RE-EXAMINING THE DOCTRINE OF JUDICIAL NOTICE IN THE FAMILY LAW CONTEXT

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Étant donné que le besoin, les écueils et les défis des tribunaux de percevoir les réalités sociales par le biais de la connaissance judiciaire ont fait couler beaucoup d'encre aux États-Unis au cours des dernières années, l'article qui suit a pour but d'examiner les forces et les faiblesses de l'utilisation possible par les tribunaux de la connaissance judiciaire de données socio-économiques afin d'assurer que les questions relatives au droit de la famille, entre autres, soient abordées d'une manière qui tienne compte à la fois des règles de droit et du contexte social.

À cette fin, l'article examinera certains aspects du débat, sans cesse croissant, qui a cours aux États-Unis au sujet du rôle des sciences sociales sur les plans de la formulation et de l'application des principes légaux, et traitera ensuite d'une approche à la lumière de la théorie de la connaissance judiciaire au Canada. Pour le reste, cet article abordera les caractéristiques du droit de la famille qui en font un domaine particulièrement propice à l'élargissement du rôle de la théorie de la connaissance judiciaire de données socio-économiques. La discussion comprendra les sujets suivants : (1) une étude du besoin et du rôle de telles données; (2) une revue des aspects tant positifs que négatifs propres à l'emploi de toute preuve du contexte social dans le cadre de litiges en matière familiale; (3) un examen des préoccupations voulant que les tribunaux en droit de la famille n'auraient pas la compétence institutionelle requise pour mener eux-mêmes de telles enquêtes; et (4) quelques propos illustrant en quoi le rôle des juges, et la nature du domaine du droit de la famille, diffèrent des autres disciplines du droit. L'article se termine par une brève discussion des questions d'égalité, lesquelles ne doivent pas être négligées dans le contexte d'une appréciation des possibilités qu'offre la connaissance judiciaire en matière de droit de la famille.

Given that the needs, the dangers and the challenges of bringing social reality to the courtroom by way of judicial notice have been the subject of considerable commentary in the United States for years, this article proposes to review the potential uses and abuses of judicial notice of social science data and research as a vehicle by which to ensure that, amongst other fields of law, family law matters are approached having regard to both rule of law and social context.

To this end, the article will be examining some aspects of the broadening debate in the United States on the role of social science in both the formulation and the application of legal principles, and then discuss one such approach in light of the doctrine of judicial notice in Canada. The remainder of this article will address those aspects of family law which may make it particularly conducive to a broader role for the doctrine of judicial notice of social data and research. This discussion will include the following topics: (1) a consideration of the need for, and role of, such data; (2) a review of both the positive and negative aspects of using social framework evidence in family law disputes; (3) an examination of concerns that the family law judiciary may not have the institutional competence to conduct such inquiries on its own; and (4) some thoughts on how the role of judges, and the nature of the family law discipline, differ from those in other fields of the law. It concludes with a brief overview of some of the equality considerations that must not be overlooked when examining the potential of judicial notice in family law.

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> As with so many other legal presumptions,....reality may rebut what the law accepts as a starting point[1]

The needs, the dangers and the challenges of bringing social reality to the courtroom by way of judicial notice have been the subject of considerable commentary in the United States for years. In Canada, although the debate has been slower to develop, it seems to have found fresh vigour as a result of the Supreme Court of Canada's decision in *Moge* v. *Moge*[2] and, more recently, *Willick* v. *Willick*.[3] This article proposes to review the potential uses and abuses of judicial notice of social science data and research as a vehicle by which to ensure that, amongst other fields of law, family law matters are approached having regard to both the rule of law and the social context.

I will begin by examining some aspects of the broadening debate in the United States on the role of social science in both the formulation and the application of legal principles, and then discuss one such approach in light of the doctrine of judicial notice in Canada. The remainder of this article will address those aspects of family law which may make it particularly conducive to a broader role for the doctrine of judicial notice of social data and research. This discussion will include the following topics: (1) a consideration of the need for, and role of, such data; (2) a review of both the positive and negative aspects of using social framework evidence in family law disputes; (3) an examination of concerns that the family law judiciary may not have the institutional competence to conduct such inquiries on its own; and (4) some thoughts on how the role of judges, and the nature of the family law discipline, differ from those in other fields of the law. I will conclude my thoughts with a brief overview of some of the equality considerations that must not be overlooked when examining the potential of judicial notice in family law.

I. The Role of the Social Sciences in the Law

A. *Adjudicative versus Legislative Facts*

Under the classical view of the law that predominated at the beginning of the twentieth century, law was made up of sets of quasi-permanent rules, and questions of law implied a process of choosing between these competing rules.[4] Because the law was regarded as immutable, then anything which was demonstrably changeable was lumped into the general category of "fact". The Legal Realists' movement in the early twentieth century, however, rejected this vision of the law, and maintained that the law was not an insulated or static discipline but rather an institution influenced like any other by changing social needs and purposes. For them, "[t]he life of the law has not been logic: it has been experience."[5] Out of these ideas, first significantly implemented in the brief

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[1] Chief Justice Warren Burger of the United States Supreme Court in *Parham* v. *J.R.*, 442 U.S. 584 at 602, 61 L. Ed.2d 101 at 119 (1979).

[2] [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345 [hereinafter *Moge* cited to S.C.R.].

[3] [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161 [hereinafter *Willick* cited to S.C.R.].

[4] J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown & Co., 1898) at 183-262, as cited in J. Monahan & L. Walker, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law" (1986) 134 U. Pa. L. Rev. 477 at 479 [hereinafter "Social Authority"].

[5] O.W. Holmes, Jr., *The Common Law* (Boston: Little, Brown & Co., 1881) at 1.

of a lawyer named Louis Brandeis,[6] came a greater intellectual focus on "sociological jurisprudence" and attention to the social context of legal disputes.

This realization led Kenneth Culp Davis to elaborate upon the classical dichotomy between law and fact. He recognized that within the spectrum of fact, significant differences between certain types of fact made it inappropriate to treat them in the same manner. He therefore found it helpful to distinguish between adjudicative facts, which pertain to issues that are specific to the case being considered, and legislative facts, which pertain to decisions on questions of law or policy.[7] Adjudicative facts relate to the immediate parties, their actions, their activities, their possessions. They involve, for instance, determinations of "who did what, where, when, how, and with what motive or intent".[8] Determinations of this nature are unique to the litigants. Legislative facts, by contrast, aid the tribunal in determining the content of legal rules, themselves, and in exercising judgment or discretion in deciding what course of action to follow. They can include, for example, information concerning the impact of prior and proposed law, or information concerning the legislative history of a statute to assist in its interpretation. Legislative facts affect the interests of many who are not parties before the court.[9] While the legislative/adjudicative fact distinction, with its corresponding rules of admission of evidence, has long since become a fundamental aspect of American law, its acceptance in Canada has, until recently, been more muted.[10]

What is significant for our purposes, however, is that in Professor Davis' view, the legislative/adjudicative distinction largely dictated the evidentiary treatment of the fact under consideration:

> [T]he exceedingly practical difference between legislative and adjudicative facts is that...the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts, need not, frequently are not, and sometimes cannot be supported by evidence.[11]

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[6] The Brandeis brief, filed in the case of *Muller* v. *Oregon*, 208 U.S. 412, 52 L. Ed. 551 (1908) [hereinafter *Muller* cited to U.S.], employed extensive social science research to support the constitutionality of a state statute that prohibited women working for more than ten hours in any given day. In order to distinguish *Lochner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937 (1905), an earlier decision of the Supreme Court striking down limits on the number of hours permissible in a work week as violative of liberty of contract as guaranteed by the Due Process Clause, Brandeis' brief contained only three pages of legal precedent, and devoted the remainder of its argument to the legislation's social context:

> The facts of common knowledge of which the court may take judicial notice establish....conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a "mechanical establishment, or factory, or laundry" more than ten hours in one day is dangerous to the public health, safety, morals, or welfare.

Muller at 416.

[7] K.C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv. L. Rev. 364 at 402.

[8] 32B Am. Jur. 2d, *Federal Rules of Evidence* § 32.

[9] M.A. Larkin, "Article II: Judicial Notice" (1993) 30 Hous. L. Rev. 193 at 197.

[10] J. Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 213 at 214-16; G. Bale, "Parliamentary Debates and Statutory Interpretation: Switching On the Light or Rummaging in the Ashcans of the Legislative Process" (1995) 74 Can. Bar Rev. 1; T.St.J.N. Bates, "The Contemporary Use of Legislative History in the United Kingdom" (1995) 54 Cambridge L.J. 127.

[11] K.C. Davis, "Judicial Notice" (1955) 55 Colum. L. Rev. 945 at 952-53.

Interestingly enough, to this day in the United States, while clear rules exist on the use, admissibility and judicial notice of adjudicative facts, the use, admissibility and judicial notice of legislative facts are almost completely unfettered.[12] In fact, American deference to judicial notice of legislative facts is virtually as broad as a judge's power to independently determine the domestic law.[13] The potential for misuse of such a broad discretionary standard, however, has sparked calls for greater structure and safeguards in the taking of judicial notice of such facts.[14]

B. *Social Facts, Social Framework and Social Authority*

One of the most concerted attempts to provide such structure has come from Professors Walker and Monahan, who have authored several articles on the appropriate use of social science research and data in litigation.[15] They divide their classification of facts into three categories which are related, yet distinct, from Davis' adjudicative/ legislative distinction: (1) social authority; (2) social framework; and (3) social facts.

