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Book Review: "Dancing in the Dark": A Review of Gwen Brodsky and Shelagh Day's Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?

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"DANCING IN THE DARK":
A review of Gwen Brodsky and Shelagh Day's *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Canadian Advisory Council on the Status of Women, 1989).

by
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The following article argues that while Brodsky and Day's study of the first three years of equality litigation under the Charter of Rights and Freedoms is an important contribution in revealing the extent to which equality rights have been used by men rather than women and other disadvantaged groups, it fails to adequately interrogate the role of rights discourse in feminist struggles for social change. After reviewing the debates regarding rights discourse, the article argues that feminist litigation strategies must be informed by a more complicated understanding of the role of rights, and must be made accountable to the broader social movement.

Danser dans le noir

Le présent article trouve que l'étude par Brodsky et Day sur le litige pour l'égalité pendant les trois premières années de la Charte des droits et libertés constitue une contribution importante à ce sujet, car elle révèle à quel point les droits à l'égalité ont été utilisés par les hommes plutôt que par les femmes et les autres groupes défavorisés. Toutefois, elle n'examine pas assez le rôle que le discours sur les droits joue dans la lutte féministe pour le changement social. L'article passe en revue les débats autour du discours sur les droits, puis soutient que les stratégies de litige féministes doivent être informées par une compréhension plus complexe du rôle des droits et doivent être responsables envers le mouvement social plus large.

I. Introduction

In their recent study, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back?*, Gwen Brodsky and Shelagh Day report on the performance of section 15 of the Charter during

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its first three years.[1] They set out to answer some basic questions: "How are women using the Charter? How are the courts interpreting the equality guarantees? Are the guarantees helping women? What factors will determine whether women are helped by the Charter in the long run?"[2] In answering those questions, Brodsky and Day reveal the extent to which sexual equality rights under the Charter have been used by men rather than women and other disadvantaged groups, illustrate the formal theory of equality that has produced those results, and argue that a substantive model of equality must be adopted to ensure that the Charter does not ultimately represent "two steps back" for the struggles of Canadian women.[3] The study is both impressive and important; particularly in so far as it provides invaluable documentation of the use of the sexual equality guarantees, and indeed the equality guarantees more generally, over the first three years of the Charter's existence. However, *One Step Forward* leaves some important implications of its findings unterrogated, and consequently, as a strategy for feminist engagement with the law, the study is less helpful. Rather than considering the broader question of the role of rights discourse in feminist struggles for social change, Brodsky and Day conclude that the problem has been primarily doctrinal, and as a result they remain firmly committed to the use of equality rights in those struggles.

II. Report on the Charter Equality Rights

As Brodsky and Day conclude — "the news is not good".[4] Their study reveals that less than 10% of equality rights decisions deal with sex discrimination, that is, only 44 cases of the 591 equality

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[1] Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Canadian Advisory Council on the Status of Women, 1989) (hereinafter — *One Step Forward*).

[2] *Id.*, 3.

[3] At the outset, the authors specifically turn their attention to the relationship between gender and other forms of oppression in women's lives including race, disability, sexual orientation and religion. While they recognize the fundamental importance of acknowledging the interlocking nature of these oppressions, they further note the limitations of their study in this regard in as far as "cases that challenge the particular complex of disadvantage experienced by women of colour or women with disabilities, for example, are virtually absent from the courts" (Id., 4). Notwithstanding this limitation, Brodsky and Day argue that the substantive approach to equality advocated by them can accomodate the multiple forms of discrimination that women experience. While this approach to equality may well be both broad enough and contextual enough to do so, the limitations of the study must not be understated. Until such time as the experiences of women of colour, women with disabilities and other women who experience such interlocking oppression are specifically considered, we would be well advised to limit such generalizations. Moreover, notwithstanding the best intentions of the authors, it is essential to recognize the limitation is such that references to the all-inclusive category of "women" throughout the study are based on the experience of white, able bodied women.

