinnon, *supra*, note 72 at 248.

⁸⁷ M.J. Mossman, "'Otherness' and the Law Schools: A Comment on Teaching Gender Equality" (1985) 1 C.J.W.L. 213; C. Boyle, "Teaching Law as if Women Really Mattered, or What about the Washrooms?" (1986) 2 C.J.W.L. 96; S. McIntyre, "Gender Bias Within the Law School: 'The Memo' and its Impact" (1987-88) 2 C.J.W.L. 362; S. McIntyre, "Promethea Unbound: A Feminist Perspective on Law in the University" (1989) 38 U.N.B. L.J. 157; S. Vella, "Feminist Refugees — The Osgoode Hall Law School Experience" (1990) 11 *Jurifemme* 9; B. Feldstein, "The Gender Wars: 'Where The Boys Are'" (1990) 4 C.J.W.L. 66; Ad Hoc Committee on Gender Related Policy, *Survey 1991 Report* (Faculty of Law, U.N.B., October, 1991); M. Angel, "Women in Legal Education: What it's Like to be Part of Perpetual First Wave or the Case of the Disappearing Women" (1988) 61 *Temp. L.Q.* 799.

Women face similar problems in the social sciences.⁸⁸ Until women and other marginal groups gain access to the "scientific community," the results of such research will bear the stamp of the androcentric culture within which it is generated.

The second evaluative criterion suggested by Monahan and Walker, valid research methods, ignores the controversy over what qualifies as "valid" research methods and the methodological issues raised by feminists' critiques of science.⁸⁹ Monahan and Walker define social science as "the application of empirical research methods to questions of human behaviour."⁹⁰ In their book, *Social Science in Law*,⁹¹ they devote a chapter to "A Primer of Social Science Methods." The following quotations give the flavour of their approach to social science:

Asking the right question is the necessary first step in any form of useful social inquiry. ... To have meaning to a social scientist, a question must refer to some aspect of the empirical world, i.e. to something we can observe with our senses. ... Finally, the question would be put in such a manner that answering it necessarily would involve measuring or quantifying in some way what is observed. Thus, the empirical approach, causal explanation, and measurement, seem to be the three components of asking the right question in social science.⁹²

When a social scientist has framed a question properly — that is, when the question is empirical and the variables presumed to be causally related have been operationally defined in a reliable and valid way — the next task is to gather relevant information.⁹³

⁸⁸ See for example, R. Menzies & D.E. Chunn, "Kicking Against the Pricks: The Dilemmas of Feminist Teaching" in B.D. MacLean & D. Milovanovic, eds, *Critical Criminology* (Vancouver: Collective Press, 1991); C. Backhouse *et al.*, *The Chilly Climate for Faculty Women at UWO: Postscript to the Backhouse Report* (1989); A.I. Dagg & P.J. Thompson, *MisEducation: Women and Canadian Universities* (Toronto: Ontario Institute For Studies in Education, 1988); J. Gaskell & A. McLaren, eds, *Women and Education: A Canadian Perspective* (Calgary: Detselig, 1987).

⁸⁹ See for example, D.E. Smith, *The Everyday World of the Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987); W. Tomm, ed., *The Effects of Feminist Approaches on Research Methodologies* (Waterloo: Wilfrid Laurier, 1989, printed for the Calgary Institute for the Humanities); W. Tomm & G. Hamilton, *Gender Bias in Scholarship: The Pervasive Prejudice* (Waterloo: Wilfrid Laurier, 1988); and S. Harding, *Feminism and Methodology* (Bloomington: Indiana University Press, 1987).

⁹⁰ *Supra*, note 9 at 479.

⁹¹ J. Monahan & L. Walker, *Social Science in Law: Cases and Materials*, 2d ed. (New York: Foundation Press, 1990).

⁹² *Ibid.* at 33–34.

⁹³ *Ibid.* at 45.

