

What is a Right to Shelter in the Desert of Post-Democracy?  
Tracking Homeless Narratives from the Courtroom to Dissensus

by

Mark Zion  
BSc, University of Alberta, 2009  
JD, University of Alberta, 2012

A Thesis Submitted in Partial Fulfillment  
of the Requirements for the Degree of

Master of Laws

in the Faculty of Law

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## **Supervisory Committee**

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## Abstract

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This thesis begins by critically evaluating the right to shelter jurisprudence in Canada, specifically with respect to urban camping. It argues that whereas homeless people sleeping in parks have had (limited) success in the courtroom on an ‘emergency’ temporality—preventing the worst bodily suffering—even such success often paradoxically reinscribes their inequality with housed citizens. Next, the author interrogates normative proposals from legal academics who prescribe court orders for the state to provide some minimal level of shelter to everyone, thereby conjoining the emergency temporality with a longer term ‘political’ temporality. It is argued that these proposals insufficiently formulate how judges see their institutional role, how certain neoliberal features of the jurisprudence are integral and not incidental, and how egalitarian politics cannot be deferred to a future that a certain group of elites must deliver. Therefore, a direct action-based ‘insurgent pantemporality’ is proposed as a more democratically constructive (coexisting) antipode for the courtroom emergency temporality. The tent city is taken as an example of what Jacques Rancière terms ‘dissensus,’ in which participants collectively stage their equality and reconfigure the sensory field for dwellers of all sorts. Emplaced dissensual politics is shown to operate with an expansive nonlinear temporality, channelling egalitarian predecessors, taking action now rather than waiting for experts’ perpetually deferred solutions, and prefiguring a more equal future dwelling arrangement.

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## **Dedication**

For Kate Plyley, my beloved muse and protector.

The increasingly violent forms of exclusion of the homeless from public spaces correspond to a rigorously normative definition of the public that views the propertylessness and displacement experienced by the homeless as a threat to the property and place possessed and controlled in the name of the public.

—Samira Kawash, “The Homeless Body”

The democratic movement... is in fact a double movement of transgressing limits: a movement for extending the equality of life in common, and in particular to all those that govern the limitlessness of capitalist wealth; another movement for reaffirming the belonging of anyone and everyone to that incessantly privatized public sphere.

—Jacques Rancière, *Hatred of Democracy*

## Introduction

Located on Vancouver Island on the west coast of Canada, the City of Victoria, British Columbia (BC) is approximately 100km from both Seattle, Washington and Vancouver, BC. It is the traditional and unceded territory of the Coast Salish First Nations (specifically, the Songhees and Esquimalt), who have a considerable presence in the City, with many public buildings (see Figure 1). Victoria’s landscape boasts spectacular views of the Pacific Ocean with Washington’s Olympic Mountains in the distance. Because of the City’s natural beauty and Mediterranean climate, many people hike, cycle, swim and engage in other outdoor activities year round. Victoria’s inner harbour, located downtown, is also a popular cruise ship port. Tourists pour onto nearby Government Street, which has many coffee shops, restaurants, and souvenir shops. For a considerable fee, tourists can take horse-drawn carriage rides or go on sailing day trips (see Figures 2 and 3). Government Street also passes in front of the century old Empress Hotel and the BC Provincial Legislature (see Figures 4 and 5), which are both frequently photographed.

Victoria is also known as the ‘City of Gardens’ because of the flower gardens that bloom around the city year round, but especially in the summer; nearby Butchart Gardens, a sprawling floral show garden, receives one million visitors each year and is a National Historic Site.<sup>1</sup>



Figure 1: *The Mungo Martin House is a meeting place for Indigenous peoples practicing their traditional cultures, as well as a visiting centre at which non-Indigenous people learn about those cultures. Photo taken from “Mungo Martin House,” Wikipedia (accessed June 6, 2015). Online: <[https://en.wikipedia.org/wiki/Mungo\\_Martin](https://en.wikipedia.org/wiki/Mungo_Martin)>.*

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<sup>1</sup> Parks Canada (Online).



Figure 2: *Victoria's Inner Harbour, viewed from the 'Victoria West' side. Foreground: a sailboat offering a 3-hour harbour voyage at \$89.00/per person. Background: the BC Provincial Legislature (with the green top) in the center; and a cruise ship to the right.*



Figure 3: *Victoria's downtown inner harbour, viewed from the Legislature. The famous Empress Hotel is covered in moss, right. A horse-drawn carriage is in the foreground.*



Figure 4: *The BC Legislature. The lawn reads 'Welcome to Victoria.'*



Figure 5: *The BC Legislature, illuminated with LED lights at night. For holidays, the colours change (e.g. red and green for Christmas).*

At the same time, Victoria is home to a growing homeless population; those taking carriage rides pass people panhandling on street corners. It is a polarized space in which those with enough capital enjoy limitless leisure options whereas the poor, and especially the homeless, struggle to stay alive.

David Arthur Johnston is the homeless man at the centre of this thesis. He is a Victoria political activist, and he was one of the litigants in Canada's leading case on the right to shelter, *Victoria v Adams*.<sup>2</sup> He was part of a tent city that had a peak population of 70 people in Cridge Park in downtown Victoria, which the government ordered cleared in 2005, the triggering event leading to *Adams*.<sup>3</sup> After that time, Johnston alone and sometimes with a few others camped across the street on the land outside St Ann's Academy, a former Catholic girls school and chapel owned by the province and maintained at that time by the Provincial Capital Commission as a historic site (see Figures 6-8).

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<sup>2</sup> *Adams* BCCA; BCSC.

<sup>3</sup> See below at 35 for a more detailed discussion, with photos.



Figure 6: *David Arthur Johnston camps on the grounds of St Ann's Academy in a cardboard structure as his friends look on and police officers and a bylaw enforcement officer ask him to move on. Photo taken from Johnston's Journal, e-book edition.*



Figure 7: *St. Ann's Academy, across the road from Cridge Park.*

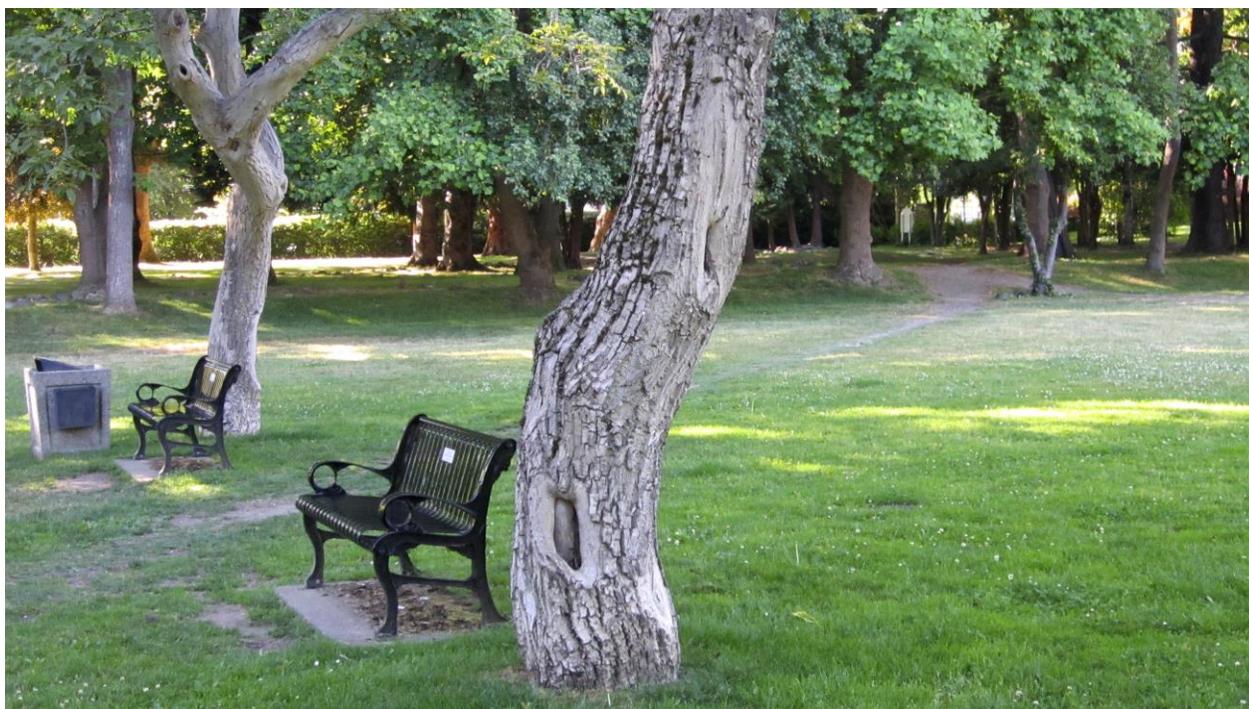


Figure 8: *The grounds at St. Ann's Academy.*

Although the litigation began as an attempt to preserve the tent city, it ultimately resulted in the right to use overhead shelter (e.g. a box or tarp) overnight.<sup>4</sup> Even in Victoria’s relatively warm climate, temperatures may drop below freezing at night and rain can soak clothes, ground cover, and sleeping bags; homeless people in the city have been injured and have even died outdoors as a result of hypothermia, as they have in every major Canadian city.<sup>5</sup> For that reason, gaining the “the right to a box” was,<sup>6</sup> to be sure, an important legal victory. However, it fell far short of a tent city allowance, which is what Johnston and numerous other homeless people repeatedly state that they seek.<sup>7</sup> This thesis is an extended inquiry into how and why the claimants’ tent city origins evanesced, not only in the BC Supreme Court and Court of Appeal judgments, but also in mainstream legal commentary about the case. Why are tent cities mentioned askance or more commonly, not even *mentioned* if only to be rejected as a viable allowance? Before considering the substance of homeless peoples’ tent city aim, it will be useful to inquire into the ostensibly coherent group of people behind it—‘the homeless.’ What does that vernacular label mean?

### **A. Home and Homelessness**

To be homeless is to have an anomic name. It is to be constituted by what one lacks: a home. Although policy literature definitions focus on physical dwellings and their degree of security,<sup>8</sup> home connotes more than a physical structure. The OED most relevantly defines home

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<sup>4</sup> As explained below, this was a right contingent on there being far more homeless people than available emergency shelter beds. The city could apply to revisit the decision in the future if there are sufficient beds.

<sup>5</sup> Street Corner Media Foundation (2014).

<sup>6</sup> I borrow this phrase from Martha Jackman (2010).

<sup>7</sup> As I will explain later, the emphasis in the phrase ‘tent city’ is on ‘city,’ with its suggestion of relatively permanent and legitimate community, rather than on ‘tent,’ which suggests relative impermanence and forced nomadic unmooring.

<sup>8</sup> Estimates of Canada’s total homeless population (out of a total population of roughly 35 million) range anywhere from 200 000 to 300 000 depending on the definition used and given the lack of actual street counts. There is no official definition of homelessness in Canada; it is a heterogeneous phenomenon even with respect to physical

as “a place, region or state to which one properly belongs, on which one’s affections center, or where one finds rest, refuge, or satisfaction.”<sup>9</sup> The breadth of this definition, ranging from the place for which one feels the greatest affection to the place in which one simply finds rest at any geographic scale, helps to explain why ‘homelessness’ means different things to different people. Sheila Watson explains that home suggests “warmth, comfort, stability, and security.”<sup>10</sup> Being without a home implies severance from both social and familial ties. However, Watson goes on to suggest that it “is useful to consider [homelessness] in terms of a continuum with sleeping rough at one end and absolute security of tenure in the form of outright ownership at the other.”<sup>11</sup> Actually, the continuum has to do not only (or perhaps not even most importantly) with the adequacy of physical structures—what is most important is the relations they contain (or especially for a solitary occupant, the extent to which they provide privacy, which might be thought of as the absence of possibly unwanted relations).

Samira Kawash explains how one might easily conflate rooflessness (the lack of permanent/paradigmatic housing) with homelessness (the lack of a home) in our culture. For Kawash, “in contemporary U.S. culture, homelessness is defined in relation to private property; that is, homelessness is houselessness.”<sup>12</sup> The same could be said of Canadian culture. Kawash invokes a helpful construction, ‘the phantomal housed public,’ in order to crystallize the ‘housed’ part of the “housed-homeless” dichotomy in popular discourse.<sup>13</sup> Even if no housed person would explain his or her own behaviour in terms of this collective phantom (that is the

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shelter, “ranging from *rooflessness* (living on the street or in emergency shelters) to *houselessness* (living in various types of shelters or institutions), to *insecure housing* (living under threat of eviction or violence).” Readily visible rooflessness can be understood as ‘the tip of the iceberg’ with respect to widespread but largely hidden housing precarity. Echenberg and Jensen (2008) at 2.