[4] *Id.*, 3.

decisions.[5] Further, they document the extent to which these sexual equality rights have been used by men rather than women:

> Only nine of the sex equality challenges were made by or on behalf of women. The other thirty five challenges were made by or on behalf of men.[6]

In reviewing these cases, Brodsky and Day note that, although women's success rate has been higher than men's, "because there are more men's sex equality challenges men's successes have been more than double those of women".[7] The broader context of equality decisions reflects similar patterns. The study found that only 189 of the 591 decisions raised grounds of disadvantage, and moreover, that only 66 of these cases were initiated by or on behalf of disadvantaged persons.[8]

Brodsky and Day argue that two factors underlie the extent to which sexual equality rights in particular have been used by men, rather than women. In their view, the most significant factor is the approach to equality adopted by the courts. Until very recently the courts have overwhelmingly adopted a very formal model of equality, a model which is ill-suited to guarantee real equality for minority and disadvantaged groups. Brodsky and Day illustrate both the narrow approach to comparability and the rendering of disadvantage virtually invisible within this model.[9] According to this approach, all individuals who are similarly situated are to be treated the same. Any differentiation in treatment is only justified if the parties are not similarly situated, that is, if they are not the same. Equality is equated with sameness. Women and men are equal if they are treated the same. Therefore, when women and men are not similarly situated, then they are not entitled to equality, even if the difference in their situation is the produce of historic and systemic disadvantage.[10] According to this limited model of equality, these gender differences based on disadvantage preclude equality.

A second and related factor is access to the courts.[11] Brodsky and Day argue that "women in Canada do not have adequate access to the use of Charter rights"[12] and accordingly, argue that a substantive model of equality can only be guaranteed if women and other disadvantaged groups are ensured substantive access to the courts:

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[5] Brodsky and Day report at page 49 that while there were in total 52 cases, this number is reduced to 44 cases "when appeals and other additional proceedings related to any one case are discounted".
[6] *Id.*, 49.
[7] *Id.*, 56.
[8] *Id.*, 117-119.
[9] *Id.*, 117-151.
[10] *Id.*, 151-165.
[11] *Id.*, 131-140.
[12] *Id.*, 131.

> Questions of access are crucial because they determine who can make their voices heard in the courts and who can participate in shaping the interpretations of the new equality guarantees.[13]

In their view the problem is two fold. Firstly, a generous approach to both standing and intervenor status must be adopted by the Courts. While the rules of standing have recently been relaxed, Brodsky and Day note that it is not yet clear whether non-profit/non-governmental organizations will be allowed to initiate proceedings on women's behalf. Further, they argue that a similar broadening of the rules governing intervention, particularly to public interest interventions, must be adopted. Secondly, adequate funding must be made available to women and other disadvantaged groups.

Brodsky and Day argue that a model of substantive equality must be adopted by the courts in interpreting the equality guarantees of the Charter.[14] In their view, a substantive model of equality would:

> . . . focus on the problem of substantive inequality and not on sameness or difference of treatment; appreciate that the interest of true equality may require differentiation in treatment; and reject reasonableness as a qualification on equality rights.[15]

They further argue that a distinction must be made between claims based on substantive inequality and other equality claims.[16]

By way of a postscript, Brodsky and Day argue that the recent Supreme Court of Canada decision in *Andrews*[17] is encouraging, in so far as the Court "introduced the concept of disadvantage to section 15 analysis and has made human rights principles and jurisprudence a source for interpretation".[18] They note the limitations of the decision. They are critical of the vagueness with which the concept of disadvantage was discussed by the Supreme Court of Canada, the continuing narrow scope of the Charter, the on-going debate within the Court of the applicability of section 1, and the failure to expressly reject the formal model of equality underlying the similarly situated test.[19] However, Brodsky and Day conclude that in the aftermath of Andrews, it is only more "essential that women and other disadvantaged groups now increase their efforts to put their views and experiences before the Court so that the Mark Andrews decision can be built on".[20]

This is not the only conclusion that might be drawn from these findings. Indeed, the authors themselves note that the conclusions of the study might be seen to support a much more critical position on the Charter. After briefly referring to several commentators who

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[13] *Id.*, 131.
[14] *Id.*, 187-201.
[15] *Id.*, 190.
[16] *Id.*, 190.
[17] *Andrews* v. *Law Society of British Columbia (1989)*, 56 D.L.R. (4th) 1.
[18] *Supra* note 1, 209.
[19] *Id.*, 207-209.
[20] *Id.*, 210.

have warned against disadvantaged groups resorting to Charter rights and the courts in their struggles for social change, Brodsky and Day nevertheless conclude that women must continue to press for social change in both legislative and judicial forms:

> . . . women have not chosen the courts as the sole forum in which to seek advancement of their equality. Women are pressing governments actively and continually for improvements in laws and programs. Nor can women conclude from their experience that governments provide a better forum for their concerns; after all, governments, like the courts, are unrepresentative and too often unresponsive to women's needs. Because women's disadvantage is so entrenched, women do not have the luxury of choosing one forum over the other. The full support of both governments and the courts is needed to take their rightful place in Canadian society. Women must press for change in both arenas.[21]

This conclusion may ultimately be quite legitimate. However, it is not supported by sufficient consideration of the broader question of the role of rights discourse in feminist struggles for social change. Indeed there is a tension in their work between a recognition of the critique of rights and their conclusion advocating a continued reliance on this discourse. However, their view that the failure of the Charter is primarily doctrinal precludes any further interrogation of this broader issue. On further reflection of their findings, we may need to problematize more than doctrine. We need to interrogate the role of law, and the various factors that may operate to limit the role of the law.

III. The Role of Rights Discourse Reconsidered — Again and Again

The question of the efficacy of rights discourse has recently become the focus of considerable attention among feminists and other critical scholars. Influenced by critical legal studies and/or socialist approaches to law, some feminists have begun to rethink the unproblematized reliance on rights in particular, and law in general. Some have outrightly rejected rights, others have suggested the need to understand the limited use of rights; and yet others continue to defend the reliance on rights, albeit from a more sophisticated understanding of the nature of rights, and the role of rights discourse in feminist strategies.

In the United States, the debate within legal scholarship was first articulated by the critical legal studies movement. CLS writers began to question the efficacy of rights discourse in struggles for social change.[22] Rights have been considered to be individualistic and formalistic. The critique is often associated with the broader critique

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[21] *Id.*, 3-4.

[22] See P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984), 62 *Tex.L.Rev.* 1563; Gabel and Harris "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982), 11 *N.Y.U.Rev. L.& Soc.Change* 369; Tushnet, "An Essay on Rights" (1984), 62 *Tex.L.Rev.* 1363.

of liberalism, and its impoverished conception of the individual as an atomistic, voluntaristic self, defined only in opposition of others. This focus on the separation of the self from the other, from the community, is seen to undermine an understanding of interdependency and connection.

A similar debate has arisen within the context of Canadian legal scholarship, specifically with regard to the *Canadian Charter of Rights and Freedoms*. Legal scholars within a socialist tradition have argued that the *Charter* is not an effective tool for social change, and moreover, that resort to the rights discourse of the *Charter* may do more harm than good. Some have argued that Charter rights are negative by their nature, that is, they are capable only of restricting state power, not conferring positive benefits.[23] As a construct of a social discourse representing the interests of the dominant class, rights discourse could not represent the interest of disadvantaged and marginalized groups. Glasbeek and Mandel argue that the enactment of the *Charter* has resulted in the legalization of politics — issues have been translated into the abstract discourse of law and rights and thereby deprived of their political force and character.[24] Some argue that the role of law itself is to prevent social change and that the translation of issues into rights is a mechanism by which law so maintains the status quo.[25] Moreover even apart from a direct critique of rights, reliance on courts for

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[23] Andrew Petter, "Legitimizing Sexual Inequality: Three Early charter Cases" (1989), 34 *McGill L.J.* 358, 358-9 ("[the] thesis . . . is that the Canadian Charter of Rights and Freedoms is a regressive instrument whose coherence and legitimacy depend upon the values and assumptions of nineteenth century liberalism. Like other liberal rights documents, the *Charter* equips individuals with a formal set of negative rights enabling them to repel interference by the regulatory and redistributive arms of the state. At the same time, it provides no opportunity for challenging the major source of inequality in our society: unequal distribution of property.") See also A.C. Hutchinson and A.Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *U. Toronto L.R.* 278; A.C. Hutchinson, "Charter Litigation and Social Change: Legal Battles and Social Wars" in R.J.Sharpe, ed., *Charter Litigation* (1987).

[24] H. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984), 2 *Socialist Studies/Etudes Socialistes* 84, 87 (". . . the legal technique actually obscures issues by dealing with them in abstractions that are meant to disguise the political nature of the choices being made"). See also M. Mandel, *The Charter of Rights and Freedoms and the Legalization of Politics in Canada* (1989) and M. Mandel, "Marxism and the Rule of Law" (1986), 35 *U.N.B.L.J.*, 7.