When social science research is used to establish or interpret the law in some way, then Walker and Monahan argue that it should be regarded as "social authority". In other words, where social science relates to the lawmaking process in the same way as judicial precedent, then it is both more intellectually honest and more efficient to treat social science in the same manner as courts treat legal precedents. Monahan and Walker rely on important similarities between the two sources of law in order to draw this parallel. The most important of these is the fact that both law and social science research are

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[12] *Supra* note 8. Rule 201 of the *Federal Rules of Evidence* expressly relates only to judicial notice of adjudicative facts. There is no rule in the *Federal Rules of Evidence* relating to judicial notice of legislative facts or law– it "is ordinarily limited only by the court's own sense of propriety." Larkin, *supra* note 9 at 198.

[13] According to the Advisory Committee on Rule 201 of the *Federal Rules of Evidence*, the judicial reception of legislative facts should not be circumscribed by limitations in the form of indisputability or by any formal requirements of notice other than those already inherent in the opportunity to hear and be heard. The process is virtually identical to the process by which courts determine domestic law:

> [T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.... [T]he parties do no more than to assist; they control no part of the process.

E.M. Morgan, "Judicial Notice" (1944) 57 Harv. L. Rev. 269 at 270-71.

[14] See *e.g.* P.C. Davis, "'There is a Book Out...': An Analysis of Judicial Absorption of Legislative Facts" (1987) 100 Harv. L. Rev. 1539; "Social Authority", *supra* note 4; M. Rustad & T. Koenig, "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs" (1993) 72 N.C.L. Rev. 91; R.P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence" (1989) 52(4) Law & Contemp. Probs. 85; G.S. Perry & G.B. Melton, "Precedential Value of Judicial Notice of Social Facts: *Parham* as an Example" (1983-84) 22 J. Fam. L. 633; A. Woolhandler, "Rethinking the Judicial Reception of Legislative Facts" (1988) 41 Vand. L. Rev. 111.

[15] "Social Authority", *supra* note 4; L. Walker & J. Monahan, "Social Frameworks: A New Use of Social Science in Law" (1987) 73 Va. L. Rev. 559 [hereinafter "Social Frameworks"]; L. Walker & J. Monahan, "Social Facts: Scientific Methodology as Legal Precedent" (1988) 76 Cal. L. Rev. 877; L. Walker & J. Monahan, "Empirical Questions without Empirical Answers" (1991) Wis. L. Rev. 569 [hereinafter "Empirical Questions"].

general in nature, having application beyond the particular instances in which they are measured. In the same way that a court decision takes on the status of precedent when it is found to embody a principle that is of use in subsequent instances, social science research is evaluated in part according to its ability to set down a heuristic by which to predict future behaviour.[16] Thus, Monahan and Walker's social authority is roughly analogous to legislative fact, in the way that term was coined by Professor Davis.

On the other hand, social science research may occasionally be used to resolve a dispute that is specific to the proceedings (*e.g.* in trademark litigation, a consumer survey carried out to see if two trademarks are so similar that they are frequently confused by members of the public). Under such circumstances, the social research will take on a character that is akin to adjudicative facts. Monahan and Walker label social science used in this way as "social facts".

Monahan and Walker's third category, "social framework", is a hybrid of the first two, and would not appear to have any equivalents under the traditional adjudicative/ legislative fact distinction. Social framework facts refer to social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case. In other words, social framework refers to "the use of general conclusions from social science research in determining factual issues in a specific case."[17] An example of social science research used for the purposes of establishing social framework is evidence on the battered woman syndrome, which may be important background to the more fact-specific determination of whether a woman accused of killing her husband was "reasonably" acting in self-defence.[18] In the words of one judge, social science

> may, in effect, encapsulate ordinary human experience and provide an appropriate frame of reference for a jury's consideration.[19]

Though it may be introduced in a context that is specific to the proceedings at hand, social framework is therefore imbued with a quality of generality that causes it to bear greater resemblance to social authority than it does to social facts.

For Monahan and Walker, whether social science data or research is used as social authority, social framework, or social fact provides helpful insight into two pressing questions: (1) whether the parties to a proceeding should present the research orally or by written brief, and (2) the extent to which independent judicial investigation into social science research and data is permissible.

Where the research serves as either social authority or social framework, they argue that its generality suggests that such research be most appropriately introduced in the same way as would be legal precedent – by way of written brief.[20] On the other hand,

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16 "Social Authority", *supra* note 4 at 490-91.

17 "Social Frameworks", *supra* note 15 at 570.

18 *Ibid.* at 566, citing *State* v. *Kelly*, 97 N.J. 178 (1984). The same defence was recognized in Canada in *R.* v. *Lavallée* [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1 [hereinafter *Lavallée*].

19 *State* v. *Davis*, 477 A.2d 308 at 311 (N.J. 1984), as cited in "Social Authority", *supra* note 4 at 488ff.

20 "Social Frameworks", *supra* note 15 at 588-89. They suggest that written briefs are generally more comprehensible to finders of fact than oral testimony: "Social Authority", *supra* note 4 at 496-97. Other commentators indicate that another advantage of introducing social framework evidence by way of brief is that the temptation will be avoided of asking an expert, called for the purposes of

when it involves a determination that is specific to the proceedings, then oral evidence, with the opportunity for cross-examination, is more appropriate. On the question of judicial investigation, Walker and Monahan are equally informative. Judges should be free to conduct their own research of social authority and social framework in much the same way that they might search independently for legal precedents that the parties might have failed to point out. Based on four criteria that relate to the jurisprudential value of a given case as precedent,[21] they identify four criteria according to which courts should evaluate social authority and social framework:

> Courts should place confidence in a piece of scientific research to the extent that the research (1) has survived the critical review of the scientific community; (2) has employed valid research methods; (3) is generalizable to the case at issue; and (4) is supported by a body of other research.[22]

Though other authors advocate different means by which to structure the judicial notice of social science research,[23] the question, in the United States at least, is not so much *whether* judges should be able to conduct independent research into, and take notice of, social framework and social authority, but rather *how* this important activity is best carried out, having regard to the interests of both the individual litigants and those not present yet indirectly affected by the litigation.[24] It cannot be forgotten that the broader the issue, the more inadequate may be the facts of the individual case as a basis for decision. Though this may be particularly true of constitutional questions,[25] it may be no less relevant to certain instances of statutory interpretation.[26]

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discussing the general question of social framework, to comment on findings of fact specific to the case itself:

> [T]he expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped.

Mosteller, *supra* note 14 at 127 citing *State* v. *McCoy*, 366 S.E. 2d 731 at 737 (W.Va. 1988). See more generally at 125-28.

[21] "Social Authority", *supra* note 4 at 498:

> At least four indices of precedential persuasiveness can be easily abstracted from the jurisprudential literature: (1) cases decided by courts higher in the appellate structure have more weight than lower court decisions; (2) better reasoned cases have more weight than poorly reasoned cases; (3) cases involving facts closely analogous to those in the case at issue have more weight than cases involving easily distinguished facts; and (4) cases followed by other courts have more weight than isolated cases.

[22] *Ibid.* at 499. They elaborate upon this parallel at 499-508. See also "Social Frameworks", *supra* note 15 at 588-91.

[23] Davis, *supra* note 14 at 1602-04, for instance, has argued for a somewhat ethereal "tradition of care" in the judicial notice of social science research.

[24] *Supra* note 14.

[25] See Perry & Melton, *supra* note 14 at 644.

[26] See *e.g. Moge*, *supra* note 2; *Willick*, *supra* note 3. See also Bale, *supra* note 10 and Bates, *supra* note 10.

II. The Doctrine of Judicial Notice

A. *General Principles*

One of the more significant aspects of Davis' recognition of legislative facts is his implicit acceptance that agencies and judges, in deciding questions of law or policy, essentially perform an active law and policymaking role rather than passively recognizing or discovering law that is dictated by precedent or principle.[27] Although this observation has long been recognized as "conventional wisdom" in the United States,[28] only recently has it begun to take on a similarly irrefutable character amongst Canadian courts and commentators.[29] The way in which the role of the court is perceived can, in turn, very much affect the way in which the doctrine of judicial notice is conceptualized. The more courts acknowledge their active contribution to lawmaking, the greater becomes both their duty and their need to lay bare the policy assumptions upon which their decisions are based.

On the other hand, if courts deny their lawmaking role, then they deny our judicial system the ability to monitor that role. Unfortunately, however, a by-product of imposing strict rules on the taking of judicial notice is that such rules discourage courts from admitting that they use it. As a consequence, underlying questions of policy are obfuscated by a mask of legal "principles". Principles formulated on such a basis, in turn, may lead to illogical applications in subsequent cases.[30] Judicial notice must not be a convenient means by which courts can escape examination of their underlying policy assumptions.

Judicial notice plays an important role even when courts are acting in a purely adjudicative capacity, however. In such contexts, the doctrine in Canada has been described in the following way:

> Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of

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[27] See J.W. Strong, ed., *McCormick on Evidence*, vol. 2, 4th ed. (St. Paul, Minn.: West, 1992) at 387.