<sup>9</sup> OED.

<sup>10</sup> Watson (1986) at 8. One might take ‘security’ to include privacy.

<sup>11</sup> *Ibid* at 9.

<sup>12</sup> Kawash (1998) 319 at 335.

<sup>13</sup> The dichotomy of course deconstructs under any scrutiny, but Kawash wishes to emphasize its powerful performative (i.e. material) effects.

point), it arises out of the actual spatial-discursive arrangement that (re)produces ‘homeless’ people. For the phantomal housed public, homeless place-making does not count as home. This is because to be ‘not homeless’ involves maintaining “some tenable position in relation to property (not ownership necessarily, but some form of enforceable private property right).”<sup>14</sup> I will return to Kawash’s important discussion in Chapter 3 of this thesis, but for now it will suffice to emphasize how the dichotomy based on a legal property right, performed by the home-owning and renting public (dominant by numbers alone), convokes so as to abject an actually heterogeneous minority defined—constituted, even in its very anomic name, ‘the homeless’—by a lack.<sup>15</sup>

Having considered the construction of homeless (non)subjectivity from the (disembodied) perspective of the unitary phantomal housed public, it may also be viewed from the contrastingly *varied* perspectives of embodied homeless people themselves. Let us return to the OED definition of home: “a place, region or state to which one properly belongs, on which one’s affections center, or where one finds rest, refuge, or satisfaction.” Use of the present tense places the reference frame on a person’s attachments in the now, even (perhaps especially) if the space one associates with home exists in the past and to which it is perhaps even impossible to return in any meaningful way. At the same time, “homes are ‘origin stories’ constructed as retrospective signposts within visual space, acoustic space, and even tactile space. They are *made*

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<sup>14</sup> Kawash (1998) at 335.

<sup>15</sup> ‘Performed’ is the operative word here. Of course, the views of actually existing housed people will be heterogeneous, and some will be entirely consonant with views of homeless people that run against the grain of legal/propertied normative ‘home.’ My emphasis is on the reproduction of space (or aggregated actions), not avowed perspectives. This emphasis differs from writing that aims to responsabilize *every* housed person on an *individual* level for the plight of the homeless. Jennifer Nedelsky, for instance, cites “a *direct* relationship between [her] legally protected right to exclude even a cold and hungry person from [her] home and that person being on the street.” Nedelsky (2011) at 24 [emphasis added]. Nedelsky wishes to explain how this relationship is obscured by “habits of individualistic thought” that efface the relationality between housed and homeless people. But is such a framing—emphasizing her own *particularized* right to exclude (thereby performing individualistic thought) and inviting people to overcome individualistic thought—not circular?

*for coming from.*”<sup>16</sup> This suggests that a ‘homeless’ person might subjectively produce his or her status as contingent by attaching to a past space (e.g. indoors). For example, “I have no home right now but I am doing well at work and I will soon have enough money to rent an apartment.” Alternatively, or perhaps ambivalently, he or she might construct a certain outdoor space (e.g. a sleeping spot in a park) as home in order to demote or even erase a past (e.g. traumatic) space, rendering it ‘not home’ and therefore without its affective charge. Many people who live in parks call those parks or even park systems home; within park space or under bridges *etc*, they sometimes have specific long term spots respected by other homeless people and which they consider home.<sup>17</sup> Yet another possibility is of course that people calling parks and other roofless spaces home simply regard them as their present home, without some sort of calculated or repressed relationship to past or future dwellings.

The self-reported perspectives of homeless people help to problematize the dominant and performatively consequential construction of home in our culture. An abused spouse residing in formally secure tenure may live more precariously and be more home-less in actuality—and this will be vital to my discussion—than a similarly situated person who abandons the house in favour of an urban camping existence, albeit precarious, characterized by immersion in a dense network of reciprocal care and friendship relations: a homeless community.<sup>18</sup> My point for the moment is just to relativize normative preconceptions of home, which tend to conflate rooflessness and homelessness. In the remainder of the thesis, to be consistent with the legal

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<sup>16</sup> Dietmar Dath qtd in Morse (1999) at 68.

<sup>17</sup> Jeff Rose did ethnographic work with people living in a municipal park in North Carolina that they know as ‘the Hillside.’ He notes how they construct their physical environment to better meet their needs and to be aesthetically pleasing, even having a rubber ‘welcome’ mat outside a tent and keeping an extra bed in a sleeping area for guests. Rose explains that “for the residents, the Hillside [is] not just where they [reside], but their home, complete with material modifications of their possessions and the local environment to better accommodate themselves and visitors.” Rose (2014) at 261.

<sup>18</sup> Domestic instability coupled with poverty is one of the frequent entry routes into homelessness and a desire to preserve homeless social connections is one of the impediments to successful exit back to housed society if those connections cannot be maintained. Ravenhill (2008).

literature, I will participate in this conflation, using “homelessness” to refer to being without a roof on a long-term basis.

### **B. The Dilemma of Shelter Discipline or Outdoor Inhospitability**

It is understandable that many homeless people insist on producing ‘home’ through collective urban camping. The alternative is life in shelters, which require compliance with onerous rules—rules that do not apply to people who own private homes—and which are plagued by problems that include overcrowding, violence, theft, gender segregation, hetero- and cisnormativity,<sup>19</sup> and pet restrictions. One homeless person describes life in a shelter as follows: “it’s nonexistence. I don’t really live anywhere.”<sup>20</sup> In any event, there is presently insufficient shelter space for all homeless people in Victoria (and this is the case in other major North American cities). Homeless peoples’ insistence on urban camping was recorded in the reasons of *Adams*, and it is repeated by homeless people on the street and in written material,<sup>21</sup> such as Johnston’s personal journal. In that journal, he details his daily life on the streets, what he sought to accomplish by going to court, and how it fit into his larger political vision.<sup>22</sup> He ‘chose’ to be homeless in the sense that he left his comfortable but unfulfilling indoor life, and his job as a baker, to live outdoors. By all indications, he is in the minority within the homeless population; most people are homeless because they cannot get access to housing despite their best efforts. However, there is a difference between choosing to live outdoors when one’s culture makes that a viable option and another when urban homeless life is so perilous; Johnston shares many of the

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<sup>19</sup> See e.g. Pyne (2011)

<sup>20</sup> Kawash (1998) at 328.

<sup>21</sup> Even if the majority of homeless people would prefer permanent adequate housing to life on the street, virtually all homeless people would prefer being allowed to live in a tent city to the atomizing and forced nomadic existence they presently endure.

<sup>22</sup> Johnston (Online). When he is sporadically jailed, his friends (who are also homeless) write entries. Johnston and two anonymous donors gave it to the University of Victoria library in book form; it contains the entries that he has also posted online up to 2011. Johnston (2011).

difficulties encountered by the ‘involuntary’ homeless.<sup>23</sup> Because he wishes to contest the culture and laws that make outdoor life so difficult, as (diametrically) opposed to advocating for universal indoor living, Johnston sees himself as a political activist above all, and not a “homelessness” activist. He wishes to hold housed people to their own rules and touted inclusive principles, and (as) extending them to him. I will return to his politics and his legal battles later, but I presently turn to his daily outdoor existence.

Johnston’s daily life outdoors is experienced in unpredictable and rapidly cycling vicissitudes. His small pleasures consist in sleeping under the stars, smoking his pipe, being visited by friends, having a meal brought to him by a friend, writing his journal entries on a computer at the public library (one of his main conduits for political expression and social connection), (less romantically) finding a sealed deluxe food item in a dumpster, and in acts of benevolent non-interference or friendly conversation on the part of security guards and police officers. His recurrent traumas include suffering weather extremes, having to keep his meagre possessions with him at all times, and attending to basic bodily functions in spaces increasingly hostile to such needs, including sleep—officials at one point spread fertilizer reeking of rotten fish on known homeless sleeping grounds.<sup>24</sup> But he also endures various forms of direct and personal official harassment: security officers on the state-owned yard of St. Ann’s Academy interrupt his sleep, subject him to verbal abuse, and repeatedly confiscate possessions such as a minimally protective sleeping bag; police drive him in a cruiser away from the city centre on more than one occasion, sometimes requiring a 45 minute walk back,<sup>25</sup> and some judges and

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<sup>23</sup> Johnston may also be considered somewhat distinct as a confident white male. Although 47.5% of homeless people are single adult males between 25 and 55 years old, youth, women, queer people, and aboriginal peoples (who are dramatically overrepresented among the homeless) confront intensified experiences of sexism, racism, and violence. Gaetz et al (2013) at 7.

<sup>24</sup> Johnston (2011) at 263. Johnston refers to this fertilizer as “bum-away.”

<sup>25</sup> The city centre attracts homeless people because of its relatively high concentration of social services and jobs (which is not to say that social services just happen to appear there, but the reason for that is beyond the scope of

Crown counsel medicalize him, stigmatize him, and send him to jail for as long as 72 days for repeated *Criminal Code* violations related simply to living his life outdoors. The coercive and indeed violent force of law is not a subtle and largely untested background reality for Johnston in the way that it is for most housed people. How does state law register and reproduce homelessness?

### C. Constellating the Paradoxes of Law and Homelessness

This thesis explores law's multi-faceted role in the struggle for shelter equality. How is it that Canada is one of the wealthiest countries in the world, but the number of homeless citizens<sup>26</sup> like David Arthur Johnston on our streets increases significantly, year after year?<sup>27</sup> Behind this major paradox lie several others that complicate any inquiry that ventures beyond the myopic.<sup>28</sup> Our country is touted as democratic in reformist public philosophy, resting on equiprimordial principles of "the rule of the people" and "the rule of law,"<sup>29</sup> but homeless people have relatively little say over the daily conduct of their lives in common with others and they disproportionately bear the burdens of law. State officials assume the legitimacy of ordering 'public' land in ways that make life difficult for homeless people, but officials' very ability to control the land in this way rests on the prior dispossession of Indigenous peoples, many of whom contest the

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this inquiry). Susan Ruddick explains that for homeless people, downtowns often represent a good mix of "marginal spaces" and "prime spaces." The former "provide places to sleep or hang out without being evicted" whereas the latter "enhance the possibilities of subsistence through begging or other activities." Ruddick (2002) at 57. In turn, homeless social networks form in these spaces and become an additional reason to remain there.

<sup>26</sup> When I refer to homeless 'citizens,' I am following Leonard Feldman (2004) to use 'citizenship' in a non-legalistic way.

<sup>27</sup> For instance, although precise figures for Victoria are not available, Calgary's homeless population grew 740 percent between 1994 and 2006. This growth rate is thought to be typical in major Canadian cities. Laird (2007) at 4.

<sup>28</sup> Wendy Brown explains that "paradox" may have two closely related connotations. First, it implies "multiple yet incommensurable truths, or truth and its negation in a single proposition, or truths that undo even as they require each other." Here, the emphasis is on "unresolvability." Second, "paradox" can mean "against the doxa," indicating a challenge to "received authority." Quoting Joan Wallach Scott, Brown explains that paradox may be a "political formation" in which "'a set of truths that challenge but don't displace orthodox beliefs create a situation that loosely matches the technical definition of paradox.'" Brown (2002) at 431.

<sup>29</sup> Tully (2008) at 95.

legitimacy of state control of their former territories.<sup>30</sup> Homelessness is a structural problem, intensified by years of state welfare and service cuts, but media and popular discourse too often foreground individualized defects of homeless people. Urban architecture rests on a presumed complementarity between private spaces of dwelling and public spaces of leisure, but homeless people by definition have no private spaces to which to retreat. Homeless citizens must perform essential bodily activities such as sleeping somewhere, yet it is a crime to do so in the leisure spaces in which they have no choice but to reside (no Canadian city has adequate shelter spaces even for those who wish to use them). Policy makers increasingly rely upon emergency shelters to address rooflessness, yet as stated above, these spaces are often so disciplinary, violent, and isolating that many potential users understandably choose to attempt to live outdoors together instead. And so the paradoxes entangle, proliferate, and threaten to overwhelm contemporary shelter struggles.

