

## Social Justice and the *Charter*: Comparison and Choice

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At a time of radical inequality, the changes sought by social justice advocacy are urgently needed. Yet repeatedly, courts fail to respond adequately to this challenge. A core issue plagues social justice jurisprudence under sections 7 and 15: the difficulty inevitable in the contemplation and expression of the social and political forms in which oppression and social injustice occur. This problem manifests doctrinally in ways specific to the rights at issue. In section 15 cases, the casting of comparator groups has been deeply problematic, and in both section 15 and section 7 cases, the courts fail to deliver a nuanced understanding of how notions of choice ought (and ought not) to figure in the consideration of rights claims. Judgments map a complex reality in both powerful and necessarily incomplete ways. Judicial attentiveness to this fact will determine the role that the *Charter* does or does not play in the reach for social justice.

À une époque d'inégalité radicale, les changements que recherchent les défenseurs de la justice sociale s'avèrent nécessaires de toute urgence. Pourtant, les tribunaux évitent constamment de réagir à ce défi de façon appropriée. Une question fondamentale entrave la jurisprudence de la justice sociale en vertu des articles 7 et 15, soit la difficulté inéluctable de l'examen et de l'expression de la forme sociale et politique sous laquelle surviennent l'oppression et la justice sociale. Ce problème se manifeste au plan doctrinaire de manières particulières aux droits dont il est question. En fonction de l'article 15, le choix de groupes comparatifs s'est avéré considérablement problématique, et dans les causes relevant tant de l'article 15 que de l'article 7, les tribunaux n'offrent pas une compréhension nuancée de la

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manière dont les notions de choix devraient ou non figurer lors de l'examen des réclamations ayant trait aux droits. Les jugements dépeignent une réalité complexe et forcément incomplète. L'attention judiciaire accordée à ce fait déterminera le rôle que la *Charte* jouera ou ne jouera pas dans la quête de la justice sociale.

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IT IS NOT THAT THE COURTS have not had the right case. Nor is it that smart doctrinal arguments have yet to be made. Yet, in thirty years of litigation under the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> social justice victories are few and slim. This is not the future many social justice activists heralded in 1982.<sup>2</sup> Why has *Charter* litigation proven such barren ground for social justice intervention?

The question is an important one. We face, in political theorist Nancy Fraser's words, "a time when an aggressively expanding capitalism is radically exacerbating economic inequality."<sup>3</sup> The changes that social justice advocacy litigation seeks are urgently needed. In this context, judicial treatment of constitutions has at least two significant implications for constitutional democracies such as Canada.<sup>4</sup> First, judicial review is an important accountability measure. It provides some means for holding the exercise of power, at least by the state, to collectively generated norms, limits, and standards as signalled by a country's constitution. Thus, judicial review under the *Charter*, at its best, serves as a cross-check on otherwise legally unassailable government action and funding decisions. Rights litigation in particular does this by providing a forum and metric for evaluation

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
  2. See Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23:1 *Windsor YB Access Just* 145 [Porter, "Reclaiming Expectations"].
  3. "Rethinking Recognition" 3 *New Left Review* 107 at 108.
  4. Enjoining the debate over judicial review is not my purpose here. For an interesting foray into that territory, see James B Kelly & Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16:1 *CJLS* 3.

of state action in accordance with the protections set out in a bill of rights. This process provides a highly public site for the articulation of claims, often catalyzing a broader political and social appreciation of otherwise more subterranean issues of distribution, participation, and voice.<sup>5</sup> As two legal academics scribe, “The benefit of a *Charter* challenge is that it can serve both as a forum for the deliberation of resource allocation, and as a catalyst for wider public debate ... .”<sup>6</sup> In this sense, *Charter* litigation is used as potentially both “a tool and a terrain”<sup>7</sup> for pushing social change.

Second, as the courts perform this task, the judiciary sends powerful and influential messages about the perpetuation and evolution of norms that are central and critical to our polity. These messages shape how we understand our shared political community and key relationships between the state, society, and the individual.<sup>8</sup> John Whyte writes that the introduction of a bill of rights into our *Constitution*<sup>9</sup> ushered in a “new paradigm—a range of constitution-based controls of the relationship between state and citizen ... shift[ing] a significant class of personal interests from the domain of politics to that of law ... .”<sup>10</sup> Whether such strong judicial influence and power is politically desirable or not, it is nonetheless the era that the *Charter* confirms. Court pronouncements speak loudly, legitimating certain visions of society and de-legitimizing others. What those messages are matters. We may decry the influence given to courts, but we cannot deny that in the current mock-up it is no small concern what they pronounce.<sup>11</sup>

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5. Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality, and Citizenship” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77.
  6. Colleen M Flood & Michelle Zimmerman, “Judicious Choices: Health Care Resource Decisions and the Supreme Court” in Jocelyn Downie & Elaine Gibson, eds, *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007) 25 at 54.
  7. The linkage of these two notions is Martha Jackman’s. See Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” [Jackman, “Castaways”] in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 297 at 299 [Rodgers & McIntyre, *Social Justice*]. The phrase captures strategic use of the *Charter* as both a method of and a platform for advocacy.
  8. See generally Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006).
  9. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
  10. “The *Charter* at 30: A Reflection” (2012) 17:1 *Rev Const Stud* 1 at 1.
  11. In this statement, I demonstrate a key inclination of what Gavin Anderson describes as the third phase of Canadian constitutional criticism. Anderson argues that in such criticism, “the key consideration is pragmatic: Even if far from ideal, rights constitutionalism cannot simply

This article takes up the question of the scarcity and paucity of successful social justice rights challenges by looking at jurisprudence under sections 7 and 15 of the *Charter*—the sections that provide protection for life, liberty, and security of person, and that guarantee equality respectively. Notably, the text of the *Charter* provides no explicit guarantees of social and economic rights.<sup>12</sup> Consequently, legal activism has focused on one or the other of these two sections as an expandable base for textual interpretation that would allow for some specific social and economic protection. Social justice claims have thus cycled between these two *Charter* provisions as ciphers for rendering the *Charter* more responsive to the injustices of twenty-first century Canadian society.

The term “social justice” is used in this article in a loose and embracive manner (also, perhaps, in an abrasive manner, as I wish it to have some “scouring” force). The Supreme Court of Canada itself has used the phrase “social justice,” although, as Heather McLeod-Kilmurray notes, clear elaboration by the Court of what the notion signals—either in general or in the specific context of the case at play—is lacking.<sup>13</sup> For the purposes of this article, “social justice” signifies claims for more just distribution, recognition, and empowerment.<sup>14</sup> At study is litigation that has, as its goal, redistribution of privilege and disadvantage in a more politically justifiable manner. In particular, I reference Janine Brodie’s formulation that accounts for the significance of attaching the term “social” to the idea of “justice.”<sup>15</sup> Brodie argues that the conjoining of the terms “social” and “justice” allows recognition of the key political goal of fixing the “inherent gap between liberalism’s promise of citizen equality and the structural inequalities of capitalism.”<sup>16</sup> In the constitutional legal context, it is about affirming and asserting

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be wished away, and it remains a key site of democratic struggle.” Gavin W Anderson, “The New Borders of the Constitutional” (2013) 50:3 Osgoode Hall LJ 737 at 745-46.

12. In this sense, our *Charter* is an older generation of a bill of rights, one that omits explicit protection of at least some social and economic rights.
13. “Does Preserving the Environment Advance or Conflict with Social Justice and Human Rights?” in Rodgers & McIntyre, *Social Justice*, *supra* note 7 at 465. McLeod-Kilmurray goes on to spell out the connection between social justice and environmental protection, noting that the two have complex involvements. This is, of course, beyond the scope of this article, but indicates how rich and complex the political deployment and projection of social justice necessarily is (*ibid* at 466-70).
14. See the discussion in Nancy Fraser, “Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice” (2007) 1:1 *Stud in Soc Just* 23 at 24.
15. “Reforming Social Justice in Neoliberal Times” (2007) 1:2 *Stud in Soc Just* 93 at 93-95.
16. *Ibid* at 98. For a longer discussion of this, see Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” [Young, “Unequal”] in Rodgers & McIntyre, *Social Justice*, *supra* note 7.

the “responsibilities on government to identify and proactively address issues of socio-economic disadvantage and systemic discrimination . . . .”<sup>17</sup>

Social justice challenges across sections 7 and 15 have had mixed success. Generally, the courts have not been receptive to cases that plead the causes of the most economically marginalized and disadvantaged in our society. Cases that have recently been successful have often looked to section 7 rights as an anchor for specific and narrow justice claims of marginalized groups.<sup>18</sup> Section 15 claims raising similar social justice aspirations have tended to meet with failure. Indeed, one might argue that section 15 doctrine is stalled—the Court is apparently stymied as to how to elaborate a functional and substantive approach to equality claims. Section 7 doctrine, in contrast, has proven quite amenable to a more contextual and nuanced appraisal in at least a few cases, although important qualifications pertain here.