There is no doubt that asking the right question is the first step. However, Monahan and Walker's criteria for asking the right question ignore the fact that "people who identify and define scientific problems leave their social fingerprints on the problems and their favoured solutions to them."⁹⁴ The conceptualization of an issue which takes place in context of discovery is not a neutral process, rather it is value laden. It is part of the androcentric bias which exists in science and has been characterized as "part of ruling."⁹⁵ A similar process takes place in law. Conceptualizing harassment as a "sexual encounter" identifies and labels the event from a male perspective. This was the approach taken by the Manitoba Court of Appeal. Conceptualizing harassment from the perspective of women, a confrontation and insult which elicits anger, vomiting and insomnia, leads one to asking different questions about it.⁹⁶

Monahan and Walker see case studies, correlational designs, quasi-experimental research and true experiments as the most commonly used research methods in law.⁹⁷ With regard to case studies, they write,

Case studies perform valuable functions in social science. They provide concrete illustrations that give form to more abstract theories. Most importantly, case studies are a source of hypotheses for systematic testing by more rigorous research methods. ... When used to test hypotheses, however, case studies have severe limitations because they are subject to so many threats to internal validity. The most salient of these threats is selection... . This is a severe threat to the validity of any inferences drawn from the investigation, and it places the case study among the most problematic designs for social science research.⁹⁸

They are also of the view that, "the intensive analysis of a specific case illustration, often used in journalism and biography, is close to useless as a method for drawing any valid conclusions."⁹⁹

⁹⁴ Harding, *supra*, note 89 at 183. It is necessary to ask questions for women, rather than about them. See for example, J. Brockman, D. Evans & K. Reid, "Feminist Perspectives for the Study of Gender Bias in the Legal Profession" (1992) 5 C.J.W.L. 37.

⁹⁵ S. Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986) at 76.

⁹⁶ Brockman & Phillippe, *supra*, note 85 suggest that the research on sexual harassment which fails to incorporate women's own experiences will result in research which is by and large androcentric.

⁹⁷ *Supra*, note 91 at 52.

⁹⁸ *Ibid.* at 53-54.

⁹⁹ Monahan & Walker, *supra*, note 9 at 504.

Monahan and Walker's presentation of "empirical" social science leaves one with the impression that social science provides an objective means of discovering truth, much like law has historically been seen as providing a neutral, just, and objective means of resolving disputes.

The myth of law's neutrality has been largely eroded.¹⁰⁰ Task forces and studies have established the existence of gender bias in the courts and substantive areas of the law.¹⁰¹ It would be unfortunate if the "objectivity" of science was used to rescue the law from its crisis in legitimacy, without some fundamental recognition of the nature of law and social science.

The third evaluative criterion, that the research "is generalizable to the legal question in issue" ignores the fundamental difference between generalizability as a feature of traditional social science and generalizability as a feature of law. Generalizability in the social sciences conjures up images of random sampling, generalizing from the sample to the population, etc. Social scientists, in the male tradition, have been very critical of the case method approach, and

¹⁰⁰ Work by feminists and critical legal theorists have raised many doubts about law's neutrality. See for example, S.L. Martin & K.E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on Status of Women, 1989); *supra*, note 21.

¹⁰¹ See, for example, M. Brown & H. Penner, *Gender Equality in the Courts: A Study for the Manitoba Association of Women and the Law* (Ottawa: National Association of Women and the Law, 1988); A. Bond & S. Adams, *Gender Equality in the Judiciary: A Survey of British Columbia Decisions* (Ottawa: National Association of Women and the Law, 1988); and M. Brown *et al.*, *Gender Equality in the Courts: The Criminal Law A Study by the Manitoba Association of Women and the Law* (Ottawa: National Association of Women and the Law, 1991). In her opening address at a National Symposium on Women, Law and the Administration of Justice in Vancouver, June 10, 1991, the Honourable Kim Campbell stated, "We are not questioning whether gender bias exists in Canada; rather, we want to discover how biases are reflected in our justice system."