With these paradoxes in the background, ‘progressive’ legal academics have confronted one that is ‘closer to home:’ homeless citizens have a panoply of rights in our *Charter*, but court cases to date have fostered only the thinnest realization of those rights. For these commentators, the dominant ‘normative’ argument is that on the basis of a certain interpretation of the *Charter*, read through the lens of Canada’s international human rights commitments (which are not themselves domestically binding), courts ought to order governments to provide more shelter space of some sort. Such orders would dissolve the paradox of notionally universal rights guarantees and their failure to materialize for those who need them most. But what does it mean for academics to continue (sometimes in moralizing tones) to invite consistently recalcitrant courts to provide far more expansive rights and remedies? What sort of political assumptions go

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<sup>30</sup> Indigenous people are also overrepresented among the homeless, adding another cruel irony when a police officer commands them to ‘move along’ simply for resting in urban space too long, *etc.* This important Indigenous dimension of homelessness cannot be adequately addressed in this limited space.

into prescriptions of this sort, intended to pass smoothly from one expert (the academic), perhaps via a second (the rights crusading litigator), to a third (the judge) on its way to a fourth set, the implementing bureaucracy, finally to deliver social progress ‘from above’? Is the shelter-related direct action (e.g. the tent city) that consistently falls out of this picture *legally* and *politically* significant? My social position as a housed graduate student and as an agent of legal critique affects my perspective on all these questions.

#### **D. Situating Myself Methodologically**

With the dethronement of Weberian social science approaches striving for neutral or aperspectival objectivity, it has become a commonplace that one’s social position affects one’s research perspective. Being securely housed (relative to the homeless) and enjoying the ongoing material advantages of a privileged upbringing in a loving suburban nuclear family, I have no firsthand experience of rooflessness or precarious housing. It is hard to imagine actually living outdoors on a nearly permanent basis. My deeply engrained habits affect my very outlook; I have grown too dependent on a predictable bed, showers, and consistent meals. It is not even clear that researchers who are ‘homeless for a night’ or even for a week really understand long-term rooflessness; on first becoming roofless, homeless people themselves may experience a sort of liberated phase for a couple weeks or even a month, particularly in the summer, before malnutrition, sleeping fitfully on rough and cold surfaces, *etc* catch up with them (especially in the absence of tent city options).<sup>31</sup>

Absent direct experience, and following Talmadge Wright, I hold that the best a housed researcher can do is to strive for genuine dialogue with the (varied) narratives of homeless

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<sup>31</sup> Ravenhill (2008) at 158.

people.<sup>32</sup> So, my goal is to attend carefully to homeless peoples' perspectives without adopting the crypto-condescending pose of the (relatively) privileged intellectual presuming some deeper or privileged truth in their (implicitly homogenous) statements.<sup>33</sup> Whereas Wright is concerned with ethnographic fieldwork with homeless subjects with whom it is possible to converse, my dialogic task is somewhat different. In the space of this short thesis, I aim to mediate between the perspectives of homeless people—as they are found in written material (cases and autoethnographic accounts)—and the discourse of legal critique. I draw on textual homeless voices to diffract my object, legal discourse on shelter. For Donna Haraway, “diffraction is simply to make visible all those things that have been lost in an object; not in order to make the other meanings disappear, but rather to make it impossible for the bottom line to be one single statement.”<sup>34</sup> As I will discuss in Chapter 3, the (multiplying) logic of diffraction differs from the (reductive/focusing) logic of ‘mapping,’ which is either implicitly operant or an explicit goal in the normative legal scholarship on shelter that I evaluate. I too am doing legal scholarship, of course, so it will be useful to distinguish between what I term the normative variant and the (comparatively ‘descriptive’ or ‘critical’) variant to which I aspire.

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<sup>32</sup> Wright (1997) at 32.

<sup>33</sup> See e.g. the related discussion in Spivak (1988). Wright (1997) likewise explains that even constructing what one might call “pure” homeless perspectives is impossible because “homeless persons, like advocates and academics, are caught up in systems of interpretation, refracted [or diffracted] through the dominant social imaginary, conditioned by the differential social locations of each, by their race, class, and gender positions, and existing in specific social-physical spaces.”

<sup>34</sup> Haraway (2000) at 102-105. Contrasting diffraction to the more familiar optical metaphor of “mirror reflections,” which “displace the same elsewhere,” she succinctly captures the physics of diffraction: “Think of Newton’s experiments or Goethe’s experiments with diffraction crystals... when light passes through slits, the light rays that pass through are broken up. And if you have a screen at one end to register what happens, what you get is a record of the passage of the light rays onto the screen. This ‘record’ shows the history of their passage through the slits.” The emphasis is not on mimetically crystallizing the object of inquiry, but on “noting [its] patterns of interaction, interference, reinforcement, difference.”

In normative legal thought, legal academics argue that ‘the law,’ reduced to courtroom law, *ought* to be reformed in a specific way.<sup>35</sup> For instance, a proposed reform may make a body of case law more rationally integrated or internally consistent, or better conform to some higher-order value that is arguably latent in the cases. This is a form of “meta-adjudication,” arguing for developments in the law that take the existing political order largely as a given but which attempt to make law function more smoothly or fairly.<sup>36</sup> Indeed, for Pierre Schlag there is in mainstream legal academia “a primal and largely unnoticed self-identification of the legal thinker with the figure of the judge.”<sup>37</sup> Although different legal academics will consciously attest to this self-identification to varying extents, it is a quality toward which the discourse tends. In its most extreme form, this has interconnected ‘substantive’ and ‘formal’ (aesthetic) implications. Substantively, judges “are supposed to honor the norms, values, and beliefs that generally hold in the relevant authoritative community... intellectual inquiry is subordinated to and guided by normative starting points, channels, and end-goals that are presumed to hold within [that] community.”<sup>38</sup> Certain conclusions are pre-emptively off-limits: “if one is engaged in legal thought, one is obliged to re-present the practice of ‘law,’ however degraded its actual condition may be, as nonetheless *essentially* justified, coherent, rational, and good.”<sup>39</sup> At the level of form, academic writing may demonstrate “a higher degree of reflexivity, or self-consciousness, than its juridical counterpart, but not so much as to [threaten] the fundamental ontological forms, the formal order, and the desirable eschatology always already assumed to underwrite [Anglo-]

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<sup>35</sup> There are also many ‘legal pluralist’ scholars who recognize the importance of law beyond the courtroom if not the state, but nonetheless proceed in a ‘normative’ vein.

<sup>36</sup> For example, take the argument that courts ought to order states to provide shelter because Canada already has a commitment in international law to provide housing for everyone. That would allow us to meet an obligation (Canada, like the ‘reasonable person’ in contract law, must live up to its obligations) while being fairer to homeless people (who, unlike housed people, at present must routinely break the law in the conduct of their lives outdoors).

<sup>37</sup> Schlag (1995) at 1112.

<sup>38</sup> *Ibid* at 1113.

<sup>39</sup> *Ibid* at 1118.

American law.”<sup>40</sup> Academics risk internalizing from case law—their primary if not exclusive object of inquiry—a substantive-aesthetic approach that is both narrow and conservative. This has some troubling implications, to which I now turn.

For Schlag, the self-identification with the judge produces a “radical simplification of law.”<sup>41</sup> First, this involves the assumption of a singular perspective. Schlag invokes Robert Cover’s oft-quoted figuration of judges: “confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”<sup>42</sup> This univocality also obscures law’s “genesis from the different perceptions, actions, and representations of various different actors: judges, lawyers, clients, witnesses, press, *etc.*”<sup>43</sup> Schlag ultimately identifies a serious perspectival limitation for those who over-identify with the judge:

To enshrine oneself in the position of the judge is to miss almost entirely the processes of juris-genesis—the processes by which law comes to be formed as law. It is to assume into existence an entire juridical world of artifacts like ‘rules’ and ‘doctrines’ and ‘principles’ and ‘methods,’ whose identities are not only already ontologically secure, but that are, supposedly, already ruling, already ‘in force,’ as it were. In short, the self-identification with the judge assumes away much of what is interesting and mysterious about law.<sup>44</sup>

Assuming the singular perspective of the judge in this way is obviously not conducive to problematizing the categories, gaps, translations, *etc.*, that exist in case law.

Second, the academic’s self-identification with the judge produces a sense of “false empowerment.”<sup>45</sup> Academics channel the judge’s belief “as a matter of social aesthetics, in the

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<sup>40</sup> *Ibid* at 1114. I will return to the important question of the desirable eschatology, which I will term ‘the centrist progress narrative,’ below. With respect to law’s “fundamental ontological forms,” Schlag concludes in a later article that normativity *is* the fundamental (anti)ontology in law: “normativity rules epistemology. Epistemology rules ontology. That is the ontological structure.” Schlag (1996) at 1718.

<sup>41</sup> Schlag (1995) at 1115.

<sup>42</sup> *Ibid* at 1114-1115.

<sup>43</sup> *Ibid* at 1117.

<sup>44</sup> *Ibid* at 1116.

<sup>45</sup> *Ibid*.

effectiveness of law... that because the law decrees something, it will in fact be so.”<sup>46</sup> There is an attendant belief that “juridical concepts such as consent, coercion, public, individual, and so on—actually map onto the social world in relatively obvious, nonproblematic ways.”<sup>47</sup> Before returning to the question of mapping in some detail, it will suffice to note that assuming this straightforward correspondence causes legal thinkers “to have wildly utopian assessments about the normative consequences of their own legal thought and law in general.”<sup>48</sup> Normative legal thought, including and especially in the ‘right to shelter’ context, typically concludes with phrases such as ‘the court should do \_\_\_\_,’ emulating the structure of the legal judgment, with its holding at the end. There is the “rather odd, though widespread, belief among... legal thinkers that *prescribing* solutions, methods, or even attitudes is somehow a useful or effective way to alter the behavior of legal actors—most particularly, judges.”<sup>49</sup> For readers of law reviews, this prescriptivism is the water in which we swim, but is some aspect of the law in its present form to be castigated because the judges who produce it have demonstrated a (remediable) doctrinal lapse or because the supposed lapse is necessary to perpetuate (as if by inertia) bureaucratic institutions roughly in their present condition?<sup>50</sup> Again following Cover, Schlag notes that this simplification of law both in terms of univocal perspective and false empowerment is motivated

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 1117.

<sup>49</sup> *Ibid.*

<sup>50</sup> In his insightful and entertaining article, “Normative and Nowhere to Go,” Schlag notes the imperious tendency in normative legal thought, which “cannot wait to enlist epistemology, semiotics, social theory or any other enterprise in its own ethical-moral argument structures about the right, the good, the useful, the efficient (or any of their doctrinally crystallized derivatives). It cannot wait to reduce world views, attitudes, demonstrations, provocations, and thought itself, to norms. In short, it cannot wait to tell you (or somebody else) what to do.” Normative legal thought has “a very pressing and urgent tone. It wants to know right away what should be done. Right away.” This a peculiar insistence because “normative legal thought doesn’t seem overly concerned with... the character and the effectiveness of its own discourse. It just goes along and proposes, recommends, prescribes, solves, and resolves. Yet despite its obvious desire to have worldly effects, worldly consequences, normative legal thought remains seemingly unconcerned that for all practical purposes, its only consumers are legal academics and perhaps a few law students—persons who are virtually never in a position to put any of its wonderful normative advice into effect.” (1990) at 178.

“not by a desire to produce insight or understanding, but rather by that law’s desire to hide from itself its own violent and destructive character.”<sup>51</sup> Paradoxically, it may be precisely by acknowledging this aspect of law’s (arguably not so simply distilled) ‘character’—other than by way of prefacing an apologia—that we may take the first step toward engaging in relatively emancipatory political projects and (with a wider lens) perceive those already underway. That is the promise of critique, to which I now turn.