[25] Harry Glasbeek, "Some Strategies for an Unlikely Task: The Progressive Use of Law" (1989), 21 *Ottawa L.Rev.* 387, 393: "It is my argument that while some reforms are obtainable through judicial activity, they are limited in scope and impact because fundamental changes cannot be yielded by our legal system. The ultimate purpose of law is to prevent radical change and, most importantly, the judiciary has a leading part to play in the maintenance of the status quo".

the vindication of rights is also considered problematic. Courts, it is argued, are elitist, conservative and undemocratic institutions; judges unable to transcend their perspectives as white, upper-middle class, conservative men. Thus, the judicial institution itself is argued to be the antithesis of social change.

The critique of rights and of the legal discourse more generally has been met with considerable controversy, and in the United States has given rise to what has become known as the critique of the critique of rights, or the minority response to the critique of rights. "Minorities", that is, the term referring to women, non-white men, and other disadvantaged groups who constitute an overwhelming majority of the world's population, challenged the proclamations of the political inefficacy of rights from the white male academics who formed the core CLS group. The critique of rights was argued to reflect the privileged position of white, middle class, male authors; only those who had rights could imagine the luxury of giving them away. Black feminists such as Patricia Williams defend the political necessity of reliance on rights discourse for those black women, like herself, who have always been denied rights.[26] Black women, and other disadvantaged groups have never been afforded the protection of individual rights, of the rule of law or of full legal personality. While those who have achieved such protection may be in a position to argue that it is insufficient to guarantee full and substantive equality, those who have been denied even the protection of formal equality are not so privileged. Williams argues that rights therefor remain an important political signifier.[27]

Elizabeth Schneider has responded similarly to the critique of rights from her perspective and experience within the women's movement.[28] Schneider argues that reliance on rights discourse has been an important and effective political strategy for feminists, although she does so from a perspective that problematizes the traditional conception of rights. She argues that rights must be seen as part of a political strategy — she challenges the traditional distinction between law and politics, and argues that feminists must approach rights discourse with an understanding of the dialectical

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[26] Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987), 22 *Harv.C.R.-C.L.L.Rev.* 401. See also R.A. Williams, "Taking Rights Agressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour" (1987), 5 *Law and Inequality* 103; R. Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987), 22 *Harvard C.R.-C.L.L.Rev.* 301.

[27] Williams, *id.*, 414: "The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort: it has been a process of finding the self".

[28] Elizabeth Schneider, "The Dialectics of Rights and Politics: Perspectives for the Women's Movement" (1986), 61 *N.Y.U.L.Rev.* 589.

relationship between rights and politics.[29] According to Schneider, rights discourse can be important in consciousness-raising, in mobilizing marginalized groups and in providing these groups with a powerful language with which to voice and legitimize their demands.[30] Like Williams, Schneider grants considerable importance to the symbolic power that rights claims represent in current political discourse and sees this power as efficacious in feminist struggles for social change.

Other feminists remain more critical of rights, and sceptical of the efficacy of rights discourse in feminist struggles for social change. Carol Smart, for example, while recognizing both the attraction of rights discourse and the contribution of rights struggles for feminists in the past, suggests that "the rhetoric of rights has become exhausted and may even be detrimental".[31] Smart argues that resorting to rights can "oversimplify complex power relations", and give the impression that acquiring rights has in fact resolved power differentials.[32] Furthermore, she argues that "rights formulated to protect the individual against the state, or the weak against the strong, may be appropriated by the more powerful".[33]

In a similar vein, Judy Fudge directly challenges many of Elizabeth Schneider's views on the efficacy of rights.[34] Fudge challenges the

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[29] *Id.*, 611: "Rights discourse and rights claims, when emerging from and organically linked to political struggle, can help to develop political consciousness which can play a useful role in the development of a social movement". See also the work of Ed Sparer, "Fundamental Rights, Legal Entitlement and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement" (1984), 36 *Stan.L.R.* 509. At page 560 Sparer writes: "Various kinds of legal rights and entitlements may be used in a manner that helps to develop social movement. . . . The meaning of a right or entitlement depends upon the way in which it intertwines with social movement".

[30] *Id.*, 611-62: "Rights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity. Rights discourse can also have a dimension that emphasizes the interdependence of autonomy and community. It can play an important role in giving individual a sense of self-definition, in connecting the individual to the larger group and community, and in defining the goals of a political struggle, particularly during the early development of a social movement." Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987), 96 *Yale L.J.* 1860, similarly speaks of rights as a language through which both individuals and groups claim both legitimacy and membership in the community. She writes, at page 1884, note 94: ". . . the language of rights offers some hope: It is the language of protest, made legitimate by the powerful, even for use by the powerless".