[28] *Ibid.* at 398. Consider, also, the view of Perry & Melton, *supra* note 14 at 642:

> [T]he judiciary's long recognized policy-finding function sometimes demands its attention to [legislative] facts, even when the disputing parties do not themselves present evidence on a relevant issue of public policy. Neither the rules of judicial notice, nor the doctrine itself for that matter, technically is needed to clear the way for the consideration of [legislative] facts.
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> One study in a limited area of U.S. jurisprudence, however, found that courts engaged in changing the law were nonetheless likely to insist that they were merely applying established law. Only rarely would they expressly acknowledge the fact that they were actively choosing between competing policy considerations.

Davis, *supra* note 14 at 1600.

[29] See *e.g.* W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983) 7(3) Dalhousie L.J. 7; see also *supra* note 10.

[30] See Perry & Melton, *supra* note 14 at 674:

> If the Court....wished to support a particular ordering of families in law, then why not state this directly rather than search the "pages of human experience" for an illusory reality? A court's pretense that it is finding – or simply "noticing" – facts when it is really making policy masks and distorts underlying policy.

> affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. It expedites the process of the courts, it creates uniformity in decision making and it keeps the court receptive to societal change. Furthermore, *the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.* [Emphasis added][31]

The last sentence of that description would appear to relate to that seemingly innocuous subcategory of facts sometimes referred to as "non-adjudicative facts" or "non-evidence facts"[32] – those very basic facts that the average factfinder possesses regarding the world in which we live, and that must be used in the drawing of inferences, the judging of witness' credibility, or the evaluation of evidence. These fundamental facts comprise a prism of personal experience and understandings through which judges and jurors, as factfinders, both perceive and interpret that which is put before them. Not all factfinders, however, will perceive the same circumstances in the same way.[33] Moreover, while the prism held by most factfinders may constitute a perfectly adequate analytical framework in most situations, in certain contexts it may not accord with reality, and may therefore impede rather than advance the quest to find facts in a way that is reflective of how people really experience the world. In cases such as these, social framework evidence can play both a meaningful and a necessary role in re-aligning that prism with reality.[34]

To summarize, a proper decision-making framework is central to even the most purely adjudicative decisions. This recognition explains why one learned commentator has suggested that judicial notice plays a larger role in the judicial process than might be suspected:

> The concept of judicial notice is often considered an exception to the modern doctrine that the trier of fact must determine all factual questions on the basis of formal proof. More likely, however, judicial notice is the pillar around which the modern doctrine was constructed.[35]

I will return to this matter shortly.

B. *Judicial Notice in the United States*

As noted earlier, there are no rules governing the judicial notice of legislative facts in the United States, and the *Federal Rules of Evidence* on judicial notice expressly confine themselves to adjudicative facts. The rationale underlying the different treatment of judicial notice of adjudicative facts and legislative facts has been explained by Professor Davis in the following way:

> One world of judicial notice has to do with a judge's thinking about questions of law or policy. The other world of judicial notice has to do with finding the facts about a particular

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[31] J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976.

[32] *Federal Rules of Evidence*, *supra* note 8, discussing Rule 201, Advisory Committee's note, subdiv. (a).

[33] See generally, S. Fish, *Doing What Comes Naturally* (Oxford: Clarendon Press, 1989) at 93-99.

[34] See *Lavallée*, *supra* note 18.

[35] Larkin, *supra* note 9 at 193.

> party. The two worlds are almost totally different, having hardly anything in common with each other.[36]

In his view, the requirement of virtual indisputability was only relevant to the context of judicial notice of adjudicative facts.[37] This approach to the judicial notice of legislative facts appears to have been adopted by a significant number of U.S. appellate courts.[38]

Judicial notice of social framework evidence in the United States would appear to be governed by similar precepts:

> Background facts are characteristically derived both from record and extra-record sources. They are frequently "noticed", despite the absence of pertinent evidence, in an invisible process by which a judge or juror relies upon "beliefs" (though they are not in evidence) which he reasonably thinks he shares with other intelligent persons as to the general nature of things.... Judicial (or jury) notice of background facts is pervasive, occurring "inconspicuously and interstitially" as an inevitable part of the adjudicative decisionmaking process.
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> ....
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> *On [some] occasions, background facts are flushed to the surface but may not be subjected either to the test of indisputability or to the requirements of proof by formal evidence. On these occasions, they may be the subject of argument, Brandeis briefs, or independent judicial investigation.* [Emphasis added][39]

At the risk of generalizing, judges in the United States would appear to have a fairly wide discretion to investigate by their own initiative both social authority and social framework evidence. There is a recognition that judges must be cognizant of social realities, and of their obligation to avoid decision-making in a vacuum.

C. *The Practice of Judicial Notice in Canada*

Until recently, courts in Canada appear to have been more reluctant to acknowledge both their lawmaking function and the merits of recognizing openly the differences between judicial notice of facts that are adjudicative and those that are legislative.[40] The

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[36] K.C. Davis, *Administrative Law Treatise*, vol. 3, 2d ed. (San Diego: University of San Diego, 1980) 15:4 at 146.

[37] Davis, *supra* note 11 at 982-83:

> [T]he facts that enter into [courts'] thinking processes are frequently either highly disputable or inseparably fused with questionable or uncertain judgment. The courts often take judicial notice of legislative facts in circumstances in which they would not take judicial notice of adjudicative facts....

[38] One study of U.S. appellate litigation revealed that forty percent of judicial references to scientific literature were derived from the court's independent research. T.B. Marvell, *Appellate Courts and Lawyers* (Westport, Conn.: Greenwood Press, 1978) at 192, as cited in Davis, *supra* note 14 at 1549 n.44.

[39] Davis, *supra* note 14 at 1548.

[40] For a recent example in the criminal law context, see *R.* c. *Désaulniers (L.)* (1994), 65 Q.A.C. 81, in which the Court of Appeal held it to be an error of law for the trial judge to have taken notice of, and relied on, the 1984 Badgley Report on Sexual Abuse to refute expert evidence presented by the accused at his trial, without affording the accused's counsel the opportunity to refute the evidence contained within this report. For reasons that I shall develop below, there may be greater leeway to take judicial notice of extrinsic social data or research in areas such as family law than there is in domains such as criminal law, where an individual's liberty may be adversely affected and where his or her right to make full answer and defence under s. 7 of the *Charter* may be infringed.

somewhat haphazard way by which appellate courts have approached this problem is due in part to the fact that the Supreme Court has not yet pronounced upon an appropriate approach to the admission of extrinsic evidence for the purposes of statutory interpretation.

The historical development of judicial notice of extrinsic materials in Canada has been well canvassed by others.[41] Suffice it to say that, in the period before the *Charter of Rights and Freedoms*,[42] the Supreme Court slowly but surely expanded the ambit of admissible, non-precedential, extrinsic evidence to include Royal Commission reports, Law Reform Commission reports, and legislative history in both constitutional and non-constitutional cases.[43] Such sources were only to be used to show the mischief that Parliament meant to address, however, and not the purpose or object of the legislature in enacting the statute.[44] Recognition was also extended to some socio-economic data[45] and to general factors affecting social context.[46]

The use of extrinsic evidence by the Supreme Court has increased significantly, however, since the onset of the *Charter*. The *Charter*, in effect, compelled the Court to take on, and acknowledge, a greater lawmaking function than ever before. Nowhere did it become more apparent than under the *Charter* that competing policy considerations frequently underlay the court's decisions and that the effects of the particular litigation could reach far beyond the actual parties.

The Supreme Court has often taken judicial notice of reliable social science research and socio-economic data in order to assist its contextual section one analysis of a rights violation.[47] In the words of Justice La Forest, the Court has a responsibility to apprise itself of all relevant considerations, even where these have not been raised by the parties themselves:

> I do not accept that in dealing with broad social and economic facts such as those involved here the Court is necessarily bound to rely solely on those presented by counsel. The admonition in *Oakes* and other cases to present evidence in *Charter* cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them.[48]

In cases involving human rights legislation, the Court has drawn its interpretation of the meaning of statutory terms from the social environment in which those terms are made

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41 Charles, *supra* note 29.

42 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

43 Charles, *supra* note 29 at 22-38.

44 E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 153-54.

45 *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 9 N.R. 541. Consider as well, the follow-up remarks of Dickson C.J. as reproduced in Charles, *supra* note 29 at 7:

> [T]he Supreme Court of Canada signalled an increasing receptiveness to the use of extrinsic materials in the *Anti-Inflation Reference*. Accordingly, I expect that we will see an increasing use by appellate courts of extrinsic evidence.

46 Driedger, *supra* note 44 at 150-51.

47 See *e.g. R.* v. *Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 804, 35 D.L.R. (4th) 1 at 73-74, La Forest J. [hereinafter *Edwards Books* cited to S.C.R.]; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129; *R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257, 50 C.C.C. (3d) 22; *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193, L'Heureux-Dubé J., dissenting; *R.* v. *Downey*, [1992] 2 S.C.R. 10, 90 D.L.R. (4th) 449; *R.* v. *Penno*, [1990] 2 S.C.R. 865 at 881-83, 80 C.R. (3d) 97 at 111-13.