This article does not attempt to decide which of the two sections is the best bet for future social justice challenges. Instead, the article’s purpose is to identify a central tension apparent in articulations of social justice claims that figures significantly in the jurisprudence of both sets of rights. This article argues that a core concern plagues social justice *Charter* litigation per se. This issue manifests itself slightly differently in section 15 and section 7 cases given the doctrinal variations of the two sections. But it is this article’s argument that an issue is common across all social justice litigation. Quickly spun, the challenge is that courts have failed to contemplate adequately the social and political form in which oppression and social injustice occur.<sup>19</sup> Central to this is a failure to theorize and to address fully the manner in which individual harm and systemic fields of social power hierarchies co-occur. This confounding of individual and systemic features of oppression condemns courts to overly simplistic, thin, and ultimately unsatisfactory contemplation of the social injustices these cases foreground.

The tasks, then, that this paper takes up are to chronicle social justice cases across both sections 7 and 15, to assess some of the case law these decisions have generated, and to analyze where and how opportunities best lie for social justice *Charter* rights litigation. A variety of critical perspectives on *Charter* litigation generally as well as issues specific to each of these rights sections will inform the

17. Porter, “Reclaiming Expectations,” *supra* note 2 at 172.

18. See e.g. *Attorney General of Canada et al v Bedford et al*, 2012 ONCA 186, 109 OR (3d) 1; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134 [*Insite* (SCC)].

19. I am not making any claims in this article about the specific forms of harm that oppression takes. For this question, see Iris Marion Young, “Five Faces of Oppression” in *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) ch 2.

analysis. Part I of the article is an elaboration of the conceptual challenge that oppression, and its social justice responses, present to *Charter* rights litigation. This Part invokes more theoretical treatment of social injustice, and of the harms that one would wish sections 15 and 7 to recognize, by looking at social theorists' treatment of oppression and power. Part II introduces the specific doctrinal challenges of both sections 7 and 15 triggered by the courts' failures to comprehend successfully the interconnection and layering of oppression. This failure has some section-specific implications: In section 15 it has rendered the casting of comparator groups deeply problematic, and in both section 7 and section 15 it has allowed the courts to engage problematic notions of choice as spoilers of rights claims. The final Part concludes with the recognition that adequate consideration of the relationship between individual harm and systemic hierarchies is difficult, but it is a challenge importantly engaged.

## I. THE CHALLENGE: INDIVIDUALS IN CONTEXT

Nuanced and effective treatment of the relationship between individual harm and systemic fields of social power is key to any social justice claim. As Sherene Razack notes, "responses to subordinate groups are socially organized to sustain existing power arrangements ... ." <sup>20</sup> Equality theorists—particularly those schooled in law—have been articulate in theorizing the complex placement of persons and groups in broader patterns of hierarchy and oppression informed by a range of social divisions. Debate continues about how to interpret the relationship between social divisions and how to conceptualize the different analytic levels at which to understand such relationships. <sup>21</sup> Nira Yuval-Davis argues that social divisions operate at a number of levels: Social divisions have "organizational, intersubjective, experiential and representational forms ... ." <sup>22</sup> These divisions "are expressed in specific institutions and organizations ... ." and "involve specific power and affective relationships between actual people" that affect how individuals experience their daily lives. <sup>23</sup> They also adhere at the level of representation; that

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20. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 8.

21. Nira Yuval-Davis, "Intersectionality and Feminist Politics" (2006) 13:3 *Eur J Wom Stud* at 195 [Yuval-Davis, "Intersectionality"].

22. *Ibid* at 198. Other theorists articulate other differences across analyses. See e.g. Ina Kerner, "Feminist Theory and the Representation of Diversity" (Paper delivered at the American Political Science Association Annual Meeting, New Orleans, 2012), online: <<http://ssrn.com/abstract=2104789>>.

23. Yuval-Davis, "Intersectionality," *supra* note 21 at 198.

is, they are expressed in symbols, texts, and ideologies.<sup>24</sup> Simply put, group experiences—as shapers of individual circumstances—are relevant, and the right to equality is about both groups and individuals as members of the oppressed or marginalized. There is no “ground zero”<sup>25</sup> at which historical and social context and group membership are irrelevant.<sup>26</sup> Social divisions structure and form the axes of social power, and actual, concrete people are caught up along these axes.<sup>27</sup> The resulting hierarchies of differential access to a range of resources<sup>28</sup> constitute the stuff of equality analyses.

Three important observations have emerged from this literature. First, individual identity is multiple, fractured, and infinite.<sup>29</sup> This means not simply that the world is diverse (which, of course, it is marvellously), but also that individuals map onto this diversity in varied, shifting, and numerous ways. As Darren Lenard Hutchinson writes, “oppression is fluid and contextual and . . . operates on many different axes.”<sup>30</sup> No one vector of identity captures any one individual experience, and we are all marked—although often do not acknowledge ourselves as such—by every identity variable at play.<sup>31</sup> No person is “left untouched,”<sup>32</sup> and no single category can capture the “wide range of different experiences, identities, and social locations” in the world.<sup>33</sup> Social divisions “are not reducible to each other.”<sup>34</sup> The insistence on pigeonholing comparison “falsely homogenize[s] the experiences of different group members.”<sup>35</sup> Thus, the “pixilation of human experience”<sup>36</sup> done by the

24. *Ibid.*

25. Razack, *supra* note 20 at 8.

26. Young, “Unequal,” *supra* note 16.

27. Yuval-Davis, “Intersectionality,” *supra* note 21 at 198.

28. *Ibid.*

29. See Rita Kaur Dhamoon, “Considerations on Mainstreaming Intersectionality” (2011) 64:1 Pol Res Q 230 at 231.

30. “New Complexity Theories: From Theoretical Innovation to Doctrinal Reform” (2002) 71 UMKC L Rev 431 at 442.

31. Nancy Ehrenreich’s discussion of “hybrid intersectionality” offers a compelling account of how the particular mixes of privilege and oppression many experience co-shape individual perspectives and circumstances. See Nancy Ehrenreich, “Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems” (2002) 71:2 UMKC L Rev 251 at 266 [Ehrenreich, “Subordination and Symbiosis”].

32. Kerri A Froc, “Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination” (2010) 25:1 CJLS 21 at 23.

33. Leslie McCall, “The Complexity of Intersectionality” (2005) 30:3 Signs: J of Women in Culture and Soc’y 1771 at 1777.

34. Yuval-Davis, “Intersectionality,” *supra* note 21 at 200.

35. Nancy Levit, “Introduction: Theorizing the Connections Among Systems of Subordination” (2002-2003) 71:1 UMKC L Rev 227.

36. Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall LJ

categorization of constitutional law has been criticized. Social divisions, while ontologically distinct from one another, are “always constructed and intermeshed in other social divisions,”<sup>37</sup> are contested, and evolve in context. These social categories are interactive; they reinforce, challenge, and shape each other, rather than simply intercross.<sup>38</sup> In any analysis of oppression, one must be alert to the “homogenizing and simplifying dangers of category-based research.”<sup>39</sup> The dangers of narratives that ignore such a warning include rendering invisible the most marginal in any specific social category.<sup>40</sup>

Second, such identity features are patterned. Power and privilege (and discrimination and disadvantage) are distributed repetitively—and predictably—along sets of lines of identity. Yuval-Davis makes the argument that analyses must

retain the multiplexity and multidimensionality of identities within contemporary society, but without losing sight of the differential power dimension of different collectivities and groupings within the society and the variety of relationships of domination/subordination between them.<sup>41</sup>

Certain identity features are coded as desirable and admirable, others as not so positive. Discrimination is not randomly distributed, skipping haphazardly from one trait to another, but piles up in the same channels.

Third, the structures of power set up by such discrimination are mutually reinforcing; they tend to concentrate and compound.<sup>42</sup> The most disadvantaged individuals and groups will typically experience stigmatization and discrimination along several identity vectors. Oppressions are interlocking and stack one upon the other. While the particular patterning may be historically and culturally specific and “under continuous processes of contestation and change,”<sup>43</sup> systems of oppression reinforce each other. They are “interrelated rather than conflicting phenomena.”<sup>44</sup>

These three observations feature, in one form or another, in an extensive literature on the intersectionality of oppressions and on identity constitution,<sup>45</sup>

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277 at 284.