[31] Carol Smart, *Feminism and the Power of Law* (1989), 139.

[32] *Id.*, 144.

[33] *Id.*, 145.

[34] Judy Fudge, "The Efficacy of Entrenching a Bill of Rights Upon Political Discourse" (1989), 17 *International J. of the Soc. of Law* 445, 448: "I want to propose an alternative, less sanguine, analysis which focuses on the nature of the political discourse generated by the assertion of abstract legal rights. Schneider's analysis ignores the impact this form of politics has upon the

role of rights in feminist mobilization based on the Canadian experience in the first few years following the enactment of the Charter:

> Various anti-feminist groups have employed the Charter as a political symbol to mobilise opposition to affirmative action for women, to win fathers a say in abortion, to protect the rights of the foetus, and to secure more rights for those accused of sexual assault. This suggests that to the extent that the Charter can be used as a symbol for political mobilisation by feminists, it can also be used by groups and organisations which are directly opposed to a feminist political agenda.[35]

She argues that there is nothing in rights discourse that in any way "precludes its use as a political symbol by a wider variety of groups which seek to attack" various forms of legislation intended to benefit historically disadvantaged groups.[36] Fudge concludes that it is not possible to evaluate the effect of the Charter only in terms of mobilization. She suggests that it must further be evaluated "with reference to the form of political discourse constitutional litigation generates".[37] With regard to the legal regulation of sexual violence for example, she argues that the effect of the Charter has been to narrow the debate, without challenging the existing discourse of sexuality.[38]

Indeed, Fudge's work provides an interesting contrast to Brodsky and Day. In an earlier work, Fudge reviewed the sexual equality decisions under the Charter.[39] Like Brodsky and Day's study, her examination of these cases revealed that the sexual equality guarantees have been no cause for celebration for feminist struggles. Indeed, she argued that the reliance on sexual equality rights has been politically damaging for women. However, in her view the problem was not simply one on the level of doctrine. Rather, she argued that the public/private distinction has operated to preclude the Charter from bringing about any meaningful social change.

This is not to say that Brodsky and Day do not recognize the problematic implications of the public/private distinction in respect of the application of the Charter. In fact, they state that:

> The tendency of the courts to make a public private distinction in relation to the Charter is an important issue for women because

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nature of political discourse generated by the assertion of abstract legal rights. Rather than regarding the fact of mass mobilisation as positive per se, it is important to examine how abstract legal rights function as the basis for coalitions or mobilisation".

[35] *Id.*

[36] *Id.*

[37] *Id.*, 450.

[38] *Id.*, 459: "the social construction of sexuality and the social relations of power in which sexual relations of practices take place fade into the background".

[39] J. Fudge, "The Public/Private Distinction: The Possibilities and Limitations to the Use of Charter Litigation in Further Feminist Struggles" (1987), 25 *Osgoode Hall L. J.* 485.

> it is central in determining how useful the Charter will be in overcoming inequality. . . . This public private distinction may rob women of the full benefits of section 15 and 28. The problem that women have in too many situations is not that government is acting in a directly abusive fashion, but that government is doing nothing or not doing enough to stop discrimination against women. Cutting off the application of the Charter to the so-called private sphere is another way of failing to stop the discrimination against women.[40]

Yet their response is not less Charter, but more Charter. In their view, a more expansive approach to the Charter must be adopted in which equality guarantees are extended to the private sphere. There is however little discussion of the deeper implications of this distinction beyond the question of the scope of the Charter. In contrast, Fudge problematizes not only the distinction, but further, the extent to which the distinction is constitutive of the liberal discourse informing the Charter and thus unavoidable once we enter into rights discourse. She explores how the public/private distinction has operated as an obstacle to women's struggles for substantive equality in less obvious ways.[41]

Thus, this question of the relevance of the public/private distinction in Charter litigation is but one example of the need to further interrogate the role of rights discourse in feminist struggles for social change, rather than simply accepting rights as the terrain on which to conduct these struggles. However, it is important to note that neither "side" of the debate about rights tells a simple story. Even those who argue against the efficacy of rights discourse are not willing to surrender the terrain entirely. Fudge, for example, argues:

> . . . it is essential to understand that Charter litigation, although at times a necessary arena of struggle, is not in itself sufficient to achieve substantive equality. However, it is equally important to understand that liberal rights are contradictory and insufficient rather than illusory and the struggle for social transformation may often involve pushing bourgeois forms of legality to their limit. Feminists must be vigilant against allowing litigation to dominate the political and social struggle to obtain substantive equality for women, because the tendency of litigation strategies is to transform politics into a series of narrow issues packaged as private and individual cases.[42]

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[40] Brodsky and Day, *supra* note 1, 91.