48 *Edwards Books*, *supra* note 47 at 802.

meaningful.[49] Generally, under the *Charter*, the Court has sought to approach the law from a contextual rather than abstract perspective, and on a practical rather than theoretical level.[50]

Significantly, the Court has also accepted the value of social authority in non-constitutional contexts which nonetheless raise broad questions of public policy. It has, for instance, on several occasions in cases involving the interpretation of criminal law, other statutes and the common law, recognized the usefulness of social science research and judicial notice of social context in debunking myths and exposing stereotypes and assumptions which desensitize the law to the realities of those affected.[51] It has used social context to help define the requisite elements of an offence.[52] It has relied on personal knowledge gained through practice as a trial judge to take notice of problems involving directed verdicts.[53] It has taken judicial notice of documents gathered independently for the purposes of assessing the nature and historical context of a treaty.[54] If historical context constitutes relevant authority to the interpretation of historical documents, then does it not follow that contemporary social context constitutes relevant authority to interpreting the mischief that Parliament seeks to address by way of statute?

Finally, it is worth noting that the by now well-established practice in Canada of interpreting statutes in a manner that is consistent with *Charter* values also would appear to demonstrate a greater readiness to acknowledge the relevance of policy considerations, and therefore of social authority, to statutory interpretation.[55] Though a majority of the Supreme Court has refused to contemplate consistency with *Charter* values in cases where the legislation was clear and unambiguous,[56] one would think that such total lack of ambiguity will be infrequent in cases that are of sufficient public importance to actually make their way up to the Supreme Court.[57] To a similar effect, Lord Reid once observed, "[there are] comparatively few cases where the words of a statutory provision

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[49] *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321; *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39 [hereinafter *Janzen*].

[50] *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1356, Wilson J. and at 1381, La Forest J., dissenting, [1990] 1 W.W.R. 577 at 586-87 and 607 respectively.

[51] *Lavallée, supra* note 18; *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6 at 27-32, 96 D.L.R. (4th) 289; *R.* v. *Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, L'Heureux-Dubé J., dissenting; *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 763, 161 N.R. 243 at 321 [hereinafter *Symes* cited to S.C.R.]; *R.* v. *W.(R.)*, [1992] 2 S.C.R. 122 at 133-34, 74 C.C.C. (3d) 134 at 143-44; *R.* v. *Chartrand*, [1994] 2 S.C.R. 864, 116 D.L.R. (4th) 207.

[52] *R.* v. *Finta*, [1994] 1 S.C.R. 701 at 816, 112 D.L.R. (4th) 513 at 596, Cory J.

[53] *R.* v. *Rowbotham*, [1994] 2 S.C.R. 463 at 464-65, 30 C.R. (4th) 141 at 142-43.

[54] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1050, 70 D.L.R. (4th) 427 at 446. The justification offered by Lamer C.J., speaking for the entire Court, is quite apposite:

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge.... The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

[55] *Hills* v. *Canada (A.G.)*, [1988] 1 S.C.R. 513 at 558, 48 D.L.R. (4th) 193 at 226-27; *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1078, 59 D.L.R. (4th) 416 at 444-45; *Symes, supra* note 51; *Willick, supra* note 3, L'Heureux-Dubé J. See also *Marzetti* v. *Marzetti*, [1994] 2 S.C.R. 765 at 800, [1994] 7 W.W.R. 623 at 648.

[56] *Symes, supra* note 51 at 752, Iacobucci J.

[57] *Willick, supra* note 3 at 706, L'Heureux-Dubé J.

are only capable of having one meaning...."[58] It is becoming less and less acceptable to search for obvious meanings in the text of a statute, however, without regard for the law's purpose and spirit, springing from a more contextual examination of its precepts:

> [T]o apply a provision is to interpret it. The meaning is inevitably understood not only from its written expression but also from its context, which includes the statute's purpose, and its relationship to the relevant facts.[59]

One concern arising from the greater use by courts of extrinsic evidence for the purposes of social authority or social framework is that the parties to the particular litigation could be unfairly surprised. One respected Canadian commentator seems to indicate that the risk of such surprise, however, is outweighed by the need for courts to ensure that legislative solutions to complex social problems are as effective as possible.[60] Others suggest that an opportunity be provided to the parties, where possible, to comment on the appropriateness of a judge's proposal to take notice of certain economic, scientific, or social data.[61] This question is important, and cannot be glossed over. Regardless of how this concern may be addressed, though, what is significant for our purposes is the fact that Canadian courts are now acknowledging the *need* to incorporate social context into judicial consideration and the potential role that judicial notice may play. The debate in Canada, as in the United States, has shifted from *whether* judicial notice has a role to play in establishing the social context of legislation to *how*, and in what contexts.

Although most commentators have sought to apply a uniform set of rules on judicial notice to all disciplines of the law, the remainder of this article will focus on the family law context, leaving to other days and other authors the task of examining the extent to which the thoughts set out in this setting are generalizable to other contexts.

III. The Need for Social Framework in Family Law

In rendering decisions under legislation such as the *Divorce Act*, for instance, courts have always had to tread a fine path amongst considerations of consistency, fairness, discretion, and objectivity. Objectivity, however, if not carefully construed, can be less a friend than a foe in family law. Professor Lynn Smith, for instance, has observed that objectivity does not always lie in unrelenting detachment:

> [U]nrelenting 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.[62]

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[58] *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 at 613, 1 All E.R. 810 (H.L.).

[59] P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville: Yvon Blais, 1991) at 239.

[60] Charles, *supra* note 29 at 41.

[61] Law Reform Commission of Canada, "Judicial Notice" (Study Paper #6, Law of Evidence Project, 1973). The paper suggested recognizing the adjudicative/legislative fact distinction and proposed a provision permitting courts to "take judicial notice of scientific, economic and social facts in determining the law or in determining the constitutional validity of a statute" [s. 2(3)], provided that the court "afford each party reasonable opportunity to make representations as to the fact or matter of law involved and as to the propriety of taking judicial notice" [s. 4(2)(a)].

[62] As quoted in J. Brockman, "Social Authority, Legal Discourse and Women's Voices" (1992) 21 Manitoba L.J. 213 at 235.

In family law, a distinct danger lies in failing to take this fact into account. It must be recognized that fact-finding in fields such as this is an essentially value-laden concept. Until recently, for instance, the dominant values in the judicial system failed to recognize the worth of women's work in the home.[63] For similar reasons, courts failed to take into account the significant barriers that women faced when trying to re-enter the workforce, and the opportunity costs suffered in furtherance of the husband's career or in childraising. When changes in these value-structures eventually did occur, they resulted in greater sensitivity to the realities of marriage, both before and after divorce, and in different "findings of fact" regarding the situation of the economically disadvantaged spouse. Fact-finding, therefore, is neutral only to the extent that the values of the fact-finder permit it to be. To the extent that values infuse the fact-finding exercise, and to the extent that these values may affect the outcome of this exercise, it would seem appropriate to acknowledge this relationship and to ensure by the introduction of social framework evidence that the fact finder's perception of reality is as closely congruent to that of the litigants as possible:

> [A] "contextual approach" is an attempt to attack the problem of privilege and to understand the diversity of people's experiences. When issues are examined in context, it becomes clear that some so-called "objective truths" may only be the reality of a select group in society and may, in fact, be completely inadequate to deal with the reality of other groups.[64]

The danger of relying on the myth of fact-finding neutrality to ensure equitable outcomes in family law contexts is all too apparent.

In family law, more than in almost any other field, judges are called upon to interpret provisions that will profoundly affect people's daily lives.[65] Most judges will not have had personal experiences akin to those whom their decisions will affect. Fewer still are the primary caregivers in their family. Moreover, unless they themselves have gone through a divorce as a custodial parent, they may be just as inclined as the custodial parent to underestimate the costs of raising a child on one's own. It has been noted earlier that interpretation always takes place through the finder of fact's own prism, and that in certain cases this prism may not be appropriate to reflect suitably the realities of those affected.[66] For this reason, social framework evidence can play an important role in combatting popular misconceptions touching upon the fact-finding exercise, and in

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[63] Rosalie Silberman Abella, now a judge at the Ontario Court of Appeal, commented back in 1981 on the manner in which assumptions that failed to take into account the reality of women permeated the law of divorce:

> To recognize that each spouse is an equal economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means, among other things, that caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as important as the career that subsidizes this domestic enterprise. It means that the economics of marriage must be viewed qualitatively rather than quantitatively.

"Economic Adjustment On Marriage Breakdown: Support" (1981) 4 Fam. L. Rev. 1 at 3, as cited in *Moge, supra* note 2 at 864.

[64] *Symes, supra* note 51 at 826, L'Heureux-Dubé J., dissenting.

[65] *Moge, supra* note 2.

[66] In N.J. Vidmar & R.A. Schuller, "Juries and Expert Evidence: Social Framework Testimony" (1989) 52 Law & Contemp. Probs. 133 at 157, for example, the authors note a study that reveals how jurors' findings on sexual assault are materially influenced by their own attitudes about rape.

helping to bring the beliefs and understandings of the trier of fact into congruence with social reality.[67]

In *Willick*, it was argued that a failure to interpret certain provisions relating to child support in light of social context had prevented many courts from fully appreciating the true nature of those terms:

> Only by looking to social context can this Court meaningfully interpret what is meant in ss. 15(5) and 17(5) of the Act by the open-ended reference to "condition, means, needs and other circumstances of each spouse and of any child of the marriage", and assess what is truly at stake by way of the "best interests of the child", as required by s. 17(5). Acknowledgement of the alarming level of poverty amongst children in single parent families informs (but does not dictate) my interpretation of these contextually sensitive terms. Furthermore, only by looking to social context can this Court appreciate the true character of the "joint financial obligation to maintain the child" in the requirement in ss. 15(8) and 17(8) that courts "apportion that obligation between the former spouses according to their relative abilities"....[C]ourts' failure to consider hidden costs in this equation indicates a failure to appreciate and interpret these terms in light of indisputable social reality.[68]

The recognition in *Levesque* v. *Levesque*[69] that the parties, themselves, are often ill-equipped to estimate reliably the true costs of child support is of similar significance.