37. Yuval-Davis, “Intersectionality,” *supra* note 21 at 195.

38. See Froc, *supra* note 32 at 23.

39. McCall, *supra* note 33 at 1786.

40. Yuval-Davis, “Intersectionality,” *supra* note 21 at 195.

41. Nira Yuval-Davis, “The Citizenship Debate: Women, Ethnic Processes and the State” (1991) 39 *Fem Rev* 58 at 67.

42. See Levit, *supra* note 35 at 233, citing Nancy S Ehrenreich, “O.J. Simpson & the Myth of Gender/Race Conflict” (1996) 67:4 *U Colo L Rev* 931 at 945-46.

43. Yuval-Davis, “Intersectionality,” *supra* note 21 at 200.

44. Levit, *supra* note 35 at 231.

45. McCall, a sociologist, defines intersectionality as “the most important theoretical



where it is recognized that destabilization of the categories of identity is often critical to positive social change.<sup>46</sup> Yet, to summarize, the oppression that the most marginalized in society experience is a tangle. To pull on one string, to focus on only one aspect of the disempowerment, is impossible. Different features of the overall experience are knotted together and the jumble is uniquely and singularly created by those mutually entwined knots, twists, and threadings.

I am not alone in turning to metaphor to capture the social configuration of oppression.<sup>47</sup> Metaphors abound in academics' attempts to portray this complex web of identities in which individuals are sited. Nancy Ehrenreich uses the idea of symbiosis, the kind of relationship that exists between mycorrhizae fungi and plants.<sup>48</sup> Stephanie Wildman and Adrienne Davis proffer the idea of the KOOSH™ ball (a child's toy made up of hundreds of multicoloured rubber bands tied together at the centre of each) to convey postmodern understandings of the mobile matrix of categories that constitute a nonetheless graspable individual reality.<sup>49</sup> Kimberle Crenshaw originated the image of "intersectionality" to capture issues of African American women's employment.<sup>50</sup> Hester Lessard uses the children's game of freeing a trapped ice cream truck to convey ideas about the gridlock created by *Charter* argument.<sup>51</sup> There are many more examples. The area is rich with turns to creative and engaging depictions of complex conceptualization.

This use of metaphor by equality theorists is enticing. The proffering of a clever novel visualization or the contrasting of a new image to more received conceptualization can "unstick" thinking.<sup>52</sup> The effect is a creative and elegant

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contribution" of women's studies, understanding it as "the relationships among multiple dimensions and modalities of social relations and subject formations." *Supra* note 33 at 1771.

46. *Ibid* at 1777.

47. Jennifer Nedelsky notes, more generally, that "[l]aw, like all conceptual systems, relies on metaphor." See *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 91 [footnotes omitted].

48. "Subordination and Symbiosis," *supra* note 31 at 277.

49. "Language and Silence: Making Systems of Privilege Visible" (1995) 35 *Santa Clara L Rev* 881 at 899-900.

50. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U Chicago Legal F* 139.

51. "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Butterworths, 2006) 291 at 292 [McIntyre & Rodgers, *Diminishing Returns*].

52. It is difficult to talk about the use of metaphor without resorting to metaphor.

literature on this topic. But some critical pause is necessary. Peter Kwan has written about the use of metaphor, arguing that while metaphors are extremely helpful in conversations employing high levels of abstraction, it is important that the metaphor not replace the concept.<sup>53</sup> His caution is twofold. First, we must be careful not to bestow “ontological status to that which properly belongs to systems of thought.”<sup>54</sup> That is, we must not confuse real objects with concepts that belong simply to systems of thought: “Race, gender, and sexual orientation are not *things* like plants and fungi with separate and independent existences. They are concepts, used within systems of language and culture, to apportion and police regimes of power.”<sup>55</sup> Second, the chosen metaphor must not function to limit or weaken the conceptual claim that one wishes to make.<sup>56</sup> Metaphors risk in their literalness—which, incidentally, is also part of their value—too rigidly or narrowly constricting the desired conceptual point. Indeed, “metaphors inevitably distort or shape our perceptions in the sense that they hide some dimensions of the phenomenon they refer to and highlight others.”<sup>57</sup> The challenge is to craft the right metaphor for the moment, one that conveys most evocatively the under-expressed or complex conceptual point one wishes to communicate.

In any case, and independent of the creative imagery employed to convey these three theoretical points about oppression and identity, the conversation about interconnected and multiple identity features is an important discussion to have in the context of social justice aspirations. True, these theoretical observations are no longer novel or startling.<sup>58</sup> But they are nonetheless basic, unavoidable, and important. These observations therefore bear repeating and summarizing—they elaborate the tricky background against which social justice claims and litigation take shape. And, it is my argument that this complexity is often what the courts fail to contemplate adequately, with clear, persistent, and troubling doctrinal implications.

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53. “The Metaphysics of Metaphors: Symbiosis and the Quest for Meaning” (2002) 71:2 UMKC L Rev 325 at 327.

54. *Ibid* at 328.

55. *Ibid* at 328-29 [footnotes omitted; emphasis in original].

56. *Ibid* at 329.

57. Nedelsky, *supra* note 47 at 98.

58. Ange-Marie Hancock notes that “the idea of analyzing race, gender and class identities together has existed for over a century.” See Ange-Marie Hancock, “When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm” (2007) 5:1 Perspectives on Politics 63 at 63.

## II. THE CASES AND THE CHARTER: COMPARISON AND CHOICE

On occasion, individual Supreme Court justices have come close to recognizing the complexity of individual identity, at least in principle. For example, Justice Wilson in the *Morgentaler* case noted that:

An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both.<sup>59</sup>

Of course, this is not a remarkable observation. It simply contemplates the metaphor of separateness and independence as ill-fitting for the full experience of the individual in community and notes a tension in the distinction between the individual and the collective. But, as such, it is certainly the starting place for the necessarily more layered and nuanced consideration of oppression that social justice necessitates. Yet the fuller reach of recognition of complex identity is lacking.

In this Part, the analysis turns to many of the cases in which litigants from across Canada have tried to leverage *Charter* rights into successful claims for a more just distribution of resources. As already mentioned, the discussion is limited to cases involving one or both of sections 7 and 15. The review is not a complete cataloguing, nor is it more than merely illustrative. Instead, the hope is, through recollection of some tough cases, to adumbrate the major snares in which social justice litigation under these two sections is likely to get caught. More directly, this Part identifies two doctrinal challenges or impasses that have resulted from inadequate judicial acknowledgment of the theoretical lesson proffered by feminist identity theorists. First, social justice litigation demands a subtle and layered unpacking of individual features at play in any claim of harm made by a claimant. This sets up a problem for the inevitable comparison that section 15 entails and the often unacknowledged harm definition central to a section 7 analysis. I consider this problem first. The article then turns to the second problem: social justice claims are often defeated by the ascription of agency or choice to the claimant as the cause of the harm at root in the claim. Once ascribed, choice functions to defeat the claimant's request for state action of any sort in relation to such harm. I argue that this assignment of choice, and the fact that such choice matters, rest on faulty conceptualization of the individual in the context of systemic structures of oppression.

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59. *R v Morgentaler*, [1988] 1 SCR 30 at 164, 63 OR (2d) 281.

## A. COMPARISON: GROUP CONSTITUTION AND CAPTURING HARM

Both section 7 and section 15 analyses demonstrate inadequate attention to the complex of social divisions in which individuals are interlarded, particularly in reference to how courts understand the use of comparator analysis in section 15 cases and the crystallization of the harm complained of in section 7 cases. Admittedly, pinning down group identity is tough—maybe even impossible to do fully in any specific circumstance—and is certainly politically fraught. As noted, even describing group identity on a conceptual or theoretical level sends academics off on glorious rounds of metaphor creation. But grasping this complexity is a critical part of analyses under these sections and is probably unavoidable in social justice claims. Account must be taken of a “multiplicity of social logics” and attentiveness given to how difference must be recognized, shared, and ultimately valued.<sup>60</sup>

### 1. SECTION 15

The Supreme Court of Canada has been unwaveringly clear that the equality protected under section 15 is a comparative concept.<sup>61</sup> This means that the Court will have to select from the infinite variety of individual features that any claimant possesses those that are the most pertinent, or relevant even, to the claim, such that an effective, framed, and appropriately narrowed comparison can take place. But such a tactic is hazardous. It involves judicial judgment as to what aspects of the claimant are relevant to the claim as the analysis is forced to select from a complex that is more than simply additive. This risks that courts will proceed as if only a few of the relevant features or social divisions that make sense of the individual experiences are involved. The parsing of identity to key features raises well-discussed problems. It risks blindness to differences within identity categories, enhancing marginalization of subgroups.<sup>62</sup> It also makes difficult the recognition of the socially constructed nature of identity; justification of identity framing will often emphasize ideas of natural or innate qualities.<sup>63</sup> Diminished is appreciation for the constructed, multiple, and elastic character

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60. Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2d ed (London, UK: Verso, 2001) at 188.