[41] Fudge, *supra* note 39, 551: "The public/private distinction has operated in a variety of ways to exclude judicial scrutiny of the private sphere of the market, to reinforce the naturalistic ideology of familism and to emphasize women's biological vulnerablity while ignoring men's socio-sexual agression."

[42] *Id.*, 548. Stephen Brickley and Elizabeth Comack in "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?" (1987), 2 *Law and Society* 97, similarly argue that there are important reasons for not abandoning law. At page 104, they write: "'law is not simply imposed upon people but is also a product and object of and provides an arena which circumscribes class (and other types of) struggle'. Indeed, the rights enshrined in law were not simply handed down by a benevolent state, but were the outcomes of progressive struggles by the subordinated classes."

As Carol Smart concludes ". . . law remains a site of struggle".[43] Equally, those who defend rights discourse as useful recognize that it is not the only terrain for feminist struggles. As Schneider, for example, acknowledges ". . . rights, although they must vigorously be fought for, cannot perform the task of social reconstruction".[44]

We need to tell more complicated stories about rights. As Patricia Williams writes:

> What is needed . . . is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of each others' rights valuation.[45]

Didi Herman, in reviewing the debates regarding the use of rights discourse and considering its role in struggles for lesbian and gay liberation, speaks similarly of the need to complicate our understanding of rights:

> Perhaps we need to retreat from an either/or position. Rights . . . mean different things to different people. In asserting the efficacy of rights claims, it may be helpful to distinguish between various kinds of rights, their initiating process, and the way a social movement takes up a particular rights struggle as a political mobilizer. We need to appreciate the particular circumstances where rights claims are necessary, strategic and even empowering, and acknowledge that the acquisition of formal rights may be a precondition for more substantive or fundamental change. Yet, at the same time, we may need a heightened awareness at the pitfalls of rights discourse.[46]

The question is not therefore one of negating or abandoning the role of rights claims in feminist struggles, as more straight forward critiques of rights often imply, nor is it one of uncritically adopting rights as the focus of feminist struggles. It is rather a question of interrogating if, when and how rights claims ought to be used. The critique of rights, and the attempt by women and other disadvantaged groups to respond to these critiques, are useful in achieving this more sophisticated and strategic understanding of the utility of rights discourse. We need to understand what we can reasonably expect from using rights discourse, if we decide to use it. We need to anticipate the consequences, and to formulate political strategies to meet the shortcomings of a rights based strategy.

Indeed, the idea that social movements can avoid the law is unrealistic. Clearly, the law may directly stand in the way of our

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[43] Smart, *supra* note 31, 88: "While it is the case that law does not hold the key to unlock patriarchy, it provides the forum for articulating alternative visions and accounts". At page 165, Smart further concludes: "Law cannot be ignored precisely because of its power to define, but feminism's strategy should be focused on this power rather than on constructing legal policies which only legitimate the legal forum and the form of law."

[44] Schneider, *supra* note 28, 651.

[45] Williams, *supra* note 26, 410.

[46] Didi Herman "Are We Family? Lesbian Rights and Women's Liberation" (1990), 28 *Osgoode Hall Law School* 789, 809.

struggles, or the law may be called upon by others, as Brodsky and Day rightly note, leaving women with no choice but to engage with it. But there are more politically viable ways of participating in legal discourse. For example, we can attempt to develop feminist litigation strategies that are accountable to the broader social movement. Effective use of the dialectical relationship between law and politics described by Schneider and others demands such contextualization and accountability. Legal battles must be located within the larger political struggle and must make sense in terms of the more general, less specifically legal objectives of such a struggle. Long term political objectives, as developed by the social movement must not be lost to the shorter term objectives of litigation strategies.[47] Without such linkage, we risk both isolating and reifying the struggles in the legal forum. There is, moreover, the constant danger that the social movement will itself become legalized — its agenda will beset by lawyers and individual plaintiffs rather than by the women organized as a collective political force, and the effect may well be demobilization rather than mobilization. Making feminist litigation strategies so accountable may help avoid many of the disadvantages associated with rights discourse.