In a critical approach, the emphasis is not on asking ‘what should we do?’ in a way that risks reproducing/depoliticizing too much of what we are already doing, but on putting assumptions—even regulative ones—into question. In their Introduction to *Left Legalism/Left Critique*, Wendy Brown and Janet Halley examine critique in a way that resonates with Haraway’s diffraction. Critique is the space of intellectual inquiry that opens up when one begins with the complicated effects of a given law reform (rights or governance) initiative, rather than beginning with an instrumental focus on its role in some larger political struggle.<sup>52</sup> For example, what if the law reform project of getting everyone into indoor housing risks overlooking the tent city demands of the very people who are supposed to be the beneficiaries of this project? Responding to concerns that critique is just a ‘negative’ or ‘ultratheoretical’ practice that distracts from getting things done in the Real World, Brown and Halley return us to the ancient Greek etymology of the word: “*crisis*, a term that connotes ‘the art and tools of making distinctions, deciding, and judging.’”<sup>53</sup> There are many forms of critique, but in highlighting “the workings of ideology and power in the production of existing political and legal possibilities,”

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<sup>51</sup> Schlag (1995) at 1115. Marianne Constable points out that high profile legal hermeneutic scholars such as James Boyd White and Ronald Dworkin are actually at pains to acknowledge the state monopoly of violence that is channelled through the legal system. Constable (2007) at 133-134. However, the point for them is nonetheless to ensure that *given* this *unavoidable* and *legitimate* violence, legal interpretation proceeds in a way that is as principled and self-reflexive *as possible*. In such scholarship, ‘unavoidable and legitimate violence’ is one of Schlag’s mandatory normative starting points, which various forms of critical legal thought do not share.

<sup>52</sup> Brown and Halley (2002).

<sup>53</sup> *Ibid* at 25.

critique allows us to see “how the very problem we want to solve is itself produced, and thus may help us avoid entrenching or reproducing the problem in our solutions.”<sup>54</sup> Critique is not the negation of deeds in the world, but a requirement for carrying them out responsibly.

Critique foregrounds the extent to which a given law reform project (what Brown and Halley term “left legalism”) may have both dominating and emancipatory effects *at the same time*. It allows us to voice our ambivalence at these times, rather than repressing part of a complete analysis in order to ‘toe the line’ politically. It therefore has a “ludic” or pleasurable dimension (which stands in contradistinction to the self-sacrificing or “suffer-mongering” posture sometimes demanded of political agents working toward a cause). They stress the possibilities foreclosed when legalism *translates* complex political questions into narrowly framed legal questions:

Politics conceived and practiced legalistically bears a certain hostility to discursively open-ended, multigenre, and polyvocal political conversations about how we should live, what we should value and what we should prohibit, and what is possible in collective life. The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and *yes/no* structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions; the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns.<sup>55</sup>

When they adopt liberal legalism rather than contesting it as a regulative frame, legal and political inquiries can flatten and desiccate.

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<sup>54</sup> *Ibid* at 27. Costas Douzinas and Adam Gearey likewise explain that “no social organization is a ‘given’—it is a cultural construction, where ideas have gone into action. Over time, these ideas take a solid form, and the sheer contingency of the events that have constituted an order become forgotten. Behind every social organization there is thus a philosophy, even if it has become fetishized, unquestioned common sense, forgotten.” (2005) at 40.

<sup>55</sup> Brown and Halley (2002) at 19.

Critique provides the opportunity to re-evaluate not merely our legal-political goals but our always-operand if not-always-avowed premises. It offers perspective, not objective “truth.”<sup>56</sup> Brown and Halley are concerned with how legalism can “call the question too peremptorily,” noting that it was only “through the process of subjecting political and philosophical idealism to critique that Marx found his way to dialectical materialism and political economy... he did not know in advance where his critiques would take him.”<sup>57</sup> Critique is therefore “risky” in that it can produce “vertiginous knowledge, knowledge that produces bouts of political inarticulateness and uncertainty, knowledge that bears no immediate policy outcomes or table of tactics.”<sup>58</sup> However, at the same time, critique does not require “suspending all political values.”<sup>59</sup> It is possible to submit to aggressive critique proposals for courts to order states to provide housing while caring deeply about struggles to make dwelling arrangements more equal.

## **E. The Research Question**

Before briefly stating my argument, I will elaborate the central question in this thesis: how do contending discourses of legal rights (the right to shelter specifically) configure political struggles over shelter by and for the homeless in Canada? Having already addressed the label ‘homeless,’ allow me to unpack the remaining loaded phrases in turn: ‘contending discourses of legal rights,’ and ‘political struggles over shelter.’

### **1. The Contending Discourses of Legal Rights**

By ‘the contending discourses of legal rights,’ I am referring to public invocations of the rights in the *Canadian Charter of Rights and Freedoms*, such as section 7’s right to “life, liberty,

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<sup>56</sup> *Ibid* at 26. In fact, “critique is part of the arsenal of intellectual movements of the past two centuries that shatters the plausibility of objectivity claims once and for all.”

<sup>57</sup> *Ibid* at 27.

<sup>58</sup> *Ibid* at 28.

<sup>59</sup> *Ibid* at 27.

and security of the person.” These invocations are made by three importantly different sorts of actors. First, academics evaluate rights controversies from a variety of perspectives. I have already discussed the difference between normative and critical variants, aspiring in this thesis to the latter practice.

Second, there is courtroom official discourse in the right to shelter context; judges and lawyers negotiate constitutional rights guarantees in the courtroom. During litigation, lawyers advancing claims on behalf of the homeless argue for interpretations of prior case law that will support their clients’ rights claims, such as the right to use public space in ways prevented by present law,<sup>60</sup> or for the restoration of government services that have been cut.<sup>61</sup> Conversely, counsel for the government tends to argue, among other things, that individual constitutional rights guarantees—binding on all public officials, not just judges—should not be used to circumscribe the jurisdiction of the state to arrange space, such as city park space, or to decide on state spending priorities. In other words, the argument is that courts should defer as much as possible to elected officials to decide controversial public questions (who they argue have greater ‘democratic legitimacy’ than judges) and/or the bureaucrats they appoint.<sup>62</sup> Judges attempt to justify their ultimate holdings by interpreting the relevant precedent and applying it to the case at hand, typically attempting to balance perceived competing demands of protecting individualized constitutional rights and deferring to state officials’ political choices.

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<sup>60</sup> *Adams* BCSC, BCCA; *Johnston* BCSC, BCCA 400. Here I use ‘law’ in a highly restricted (statist) way to include municipal bylaws, *Criminal Code* provisions, and police operational practices.

<sup>61</sup> *Tanudjaja* ONSC, ONCA.

<sup>62</sup> Obviously, judges are also appointed by the provincial government (provincial courts) or the federal government (higher level courts). The difference is that whereas bureaucrats are ultimately accountable both to elected officials and to judges interpreting the constitutionality of their actions, the judiciary is ‘independent.’ At least, this is the liberal justification story sometimes told in the law school. With the growth of the administration, bureaucrats are increasingly free from meaningful oversight. And as discussed in Chapter 3, judges guarding their self-perceived legitimacy and acutely aware of the norms in their culture may not be so independent of wider state political consensus.

Finally, there is the rights discourse of shelter activists, some of whom are homeless or precariously housed. For my purposes here, a shelter rights activist is anyone who asserts publicly either that access to shelter must be more equal or that our society must be made more equal in ways that would affect shelter. These assertions may be framed in terms of politics without reference to rights or in terms of a right (e.g. a constitutional right) to shelter. All three discourses are only analytically separable; people who are neither officials nor academics can certainly channel those discourses, and sometimes do so strategically. However, whereas academics approach rights with respect to pragmatic normativism, theoretical critique, historical contextualization, *etc*, and whereas courtroom officials negotiate rights in a formalized way, with reference to boundaries set or possibilities opened by prior case law, shelter rights activists often use rights in a vernacular way. For instance, they might declare (e.g. on the street or in a blog posting) that there is a ‘right to shelter’ despite the lack of present legal support for such a claim. This sense of ‘right’ refers not to the 19<sup>th</sup> century liberal sense of a zone of constitutionally guaranteed individual inviolability vis-à-vis the state, but rather to a subjective (possibly collective) entitlement based on something more akin to natural justice. For instance, when David Arthur Johnston lay on the ground to sleep one night and smelled repellant fertilizer used by the City, he was moved to insist on “the right to sleep.”<sup>63</sup> This was even more specific than a ‘right to shelter;’ the hope was to highlight that the City was denying something so basic as sleep, and thereby to mobilize popular support. Something is taken to be a right in the absence—or even because of that absence, as in this example—of a (state-based) positive legal requirement.

Courtroom officials and activists may both refer to the *Charter* in their rhetoric. However, they may understand different things by it. For instance, when a lawyer argues in court

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<sup>63</sup> Johnston (2011) at 1.

for a right to some form of shelter, he or she is working with how prior case law has already closed some avenues of viability and opened others; if claims for tent cities have in the past failed peremptorily, the section 7 rights to “life,” “liberty,” and “security of the person” might translate into an argument for the mere right to overhead shelter as the best possible outcome, as it did in *Adams*. Lawyers usually select (or argument is narrowed over the course of litigation to) just one or two sections of the *Charter* because they contain the ‘best package’ of associated precedents. If a section 2 “freedom of expression” argument seems like a less viable route to an overnight shelter allowance than a section 7 argument, the former is abandoned, even if a tent city has a politically expressive as well as life-preserving dimension.<sup>64</sup> This is above all an *instrumental* discourse. By contrast, when shelter activists argue for tent cities, they may rely on the ‘popular’ meaning of various sections. In the above example, David Arthur Johnston invoked the “right to life” in section 7 of the *Charter*, which was taken to contain or imply the “right to sleep.” Similarly, tent cities represent free expression, (socially meaningful) life, liberty, security, and a host of other abstract values listed in the *Charter*.<sup>65</sup> However, whereas officials instrumentally pass those values through precedential filters, activists often use them in a non-technical and even utopian way.

## 2. ‘Political Struggles over Shelter’

I turn now to the final term in my research question, “political struggle over shelter.”

Here I refer to the ability of anyone and everyone to contest the present arrangement of public

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<sup>64</sup> Certain cases in the legal community become hypostatized to correspond to just one *Charter* section silo (e.g. ‘*Adams* is a section 7 case’) when the full facts of the case touch on many different dimensions of collective life. Some fall into ‘irrelevant’ *Charter* sections, such as those referring to equality (at least ‘equality’ read through the narrow prism of state discrimination in section 15) or ‘expression’ or ‘mobility’ and some fall out of the *Charter* altogether, such as ‘property.’ ‘Property’ was purposely not included in the *Charter* in 1982 because of fears that it would in practice augment the existing property rights of the powerful.

<sup>65</sup> One might include ‘privacy’ and others that although not included explicitly, are arguably implied by one section or by the combination of several (or even all) sections.

space.<sup>66</sup> Most legal academics tend to consider state provision of a minimal level of food, shelter, healthcare, *etc* a precondition for meaningful access to “political” rights, such as voting.<sup>67</sup> Others note that in practice, the priority of material needs over political participation tends to defer the latter to a future that never arrives, while failing to achieve the former because those most in need and best situated to act directly and collectively to meet material needs lack voice in state institutions. This latter set of academics instead invokes “participatory” rights, such as a right to consultation by state institutions on important decisions, as a precondition for actualizing all other rights.<sup>68</sup> A third approach, which I adopt in Chapter 3 of this thesis, avoids making the state the ultimate reference frame; the question is not the priority sequence in which it should ensure material or participatory rights. Rather, the emphasis is on being able to perceive already existing direct action (however fleeting because suppressed by the state) that *may* incidentally shape state measures, but not by petitioning officials (e.g. the tent city). Here, either there is an appeal to natural justice as opposed to positive law and/or rights guarantees are interpreted and performed in a way that is incompatible with present law.

## **F. The Argument**

Although courtroom litigation has an important function with respect to checking the worst excesses of homeless spatial violence, it simultaneously should not be understood as a vehicle for delivering a sufficiently egalitarian society. Understanding homeless practices such as the tent city in light of the deep structural causes of homelessness and in terms of their homeless proponents’ aims reveals significant limitations in the right to shelter jurisprudence, as well as in

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<sup>66</sup> What is often referred to as ‘public space,’ such as parks, is actually state-owned space because the state has the right to control and exclude people therein. Common space, on the other hand, is defined by the right of those within it not to be excluded. Of course, commoners might collectively agree to exclude someone if he or she were violent, persistently greedy, *etc*.

<sup>67</sup> See the discussion below at 60.

<sup>68</sup> See e.g. Fredman (2008).

mainstream (normative) legal academic commentary on that jurisprudence. My overall argument has four interactive components. First, I credit the successes of litigation with respect to what I term an ‘emergency temporality’ whereas I detail the limits of litigation with respect to what I term an ‘insurgent pantemporality.’ These temporalities overlap; the former helps us to understand the realization of the right to a box whereas the second helps us to understand the limits of litigation and to open a wider field of inquiry. Second, I distil a dominant position in the legal academy with respect to shelter jurisprudence and argue that it problematically conjoins the emergency temporality not with an insurgent pantemporality but with a ‘long durée political temporality.’ Therefore, I scrutinize two key assumptions in the ‘conjoined temporality’ thesis; these include the idea that courts can be used to realize a social democratic agenda and that society is making progress toward ever greater social equality. Such assumptions effectively invisibilize legally and politically significant forms of shelter direct action, such as the tent city.