Having ascertained that there is certainly a need for courts to be willing to consider social framework in many family law determinations, further elaboration on the use of such evidence is needed.

IV. The Use of Social Framework in Family Law

Social framework evidence may bear significance to different contexts in different ways. We must recall that the purpose of social framework evidence, however, is only to ensure that the parties' claims are considered by the judge in a context that is reflective of social realities. It is important to avoid the temptation to rely on it for too much. It cannot, for instance, take the place of evidence on the actual advantages and disadvantages stemming from the marriage and its breakup. It cannot take the place of the parties' actual financial statements. It cannot replace evidence on the actual relationships between each of the parents and their child.

These limitations notwithstanding, commentators have outlined several considerations that bear upon the appropriateness of judicial investigation into social framework, for it is important that social framework be utilized in a manner that is alive to both the weaknesses and the strengths of this approach. I propose to transplant some of these considerations to the family law context.

Beginning with the dissimilarities between social science and law, it has been pointed out that while social science research generally formulates and tests general hypotheses based on their predictive value, social science studies are almost always based upon a relatively small sample size. Judges, by contrast, are faced on a daily basis with decisions that will almost never have the benefit of a study that mirrors perfectly the facts before them.[70] Moreover, while social research may try to insulate and isolate

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[67] "Social Frameworks", *supra* note 15 at 580; Mosteller, *supra* note 14 at 92.

[68] *Willick*, *supra* note 3 at 706-07, L'Heureux-Dubé J.

[69] [1994] 8 W.W.R. 589, 4 R.F.L. (4th) 375.

[70] M.N. Browne & A. Giampetro, "The Contribution of Social Science Data to the Adjudication of Child Custody Disputes?" (1985) 15 Cap. U.L. Rev. 43 at 56.

one particular factor in order to study its relationship with other controlled variables, judges face a matrix of facts, all of which interrelate, and all of which must somehow be balanced.[71] Both of these considerations advise against reliance on social science data or research to arrive at specific conclusions of fact in family law settings. Neither, however, should prevent reference to such sources of information for the purposes of establishing a normative framework within which the specific facts of the case can be more satisfactorily adjudicated.

On the other hand, as I have already noted, one of the greatest similarities between social science research or data and legal principles is their generality. Both, in effect, set ground rules or points of departure for further analysis. One feature which is fairly unique to family law settings, however, is the prospective nature of the orders generally being made. Whereas much of law is retrospective, seeking to fix responsibility or damages for a discrete event occuring at a finite point in the past, family law involves evaluations of a continuum of events and interactions which extend well beyond the date of adjudication. Social framework may have a useful role to play in this respect. Specifically, social science research and data generally review the impact of a particular characteristic or course of action after it has had time to demonstrate its effect. Judges in the family law context, by contrast, have a poor feedback mechanism.[72] They preside over many custody disputes and child or spousal support arrangements, but seldom have the opportunity to evaluate whether the criteria by which they have arrived at these decisions need revising. Indeed, without greater information on the likelihood of possible consequences, and barring subsequent applications for variation by one of the parties, they have few means by which to assess how their decision has stood the test and contingencies of time.[73] The all-important "reality check" is not readily available or, if it is, it only comes by way of application of variation or by way of appeal when the order has become demonstrably inappropriate. Social framework evidence studying the circumstances of couples after divorce, or studying the effects of various custodial contexts on the child, can give judges a better picture of what might lie ahead for the individual litigants and may, in turn, spark greater sensitivity to the effects that such orders may have. Given that support and custody decisions are inherently prospective, evidence that sheds light on what may happen once the parties leave the court can therefore be of great importance to those who must make these decisions. *The guidance that such evidence may give does not in any real way restrict the judge's discretion – it merely provides a more rational basis upon which that discretion may be exercised.*

Social framework can also help in other ways, by complementing evidence that is more particular to the individual litigants. By way of example, I would note that actuarial studies on future income streams of a particular career are of limited use if the judge does not have at least some framework information on the likelihood that a person in a

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[71] *Ibid.*

[72] *Ibid.*

[73] For instance, in *R.* v. *Thibaudeau*, (25 May 1995), 24159 (S.C.C.), rev'g (1994), 114 D.L.R. (4th) 261, 21 C.R.R. (2d) 35 (F.C.A.), considerable oral argument was made to the effect that judges in family law seemed unable to accommodate and divide equitably the tax surplus made available to couples under s. 56 of the *Income Tax Act*, particularly in light of increased earnings over time by the custodial spouse.

position similar to that of the economically disadvantaged spouse will actually be able to pursue that career.[74]

More explicit use of social framework evidence, moreover, lessens the possibility that assumptions underlying adjudications take on the character of *de facto* conclusions of law, even where such conclusions defy social reality. Nowhere is this better illustrated than in the excessive prominence attributed by Canadian courts in the 70s and 80s to the criteria of self-sufficiency in spousal support litigation.[75] These decisions adopted as law what had been an implicit normative assumption in one Supreme Court decision,[76] that was subsequently seen to be reinforced by another.[77]

As courts became more aware of the social realities faced by the economically disadvantaged spouse, the inappropriateness of the self-sufficiency model became more evident. The first attempts to respond to social realities came in the most extreme cases – those involving lengthy marriages after which it was unreasonable to expect the dependent spouse ever to become wholly financially independent. In order to avoid injustices in such contexts, courts began to distinguish between "traditional" and

[74] For a similar point made in the context of evaluation of damages in personal injury cases, see P. Anisef & F.D. Ashbury, "Quantitative Research in the Social Sciences: Applications for Litigation" (1990) 12 Advocates' Q. 206 at 210.

[75] C. Davies, *Family Law in Canada: Fourth Edition of Power on Divorce and Other Matrimonial Causes* (Toronto: Carswell, 1984) at 472 gives the following examples of decisions that leaned toward a self-sufficiency model: *Patton* v. *Patton* (1983), 34 R.F.L. (2d) 318 at 321 (B.C.S.C.); *Barnard* v. *Barnard* (1982), 30 R.F.L. (2d) 337, 141 D.L.R. (3d) 150 (Ont. C.A.); *Purcell* v. *Purcell* (1982), 29 R.F.L. (2d) 438, 53 N.S.R. (2d) 508 (N.S.T.D.); *Hinds* v. *Hinds*, [1983] W.D.F.L. 388 (B.C.S.C.); *Scobell* v. *Scobell* (1980), 21 R.F.L. (2d) 109 (B.C.C.A.); *Humeniuk* v. *Humeniuk* (1982), 27 R.F.L. (2d) 191 (Alta. Q.B.); *Pearson* v. *Pearson* (1982), 44 N.B.R. (2d) 444, 116 A.P.R. 444 (Q.B.); *Dagenais* v. *Duceppe*, [1982] C.S. 400 (Qué); *McMillan* v. *McMillan* (1983), 36 R.F.L. (2d) 225, 44 O.R. (2d) 1 (Ont. C.A.); *McManus* v. *McManus* (1984), 37 R.F.L. (2d) 407 (Ont. H.C.). See, however, *Berry* v. *Murray* (1983), 30 R.F.L. (2d) 310 at 312, [1983] 1 W.W.R. 561 (B.C.C.A.); *Messier* v. *Delage*, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337; *Nunan* v. *Nunan* (1983), 37 R.F.L. (2d) 176, [1983] 3 W.W.R. 562 (Sask. U.F.C.); and *Magon* v. *Magon* (1983), 36 R.F.L. (2d) 409 (Ont. H.C.).

[76] *Messier* v. *Delage*, *ibid.*, which, ironically, involved the carving out of an exception to the self-sufficiency model in a case where it was clearly inappropriate. After a lengthy marriage, the ex-wife had obtained a Masters-level education and was having difficulties finding a job because of a particularly poor labour market. The Court decided in her favour, holding the self-sufficiency model to be inappropriate in this case. It therefore found her to be entitled to an extension of her time-limited spousal support until she overcame her serious difficulties in rejoining the work force. The minority's view would have cut off all support. Note, however, that the Court seemed to endorse, as a general rule, the goal of self-sufficiency and, furthermore, relied heavily on the fact that the labour market *generally* had suffered a considerable downturn which was not foreseeable to the parties. This factor was extrinsic to any recognition of economic disadvantage arising *from the marriage*.