We need to recognize that our litigation strategies cannot be measured in doctrine alone. For example, if we defend rights at least partially in terms of their role in mobilization, then we must directly explore the impact of particular litigation strategies in these terms. Consider the following cases. In *Symes* v. *Canada*,[48] the plaintiff, a self-employed woman lawyer, used section 15 of the *Charter* to argue that the *Income Tax Act*, which did not allow deductions for child care expenses as a business expense, violated her sexual equality rights. The Federal Court found that the high cost of day care "constitutes a barrier to women's access to the economy", and held that self-employed parents ought to be allowed to deduct their child care expenses. In *Morgantaler* v. *The Queen*,[49] section 7 of the *Charter* was used to strike down the restrictions on access to abortion in section 251 of the Criminal Code.

Both of these cases might be seen as victories. Measured solely in doctrinal terms, *Symes* might even be seen as a greater victory than *Morgantaler*, in so far as the Court recognized what might be seen as a positive right. However, when seen in the broader context of the impact on the social movements, the contrast between the cases is striking. Within the broader context of the child care movement, the *Symes* case can hardly be heralded as a victory.

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[47] I have discussed this tension between long term political objectives, and short term litigation strategies in the context of the abortion rights movement in B. Cossman, "The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion" (1986), 44 *U.T.Fac.L.Rev.* 85, 95-108; See also Elizabeth Kingdom, "Legal Recognition of a Woman's Right To Choose" Brophy & Smart, eds., *Women in Law* (1985).

[48] *E.C. Symes* v. *Canada*, [1989] 1 C.T.C.477 (F.C.C.A.).

[49] *Morgantaler* v. *The Queen* (1988), 44 D.L.R. (4th) 385.

It has divided the child care lobby, and indeed, significantly demobilized a powerful section of that lobby — upper income, self employed professional parents — who stand to benefit from the business expense deduction.[50]

The *Morgantaler* case, on the other hand, when viewed in the broader context of the abortion rights struggle has been far more successful. An interaction between the use of rights and the mobilization of a mass social movement that has pressured government and public opinion is clearly visible. While it has been argued that the *Morgantaler* case has legalized the political struggle,[51] there has nevertheless been a closer relationship between the legal and political struggles than is evident in cases such as *Symes*. The legal struggle has been used to build and support a social movement, and the social movement has been used to build and support the legal struggle. It is an example of the dialectical relationship between law and politics advocated by Schneider.[52]

These two cases further highlight the extent to which, as Fudge argued, rights are contradictory, and in turn, the extent to which we must, as further suggested by Williams and Herman, complicate our understandings of rights. If we think of rights as conversations, then we must consider the construction of meaning within those conversations. If we think of rights as a form of political discourse, then we must consider the implications of that discourse for our politics. If we think of rights as a means of mobilizing for political action, then we must explore the social movement justifying the rights strategies. If we think of rights as complex and contradictory, then we must be able to think of all these and many other dimensions of rights at the same time. We need to recognize these contradictions as we struggle to make rights strategies accountable to a broader feminist social movement.

IV. Conclusion

There is no question, as Brodsky and Day argue, that without a guarantee of substantive access and a doctrinal approach to substantive equality, the *Charter* will represent two steps back for Canadian women. However, there is simply no guarantee that such procedural and doctrinal shifts will result in a step forward. This does not mean that resorting to the courts may not continue to be an important dimension of the strategies of the women's movement. In this regard, Brodsky and Day may be quite accurate. But, it is essential that such litigation strategies be pursued in the context of, and be accountable to, the broader women's movement.

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[50] Moreover, the case only further reinforces the privatization of child care and the use of foreign domestics to care for the children of upper income families. I am indebted to my colleague, Judy Fudge, for these insights.

[51] Mandel, *supra* note 24.

[52] For a discussion of the tensions between the legal strategies and the longer term feminist objectives, see Cossman, *supra* note 47.

We need to recognize that the equality rights of the *Charter* will neither clearly represent a step forward, nor a step back for women and other disadvantaged groups. The results of recourse to these rights are, and will continue to be contradictory. It is only by stepping beyond the reductionist analysis of either/or that we will be able to evaluate the impact of the Charter on feminist struggles. Indeed, steps forward, backwards, or even sideways are ultimately only steps in the dark, until we consider these steps in the context of the contradictions of rights discourse, and of feminist struggles for social change.