61. In the Court's first s 15 case, McIntyre J stated that equality as a comparative concept may “only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.” *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at para 26, 56 DLR (4th) 1. See also *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 24, 170 DLR (4th) 1 [Law].

62. Levit, *supra* note 35 at 227.

63. *Ibid* at 227-28.

of individual placement along lines of social divisions. Thus, Patricia Williams writes that equality analyses risk recasting “the general group experience [of the marginal] as a fragmented series of specific, isolated events rather than a pervasive social phenomenon ... .”<sup>64</sup> Foregrounding too thin or too simple a set of individual characteristics ignores how oppression redoubles and connects. There are “political and social consequences of the failure to attend to the many mutual relationships between identity categories.”<sup>65</sup> Yet, equally, having too many features under consideration threatens the possibility of effective analysis.

The response at both the theoretical and doctrinal levels has been to talk of intersectionality—a term, as I have already mentioned, coined by Kimberle Crenshaw and now part of a common equality law lexicon.<sup>66</sup> The image of intersectionality captures the recognition of the cross-weaving character of identity and anchors anti-essentialist theorizing about the social dynamics of inequality.<sup>67</sup> In an influential article, Leslie McCall has described intersectionality as referring to “the relationships among multiple dimensions and modalities of social relations and subject formations” in order to overcome “the limitations of gender [for example] as a single analytical category.”<sup>68</sup>

The idea of intersectionality has come in for critique. Like any metaphor, it is partial only.<sup>69</sup> But it is an image with which Canadian courts are taken. Its acceptance in the Court’s decision in *Law v Canada* echoes across other section 15 equality cases: “There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1).”<sup>70</sup> In an earlier example, Justice L’Heureux-Dubé, for the minority in *Canada (Attorney General) v Mossop*, notes:

64. *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard: Harvard University Press, 1991) at 13.

65. Kwan, *supra* note 53 at 329, citing Ehrenreich, “Subordination and Symbiosis,” *supra* note 31 at 266, 281-83.

66. See e.g. Mary Eaton, “Patently Confused: Complex Inequality and *Canada v. Mossop*” (1994) 1:2 *Rev Cons Stud* 203 at 229; Kerner, *supra* note 21 at 2.

67. See Emily Grabham et al, “Introduction” in Emily Grabham et al, eds, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: Routledge-Cavendish, 2009) 1 at 2.

68. McCall, *supra* note 33 at 1771.

69. Theorists note that the metaphor ignores “areas of the social that exist apart from the meeting point, or overlap, that intersectionality describes.” See Emily Grabham et al, *supra* note 67 at 2. For a discussion of both the usefulness and weaknesses of the metaphor, see generally Dhamoon, *supra* note 29; Froc, *supra* note 32; Grabham et al, *supra* note 67. Even Crenshaw herself has noted that the metaphor has been employed in a less than useful manner. See Dhamoon, *supra* note 29 at 232.

70. *Law*, *supra* note 61 at para 94.

[C]ategories of discrimination may overlap, and ... individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.<sup>71</sup>

Generally, judges treat the idea, at least, of intersectionality as unremarkable.

Using the metaphor, however, is not the same as successfully deploying its message. There are problems with this judicial turn. Canadian courts have not translated the theoretical recognition into practical and politically acute argument. Intersectionality tends to be treated by courts as simply a statement of “a combination of grounds.”<sup>72</sup> The Court has yet to recognize, in theory or doctrine, that group characterization cannot merely be an additive process. For example, it is not that discrimination need only be shown on one or the other or several of a variety of grounds.<sup>73</sup> Discrimination is not properly characterized as simply a list of some number of grounds along which disadvantage occurs.

Certainly, the Court has demonstrated some limited but key aspects of an effective appreciation of intersectionality’s lessons, albeit formulated differently than in the language of intersectionality. These are those doctrinal advances in equality law that prevent overly simplistic and non-fragmented conceptualization of individual categories such as gender. Thus, the Court has allowed that group identity can be both over- and under-inclusive. This means that claims of discrimination on the basis of, say, gender cannot be defeated by showing that not all women receive the discriminatory treatment,<sup>74</sup> or that some men also receive the discriminatory treatment. This doctrinal wisdom prevents the silly conclusions

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71. [1993] 1 SCR 554 at 645-46 [citations omitted], 100 DLR (4th) 658.

72. *Law, supra* note 61 at para 94.

73. One of the few equality cases to attempt, as opposed to merely acknowledge the possibility of, an intersectional analysis is the Ontario Court of Appeal decision in *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*. In this case, Laskin JA argued that: “Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged.” (2002), 59 OR (3d) 481 at para 72, 212 DLR (4th) 633. Laskin JA then proceeded to look at each ground in turn, as if characterization of the claimants was additive rather than interactive. His conclusion was that

undertaking different comparisons to assess different forms of differential treatment is consistent with the Supreme Court’s directive to apply the Law analysis flexibly. This flexible comparative approach reflects the complexity and context of the respondents’ claim and captures the affront to their dignity, which lies at the heart of a s. 15 challenge. I have concluded that the respondents have received differential treatment on the basis of sex, marital status and receipt of social assistance (*ibid* at para 81).

74. See *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

of earlier cases that treatment of only some women cannot be based on gender or that treatment that affects many women but also a few men is thereby not gender-based.<sup>75</sup> These recognitions encode, without explicit articulation as such, the lesson that social divisions cross-cut each other. Canadian courts do better on this count than American courts.<sup>76</sup>

The Court's decision in *Gosselin v Quebec (Attorney General)*<sup>77</sup> illustrates a judicial failure to take into account fuller lessons of the theory that spawned the metaphor of intersectionality. The case involved a challenge, on a number of constitutional and legislative grounds, to the base amount of welfare benefits provided for adults under thirty years of age by Quebec law.<sup>78</sup> This base rate was set at approximately one-third the rate of benefits available to older welfare recipients. Much has already been written about the failure of the Court in *Gosselin* to afford the claimant, Louise Gosselin, substantive equality rights.<sup>79</sup> I mention the case here simply to note that the majority's framing of the claimant group misses key social divisions shaping claimant experience under the impugned legislation. Evidence before the Court included extensive testimony from Louise Gosselin herself about her attempts to subsist on the under-thirty benefit level and her efforts to participate in the workfare and other government programmes formally offered to enhance that benefit level. This evidence demonstrated the relevance of Gosselin's gender, disability, and economic status to the "acute material and psychological insecurity, deprivation and indignity" she suffered.<sup>80</sup> The Court rejected the sufficiency of this evidence and considered discrimination only in terms of the ground of "age."<sup>81</sup> As a result, the harms of which Gosselin complained appear in attenuated form. Failure to capture fully the complexity of the oppression at issue risks rendering that oppression invisible. The discrimination becomes "hidden in plain sight."<sup>82</sup> It is like those images, seemingly composed of

75. For an obvious example of such judicial absurdity, see *Bliss v Canada (Attorney General)*, [1979] 1 SCR 183, 1978 CanLII 25.

76. See Bradley Allan Areheart, "Intersectionality and Identity: Revisiting a Wrinkle in Title VII" (2006) 17:1 Geo Mason U Civ Rts LJ 199.

77. 2002 SCC 84, 4 SCR 429 [*Gosselin*].

78. *Regulation Respecting Social Aid*, RRQ 1981, c A-16, r 1, s 29(a).

79. See Young et al, *supra* note 6

80. Jackman, "Castaways," *supra* note 8, at 313.

81. *Ibid* at 314.

82. Areheart, *supra* note 76 at 229. For a compatible argument in relation to *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224, see Froc, *supra* note 32 at 42. Froc contends that the Court ignores the synergy between patriarchy and colonization with the result that the discriminatory harms the Native Women's Association of Canada (NWAC) faces remain unacknowledged. The irony here, to which Froc points, is that NWAC becomes

many randomly, differently coloured and placed dots that, when viewed through glasses with red lenses, reveal one shape and when viewed through glasses with blue lenses, show some other image. Viewed without shaded lenses, the picture is simply a mess of incoherent coloured dots—there is no pattern, no coherent image. In the same manner, the ground of discrimination accepted as the lens for viewing the discrimination claim renders any given harm visible or invisible.