[77] *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304, and *Caron* v. *Caron*, [1987] 1 S.C.R. 892, 7 R.F.L. (3d) 274. In all three cases, the payee sought to revive, extend or increase the support provisions of a previously concluded agreement on the basis that her circumstances had changed. The Supreme Court of Canada, addressing this question in the context of the 1968 *Divorce Act*, concluded that a private agreement could not negate the court's discretion to review support orders, but that where the contract was freely negotiated with independent legal advice then it should be respected. Thus, in order for an applicant to vary spousal support, the Court required him or her to establish the following: (1) that he or she has suffered a radical change in circumstances and (2) that this change flowed from an economic pattern of dependency engendered by the marriage. In other words, the radical change in circumstances has to be causally connected to the marriage. Commentators attributed the escalating use of the self-sufficiency model in Canada to the judge's adoption of the *Pelech* "causal connection" standard to

"modern" marriages.[78] Implicit judicial notice of the social context with which the disadvantaged spouse had to contend played an important part in this recognition. Perhaps such injustices would have been even more quickly recognized, and more uniformly reacted to, if courts had made more explicit their consideration of the social framework surrounding marital breakup.

This being said, however, it is important to remind ourselves that social sciences are primarily intended to identify relationships of cause and effect and to define probabilities of outcome. They may tell us whether a certain set of values are out of sync with reality. They do not, and cannot, however, make the decision for the judge about what values should be brought to bear in applying and interpreting the evidence put before the court. They may, however, somewhat indirectly constrain judges' latitude to exercise their discretion in accordance with those personal values and biases:

> One additional merit of social science is its relatively objective framework. Social scientists have values and biases, but they rarely have the emotional involvement or investment in particular research findings that counsel or judges would have. Since appellate courts are generally reluctant to oversee domestic relations decisions, judges have unusual latitude to apply *their* values and biases when making custody [or support] decisions. By recognizing the comparative objectivity of social science studies, judges might show increased willingness to take seriously the findings from such studies where they are appropriate. [Emphasis in original][79]

V. Institutional Competence, Social Framework and Family Law

Though greater resort to the social sciences may humanize the law, it may also unduly confuse the law if those using it are unable to use it properly. If judges are incapable of properly assessing the value of social science evidence, then there may be a significant risk of erroneous analysis. This risk, in turn, can constitute legitimate grounds for caution, and for requesting the parties to make submissions on social science evidence of which the judge proposes to take notice. This concern must, however, be evaluated in light of several other considerations.

First and foremost, perhaps, is the cost. It is an unavoidable reality that most parties to family law proceedings cannot afford the luxury of lengthy trials, battles of experts, and submissions by counsel on each and every issue of which the judge proposes to take judicial notice. The greater the potential cost, the greater the likelihood that the more

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"pure" support cases (*i.e.* where no separation agreement existed between the parties). See *e.g.* C. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act 1985*, (Part I)" (1990) 7 C.F.L.Q. 155 at 183-84 and 210.

[78] See *Heinemann* v. *Heinemann* (1989), 20 R.F.L. (3d) 236 at 272-74 (N.S.S.C. App. Div.), 60 D.L.R. (4th) 648. See also *Story* v. *Story* (1989), 23 R.F.L. (3d) 225 at 245, 65 D.L.R. (4th) 549 at 566:

> There may be cases where self-sufficiency is never possible due to the age of the spouse at the marriage breakdown. It is often, in my opinion, totally unrealistic to expect that a 45 or 50-year-old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed. Employment and self-sufficiency are simply not achievable. In those cases, the obligation to support must surely be considered to be permanent. That obligation must flow from the marriage relationship and the expectations the parties had when they married.

[79] Browne & Giampetro, *supra* note 70 at 57.

impecunious spouse will seek to avoid legal proceedings and accept less-than-evenhanded settlements. Other factors may also distort the equity of private settlement agreements.[80] Courts play an important role in "levelling the playing field" between unequally affected spouses. They have the responsibility of furthering the purpose and spirit of family law legislation, which is to apportion economic burdens equitably between spouses, and to respect the best interests of the children of the marriage. The role played by courts in the family law context is therefore different in important respects from that played in other contexts. These differences have brought into question the usefulness of the adversarial system in the family law context, and should also justify re-examining the traditional reluctance to engage constructively the doctrine of judicial notice.

Moreover, the danger that incorrect conclusions will be reached as a result of overreliance on the scientific aura of social science research and data is not as daunting as it may initially appear. The question of the extent to which scientists, lawyers and laypersons are influenced by the aura of statistical data and social science research has been the subject of considerable study in the United States.[81] Interestingly enough, such research has found that concrete examples tend to be far more highly valued than abstract figures or statistical evidence.[82] Lawyers and judges, perhaps out of a traditional reluctance to consider social science research, and perhaps out of a sense of awe, generally tend to approach the social sciences with scepticism. Other studies have found that layperson jurors actually tend to *undervalue* aggregate statistical data.[83] Social framework evidence, properly used, should only serve to make finders of fact appropriately sceptical of certain things which they might otherwise overvalue.[84] Unlike oral expert testimony, where the expert may be drawn into making prejudicial assessments of the particular case, social research and data used for background materials are "cold" and therefore far less evocative.[85]

While concerns about the complexity of the research may very well be legitimate in certain fields of the law, data that would habitually be used for the purposes of establishing social framework in family law should not generally be as difficult to handle. Acquiring at least a basic, critical understanding of the kind of research that will likely relate to the family law discipline should be no more difficult, and in some cases considerably less difficult, than that needed of economics to adjudicate an anti-combines case or of chemistry to preside over an environmental case.[86] In those rare cases where a court is, in fact, confronted with a difficult field of social science that is integral to either a legal rule or to establishing the proper social framework for the evidence, then the other means open to a court under the circumstances is to appoint an expert. This power is seldom used yet, particularly if the parties can agree on the expert, may save considerable resources on all sides by avoiding, or at least curtailing, lengthy

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[80] See M. Neave, "Resolving the Dilemma of Difference: A Critique of the Role of Private Ordering in Family Law" (1994) 44 U.T.L.J. 97.

[81] See the studies listed in Vidmar & Schuller, *supra* note 66 at 172 n.179.

[82] *Ibid.*

[83] "Social Frameworks", *supra* note 15 at 576.

[84] Mosteller, *supra* note 14 at 91.

[85] *Ibid.*

[86] In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) the majority of the United States Supreme Court asserted its confidence that trial judges were generally fully capable of assessing whether the reasoning underlying scientific testimony was scientifically valid and capable of proper application to the facts in issue.

and expensive "battles of the experts". In all fairness, however, though the use of court-appointed experts can benefit all sides by reducing the scope of the litigation, it is still a costly procedure and therefore beyond the practical means of most litigants in family law matters.

Though social framework evidence can play an important role in family law litigation, one must not overemphasize its significance to the dispute between the parties. Social framework research is not, itself, used to prove or disprove points that are materially in dispute. Rather, it serves to set the background against which the particular details and consequences of the parties' relationship are established.[87] More significantly, such data is relevant to identifying the mischief which Parliament sought to address by the legislation and to evaluating the extent to which this mischief has actually been addressed by the measures provided for. While there may be many reasons that the mischief at which a statute was directed has not been rectified in practice, such a finding is certainly cause for courts to re-assess whether their interpretations and applications of the legislation are actually in line with its intended purpose.[88]

Lastly, judges are well advised to take heed of the guidelines on evaluating social science research advanced by the likes of Monahan and Walker.[89] One cannot, however, disregard the arguments of commentators that have criticized Walker and Monahan's approach on the basis that it may preclude from consideration certain types of social science research, such as anecdotal evidence, which plays an important role in acquainting courts with reality as it is experienced by others.[90] I would suggest, therefore, that Monahan and Walker's proposals are better viewed as going not so much to the question of whether a judge *can* take note of and consider such authorities as to the issue of the *weight* which is properly to be attributed to such sources. Indeed, as one commentator has recognized,

> What the court considers admissible may be much different from what the court considers determinative, and the court's perceptions may greatly differ from what social scientists regard as determinative in the resolution of legal and social issues.[91]

The most important aspect of the courts' consideration of social authority and social framework, it should be recalled, is that use of this research and these data be

[87] Evidence being used for background purposes is subject to a wider margin of acceptable error and is less sensitive to abuse or misuse than evidence that is central to the dispute between the parties. See, to a similar effect, K. Swinton, "What Do the Courts Want From the Social Sciences?" in Sharpe, ed., *supra* note 10, 187 at 204.

[88] As noted earlier, the failure of judges in family law to ask themselves this question may have perpetuated the predominance of the self-sufficiency model of spousal support to the virtual exclusion of the other three objectives identified in s. 15(6) of the *Divorce Act*. With *Moge*, *supra* note 2, and a few other cases, courts began systematically to look more broadly to the social realities of marital breakup.

[89] "Social Authority", *supra* note 4 and "Social Frameworks", *supra* note 15.

[90] Brockman, *supra* note 62 at 218. Brockman observes that in *Janzen*, *supra* note 49, much of the evidence, submitted by the Appellant, underlying the Supreme Court's conclusion that sexual harassment was a form of discrimination, was experiential, anecdotal, and impressionistic. In other words, it was "soft" social science, rather than the product of empirically verifiable studies. Moreover, this "soft" social science evidence was uncontested, as the Respondent did not file a factum or make arguments at the Supreme Court level. *Ibid.* at 224 n.60.