Finally, I problematize the mimetic aspiration in normative legal commentary—the desire to think of law as a map (generated by common law judges and refined by legal academics) that must exclude some things but that can be made to track ‘society’ ever more closely. I begin a new research agenda that aims not to generate better expert maps ‘from above,’ but to attend to how our maps are disrupted by homeless politics ‘from below.’ Here I draw on the work of Jacques Rancière to interpret the tent city using a different picture of rights and of politics, making new things visible and hopefully making familiar homeless voices more audible. Rights are not universal entitlements corresponding to subjects who either have or do not have them, depending on the success of state institutions. Rather, rights are political signifiers; political subjects emerge only in the process of actualizing their rights by staging their equality. Rights exist when subjects effectively make *use* of them, and one way in which such use is made may

be to form tent cities. I wish to emphasize at the outset that I am not arguing in favour of the tent city as a political panacea or as anything else. My aim is analytic—to draw attention to the tent city’s already existing legal and political significance, particularly by attending, on the one hand, to the practices and claims of its occupants and proponents, and on the other hand, to the tent-city sized ellipsis in the normative legal literature.

### **G. Overview of the Thesis Structure**

In Chapter 1, I evaluate two important Canadian right to shelter cases. In *Adams*, Ross J struck the City of Victoria’s ban on the use of temporary overhead shelter in parks. I reconstruct her reasons, including preliminary findings with respect to whether there was sufficient state action to engage the *Charter*, whether the claim constituted a request for a ‘positive’ state obligation to provide a minimal level of shelter, and whether the claimants were asserting a property right. I evaluate her inquiry under section 7 and section 1 of the *Charter*. Next, I evaluate the Court of Appeal judgment, which upheld the trial judgment, but with some important modifications, including a change in the disposition from allowing *temporary* overhead shelter to allowing only overhead shelter *during the night*. I engage in a radical critique of both judgments, which, despite their merits, cast as atypical the nine claimants’ unanimous wish to be allowed to live together in a tent city. I discuss how homeless narratives were not validated in the reasons or outcome, and how precedents recruited in the case, as well as its overall framing, served to atomize and disconnect the claimants; *Adams* reinscribed their inequality with housed people under and beyond state law. Finally, I turn to David Arthur Johnston’s appeal of the persisting daytime ban on overhead shelter in *Johnston*.<sup>69</sup> I reconstruct the analyses at both the trial and appellate levels, but note how the court at both levels deviated

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<sup>69</sup> *Johnston* BCSC; BCCA.

from its own rules (its rules with respect to housed people, at any rate); I also detail several new ways in which homeless narratives failed to translate in the reasons and outcome. By the end of Chapter 1, I hope to have clarified some of the serious limitations in courtroom discourse on the right to shelter, including its discordance with at least some homeless narratives.

In Chapter 2, I turn to the normative legal commentary on the right to shelter in Canada. I demonstrate a ‘dominant’ position in the scholarship, which is that courts ought to order governments to provide housing or at least adequate shelter space. I take Margot Young as a particularly thoughtful representative of this position, alive to many of its difficulties. First, Young argues that courtroom rights doctrine can be reformed with respect to assessing a claimant’s context: courts may better appreciate the structural constraints claimants confront and their experience given those constraints. She suggests shifting from an assessment of claimants’ choices (‘bad’ choices could relieve the government of responsibility for rectifying conditions that are at least in part structural) to an assessment of the ‘harm’ to which a claimant is exposed. I agree with much of Young’s analysis, but I contend that doctrinal reform of this sort both overestimates the likelihood that judges will significantly reconstruct the law and performatively reinscribes the very lack of political agency among the homeless that state intervention is deemed necessary to counteract. Second, Young and others argue that courts ought to build on decisions such as *Adams* to recognize a positive obligation on the part of the state to provide housing. Although I agree that the dichotomy between positive and negative rights is theoretically incoherent—all rights require state action of some sort—I argue that it serves a political function; it allows judges to distinguish themselves from legislators in a way that they believe is likely to be acceptable to politicians and to the public. There is a stark contrast between cases like *Adams*, which seek ‘negative’ rights and cases that seek ‘positive’

socioeconomic rights of any sort. To illustrate this contrast, I turn to a final right to shelter case, *Tanudjaja*,<sup>70</sup> an Ontario case in which the claimants directly sought judicial recognition of a positive state obligation to provide housing. The case was dismissed at an early stage of litigation, and *Adams* was recruited among other precedents that affirm a rigid differentiation between positive and negative rights. By the end of this Chapter, I hope to illustrate the difficulties not only with respect to existing courtroom discourse, but with respect to reforming it in a way that might better accord with at least some homeless narratives.

In Chapter 3, I interrogate some regulative assumptions in the normative legal commentary on shelter. These assumptions include the notion that courts can be used to advance a social democratic agenda and that society is moving toward ever greater equality, which will be delivered by our institutions at some future date, however distant. I argue first that the social democratic welfare state on the US New Deal model has been replaced with a neoliberal state, and that even under the best conditions, social democratic theorists may downplay the capacity of the state both to injure and emancipate, or to injure while emancipating. Second, the social democratic frame is rendered more problematic in that the progressive teleology on which it depends has little purchase in our time, which if nothing else is demonstrated by the rising annual incidence of homelessness. These assumptions feed into a pervasive metaphor in the jurisprudence as well as in the academic commentary, which is that law is like a map that can be made to track society ever more faithfully. I discuss assumptions about what I term mapping ‘input’ and ‘output’ processes in the literature. On the input side, I note how homeless narratives have not been plotted well in law’s map either in the jurisprudence or in academic reform proposals, and I engage in a brief critical legal history to ‘make strange’ the idea that experts must map ‘law’ onto ‘society’ in order to aid marginal populations, such as the homeless. On the

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<sup>70</sup> *Tanudjaja* ONSC; ONCA.

output side, I question the extent to which—as asserted in judicial and academic rhetoric—the courtroom has really affected daily homeless life in a profound way. For various reasons, I suggest that it may be productive in a legal critique not (only) to improve law’s social map from above, but to analyze homeless legal and political activity from below. For this purpose, I draw on what Jacques Rancière terms his political ‘dramaturgy,’ which allows me to figure homeless narratives and performances such as the tent city as ‘dissensus:’ a staging or enactment of equality with other (e.g. housed) citizens. I conclude by drawing out the spatial and temporal dimensions of dissensus in the shelter context specifically. I thereby texture what I term the ‘insurgent pantemporality’ of dissensus, which I counterpose to the (coexisting) ‘emergency’ (or present-saturated) temporality of the ‘negative rights’ courtroom.

The weakness of the [homeless] defendants' position, it seems to me, is the essential failure to recognize that in any community there must be accommodation, compromise.

—Quantz J, *R v Johnston & Shebib*, Victoria Registry No 145835-1

To alleviate the city's concern about tent-city, we have made it clear that we are not fighting for the right to have a tent-city, but, officially, fighting for the right to be able to sleep, while protecting one's self from the elements. . . Obviously, it is not reasonable to order people [not to] sleep during the day...

—David Arthur Johnston, *The Right to Sleep*

A truly open-minded public space is one that admits, allows, even encourages contradictory and conflictual uses.

—Susan Ruddick, “*Metamorphosis Revisited*”

## Chapter 1: The Right to Shelter Jurisprudence and Homeless Narratives

### Introduction

The goal in Chapter 1 is to analyse courtroom and normative academic discourses on the right to shelter, drawing out some assumptions, possibilities, and limits in these discourses. Here I focus on two significant shelter cases, *Adams* and *Johnston*. As discussed in the Introduction, *Adams* stands for the proposition that in the absence of sufficient emergency shelter space, people have the right to temporary overnight shelter. In the second case, *Johnston v Victoria*,<sup>71</sup> David Arthur Johnston (whose journal was discussed in the Introduction) unsuccessfully challenged the ban on daytime shelter, which persisted when the City amended its bylaws and police operational practices after *Adams*. The Court affirmed that overhead shelter was constitutionally protected only at night. Both of these cases concern what commentators have

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<sup>71</sup> *Johnston* BCSC, BCCA.

called a ‘negative’ rights interpretation of the constitution. That is, rather than providing people with a ‘positive’ or direct state entitlement (e.g. housing), they restrict the state from interfering with certain individual actions under certain existing conditions (e.g. using rudimentary shelter in the absence of sufficient emergency shelter space).<sup>72</sup> By the end of this section, it will already be clear how at least some homeless narratives and desires are fundamentally at odds with certain assumptions in courtroom legal discourse.

What does it mean to interrogate a case? Just as Freud’s psychoanalytic theory was built on now (in)famous patient cases such as Dora, the entirety of the common law might be imagined as a temporally and conceptually open-ended series of interconnected legal cases.<sup>73</sup> But how do some cases take on special significance, to become what Laurent Berlant calls “a thing that merits interpretive recontextualization?”<sup>74</sup> For her, a case is a genre within which a given legal case may be an exemplar:

The case represents a problem-event that has animated some kind of judgment. Any enigma could do—a symptom, a crime, a causal variable, a situation, a stranger, or any irritating obstacle to clarity. What matters is the idiom of the judgment. This varies tremendously across disciplines, professions, and ordinary life scenes: law, medicine, universities, sports bars, chat shows, blogs, each domain with its vernacular and rule-based conventions for folding the singular into the general.<sup>75</sup>

Although all legal cases share the idiom of judgment, and require the “folding of the singular into the general,” some are more enigmatic or significant than others. How do some become ‘leading cases’ for judges, recurring as familiar tropes, especially within a substantive ‘area’ of law such as constitutional law? These same cases tend to be widely picked up by the media and blogosphere and may receive special attention in academic commentary. How is it that other

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<sup>72</sup> I will elaborate on this tenuous but tenacious distinction below at 99.

<sup>73</sup> New situations or cases may rearrange not merely our perception of prior cases ‘on their own terms’ but those terms themselves. This is not to downplay the ‘closure’ at the inception of the common law, in which congeries of local customs were incorporated (and truncated/distorted) into law’s rational centralized edifice.

<sup>74</sup> Berlant (2007) at 670.

<sup>75</sup> *Ibid* at 663.

legal cases become what Lauren Berlant calls a mere “event”? For her, an event is generally “the kind of thing that would have been expected, perhaps creating new precedents for future judgments, but usually not interestingly. At that point the new event usually just plumps up conventions.”<sup>76</sup> Conversely, “the case can incite an opening, an altered way of feeling things out, of falling out of line.”<sup>77</sup>

I will approach both of the cases I am about to examine as inciting this sort of an opening. *Adams* has arguably already risen above the level of an event to become a Berlantian case in the legal community and beyond; my objective is to raise some new questions about it and to cast it in a new light. *Johnston* is another matter; I argue that in many ways it is just as significant, and its tireless protagonist, David Arthur Johnston, would probably agree. However, the case’s mere footnoting askance in the commentary to date suggests event status. In this sense, it is like the many already forgotten cases that—perhaps in the briefest of reasons—simply underwrote cities’ existing tent city non-toleration convention. However, it would be unfortunate for *Johnston*’s instructive content to be lost, for reasons I will attempt to make clear. As I address each case, I will aim first to reconstruct it on its own terms before reading it ‘against the grain,’ drawing on homeless narratives.

### **A. *Adams*: Fighting for the Right to Temporary Overhead Shelter**

*Victoria v Adams*’s lengthy litigation history began in 2005, when the City of Victoria attempted to secure a civil injunction to clear a group of as many as 70 people camping in Cridge Park with more than 20 tents (See Figure 9).<sup>78</sup> The adjacent Church of Our Lord had been

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<sup>76</sup> *Ibid* at 671; *contra* Badiou (2005) at 173-177.

<sup>77</sup> Berlant (2007) at 666.