The recent section 15 case of *Withler v Canada (Attorney General)*<sup>83</sup> takes up this sort of criticism of the Court's formulation of comparator groups. Specifically, the judgment in this case calls for an approach that takes account of "the full context"<sup>84</sup> of both the claimant circumstances and the effect of the challenged law on the claimant. The Court recognizes that the casting of comparator and claimant groups can dull the Court's appreciation of the harm at issue.<sup>85</sup> It is necessary, the Court states, to look to "a conflux of factors."<sup>86</sup> The result of this series of acknowledgements is a judicial restatement of the use of comparator groups in equality analysis: The first step of establishing different treatment requires only that the claimant establish a distinction based on one or more enumerated or analogous grounds. It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. The claim should, then, proceed to the second step of the analysis, employing if necessary a wider variety of contextual understandings of claimant circumstances.<sup>87</sup> This recognition of the importance of judicial framing of claimant circumstances and the oppression at issue is valuable, but judicial analyses remain vulnerable to inadequate acknowledgement of complexity and unacknowledged discretion in narrowing complexity. The *Withler* decision is itself, in its application of equality analysis to the facts, vulnerable to this criticism.

Adequate treatment of difference is, without doubt, a doctrinal uphill struggle. This is an area in which theorists themselves have difficulty conveying and

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the problem rather than selective and discriminatory government funding.

83. 2011 SCC 12, 1 SCR 396 [*Withler*].

84. *Ibid* at para 40.

85. In support of this contention, the Court cites a number of academic commentaries. See Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill LJ 627; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's LJ 179; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37. See also Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in McIntyre & Rodgers, *Diminishing Returns*, *supra* note 51 at 135.

86. *Withler*, *supra* note 83 at para 58.

87. *Ibid* at para 65.



translating their observations into pragmatic argument. The complex nature of oppression and its relationship to identity make comparative analysis tricky. Possibly, the task required is inevitably done badly; but acknowledgement of complexity is important. Failure to do so predisposes judicial handling of social justice claims to inadequacy. Such failure can buttress the very hierarchical relations at the root of social justice challenges.<sup>88</sup>

## 2. SECTION 7

The complex and prismatic nature of individual identity is also importantly, but alas equally inadequately, recognized under a section 7 analysis. True, the rights under section 7 are not comparatively granted, so no comparator group analysis is required. Thus, capturing the parameters of the comparator group and its contrasts with other groups is not a formally articulated step of the doctrinal analysis. But the casting of the claimant and her or his group identity is critical to identification of the harms appraised under section 7. In this regard, the courts' analysis in section 7 cases can be as overly simplistic as in section 15 challenges. Failure to articulate a nuanced shaping of the claimant group under section 7 will limit understanding of the extent of rights infringement and of its consequent harms. Again, claimant characteristics as recognized by the courts filter what is perceived to be at issue. Identity grounds the claims advanced.

A recent British Columbia case, *Victoria (City) v Adams*<sup>89</sup> demonstrates this clearly. This 2009 case dealt with a challenge to a Victoria municipal by-law by a number of homeless individuals. The British Columbia Court of Appeal upheld, albeit on slightly narrower grounds, the British Columbia Supreme Court's decision declaring unconstitutional those portions of the by-law that prohibited shelterless people sleeping in parks from erecting temporary overhead shelter, such as tents, tarps attached to trees, or cardboard boxes.<sup>90</sup> The case reads most straightforwardly as a victory for the rights claimants; in the absence of adequate public shelter beds, the homeless in Victoria may now sleep outside in public parks under whatever forms of temporary cover they can muster.<sup>91</sup> Literally cold

88. See Grabham et al, *supra* note 67 at 2.

89. 2008 BCSC 1363, 299 DLR (4th) 193 [*Adams* (BCSC)]. See also *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [*Adams* (BCCA)].

90. See *Adams* (BCCA), *ibid* at para 166. The British Columbia Court of Appeal modified the trial judge's decision that held the by-law to be unconstitutional because there was an inadequate number of shelter beds available relative to the number of homeless people.

91. For critical analyses of this case, see *e.g.* Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v Adams* (BCSC)," Case Comment (2009) 164 BC Stud 103; Martha Jackman, "Charter Remedies for Socio-economic Rights Violations:

comfort perhaps, but a successful section 7 claim nonetheless.<sup>92</sup>

Pointed comments about the scope of this case aside, a significant feature of homelessness and shelter availability was left unacknowledged by the courts.<sup>93</sup> Shelter availability and suitability specifically, and conditions of homelessness more generally, are configured by the gender of the homeless population involved. Women encounter and respond to issues of housing insecurity in ways that are deeply marked by their gender.<sup>94</sup> Traditional shelters are considerably less safe for women than men.<sup>95</sup> These shelters are thus a less accessible and practical form of temporary shelter for women than for men.<sup>96</sup> Judicial assessment of shelter

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Sleeping Under a Box?” (Paper delivered at the Annual Conference of the Canadian Institute for the Administration of Justice, Ottawa, 2 October 2009).

92. Of course these citizens have no access to private property of their own—they need public property on a permanent, not merely temporary, basis. Presumably, they need more than merely temporary overhead, overnight shelter as part of this. It does, after all, quite often rain or snow during the daytime in Victoria. For further analysis of this aspect of this and other cases, see Margot Young, “Sleeping Rough and Shooting Up: Taking British Columbia’s Social Justice Issues to Court,” forthcoming in Martha Jackman & Bruce Porter, eds, *Realizing Social Rights* (Toronto: Irwin, 2013). See also Sarah E Hamill, “Private Property Rights and Public Responsibility: Leaving Room For The Homeless” (2011) 30:1 Windsor Rev Legal Soc Issues 91.
93. Arguably, the trial judge in *Adams* (BCSC) might have had some sense of this, stating in her judgment that had there been enough shelter spaces, “the case would be different and more difficult.” See *Adams* (BCSC), *supra* note 89 at para 191. The Court of Appeal, however, appears not to have sensed the more complex and nuanced argument. Compare *Adams* (BCCA), *supra* note 89.
94. See e.g. Rusty Neal, *Voices: Women, Poverty and Homelessness in Canada* (Ottawa: National Anti-Poverty Organization, 2004), online: <<http://intraspec.ca/WomenPovertyAndHomelessnessInCanada.pdf>>; Leslie Tutty, Cindy Ogden & Gillian Weaver-Dunlop, *An Environmental Scan of Strategies to Safely House Abused Women* (Calgary: RESOLVE Alberta, 31 October 2008), online: <<http://www.ucalgary.ca/resolve/reports/2008/2008-02.pdf>>; Shawn Bayes & Alison Brewin, *Bridging the Divide: Building Safe Shelters for Women and Families in BC* (Vancouver: Elizabeth Fry Society, March 2012), online: <<http://www.elizabethfry.com/initiatives/documents/Bridging-the-Divide-Building-Safe-Shelters-for-Women-Families.pdf>>; Leslie Tutty, Cindy Ogden & Gillian Weaver-Dunlop, *Feasibility Study for a National Network of Women’s Shelters and Transition Homes* (Calgary: RESOLVE Alberta, 31 March 2007), online: <<http://www.ucalgary.ca/resolve/reports/2007/2007-01.pdf>>.
95. Bayes & Brewin, *ibid* at 7.
96. *Ibid*. Many homeless women do not feel safe in temporary accommodation. Women have a higher risk of physical and sexual violence and those who reside in co-ed shelters report being in constant fear of violence from co-resident men. A recent study conducted found that of all British Columbia shelters, female-only facilities represented only 17 per cent of shelter spaces available. As a result, undesignated co-ed space is becoming all that is available in many areas. Increasingly, it is not just women-only shelters that are limited, but also designated women-

availability will miss this point unless gender is taken into account as a relevant feature of claimant identity. Neither level of court in *Adams* did this, though the issue was raised by the Poverty and Human Rights Centre, who were intervenors at the Court of Appeal level. But the ramifications of gender—which shape both the desirability and the actual availability of shelter options for women—were left judicially unacknowledged.<sup>97</sup> Admittedly, such further shaping of the group of claimants was unnecessary given the simple math of the availability even of co-ed shelters. This case thus shows how claimant identity, in its full complexity, is also relevant to the success and shaping of section 7 claims. The character, framing, and reach of the harms at issue under any section 7 claim necessarily rest on the conceptualization of the relevant identity features of the group or individual experiencing these harms.