See also the various Task Force Reports from the United States: *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (June, 1984), reprinted in (1986) 9 Women's Rts L. Rep. 129; *Report of the New York Task Force on Women in the Courts* (April, 1986), reprinted in (1986-87) 15 Fordum Urban L.J. 1; *The Final Report of the Rhode Island Committee on Women in the Courts* (June, 1987); *Maryland Special Joint Committee: Gender Bias in the Courts* (May, 1989); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts* (June, 1989) reprinted in (1989) 15 Wm. Mitchell L. Rev. 827; *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts* (December, 1989); *Gender Bias Study of the Court System in Massachusetts* (1989); *Gender and Justice in the Colorado Courts* (1990); *Report of the Florida Supreme Court Gender Bias Study Commission* (1990); and *Utah Task Force on Gender and Justice* (1990).

refer to such studies as "anecdotal," as if it were inferior or just the preliminary step to "real" science. However, generalizability in law is the product of judges' assessments of individual cases. The law builds on individual cases: this is the nature of legal precedents. If social science research is to be more conveniently dealt with as authority rather than as fact, it may also be necessary to re-evaluate the methods of social science research in light of feminist critique. Social science research could be used to provide a more contextual examination of a legal question.

Other than data on the prevalence of sexual harassment, the research introduced in this Supreme Court of Canada case was simply a confirmation of what most women already know — harassment is demeaning; it makes us angry; it is definitely not a sexual encounter. These facts are part of common (women) sense. However, this perspective may not be something with which men are familiar. Judges of the Manitoba Court of Appeal seemed to think that harassment was a sexual encounter. This perspective is quite foreign to women who have been subjected to such behaviour.

The fourth evaluative criterion, that the research be "supported by a body of other research" ignores publishing criteria which has historically ensured that the perspectives of men be published, and that the perspectives of women remain unpublished. The call for imposing such evaluative criteria on the social science research which is admissible in court may only serve to perpetuate this inequality.

IV. CONCLUSIONS

MONAHAN AND WALKER'S MODEL is effective in shedding light on the nature of law; that is, that assumptions of fact permeate judicial conclusions of law. However, if we are to use Monahan and Walker's concept of social authority, it is crucial that we not lose sight of the important role which assumed facts play in judicial decisions. The Manitoba Court of Appeal's decision clearly illustrates how assumptions of fact based on preconceived notions about harassment can result in gender bias in judicial decision making. Judges may assume facts which are false or accept stereotypes which reflect only the male perspective on the interactions between women and men.

The decisions which were examined here illustrate how the traditional legalistic approach to interpreting the law (the use of dictionaries, and judicial interpretations of the intentions of legislators, and the "plain meaning" of words) used by the Manitoba Court of Appeal, are male oriented and can interfere with the equality of women and

men in the courts. The Manitoba Court of Appeal's decision is a clear demonstration of how the underlying assumptions of fact in judicial decision making can determine questions of law. It illustrates the necessity of requiring judges to articulate their assumed facts so that they can make better informed decisions.

The nature of traditional legal reasoning allows judges to generalize and to rely on general propositions, which may disguise their assumptions of fact. Justice and equality may, however, demand a more contextualized approach; the right to have the social, economic and cultural context of our situation recognized, rather than to have stereotypes and subsequent generalizations imposed upon us with its subsequent discrimination. In September, 1990, Madam Justice Wilson (recently retired from the Supreme Court of Canada) applied a contextual approach to interpreting human rights legislation in Canada.¹⁰² Earlier that year in a lecture she suggested that such an approach might "succeed in infusing the law with an understanding of what it means to be fully human."¹⁰³

Dean Lynn Smith has suggested that an increase in empathy and understanding of the social situation of those who appear before judges would make judges objective. She writes:

Without the exercise of empathy, decisions rest implicitly upon the assumptions that the persons affected are like the decision makers. The empathetic decision maker, by taking into account relevant differences between the people involved and himself or herself, goes toward a more impartial decision. In short, unrelenting detachment is not invariably the best way to be objective and impartial. In effect, it leaves the decision maker alone with his or her own perspective of the world; and that's it.¹⁰⁴

In suggesting that the law might benefit from the use of social science to correct underlying assumptions of fact, it is necessary not to lose sight of the fact that social science might also benefit from an examination of the assumptions of fact which permeate its work. Monahan and Walker's model is a step forward in the use of social science research in the courtroom. It is still necessary to examine the

¹⁰² *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.).

¹⁰³ Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

¹⁰⁴ L. Smith, "Working for Change" A panel presentation at the National Symposium on Women, the Law and the Administration of Justice, Vancouver, British Columbia, June 10, 1991. See also L. Smith, "The Courts and Different Kinds of Objectivity" (1987) 45 Advocate 17.

nature of social science in light of feminist critiques which are levied at it.