[91] J. Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Sharpe, ed., *supra* note 10, 213 at 219.

acknowledged by the judge. Thus, where research once thought to be useful is subsequently discredited by other, reliable research then, as Walker and Monahan point out, lower courts need not continue to follow blindly legal rules that rely upon the discredited research, or engage in olympian efforts to distinguish it. Instead, they can point to the fact of the discredited research and undertake a new inquiry into the rationales upon which the impugned legal rule is founded.[92]

Wherever possible, of course, judges should encourage the parties' participation in the search for relevant social authority or framework. Parties' involvement in the process will only make judges' jobs easier. Parties' lack of participation, however, should not preclude judges from undertaking their own research, or permit them only to look to indisputable sources. *If we do not find it objectionable for judges to make "plausible assumptions" in order to resolve issues of policy that underlie a particular legal rule or normative framework then why is it more objectionable when the judge actually takes the initiative to verify whether those assumptions are, indeed, well-founded?* As with legal precedent, when a case is subsequently found to have relied on bad or questionable social authority or framework, then its precedential value will be limited and it may well be subject to appeal.

To summarize, concerns about the capacity of judges operating in the family law sphere to process and give appropriate weight to data relating to social authority and social framework are not serious when we remind ourselves of the fact that, as a general rule, there is little risk that this information will be overvalued and that, in fact, its most useful role is its tendency to ensure that other, more fact-specific, evidence will not be undervalued. The character and uses of such information in the family law context often do not require that stringent restrictions be placed on the judge's ability to take note of evidence of this nature. Where the complexity of the material may be beyond the capabilities of the individual judge, then the use of a court nominated expert may fill this lacuna.

VI. Judicial Notice and the Family Law System

A close examination of the philosophy underlying family law in Canada reveals many persuasive reasons why the furtherance of that philosophy actually requires a more generous role for the doctrine of judicial notice than that traditionally acknowledged in Canada.

It has already been argued that concerns over the ability of courts to make proper use of judicially noted information are manageable, at least in the family law context. The primary remaining rationale for restricting the use of this doctrine would therefore appear to be the need to ensure fairness amongst the parties themselves. The principles of the adversarial system hinge upon permitting the parties to present each side to the best of their abilities and depend on the judge playing a passive and disinterested role in the proceedings. Considerations of fairness to the parties therefore require that the judge confine him or herself to that which has been presented or, at the very least, afford the parties the opportunity to make submissions on any facts of which the judge proposes

[92] "Social Authority", *supra* note 4 at 514-16.

to take notice. Such rules of evidence therefore give parties a measure of control over that which is known by the judge.[93]

Though certain legal contexts may well require that the parties be afforded such opportunities, it does not follow that family law is one of them. Such a restrictive approach to judicial notice is part of the very adversarial process that is found to be increasingly unsatisfactory in the family law context. Whereas the adversarial process focuses on justice *between the parties*, the family law context focuses more simply on *justice*. This slight shift in perspective is integral to family law because frequently the party most affected is the party who often does not have independent representation – the children. Whereas the adversary system gives the parties a measure of control over the proceedings, family law recognizes that the judge may have to play a more inquisitorial role in certain respects.[94] Under the adversarial system, the system works because each party, in theory, will attempt to put its best foot forward. In family law, by contrast, this assumption is not always tenable. The court has an obligation to do justice even if some or all of the parties are not adequately represented, or not represented at all. The relatively small sums generally at issue do not justify extensive litigation, and a more active role by the judge may, in fact, be required given the resource imbalances that can exist between the parties, and the possible adverse effects of such imbalances on the less advantaged spouse.[95] The traditional adversarial system, moreover, does not make allowance for the fragile emotional state of the litigants. In family law, a court that is sensitive to social realities will be wary to accept proposed solutions that may reflect poor or irrational judgment on the part of one of the participants.[96]

We must also recall that courts adjudicating family law disputes have been given a mandate by the legislature to exercise their discretion broadly, through open-ended terms such as "need", "best interests of the child", "as the court thinks reasonable", "as it thinks fit and just" and "in so far as is practicable".[97] Broad discretion of this nature is required in order to tailor orders to the specific needs of the parties. It springs, in essence, from the family law dynamic.[98] Such discretion, while desirable in the family

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[93] C. Fabien, "L'utilisation par le juge de ses connaissances personnelles, dans le procès civil" (1987) 66 Can. Bar Rev. 433 at 435.

[94] Section 11(1)(b) of the *Divorce Act*, for instance, requires the judge to satisfy him or herself that reasonable provision has been made for the support of children of the marriage.

[95] The importance of sensitivity to resource imbalances between the parties is emphasized, for instance, in Davis, *supra* note 14 at 1599.

[96] As La Forest J. observed in *Richardson*, *supra* note 77 at 883: "What we do know for certain is that many people [in the course of separating] do very unwise things, things that are anything but mature and sensible, even when they consult legal counsel."

[97] See *e.g. Divorce Act, 1985*, R.S.C. 1985, c. 3 (2d Supp.), ss. 15-17.

[98] Professor Bala outlines four such considerations in N. Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can. J. Fam. L. 15 at 28-29. To begin with, family law cases usually involve the assessment of entire persons, as well as periods of interaction that extend over years. In this respect, assessments are generally more complex and fact-sensitive than the assessment of a discrete act or transaction. Second, in ordinary litigation, decisions made by a judge are retrospective (whose fault was it) while in family cases, the decisions are prospective (how much money will this spouse need). Inevitably those who make predictions about the future will sometimes be wrong; an acknowledgement of this dynamic implies, concomitantly, a greater measure of tolerance toward judicial decision-making and discretion. Third, family law involves a number of interrelated issues such as custody, possession of the matrimonial home and division of matrimonial assets, to name a few. These issues must be addressed by the judge as a matrix, rather than in isolation from one another –

law context, is clearly antithetical to the philosophy underlying more adversarial dispute resolution processes. The prominent role normally played by the parties in such processes must accomodate considerations of equality and justice, and may therefore call for a broader role to be played by the judge, who acts as both finder of fact and trier of law. Last, but not least, it cannot be forgotten that, of all fields of the law, family law deals perhaps most directly with *human* problems and *human* interrelationships. While the sums of money at stake may not often be large, the stakes in human terms may be enormous.

We must never close our eyes, moreover, to the practical realities of most family law litigation. Given the fact that the parties often have comparably small resources, the need for justice to be administered in a manner that is both efficient and even-handed is particularly acute. It may be financially irresponsible to require expert testimony on questions of social authority or social framework where the issue can be dealt with just as efficiently by written brief. Many parties simply would not be able to participate meaningfully in such a process. Judicial notice is an important vehicle by which to ensure that the family law system remains both accessible and worthwhile to the people who need it most. A pragmatic approach to family law requires that courts critically examine the results and realities of their own interpretation. Although pragmatic or consequentialist approaches to statutory interpretation must be approached with caution,[99] I submit that they are generally more justifiable in the family law context given the broad discretionary power vested by the legislature to the courts to do justice in each individual case. As I have already noted, courts' failure in the 70s and 80s to look to the consequences of emphasizing self-sufficiency to the exclusion of the other objectives of the *Divorce Act* contributed materially to the "feminization of poverty" during that period.[100]

Unless large finances are invested into the litigation of a case, a judge cannot necessarily assume that she has all the material before her that is needed to make a good decision. In fact, I would go so far as to say that there is an *obligation* on family law judges to inquire into and take note of relevant social data or research, without which the calibre of their decisions may suffer. As more judges begin to pursue this approach, the body of jurisprudence and knowledge on various areas of family law will grow, benefitting as well from the more informed dialogue that will hopefully spring up around it. This process will also hopefully encourage more actuarial and costing studies to come

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an exercise that once again is not highly amenable to predilection by rule-making. Finally, unlike most other areas of the law, family law cases often involve an on-going interaction between the parties after judgment, thereby requiring a court to assess – at least implicitly – how the future relationship of the parties will be affected by the disposition of their matters by the court.

[99] Côté, *supra* note 59 at 383-84:

> The actual meaning intended by the legislator may be determined by considering the consequences of possible interpretations.... If a text at first sight seems to lead to unjust or inequitable results, there may be cause to believe that the apparent meaning does not coincide with the legislator's true intention.
>
> ....
>
> Despite its obvious legitimacy, interpretation in the light of a statute's consequences brings with it serious risks. It is subject to abuse, and its scope should therefore be circumscribed.

[100] See *Moge*, *supra* note 2 and *Willick*, *supra* note 3. See also C. L'Heureux-Dubé, "Equality and the Economic Consequences of Spousal Support: A Canadian Perspective" (1994) U. Fla. J.L. & Pub. Pol'y (forthcoming).

into the public arena, contributing meaningfully to the amount of information available and relevant to the decision at hand. This process should relieve somewhat the financial burden on litigants while, at the same time, providing a more rational basis for the exercise of judicial discretion. But the impetus must come from somewhere to start the ball rolling. In the family law context, I firmly believe that it is not the *narrow* ambit, but rather the *broader* ambit of the doctrine of judicial notice that will ensure that decisions accord with reality and common sense. Courts, after all, have more than an obligation to read the law – they have an obligation to read the law *effectively*.[101]

In a complex society with increasingly involved rules and interrelationships, it is no longer acceptable for courts to foist the entire responsibility of lawmaking upon the legislature. While it clearly remains for the legislature to chart the initial course and direction, it will often be unable to foresee the kind of problems that may subsequently arise.[102] On other occasions, it may be unable to reach a consensus on a particular issue and may intentionally leave a statutory provision vague. In such an atmosphere of change, the recognition has sprung up that courts must be willing to reconceptualize their role and to see themselves less as bare agent to the legislature, charged with implementing unquestioningly the legislature's will (if one exists), and more as partners with the legislature, charged with interpreting and making law in a manner that renders the legislature's efforts as effective and just as possible.[103] At the risk of generalizing, I would submit that the central purpose of virtually all family legislation is to do justice amongst all the parties on the whole of the circumstances. Fulfilment of this purpose, for many of the reasons outlined above, requires a more activist role by courts adjudicating over family law matters than would perhaps be warranted in other legal domains. An integral aspect of this activism is a responsibly expanded role for the doctrine of judicial notice.