This general failure to appreciate and to be explicit about the complexity and fluidity of the connections between individual identity and oppression, and how individual and group experience is so cast, condemns courts, in their assessment of redistributive rights claims, to miss the substantial oppressions that form core injustices in our society. Judicial analyses under both section 7 and section 15 betray too confident and precise a pinpointing of individual and group identity in light of broader existence, meshing, and patterns of social divisions.

### III. CHOICE: AGENCY AND ACTION

This conceptual failure, or lack of attention to complexity, bears unfortunate fruit in at least one other doctrinal regard. Understanding the social world and individual identity as multiple and complex has clear implications for how the idea of choice ought *not* to figure in constitutional argument. By “choice,” I mean to capture the idea of individual volition, intention, or agency that underpins assignment of normative responsibility for outcomes to the individual. The idea of choice denotes the popular image of the “autonomous, liberal (legal) subject,” morally responsible for the outcomes of his or her actions.<sup>98</sup> This is “the sovereign self” residing at the heart of liberalism and fuelling so much of liberalism’s preoccupation with legitimate state power and with rights as a bulwark against

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only space within co-ed shelters. *Ibid* at 3, 7.

97. Hamill, *supra* note 92 at 96.

98. Rosemary Hunter & Sharon Cowan, “Introduction” in Rosemary Hunter & Sharon Cowan, eds, *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Abingdon, UK: Routledge-Cavendish, 2007) 1 at 1.

such power.<sup>99</sup> I have elsewhere cautioned “against understanding ‘choice’—or its absence—as an essential configuring factor in rights claims under the *Charter*.”<sup>100</sup> I want to elaborate on this concern and tie it to both a judicial failure to appreciate this underlying complexity as well as the difficulty that claimants have in anchoring social justice challenges in the *Charter*.<sup>101</sup> Choice as spoiler figures in both section 15 and section 7 cases; it even lurks threateningly in the background of recent apparent victories for social justice challenges. Three older section 15 cases and three more recent section 7 cases illustrate this well.<sup>102</sup>

#### A. SECTION 15

Two of the section 15 cases I examine involved discrimination claims on the ground of marital status (not coincidentally an analogous section 15 ground that involves a central contractualized relationship in our society). Both cases involved unsuccessful attempts to argue for an equality-mandated expansion of benefits flowing from opposite-sex, common law relationships. In the first of these, the 2002 case of *Nova Scotia (Attorney General) v Walsh*,<sup>103</sup> the claimant, Susan Walsh, sought revision of the Nova Scotia *Matrimonial Property Act*<sup>104</sup> to include unmarried opposite-sex cohabitants in the statutory definition of “spouse.” Absent revision, Walsh was denied the presumption of equal distribution of matrimonial property upon the dissolution of her common law relationship. The second section 15 case, *Hodge v Canada (Minister of Human Resources Development)*,<sup>105</sup> focused on the Canada Pension Plan requirement that a common law spouse must have

99. *Ibid* at 28.

100. Margot Young, “Context, Choice and Rights: *PHS Community Services Society v Canada (Attorney General)*” (2011) 44:1 UBC L Rev 221 at 248.

101. For an interesting reference to “choice” or individual autonomy in the context of judicial elaboration of analogous grounds under s 15(1), see Rosalind Dixon, “The Supreme Court of Canada and Constitutional (Equality) Baselines” (2013) 50:3 Osgoode Hall LJ 637. Although the focus of her discussion is on contrasting modes of judicial extension of analogous grounds under s 15, the linkage she draws in one portion of her argument between “choice” and immutability has interesting resonances with arguments in this article. (*Ibid*) at 653.

102. Just before this article went to print, the Supreme Court of Canada handed down its judgment in *Quebec (Attorney General) v A*, 2013 SCC 5, 21 RFL (7th) 1. Interestingly, the dissenting judgments of Justice Abella and Chief Justice McLachlin would confine consideration of “choice” to s 1 justificatory arguments. However, the majority judgment was not similarly attuned to the same concerns. Justice LeBel wrote the majority judgment and followed a line of reasoning consistent with that critiqued in this article.

103. 2002 SCC 83, 4 SCR 325 [*Walsh*].

104. RSNS 1989, c 275.

105. 2004 SCC 65, 3 SCR. 357 [*Hodge*].

cohabited with the pension contributor for at least one year prior to survivor pension eligibility. There was no such requirement for a married spouse. Betty Hodge argued that, relative to separated but still married couples, this constituted discrimination against her relationship type.

The judgment in *Walsh* is most obviously stalked by the willful claimant, a claimant who opts for circumstances of which she then complains. The majority decision to reject the equality complaint, written by Justice Bastarache, concludes that the presence of consent and choice is crucial: “A decision not to marry should be respected because it also stems from a conscious choice of the parties.”<sup>106</sup> The distinction drawn by the matrimonial property exclusion respects this decision not to marry. To find otherwise, the majority asserts, would be to use the *Charter*’s guarantees of equality and respect for individual dignity to undermine the autonomous exercise of individual choice.<sup>107</sup> This would be a failure to actually respect the complainant’s dignity. Justice Bastarache thus trumpets the primacy of choice: “choice must be paramount.”<sup>108</sup> Liberty is an underlying value of the *Charter* and, as such, it informs the inquiry into discrimination.<sup>109</sup> The claimant is “free to take steps” necessary to address through her own agency any concerns about private property distribution upon relationship breakdown.<sup>110</sup> With choice so centrally assumed, the harm such choice could have avoided cannot be the basis for state obligations under section 15.

Reliance on choice, or agency, is less obvious but still powerful in *Hodge*. Much of the reasoning in this case revolves around identifying the appropriate comparator group for Betty Hodge. The majority casts the comparator group so as to remove from the frame any unequal treatment of the claimant and others in similar circumstances.<sup>111</sup> This leaves the Court vulnerable to my earlier critique that its analytical lens is shaded selectively to leave some oppression invisible. However, in its last substantive paragraph of the judgment, the Court effectively unravels its own reasoning when it states:

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106. *Walsh*, *supra* note 103 at para 55.

107. *Ibid* at para 43.

108. *Ibid*.

109. In the *Walsh* decision, Bastarache J said: “it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty . . . . Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty” (*ibid* at para 63).

110. *Ibid* at para 55.

111. Justice Binnie, for the Court, stated that the relevant comparison was to divorced spouses, for whom survivor benefits were equally not available. *Hodge*, *supra* note 105 at para 47.

[T]he foregoing analysis deals with heterosexual couples, not homosexual couples. Until such time as the issue of same-sex marriage has been resolved, it is possible that different considerations would apply to gay and lesbian relationships in respect of a survivor's pension because, at least in the past, the institution of a legal marriage has not been available to them.<sup>112</sup>

This is the reader's "Aha!" moment in this decision. The formal possibility for the claimant as a member of a heterosexual couple to choose marriage justifies the finding that Hodge has no right against the state to address her consequent circumstances that flow from her rejection of this option. When one makes the "wrong" choice, one seemingly has no right.

We can see a similar assumption of claimant agency underpinning disentanglement in the *Gosselin* case as well. In the trial judgment, Louise Gosselin herself is presented as largely to blame for her own unfortunate circumstances:

En effet, il est constant que l'être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et maîtrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l'entraîner dans la pauvreté matérielle.<sup>113</sup>

The majority judgment of the SCC, written by Chief Justice McLachlin, reiterates this assessment implicitly in its first paragraph:

Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook, waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit.<sup>114</sup>

Further on in her judgment, Chief Justice McLachlin returns to such explanatory statements, noting that Gosselin faced "personal problems, which included psychological and substance abuse components."<sup>115</sup> The case became one about "bad, individual choices ... overridden by state-imposed choice, purportedly in the interest of (future) dignity."<sup>116</sup> There was no discrimination. State action was a

112. *Ibid* at para 48.

113. *Gosselin c Québec (Procureur general)*, [1992] RJQ 1647 at 266, JQ no 928 (Qc Sup Ct) (QL) as cited in Jackman, "Castaways," *supra* note 6 at 320. Translation as offered by Jackman: "In effect it is always the case that a human being who has developed qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychological and even physical obstacles that could pull him into material poverty."

114. *Gosselin*, *supra* note 77 at para 1.

115. *Ibid* at para 48.

116. Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" (2010) 50:2 Sup Ct L Rev 129 at 176 [McIntyre, "Equality"]. See also Dianne Pothier, "But

corrective for bad choice (individual agency), and the consequences of such state action followed from the original poor choices of the individual. The notion of choice and individual agency agilely defeat Gosselin's claim.<sup>117</sup>

## B. SECTION 7

Similar invocation of choice shadows recent judicial analysis in both the *Insite*<sup>118</sup> and *Adams* cases. The *Insite* case involved challenges to federal criminalization of activities in a provincially run, supervised safe injection site. *Adams*, as already detailed, dealt with a challenge to a municipal by-law prohibiting temporary shelter in public parks. In both cases, section 7 rights were more easily claimed due to the trial judges' factual findings that choice was not meaningfully implicated in the claimants' circumstances. The trial judge in *Insite* sees addiction as the result of a range of

personal, governmental and legal factors: a mixture of genetic, psychological, sociological and familial problems; the inability, despite serious and prolonged efforts, of municipal, provincial and federal governments, as well as numerous non-profit organizations, to provide meaningful and effective support and solutions; and the failure of the criminal law to prevent the trafficking of controlled substances in the DTES.<sup>119</sup>

Individual volition is not a significant feature in this list.

In *Adams*, the claimants' homelessness was similarly attributed to a matrix of factors, of which individual will was equally an insignificant element. In each case, the relevant attorney general argued that the activities regulated—drug addiction or supervised injection in *Insite* and homelessness in *Adams*—were simply “lifestyle” choices.<sup>120</sup> Judicial rejection of these arguments and acceptance of the absence of choice as a determining factor in each set of claimants' circumstances

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It's for Your Own Good” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 40.

117. For a similar argument in relation to *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470, see Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002). Johnson argues that Beth Symes, the s 15 claimant in this case, figures as the selfish, wilful working mother who complains of the results of her own choices. From this perspective, her claim is defeated. Froc regards this case also as an illustration of the Court's trouble in recognizing that privilege and subordination can co-occur. See Froc, *supra* note 32 at 28.

118. *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 661, 293 DLR (4th) 392 [*Insite* (BCSC)], aff'd 2010 BCCA 15, 314 DLR (4th) 209 [*Insite* (BCCA)].

119. *Insite* (BCSC), *ibid* at para 89.

120. This argument was made by the Attorney General of Canada in *Insite* (SCC), *supra* note 18 (Factum of the Appellant at para 97).

enabled a relatively uncomplicated tale of government interference with protected liberty, life, and security of the person. Thus, very crucially, successful assertion of section 7 rights in these cases relied on judicial rejection of government arguments that individual blameworthiness or wilful choice should be considered a significant factor in generating the harm about which the claimants complained.

The courts left open the possibility that the presence of choice—in another scenario—might result in just the kind of disentitlement the government pled in each case. That is, choice might have mattered as it did in the section 15 cases just discussed. This retention of choice as an assessment factor in both section 15 and section 7 cases ignores the lessons of intersectionality theory. It parlays the courts' own language about contextual analysis into the very kind of denial of inevitable and deep context cautioned against by theorists. If choice so matters, then the courts ignore the clear message of much social theory that individual actions and choices are constrained, shaped, and made possible by larger systemic norms, structures, and institutions. At the very least, individual circumstances reflect a complicated “intermingling among issues of agency, exposure, and vulnerability ... .”<sup>121</sup> Individual choice is always compromised by historic and current material and symbolic systems. Simple causal invocation of choice reduces the social matrix that theorists attempt to capture to a false simplicity.<sup>122</sup>

Acceding to the picture of the social world painted by the observations detailed in Part I demands that individual autonomy or agency be understood in a particular way. Individual choice must be seen as constructed and limited by material and symbolic conditions, both systemic and individual. Indeed, the very oppression of which claimants complain will also constrain their choices.<sup>123</sup> Thus, the greater the inequality or injustice that claimants face, the less meaningful ascription of choice may be. Social and economic structures “channel ... outcomes”<sup>124</sup> for individuals: “preferences might themselves be a result of deep-seated constraints within the social structure.”<sup>125</sup> Through such processes, inequality is systemically enforced: “perspectives of the powerful define and shape individual and cultural

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121. Robert RM Verchick, “Katrina, Feminism, and Environmental Justice” (2008) 13:4 *Cardozo JL & Gender* 791 at 800.

122. For an explanation of the development of the matrix metaphor, see Froc, *supra* note 32.

123. See generally, Razack, *supra* note 20; Carole Pateman, *The Sexual Contract* (Cambridge, UK: Polity, 1988).

124. Sheila McIntyre, “Backlash Against Equality: The ‘Tyranny’ of the ‘Politically Correct,’” (1993) 38:1 *McGill LJ* 1 at 29 [McIntyre, “Backlash”].

125. Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 14.



definitions of value ... rationaliz[ing] existing unequal distributions of power.”<sup>126</sup> Even “meaningful” choice often reflects oppressive background conditions and cannot be distilled from that oppression. That an individual can be understood to have “chosen” something is not necessarily adequate to justify the outcomes that follow from such a choice. This is, at least partly, because choice is seldom unconstrained or unframed by context and circumstances.<sup>127</sup>

Others have also made this observation. Sandra Fredman refers to the “social meaning of choice”<sup>128</sup> and Diana Majury to the necessity of a “more sceptical, problematized approach to choice.”<sup>129</sup> Sheila McIntyre has echoed concern about the “ascription to the claimant of unencumbered free choice.”<sup>130</sup> Courts have also, on occasion, seen that choice can be illusory. In *Miron v Trudel*,<sup>131</sup> both Justice McLachlin (as she then was) and Justice L’Heureux-Dubé found a section 15 infringement in part on the basis of an absence of meaningful choice. Similar recognition has occurred in relation to other rights in the *Charter*. For example, referring to the section 2(a) right in the case of *Zylberberg v Sudbury Board of Education (Director)*,<sup>132</sup> the Ontario Court of Appeal noted that the option of choice in these circumstances for these complainants was formal only. The real option was simply “compulsion to conform to the religious practices of the majority” as “children are disinclined at this age to step out of line or to flout ‘peer-group norms.’”<sup>133</sup>

However, I want to go further and reject completely the utility of reference to choice as a mechanism for rejecting a rights claim. Justification for this is both theoretical and political, as I have argued before.<sup>134</sup> The configured and contingent character of choice—as social theorists elaborate—means that the criterion of choice is inadequate to foreclose a rights analysis. Judges are ill-suited to disentangle

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126. McIntyre, “Backlash,” *supra* note 124 at 29 [citations omitted].

127. It is also because even “meaningful” choice may result in subordinating and oppressive outcomes that a substantive equality analysis might condemn the harm, whether or not these outcomes were “chosen.” See Part III(C), below.

128. *Supra* note 125 at 14.

129. “Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209 at 215.

130. McIntyre, “Equality,” *supra* note 116 at 176.

131. [1995] 2 SCR 418 at paras 95-97, 153, 23 OR (3d) 160.

132. (1988) 65 OR (2d) 641, 52 DLR (4th) 577 [*Zylberberg* cited to OR]. Thanks to Benjamin L Berger for pointing out these commonalities in the area of freedom of religion. For a perceptive discussion of choice and freedom of religion, see Berger, *supra* note 36.

133. *Zylberberg*, *ibid* at para 38.

134. Young, “Unequal,” *supra* note 16.

the social and individual factors that shape, limit, or expand choice. This is most apparent in relation to those individuals most marginalized or disadvantaged in Canadian society—individuals whose social, economic, and cultural experiences least match the biographical facts of the average Canadian judge.<sup>135</sup> The vulnerabilities and constraints of marginality and extreme disadvantage may be alien to the judges who sit in determination of these rights claims and therefore too difficult for them to discern and appreciate. Looking to choice risks inaccurate attribution of agency as the fulcrum on which a case should turn. It is objectionable to persist in using an element in rejecting rights claims that promises to be so often misread and thus misused, particularly in relation to those most in need of their rights. Thus, theory about “the true variety of human experiences”<sup>136</sup> should lead us to reject judicial reflection on the presence or absence of choice as justification for relieving the state of obligation under a *Charter* right.

The other—political—point is that foregrounding choice (either its absence or its presence) as a means of establishing state responsibility asserts a model of individual accountability and a corresponding lack of state responsibility that ill fits progressive rights protections. Indeed, it sits uncomfortably with claims for a progressive society marked by collective concern for inclusion, human flourishing, and social justice. It should not be the case that harms are addressable as rights claims only when individual choice does not cause the outcome at issue in some manner. More powerfully, why should we obsess with “fault” where human flourishing is imperilled? We have abandoned defendant intent as relevant to the determination that discrimination has occurred or that some discriminatory harm has been experienced by the claimant. Similarly, rejecting claimant choice as relevant to defendant obligation is equally fitting. Rights under the *Charter* must do more than simply abandon the unfortunate—however implicated they are in their own misfortune—to their miserable fates.