<sup>78</sup> *Adams* BCSC at para 6. The City relied on its authority under section 274(1)(a) of the British Columbia *Community Charter* (the provincial statute laying out the City’s powers) to bring legal proceedings enforcing its bylaws.

providing electricity for two large kitchen areas (See Figure 10).<sup>79</sup> The two bylaws at issue prohibit “loitering or taking up temporary abode overnight in public parks.”<sup>80</sup> While legal proceedings were underway, the City sent a notice to the “illegal occupiers of Cridge Park” ordering them, without any consultation, to disband within three days or be forcibly removed.<sup>81</sup> When the inhabitants did not respond,<sup>82</sup> the City applied for an interlocutory injunction empowering the police to clear all structures and arrest everyone in the tent city. Some of the residents opposed the City’s application using the *Canadian Charter of Rights and Freedoms* as a defence.<sup>83</sup> In an unusual order, in late October 2005, Stewart J granted an interim interlocutory injunction to the City, expiring in one year, compelling the City to bring the case to trial so that the *Charter* issues could be addressed.<sup>84</sup>

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<sup>79</sup> Many local Churches help homeless people in Victoria. Rev. Al Tysick’s Dandelion Society addresses interlocking issues related to homelessness, such as incarceration, drug addiction, and housing. He personally hands out coffee, food, and blankets to homeless people on a daily basis. Dandelion Society (Online).

<sup>80</sup> *Adams BCSC* at para 8.

<sup>81</sup> *Ibid* at para 9.

<sup>82</sup> *Ibid* at para 10. The residents had little to lose simply by disregarding this unilateral command and waiting for police to show up and clear them; conversely, they had much to lose by disbanding, which would require them to give up their emplaced community for a nomadic and possibly lonely existence on the streets.

<sup>83</sup> *Ibid* at para 11.

<sup>84</sup> *Ibid*. The alternative would have been to force homeless people to raise *Charter* issues on an individual basis if they were charged for future bylaw infractions; the City might simply choose to drop the charges repeatedly to avoid a *Charter* trial, leaving the issue unresolved and the homeless in an endless loop.



Figure 9: *Cridge Park, a small park that is a 5-10 minute walk from the inner harbour. This is where David Arthur Johnson and up to 70 others encamped prior to Adams.*



Figure 10: *Cridge Park, with the Church of Our Lord beside it. This Church provided electricity for the tent city in 2005.*

Significant legal wrangling occurred before the full *Charter* trial took place. The City filed a Statement of Claim and the tent city residents (including the nine homeless defendants) disbanded peacefully. David Arthur Johnston agreed to do so based on the specific understanding that he would have his day in court.<sup>85</sup> The homeless claimants' lawyers filed a Statement of Defence alleging breaches of their ss. 2(b), 7, 11(d), 12, and 15(1) *Charter* rights.<sup>86</sup> Already by this time, their claim was narrowed (in what would prove to be wise litigation strategy) to overnight sleeping only, as opposed to urban camping in a tent city. Before the trial could begin, the City applied for a motion of discontinuance after it updated its bylaw so that it no longer prohibited loitering.<sup>87</sup> In practice, this meant that for sleeping purposes homeless people were allowed ground cover, such as a sleeping bag, but were not allowed to use overhead shelter, such as a box or a tarp tied with string to a tree. Johnston J rejected the City's subsequent request for a permanent injunction (carefully crafted to avoid reference to sleeping in public spaces), given that the tent city had disbanded (it posed no immediate challenge to the City's objectives) and the constitution was engaged.<sup>88</sup> The City attempted to discontinue the litigation, seemingly aiming

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<sup>85</sup> Johnston (2011) at 166. A motif in Johnston's writing is that patience is a key virtue, which he had to have in abundance given that it took six and a half years since the beginning of his shelter ordeal to reach the end of all of his litigation (before the courtroom proceedings even began in 2005, he was repeatedly arrested over a year and a half and finally imprisoned; the *Adams* Court of Appeal ruling was not released until December 2010, and his final appeal of the daytime shelter ban in *Johnston* was not released until October 2011). *Charter* trials may take more than a decade to reach the Supreme Court of Canada, during which even ultimately victorious claimants may expend considerable emotional energy, as well as losing significant time and money (e.g. *Vriend* (1998) took 15 years before succeeding at the Supreme Court of Canada).

<sup>86</sup> The text of each section is as follows:

2(b). "Everyone has freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;"

11(d). "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"

12. "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment;"

15(1). "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>87</sup> *Adams* BCSC at para 18.

<sup>88</sup> *Ibid* at para 17.

not to risk constitutional entrenchment of any property rights,<sup>89</sup> but Stewart J declared it no longer to be the master of the lawsuit, which was to proceed, and the defendants filed a counterclaim on *Charter* grounds.

### 1. The Supreme Court of BC

Ross J. presided over a lengthy trial in which she read thousands of pages of evidence and heard extensive testimony from experts and from the homeless claimants.<sup>90</sup> She found that several federal and provincial policy developments had contributed to the dire homelessness situation in Victoria. Summarizing findings from the *City of Victoria Mayor's Task Force Report on Homelessness*,<sup>91</sup> she cited policy and economic changes related to homelessness, including: federal withdrawal from social housing and social services generally; increased housing costs amidst decreased earning power; a deinstitutionalisation process beginning in the 1960's in which large provincial mental institutions were closed without a corresponding increase in community services; policy changes to federal transfer payments in 1996 that permitted provinces to cut spending, which virtually all chose to do; and an aggressive strategy in BC in the mid-1990's to cut income assistance, making eligibility requirements far more onerous.<sup>92</sup> These findings form the background against which people lose their homes in increasing numbers each year while the municipal shelter system has been left to cope with fewer funds and greater responsibility.

After her discussion of background policy and economic changes, Ross J made the following key findings of fact:

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<sup>89</sup> The City had little to gain and much to lose in the event of trial, given that a win would simply preserve the status quo and a loss, in the worst case for the City, might result in a tent city allowance. MacLeod (2007) reproduced in Johnston (2011) at 163.

<sup>90</sup> For a discussion of the latter, see below at 59.

<sup>91</sup> Mayor's Task Force (2007).

<sup>92</sup> *Adams* BCSC at para 59-66. See below at 112 for a discussion of neoliberalism, which underlies these trends.

- (a) there are at present more than 1,000 homeless people living in the City;<sup>93</sup>
- (b) there are at present 141 permanent shelter beds in the City, expanded to 326 when the Extreme Weather Protocol is in effect;
- (c) the number of homeless people exceeds the available supply of shelter beds;
- (d) exposure to the elements without adequate shelter such as a tent tarpaulin or cardboard box is associated with a number of substantial risks to health including the risk of hypothermia, a potentially fatal condition; and
- (e) adequate shelter for those sleeping outside in the West Coast climate requires both ground insulation and appropriate overhead protection in the form of a tent or tent-like shelter.<sup>94</sup>

Essentially, there are more homeless people than available shelter spaces so some of them must sleep outside, where they need overhead shelter to prevent hypothermia *etc.*

With these factual findings in place, Ross J proceeded to the narrow legal question of whether it was contrary to section 7 of the *Charter* for the City to prohibit the use of temporary overhead shelter. However, before beginning the section 7 analysis proper, she rejected a series of preliminary objections (which recur in various ways throughout the section 7 analysis) raised by the City and the Attorney General of BC ('AGBC'),<sup>95</sup> which I will organize in two related clusters over the next two paragraphs.

First, she found that there was sufficient state action to engage the *Charter*, given that the impugned bylaws and the penalties imposed for their violation are by definition state action.<sup>96</sup>

Second, the state action (i.e. denial of overhead shelter) was the cause of the alleged rights deprivation. Rejecting the AGBC's claim that it was the "condition of being homeless" that

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<sup>93</sup> The number, especially in 2015, is likely closer to "1200 plus" homeless people, which is the figure in the Mayor's Task Force (2007) qtd in *Adams BCSC* at para 45.

<sup>94</sup> *Ibid* at para 69. One expert clarified that "the size of the tarp-like protection necessary depends upon weather conditions, ranging from 2m x 3m in mild weather to 4m x 4m in stormy weather." *Ibid* at para 137.

<sup>95</sup> She also concluded that "[although] the various international instruments [committing Canada to provide universal housing within its available means] do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of [section 7]." *Ibid* at para 100.

<sup>96</sup> *Adams BCSC* at paras 101-104.

resulted in the deprivation and not any bylaws governing public space, Ross J determined that the issue concerned bylaws that prevent homeless people from sheltering themselves *given* that many have no choice but to sleep outside.<sup>97</sup> Third, Ross J rejected the government Defendants' objection that the bylaws are not the cause of the harm because some homeless people chose to live in tent cities rather than shelters;<sup>98</sup> it did not matter that some make this choice because many homeless people have been turned away from shelters at full capacity and have to sleep outdoors.

Fourth, this was not a claim for a "positive benefit."<sup>99</sup> Instead of being a claim about "the allocation of scarce resources," this case was simply about the "constitutionality of a prohibition contained in particular bylaws."<sup>100</sup> Even though the government can set policy with respect to homelessness, "the fact that the matter engages complex policy decisions does not immunize the legislation from [*Charter*] review by the courts."<sup>101</sup> Importantly, Ross J declared that if the case had proceeded as initially pleaded, as a request for the city to set aside public space for a tent city, that would have represented a claim for recognition of a positive state obligation (concerning the allocation of a "scarce resource," public park space).<sup>102</sup> *Charter* law today rests on a denial of all such obligations, at least until the Supreme Court revisits the issue under the appropriate circumstances.<sup>103</sup> Finally, and relatedly, Ross J determined that this claim was not

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<sup>97</sup> *Ibid* at paras 105-113. Here she relied on cases such as *Morgentaler* (1988) and *Rodriguez* (1993). In the former, it was found unconstitutional to restrict women's right to have an abortion; it was irrelevant that no (proximal) state action caused women to need abortions in the first instance. In the latter, it was found unconstitutional to avoid a full hearing on the right to assisted suicide simply because the state did not cause the terminal illness prompting the suicide request. See discussion below at 63.

<sup>98</sup> *Adams BCSC* at paras 133-141.

<sup>99</sup> *Ibid* at paras 114-125.

<sup>100</sup> *Ibid* at para 123.

<sup>101</sup> *Ibid* at para 125.

<sup>102</sup> I will discuss this peculiar economization of somehow fungible park space in Chapter 2 below at 100.

<sup>103</sup> *Gosselin* (2002). I discuss this case and the positive-negative rights dichotomy in more detail in Chapter 2 at 99.

about property rights.<sup>104</sup> Although a “semi-permanent camp, like the one established in Cridge park,” may have amounted to a novel property right, that was not at issue here. Ross J stated that:

The use of some public property by the homeless is unavoidable. Whether or not they are allowed to keep themselves dry with a simple tent or a cardboard box, as opposed to lying with a tarp on top of their faces, does not change the nature of that utilization of public space.<sup>105</sup>

She added that “public properties are held for the benefit of the public, which includes the homeless.”<sup>106</sup> Because sleeping bags and other forms of non-overhead protection were already permitted, the addition of temporary overhead shelter, compatible with leisure uses of park space by non-homeless people, would not change the homeless “footprint” in a way that amounts to a property right (see Figures 11-14 below).<sup>107</sup> For this same reason, concerns about the homeless doing additional ecological damage to parks (e.g. to the soil) were rejected. With these preliminary objections out of the way, Ross J engaged in a section 7 analysis.

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<sup>104</sup> *Adams BCSC* at paras 126-132.

<sup>105</sup> *Ibid* at para 130.

<sup>106</sup> *Ibid* at para 131.

<sup>107</sup> This was a controversial question in the immediate aftermath of *Adams* in the mainstream legal community. The private (as opposed to Constitutional or public) law reasoning is that the homeless spatial rights after *Adams* amount to a *de facto* proprietary license from the City (the legal title holder of park space—again, this is state space, not common space) to the homeless: permission to do that which would otherwise amount to a trespass. However, a lot turns on one’s definition of property, and it is likely that as Ross J reasoned, the mere addition of temporary overhead shelter did not really change homeless peoples’ lack of choice to be in state space, which they would have to use with or without permission from the City.