VII. Equality Considerations

A discussion of judicial notice in the family law context would not be complete without brief regard to some of the more salient implications of its use on equality rights.

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[101] Fabien, *supra* note 93 at 441-42.

[102] See generally, S.G. Requadt, "Worlds Apart or Words Apart: Re-examining the Doctrine of Shifting Purpose in Statutory Interpretation" (1993) 51 U.T. Fac. L. Rev. 331.

[103] This recognition is consistent with the non-originalist school of thought, which looks to the values implicit in legislation and seeks to further those values, rather than attempting to interpret a statute by divining the framer's intent. Leading commentators in this area include, for instance, T.A. Aleinikoff, "Updating Statutory Interpretation"(1987) 87 Mich. L. Rev. 20; C. Sunstein, "Interpreting Laws in the Regulatory State" (1989) Harv. L. Rev. 405; G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982); R.A. Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986-87) 37(2) Case W. Res. L. Rev. 179; W.N. Eskridge Jr., "Dynamic Statutory Interpretation" (1986-87) 135 U. Pa. L. Rev. 1479. In Canada, Professor Côté, *supra* note 59 at 324, has similarly decried the pure agency model as a framework for statutory interpretation:

> Drafters are not clairvoyant, they cannot anticipate all circumstances to which their texts will apply. Courts should do more than simply criticize, and the drafter should be able to count on their positive cooperation in fulfilling the goals of the legislation. Lord Denning said that the judge, because of the special nature of his role, cannot change the fabric from which the law is woven, but should have the right to iron out the creases.

See also Charles, *supra* note 29 at 40-41.

Professor Côté has noted the evolution of liberal principles of interpretation for statutes that attribute or recognize rights or advantages to individuals belonging to disadvantaged groups. In his view, such interpretive guidelines are as much a part of the modern welfare state as were the guidelines favouring the individual a cornerstone of classic liberalism.[104] Although family law statutes are not, themselves, traditionally regarded as dealing with human rights, I think that human rights underlie family law. To deny the existence of a human rights element in family law is to trivialize the very real inequalities suffered largely by women and children as a result of interpretations of those laws which, until recently, were largely androcentric. In an uncertain social environment, courts should seek to ensure that their interpretations and applications of the law are consistent with the values of substantive equality underlying section 15 of the *Charter*. This obligation, in turn, demands that courts apprise themselves of the social context of the issues faced by the parties to the litigation, both during and after marriage or co-habitation.[105] Section 15 of the *Charter* came into effect in 1985 – the same year during which the most recent revisions were made to the *Divorce Act*. It would be lamentable for interpretations of the latter not to seek inspiration from the former.[106]

Monahan and Walker have noted that judges often resolve empirical questions that they perceive to be difficult or unanswerable by reversing the onus of proof.[107] While this technique may be appropriate where the empirical question arises from a dispute over social facts which are particular to the parties, they argue that it is a far less palatable solution to problems involving social framework or social authority.[108] More importantly, in a family law context in which many assumptions are based on male norms and values, this technique may place the brunt of the burden on the disadvantaged spouse to adduce evidence aimed at overcoming stereotypes or misplaced assumptions stemming from the lack of a shared reality between judges and parties. Placing the greater burden on the party less able to shoulder it raises, in my mind, concerns as to substantive equality. One vehicle by which courts may address this inequality is to demonstrate a greater willingness to share the financial and intellectual burden of bringing underlying assumptions in line with the realities of the parties. In short, to do so they must contemplate a broader role for the doctrine of judicial notice.

I would like to raise one last concern – this in respect of those who advocate that courts not go beyond the "plain meaning" interpretation of family law statutes unless absolutely necessary.[109] Though it may be both attractive and relatively easy for courts to arrest their inquiry once they feel they have uncovered a "plain meaning" interpretation, it is important to remind ourselves that "plain meaning", in failing to contemplate social context, and the actual effects which certain interpretations and applications of language may have had on people in the past, implicitly entrenches formal equality. "Plain meaning" does not encourage us to question underlying assumptions. Rather, under a

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104 Côté, *supra* note 59 at 414.

105 See *Willick*, *supra* note 3, L'Heureux-Dubé J.

106 See, by analogy, the discussion on "language context" in Driedger, *supra* note 44 at 161-63. Note also the practice of interpreting ambiguities in statutes in a manner that is consistent with *Charter* values, discussed *supra* at notes 54-57.

107 "Empirical Questions", *supra* note 15 at 570-74.

108 *Ibid.* at 573.

109 See *e.g. Willick*, *supra* note 3, Sopinka J.

veil of legal objectivity, it entrenches the status quo. Unquestioning attachment to the status quo, in turn, may be equality's greatest enemy.

VIII. Conclusion

I have sought in these pages to revisit the doctrine of judicial notice, to question the assumptions under which we have traditionally limited its scope, and to suggest reasons why the family law context may be particularly well-suited to its greater use. In family law, the need for a court to acknowledge and keep abreast of broad societal trends is particularly great. A decision of such human consequence must, in good conscience, contemplate the human picture.

The Supreme Court in *Moge* acknowledged the value of such a perspective and therefore took notice of reliable and fairly uncontroversial statistics which demonstrated beyond dispute that the economic consequences of divorce disproportionately affect women and children in Canada. Referring to various reliable studies and statistics, it endorsed judicial notice in the following terms:

> Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice. More extensive social science data are also appearing.
>
> In all events, whether judicial notice of the circumstances generally encountered by spouses at the dissolution of a marriage is to be a formal part of the trial process or whether such circumstances merely provide the necessary background information, it is important that judges be aware of the social reality in which support decisions are experienced when engaging in the examination of the objectives of the Act.[110]

In *Willick*, I did the same with respect to the social realities of child support, single parent families, and the systematic underestimation of the costs of raising a child.[111]

Some commentators have argued that judicial notice is of no assistance in the quantification of actual losses.[112] That judicial notice does not do all of a judge's work, however, does not mean that we cannot allow it to do some:

> While quantification will remain difficult and fact related in each particular case, judicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background information at the very least.[113]

Judicial notice of evidence of a general character has the potential to simplify the judges' task of assessing the true consequences flowing from the relationship and its breakup and of formulating a more accurate picture of the realistic needs of the parties, particularly when self-sufficiency, market conditions and real estate situations are at issue. It promotes judicial awareness of the context in which support awards are *experienced*, rather than merely contemplated.

Though judicial notice as a proper device in family law is not new, its use appears to have escalated since it received the Court's blessing in *Moge*. It has been taken of

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110 *Moge*, *supra* note 2 at 873-74.

111 *Willick*, *supra* note 3.

112 L.H. Wolfson, B.S. Corbin & D.S. Melamed, "The Use of the Judicial Notice in the Wake of *Moge* v. *Moge*" (1993) 8 Money & Fam. L. 37 at 41.

113 *Moge*, *supra* note 2 at 874.

many different facts in Canadian matrimonial cases. A recent article itemizes fifty-nine cases where judicial notice was taken in Canadian family law cases on subjects such as the following: the employment market for women; the impairment of the economic ability of a woman at the end of a relationship; the increase in the cost of raising children as they grow older; the effects of inflation on the parties; the tax implications to the parties; changes in the value of property, including changes in the real estate market; and the costs of disposition of property.[114] *Moge* has acknowledged that as much as laws are not enacted in a vacuum, judicial decisions should not be made in isolation, particularly of the socio-economic research and data of the time. It is now up to courts in support and custody disputes to take the baton and run with it.

Judicial notice of the general economic impact of divorce on women and children and of studies providing social science data on related matters also serves important ends of judicial efficiency. Specifically, it helps to moderate the high cost of family law litigation by reducing the need for experts, and frees for more important matters court time that would otherwise be required in order to deal with evidence on socio-economic context. Moreover, it reduces the burden on many spouses (most often women) who do not have the resources necessary to bring to the court's attention the studies and expert evidence which might demonstrate such context. In other cases, the small sums involved simply would not justify the expenditure of such resources. Finally, requiring that such facts be proven in each individual case would undoubtedly spawn needless duplication. The value of judicial notice, responsibly exercised, as a practical and economic measure to increase judicial consciousness on the social realities of support should therefore not be underestimated.

In parting, it should be evident that I do not mean to suggest that judicial notice can take the place of effective counsel and situation-specific evidence. It cannot. Moreover, whenever possible, I think that participation of counsel in determinations of what is to be noticed judicially should be encouraged. I do think it important to emphasize, however, that courts should be willing to join hands with the legislature in promoting family law legislation that truly and effectively addresses the needs and concerns of those individuals falling within its ambit. By recognizing that exclusive reliance on the adversarial framework, and all of its accompanying legal baggage, may not be the best means by which to address family law concerns, we open the door for more innovative and co-operative solutions that should ultimately improve both the interpretation and application of family law in Canada.

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[114] Wolfson *et al.*, *supra* note 112 at 42-44.