Thus, choice—even a reasonable finding of the availability of meaningful choice—should never alone excuse the state from obligations under section 7 and section 15. Even if it were reasonably possible to ascertain when choice was and was not meaningfully available to avoid or shape the situation of which the rights claimant complains, such choice or agency should nonetheless not matter. The focus instead should be on the harm that is apparent. Focus on choice or agency risks, in the words of political theorist Elizabeth Anderson, neglecting “the distinctively political aims of egalitarianism” relevant to both equality rights

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135. *Ibid* at 197.

136. Levit, *supra* note 35 at 227.

and liberty rights.<sup>137</sup> Anderson's notion of "democratic equality," something she argues is characteristic of a just society, grants to all citizens "effective access to the social conditions of their freedom at all times"<sup>138</sup> and "neither presume[s] to tell people how to use their opportunities nor attempt[s] to judge how responsible people are for choices that lead to unfortunate outcomes."<sup>139</sup> Inequality and constraints upon fundamental freedoms relevant to sections 7 and 15 obligate the state to respond on the basis of substantive theories of equality and citizenship alone, not because of the additional absence of individual complainant culpability or blame. A society where oppression and exclusion are tolerated or excused is not a society marked by equality and liberty. If such an unjust society is not what we want our society to be, then it cannot be what we allow our *Charter* to overlook.<sup>140</sup>

Attaching inquiry into the presence or absence of meaningful individual choice to standard section 7 or section 15 doctrinal analysis is a variant of the "state action" question, transposed into an additional *Charter* locale. Or, at least, it is the negative counterpoint to such a concern. Only if the individual has not somehow "caused" the harm will the state be potentially obligated. This is the risk that focus on claimant choice engages. Thus, even if some form of state action has already been shown under the section 32 argument (or not discussed but assumed), identification of another actor or other source of agency will potentially remove the constitutional burden from the state. The state, in effect, gets two chances to absolve itself of responsibility.<sup>141</sup>

The force of such an imposition lies with the idea of the neo-liberal citizen as rational chooser of all of his or her life circumstances. The world such an individual inhabits is not only uncompromised by differences in bargaining power but also one in which individuals are unmarked by context. "Difference" is irrelevant and the individual remains "free to take steps to deal with [the situation]" about which she or he complains.<sup>142</sup> As Sheila McIntyre notes, invocation of choice as tonic to a

137. Elizabeth S Anderson, "What Is the Point of Equality?" (1999) 109 *Ethics* 287 at 288.

138. *Ibid* at 289.

139. *Ibid*.

140. Although not a part of the immediate argument, erasing the distinction between negative and positive state obligations follows.

141. See also *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, 98 BCLR (4th) 109, aff'd 2009 BCCA 522, 98 BCLR (4th) 141.

The BCSC decision illustrates a similar reoccurrence in the s 15 context, this time in relation to the agency of the third party, the International Olympic Committee. The same illogic or unfairness in the substantive rights analysis permits a successful s 32 claim to founder on the absence of state action. On appeal, the s 32 stage instead was the basis for dismissing the claim.

142. *Walsh*, *supra* note 103 at para 55.

discrimination claim “individuates a collective and systemic problem.”<sup>143</sup> It turns systemic unfairness into individual bad choice, and the historic and layered harms of the marginal and dispossessed are foisted off as personal failure and foible.

### C. CHOICE AND LIBERTY

The assertion of the unsuitability of choice to short circuit rights claims leaves me in a tricky spot. So, I end this consideration of choice as an unfortunate presence in social justice constitutional challenges by noting that the argument must finesse a rather sticky point about liberty. The value of liberty is central to the rights that our *Charter* protects. As already noted, the Court understands equality rights to be informed by individual dignity, a key component of which is respect for the individual’s autonomy. The equality analysis in *Law*, since overtaken by *Kapp*,<sup>144</sup> foregrounds dignity in a way that makes clear the connection between choice and the core purpose of equality: “the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination.”<sup>145</sup> And, of course, liberty is explicitly protected by section 7. The Supreme Court of Canada has been unwavering in its insistence that the liberty interest enshrined in section 7 protects intimate choice and important personal agency. I do not mean to disrupt this observation. But in light of this, can it make sense to cast off so fully the relevance of the presence of individual agency for judicial rejection of rights challenges? Can agency, or choice, matter for the purpose of establishing a formal entitlement, but not at all as an explanation for individual claimant circumstances that relieves others of responsibility? Moreover, for marginalized and oppressed groups, the language of choice and empowerment is not of small import.<sup>146</sup> Surely, the groups championed by social justice claims have fought hard for these markers of liberal personhood. What then of my rejection of choice as relevant to relieving the state of rights obligations?

Some insights from a recent work by Jennifer Nedelsky are useful here. Nedelsky notes that the capacity for action, for agency, for freedom, and for human will are insistently “cherished and protected” in Western culture.<sup>147</sup> But Nedelsky charts a different course for understanding the relationship between the

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143. McIntyre, “Equality,” *supra* note 116 at 177

144. *R v Kapp*, 2008 SCC 41, 2 SCR 483.

145. *Law*, *supra* note 61 at para 53.

146. See Angela McRobbie, “After Post-Feminism: Neo-Liberalism and New Family Values” (Paper delivered at the DARG and CAMARG anniversary conference, Loughborough University, UK, March 2012), [on file with author].

147. *Supra* note 47 at 115.

individual and the collective than employment of the metaphor of “boundary.” She contests this imagery, arguing that it “distorts our understanding by splitting it off from, and setting it up in opposition to, the integration, interpenetration, and unity that are also part of our humanness and without which the capacity for creative action would not exist.”<sup>148</sup> In essence, we are both autonomous and dependent—characteristics that are, paradoxically, mutually enabling. It is this chord of tension between autonomy and dependence that I wish to emphasize and that my partial critique of the relevance of choice plucks. My distress at the prospect of constitutionally legitimated abandonment by the collective of the unfortunate among us leads me to conclude that it is coherent to respect choice or agency as protected by rights, but not to allow attribution of choice or agency to derail claims for fundamental justice and equality from the state when rights-relevant harms are shown. Tolerating tension between independence and vulnerability as equal parts of the human condition allows for, and indeed demands, this.

#### IV. CONCLUSION

Transposition of complex theoretical discussions about oppression and subordination into the legal arena of *Charter* rights litigation is challenging. There is no simple formula for enabling judges to see what must be seen and to acknowledge what must be acknowledged in the varied contexts of the cases that represent, discretely, larger systemic injustices and failures. Theorists have generated a raft of metaphors in the attempt to convey effectively how power sorts individuals and groups. No one metaphor can do this completely, but these metaphors are aids in ensuring that a critical capacity to re-imagine, and then re-imagine again, is possible. This does not mean that metaphors do not become stale and limiting, but it does mean that they are important tools in a complex task. The point is to recognize the limitation of our methods and modes of capturing what is inarguably a dense and sticky matrix of social divisions and logics. Judges, no less than social, legal, and political theorists, must struggle with how to appreciate this even as their task demands more simple and expeditious analysis.

In a sense, then, court judgments are like maps.<sup>149</sup> Boaventura de Sousa Santos writes that maps, in order to meet their purpose, must “inevitably distort

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148. *Ibid.*

149. Boaventura de Sousa Santos, among others, proposes a variant of this metaphor. He refers to “law” rather than “judgments” in *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1998) at 458.

reality.”<sup>150</sup> This does not mean, however, that maps must be inaccurate or not useful. But it does mean that maps have variable possibilities as to the scale or detail represented, a particular compromise as to what is projected largely and what is not, a fixed place of view that is privileged, and systems of shorthand or “signs” that are (or are not) conventionally determined.<sup>151</sup> Cases, as artefacts of law, share these features. The judge, like the cartographer, has the task of making decisions about how to orchestrate implementation of these features. I am arguing for better, more attentive, self-conscious, and acknowledged mapping by judges in social justice cases. Otherwise, judicial erasure of larger systemic conditions and structures as important features of individual and collective circumstances simply ensures that points of access for effective use of *Charter* rights are made invisible or politically unavailable. This is particularly the case for those claims that issue from the most socially marginalized and politically oppressed. And, social justice will continue to elude our society, or, at least, it will not be substantively advanced by *Charter* litigation.

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150. *Ibid* at 459.

151. *Ibid* at 459.