*Figure 11: A tarp hung over a tree in Beacon Hill Park, the largest park in downtown Victoria, which spans several blocks. It is roughly a ten minute walk from the inner harbour, and overlooks the Haro Strait/Strait of Juan de Fuca (Pacific Ocean).*



*Figure 12: A tent near the same tree in Beacon Hill Park, with one of the park's many peacock residents in the foreground and cars parked free of charge in the background.*



Figure 13: *Weeping willows and a pond in Beacon Hill Park on a sunny day.*



Figure 14: *Beacon Hill Park again, with ducks and turtles sunbathing on a log.*

*i. The Section 7 Analysis.*

Ross J made the relatively rare finding of violations of all three section 7 subcomponent rights: life, liberty, and security of the person.<sup>108</sup> She found that the bylaws violated the right to life because without overhead protection, “a number of serious and life threatening conditions, most notably hypothermia” could result in death.<sup>109</sup> The bylaws violated the right to liberty because “creating shelter to protect oneself from the elements is a matter critical to an individual’s dignity and independence.”<sup>110</sup> Finally, the bylaws violated the right to security of the person because “the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death.”<sup>111</sup> Having found a clear violation of the claimants’ section 7 rights, Ross J turned to the question of whether these violations could nonetheless be justified on the grounds that they accord with “the principles of fundamental justice.” In other words, even if a state measure violates the rights specified in section 7, it may be saved if it nonetheless accords with these principles, so this caveat has been called the ‘internal limitation clause’ in section 7.

The Supreme Court of Canada has to date specified several principles of fundamental justice,<sup>112</sup> but all are concerned with whether the impugned state measure is “fundamentally

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<sup>108</sup> As noted above, section 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>109</sup> *Adams BCSC* at para 145.

<sup>110</sup> *Ibid* at para 148.

<sup>111</sup> *Ibid* at para 153.

<sup>112</sup> *Adams BCSC* at para 156. “Three criteria that must be satisfied in order for a rule or principle to qualify as a principle of fundamental justice: the rule must be a legal principle; there must be a ‘significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate’; and the rule must be capable of being ‘identified with sufficient precision to yield a manageable standard.’” Obviously, all of these criteria raise additional questions about what a ‘legal principle’ is, what a ‘societal consensus’ means and how it is ascertained by judges, what constitutes ‘sufficient precision’ and what is a manageable standard, and manageable for whom? Precedent is (somehow) supposed to meaningfully guide all of these determinations in practice. And part of the ‘internal perspective’ when one is a judge means never asking why an inquiry into societal consensus came to matter and whether it should continue to matter at all. This is not to say that a judge like Ross J would not be interested in these questions after hours; they are just not part of courtroom legal discourse.

unfair to the affected person.”<sup>113</sup> The two principles relevant to *Adams* were overbreadth and arbitrariness. A measure will be overbroad (and therefore fundamentally unfair) if it uses means broader than necessary to achieve a state objective, regardless of the merits of the objective.<sup>114</sup> It will be arbitrary if it “bears no relation to, or is inconsistent with, the objective.”<sup>115</sup> With respect to both principles, the objective lying behind a bylaw generally turns on how government counsel frames it (i.e. it is a retroactive and often strategic inference).<sup>116</sup> The City and AGBC “identified the objective of the Bylaws and the operational policy to be the maintenance of the environmental, recreational, social and economic benefits of urban parks.”<sup>117</sup> In other words, the bylaws and operational policy will be overbroad if an alternative measure was possible that still achieved the objective of maintaining desirable park spaces (desirable to housed people, at any rate) while not violating the claimants’ rights to life, liberty, and security of the person. The bylaws will be arbitrary if preventing overhead shelter for the homeless is either irrelevant to or actually undermines the park maintenance objective.

Ross J found that the bylaw and operational policy was overbroad. Viable alternative measures existed that would address the City’s concerns, such as “requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted.”<sup>118</sup> She rejected the City and AGBC’s framing of the issue as “a choice between the Bylaws’ absolute ban on the erection of overhead shelter on the one hand

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<sup>113</sup> *Charkaoui* (2007) qtd in *Adams BCSC* at para 159.

<sup>114</sup> *Adams BCSC* at para 169.

<sup>115</sup> *Ibid* at para 171.

<sup>116</sup> Bylaws typically do not state the purposes of specific sections within the text and council deliberation records are rarely relied upon to ascertain the objective behind a particular section, even if they exist (and even then they may not disclose any objective or any singular or exhaustive objective, or the bylaw may have been left in place tacitly to address new objectives that are never even discussed).

<sup>117</sup> *Adams BCSC* at para 173.

<sup>118</sup> *Ibid* at para 185.

and chaos on the other.”<sup>119</sup> In their submissions, both Defendants equated the overhead shelter ban with a blanket tent city allowance across all public spaces, referring to land being “parceled out” and “colonized” (Indigenous homeless people might find this diction especially ironic) despite the fact that land usage would not plausibly change whether or not overhead shelter was permitted, given that homeless people already exist in public spaces.<sup>120</sup> This is a recurrent tactic used by government counsel in litigation, based on cultivating fear,<sup>121</sup> in which a change in the law for which the government can provide no evidence of triggering chaos is wielded as the clandestine harbinger of chaos or the first step on a slippery slope toward chaos.

Ross J’s findings turned crucially on the extent to which a tent city was not at issue: “to the extent [that] the purpose of the Bylaws is to prohibit tent cities, they are clearly overbroad.”<sup>122</sup> The overbreadth finding also turned on the lack of sufficient shelter spaces, so whether a ban on overhead shelter might still accord with the principles of fundamental justice if there were sufficient shelter spaces was also a separate (and here irrelevant) issue:

If there were sufficient spaces in shelters for the City’s homeless, and the homeless chose not to utilize them, the case would be different and more difficult. The court would then have to examine the reasons why homeless people chose not to use those shelters. If the shelters were truly unsafe, it might be that it would still be an infringement of s. 7 to require the homeless to attend at shelters

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<sup>119</sup> *Ibid* at para 187.

<sup>120</sup> The City assumed there would be a flood of new homeless rough sleepers simply because they had a conditional legal right to a box or tarp. Here is an excerpt from the City’s submissions quoted at length in the reasons, rising almost to the level of self-parody: “If the homeless can camp in public places, can anyone? How is the City to differentiate? Are the truly homeless to be issued free passes? What is to prevent a family camping trip stopping at a park near you? What is to stop the overnight grad party or the prostitute’s tent? Are all our beaches to be open to addicts who may pass out in the sand where their syringes will fall? Is public land to be allocated and partitioned as so many campsites? Where will businesses go and who will pay taxes when the tourists willing to pay for accommodation are gone? What happens when the public land is all parceled out? If camping is permitted, are foundations and generators and fireplaces far behind? Who will be responsible for safety when danger is courted by such conduct? Who will be liable if unsafe accommodation in a City park results in a fire causing personal injury and property damage? How will the spread of bacterial or viral diseases due to poor sanitation and hygiene be prevented? Are City of Victoria taxpayers to pay for the provision of tents and amenities? What will the City need to spend to protect its parks when they are colonized?” *Ibid*.

<sup>121</sup> “Modern elites will wield fear in order to rule, and... modern intellectuals will rely on fear, even as they distance themselves from Hobbes, to create a sense of common purpose.” Robin (2004) at 34.

<sup>122</sup> *Adams BCSC* at para 189.

or sleep outside without their own shelter. However, if the shelters were safe alternatives, it may not be a breach of s. 7 for the homeless to be required to make that choice. That, however, is not the case here, where there is a significant shortfall of shelter spaces.

Ultimately, the bylaws and operational policy were overbroad because less restrictive alternatives were available given the absence of sufficient shelter spaces.

Logically, once overbreadth was found, additional analysis was not necessary given that failure to conform to a single principle of fundamental justice is sufficient to find that a measure does not conform to section 7 of the *Charter*. However, Ross J proceeded to the arbitrariness question as part of a full analysis, which served to reinforce just how untenable the government's position was. Whereas the overbreadth question concerned whether less restrictive means were available given the objective, the arbitrariness analysis concerned whether the overhead shelter ban actually furthered the objective of park maintenance in any way. To texture its park maintenance objective, the City invoked a wide array of concerns based on the testimony of a Parks Environmental Technician, ranging from "Damage from sleeping/camping in sensitive ecosystems," to "disturbance of the birds" to "damage to the bluffs from excavation" to "litter left in parks by homeless people," to "syringes left in the parks,"<sup>123</sup> to "concern over damage to the turf."<sup>124</sup> However, Ross J reiterated that these concerns owed to the presence of homeless people in the parks, not whether they were allowed overhead shelter.

The AGBC and City argued that the concerns stated by the Technician would be intensified if the bylaws were changed because more people would be motivated to sleep in parks. In other words, the objective was not just to minimize the existing homeless "footprint," but to deter additional people from sleeping in the park. The logic is that the objective of park preservation requires keeping the number of homeless sleepers to a minimum, which requires

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<sup>123</sup> At least 40% of the 1500 to 2000 injection drug users living in Victoria are homeless. *Adams BCSC* at para 193.

<sup>124</sup> *Ibid.*

detering homeless people from using the parks, and banning overhead shelter is a deterrent.

However, Ross J found the deterrence argument not to be credible:

There is simply no evidence that people would flock to sleep in the parks once they were allowed to cover themselves at night with cardboard boxes or tarps. Moreover, that is not an inference that I am prepared to draw. It seems to me to be unlikely in the extreme and contrary to the evidence of the complex causes of homelessness to suggest that such a change would result in an increase in the number of persons sleeping in public places.<sup>125</sup>

For Ross J, on no possible understanding of the objective might it be advanced by an overhead shelter ban.

### *ii. The Section 1 Analysis*

Once the Bylaws and operational policy were found to violate section 7, violating the rights to life, liberty, and security of the person in a way not saved by sections 7's principles of fundamental justice 'internal limitation' clause, the question remained whether the measures could nonetheless be saved under section 1, the *Charter's* general limitation clause.<sup>126</sup> Section 1 reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>127</sup> Section 1 analyses in section 7 cases tend to be *pro forma* because no measure that violates section 7 has ever been saved by section 1.<sup>128</sup> This makes sense given that a "fundamentally unfair" measure is unlikely to be shown to be a "reasonable [rights] limit... [that is] demonstrably justified." However, a brief discussion is

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<sup>125</sup> *Ibid* at para 192.

<sup>126</sup> Section 1 applies only to section 2 and to sections 7 to 15.

<sup>127</sup> *Charter*. Note that the rhetoric here presumes that our society is already "free and democratic" or involves the court in a performative exercise in which the very application of the standard makes our society actually become progressively freer and more democratic. I discuss this temporality in Chapter 3.

<sup>128</sup> This is the case at the Supreme Court of Canada. As discussed below, lower courts have on rare occasions relied upon section 1 to save a section 7 violation, but this is based on a misunderstanding of the sections' relationship. The standard speculation is that section 1 might save a section 7 violation only in the case of an event on the order of "natural disasters, the outbreak of war, epidemics, and the like." *Reference re Section 94(2) of the Motor Vehicle Act* (1985) qtd in *Adams* at para 197. In any of those events, would governments' recourse to the courtroom not seem a bit quaint anyway?

warranted because Ross J's analysis here opened up one point of contrast with the Court of Appeal. Once a given measure is found to be "prescribed by law" (here, there is no question that the bylaws and operational policy are law in this sense), the *Oakes* test is generally used to assess the combined requirements of "reasonable limits" and "demonstrably justified."

The *Oakes* test unfolds in four stages. First, a measure must have a "pressing and substantial" objective. Second, there must be a rational connection between the objective and the means used to achieve it. Third, the means used to achieve the objective must minimally impair the claimant's rights. Fourth, the salutary effects of the measure must outweigh the deleterious effects. Both the Supreme Court and Appeal Court relied (if ambivalently in the latter judgment, as discussed below) on a now dated formulation of the test. As the later *Hutterian* case clarified, consistent with the growing international literature on proportionality analysis,<sup>129</sup> the meaningful disjuncture in the test is not between stages one, and then stages two to four taken together (previously known as the "proportionality subtests"), but rather between stages one to three taken together, and stage four.<sup>130</sup> This logic is compelling given that it is difficult to think about rational connection and minimally restrictive means without thinking about the objective itself. Conversely, in assessing the positive and negative *effects* of a measure, the idea is that judges are to aim to bracket the objective. For an already existing measure, judges are to attempt to assess its actual effects based on evidence supplied by the parties. For a hypothetical measure or one whose full effects cannot be known until sometime in the future, the court is to assess the likelihood of the positive effects touted by the government and the negative effects touted by the claimant before attempting to commensurate them. In this way, the objective may enter through the 'back door' with respect to future measures because it is hard to dissociate projected salutary

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<sup>129</sup> Several jurisdictions use some variation on the four-stage paradigm that diffused with liberal constitutionalism after the Second World War.

<sup>130</sup> *Alberta v Hutterian Brethren* (2009) at para 76.

effects from the objective. However, if the salutary effects are not demonstrably likely, judges should not give the impugned measure ‘deference’ simply because of the government’s claims.<sup>131</sup>

Much of Ross J’s discussion of the first three stages followed logically from her principles of fundamental justice analysis. She accepted that “the preservation of parks [is] an important objective.”<sup>132</sup> However, as in the arbitrariness analysis, she found no rational connection between the measures (denying overhead shelter) and preserving parks;<sup>133</sup> as in the overbreadth analysis, she found the measures not to be minimally impairing.<sup>134</sup> However, a noteworthy element appeared in her application of the fourth stage of the *Oakes* test.

In the final stage of the *Oakes* test, Ross J assessed the foreseeable negative and positive effects of allowing overhead shelter.<sup>135</sup> The Defendants cited several negative effects of an overhead shelter allowance; discussed above, these related to park damage, increased crime and drug use, *etc.* The defendants alleged that allowing overhead shelter “will likely concentrate and exacerbate many ill effects of homelessness and interfere with efforts to shelter and/or house people.”<sup>136</sup> Ross J held instead that the stated negative effects result from the presence of a large homeless population, not to the type of shelter used. Conversely, there were significant positive effects in allowing them to avoid hypothermia *etc.* She concluded that the “problems [cited by

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<sup>131</sup> The recommendation from proportionality scholars is to give salutary effects that are unlikely to happen a low weight (e.g. if negative effects were simultaneously almost certain, that would ‘tip the balance’ toward the negative effects unless those effects were so trivial that even their certain occurrence was acceptable... but claimants typically do not go to the trouble of litigation for trivial rights infringements). For a discussion of the internal logic of proportionality tests, see Zion (2013).

<sup>132</sup> *Adams* BCSC at para 200.

<sup>133</sup> *Ibid* at paras 202-204.

<sup>134</sup> *Ibid* at paras 205-207.

<sup>135</sup> *Ibid* at paras 208-215.

<sup>136</sup> Similar logic was invoked by Rich Coleman, the BC Housing Minister. He condemned *Adams*, saying the provincial government had a housing project under development. Fowler (2008). However, allowing homeless people temporary overnight shelter at least until such a project actually materializes would be an entirely coherent policy. Seven years later, as anyone who has visited downtown Vancouver or Victoria recently could confirm, no project that provides adequate and socially integrated space for the homeless has materialized.

the Defendants] will not be exacerbated if the homeless are permitted to protect themselves from the elements with temporary shelter. On the other hand, the condition of the homeless people will be improved by such shelter.’<sup>137</sup> Whereas the Defendants counterpose the homeless population—which must be moved indoors—to a housed population made coextensive with ‘the public’ (reminiscent of Kawash’s phantomal housed public, discussed in the Introduction), for Ross J the homeless are part of the public; allowing them to keep themselves alive when inevitably consigned to park spaces is also part of ‘maintaining public parks.’<sup>138</sup> In other words, for the Defendants, all of the positive effects of an overhead shelter allowance accrue to the homeless and all of the negative effects are borne by the City, which is made to stand in for ‘the public.’ By contrast, for Ross J, there are positive effects for the homeless as well as the public—which includes the homeless—and the negative effects are the result of the politically, socially, and economically overdetermined condition of homelessness, not the type of shelter allowed once homeless. The analysis at stage four demonstrates that even if it were credible, no deterrence objective could *in itself* justify depriving homeless people already sleeping in the parks of their life, liberty, and security of the person. This becomes especially clear when effects are separated analytically from the objective.

Finally, Ross J rejected the Defendant’s request for a declaration under section 24(1) of the *Charter*, which is used to invalidate specific government acts. If such a declaration were made, homeless people would have had to appeal to the courts on a case-by-case basis when ticketed for overhead shelter and/or having that shelter confiscated; this was not appropriate given that it would leave an unconstitutional law on the books and force homeless people to

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<sup>137</sup> *Adams BCSC* at para 215.

<sup>138</sup> I will discuss below how the homeless are figured either outside the public or to be maintained in a condition of ‘bare life’ within public spaces, both of which share a problematic set of assumptions.

undergo the time-consuming and frustrating process of dealing with courts repeatedly.<sup>139</sup> Instead, Ross J determined that a remedy under section 52 of the *Charter* (which is used to invalidate legislation that violates rights) was appropriate. Her ultimate disposition—carefully worded—was that the bylaws were “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter,” effective immediately.<sup>140</sup>

## 2. The Court of Appeal

The Court of Appeal praised Ross J’s reasons, quoting them throughout its own reasons, and adopted her decision with only minor changes, including with respect to the preliminary questions about positive obligations and property. However, it overturned the finding of arbitrariness in the section 7 principles of fundamental justice analysis, framed stage four of the *Oakes* test in the section 1 analysis somewhat differently, and altered the ultimate disposition. I will address each of these interventions in turn.

For the Court of Appeal, Ross J outlined the correct legal test for arbitrariness but did not apply it to the facts properly. At both levels, the test came from *Chaoulli*:<sup>141</sup> “a law is arbitrary where ‘it bears no relation to, or is inconsistent with, the objective that lies behind [it].’”<sup>142</sup> It is worth reproducing another part of the quotation at length:

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person’s liberty and security, the [clearer] must be the connection. Where the individual’s very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.<sup>143</sup>

<sup>139</sup> *Adams BCCA* at paras 219-237.

<sup>140</sup> *Ibid* at para 239.

<sup>141</sup> *Chaoulli* (2007). For a discussion of this case, see below at 64.

<sup>142</sup> *Adams BCCA* at para 117.

<sup>143</sup> *Ibid* [emphasis in text].

Assessing whether there was a “real connection on the facts,” Ross J had held that “there is simply no evidence that people would flock to sleep in the parks once they were allowed to cover themselves at night with cardboard boxes or tarps.”<sup>144</sup> However, the Court of Appeal saw the matter differently:

The City’s evidence of the events and damage caused at Cridge Park, the expressed preference of some homeless persons to live communally, and the evidence of urban camping generally provided some evidence that people would congregate in parks if the absolute prohibition on the erection of overhead shelter was lifted.<sup>145</sup>

The existence of “some” as opposed to ‘no’ evidence meant that the respondents on appeal (the homeless claimants) did not meet their onus of showing a lack of connection; the bylaw was found not to be arbitrary.

Overturing the finding of arbitrariness did not change the result of the appeal because the bylaws were already contrary to the principles of fundamental justice for overbreadth. But it is unclear that the Court of Appeal applied the test better than Ross J. In the above quotation, the Court of Appeal does not emphasize the part of the text saying that “where the individual’s very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.” Both levels agreed that the individual’s very life *was* at stake (the “life” subcomponent finding in the section 7 analysis). There might have been “some evidence” for the flood of new rough sleepers in theory, but given that there must be evidence in theory *and* in fact, was Ross J’s finding of arbitrariness incorrect?<sup>146</sup> The onus was on the claimants to disprove the speculative objective, but what facts

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<sup>144</sup> *Adams BCSC* at para 192 qtd in *Adams BCCA* at para 121.

<sup>145</sup> *Adams BCCA* at para 122 [emphasis in text].

<sup>146</sup> The standard on appeal for a ‘question of law’ or a ‘question of mixed law and fact’ is ‘correctness’ (the trial judge’s decision has to have been correct) whereas for a ‘question of fact,’ the standard is ‘reasonableness’ (the trial judge’s decision just has to have been reasonable). *Dunsmuir* (2008).

would have been sufficient? Presumably, they might find a jurisdiction in which a change from sleeping bags to temporary overhead shelter resulted in no increase in the number of rough sleepers (that is, no increase that could not be correlated with other factors such as a sheer increase in the number of homeless people), but does such a jurisdiction even exist? One might also ask why the onus is on the claimants at all to prove that the means used by the state only speculatively advance the objective.<sup>147</sup>

Finally, one might also problematize the Court of Appeal's assumption that there is such a tight calibration between the type of shelter permitted and the presence of people who prefer to live communally outdoors. The Court presumes that the law ('on the books' in the bylaws but 'in action' via the operational policy, to rely on a deconstructible dichotomy) may be a meaningful disincentive to living outdoors, but is someone like David Arthur Johnston, who rejects the indoor lifestyle, really going to pack up his meagre belongings and head indoors over a lack of overhead shelter? More likely, he will simply violate the bylaw, enduring tickets and ultimately jail terms. Most charitably, one might say that there is a rational connection between the city's objective and the overhead shelter ban only because the City's objective (framed in terms of deterrence) is itself so one-sided. In what sort of a society is the need to deter people from sleeping outdoors even a matter for serious discussion in the absence of alternatives—affordable housing, designated sleeping zones, or even sufficient emergency shelter space—that leave many no choice but to do so?

Because the Court of Appeal overturned the arbitrariness finding, it of course also overturned the finding of a lack of "rational connection" at stage two of the *Oakes* test. Again, this did not affect the result and the Court of Appeal upheld the lower Court findings on the three other stages. However, there is a noteworthy difference at stage four. In setting out the test, the

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<sup>147</sup> I return to questions of onus in homeless *Charter* claims below at 76.

Court of Appeal relied on an outdated formulation of that stage (going back to the original *R v Oakes* case almost 30 years prior), specifying “proportionality between the deleterious effects of the limitation and its purpose.”<sup>148</sup> It thus brought the objective into the one stage that is supposed to be about effects and not the objective (i.e. the inquiry concerns actual or demonstrably predictable effects, not effects purported to be desired by the government in the context of litigation). However, in the substantive analysis, the Court relied on the up-to-date formulation of the test: “the benefits of the prohibition do not outweigh the deleterious effects. The serious health risks that homeless people face as a result of the absolute ban on shelter outweigh any benefit that may flow from the blanket prohibition.”<sup>149</sup> The word “may” makes this formulation adequate, even if Ross J’s refusal to grant any positive effects seems sounder.

The last point of difference on Appeal was a substantial modification in the disposition. Although the change in diction may appear subtle, it had an effect on shelter policy in the City and in at least one subsequent case (*Johnston*, discussed below). First, the Court of Appeal restricted the number of invalidated bylaws so that those concerning “destroy[ing] buildings, injur[ing] other persons, or catch[ing] birds in parks” were not included.<sup>150</sup>

Second, the Court clarified the manner in which the bylaws were “of no force and effect.” They were to be “inoperative” so the bylaw would merely be “dormant for so long as paramount federal legislation remains in place, and automatically ‘revive’ if and when the paramount legislation is repealed.”<sup>151</sup> The relevant federal legislation would be something like a

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<sup>148</sup> *Adams BCCA* at para 127.

<sup>149</sup> *Ibid* at para 129.

<sup>150</sup> Only two bylaw subsections were caught in the modified disposition: sections 14(1) and 16(1) of the *Parks Regulation Bylaw*. The former bans “tak[ing] up a temporary abode at night” in a park and the latter bans constructing or “caus[ing] to be erected or constructed, a tent, building or structure, including a temporary structure such as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council.”

<sup>151</sup> *BCCA* at para 164. In legal discourse, cities, as constitutional ‘creatures of the provinces,’ derive their statutory authority from the provinces under section 92(8) of the *Constitution Act*, 1982. The constitutional interpretation

comprehensive housing strategy. However, the court would have to assess whether such federal legislation actually addressed housing to the extent that an overhead shelter ban were constitutional. In addition to Ross J's disposition that the bylaws violated section 7 and that they were of no force and effect insofar as they prevented temporary shelter, the Court of Appeal added specifically that "the Supreme Court of British Columbia may terminate this declaration on the application of the City of Victoria, upon being satisfied that sections 14(1)(d) and 16(1) no longer violate s. 7 of the *Canadian Charter of Rights and Freedoms*."<sup>152</sup> Conversely, Ross J acknowledged such a recourse but left it out of her disposition.

Third, Ross J did not define a "homeless person" for the purpose of enforcing the bylaw. This was likely a deliberate decision to avoid unduly narrowing and formalizing who can legitimately use overhead shelter in a park. However, the Court of Appeal accepted as a "working" definition "a person who has neither a fixed address nor a predictable safe residence to return to on a daily basis."<sup>153</sup> In light of the discussion in my Introduction about the meaning of home and homelessness, this working definition makes some sense;<sup>154</sup> however, it is ironic that what prevents a regularly occupied site in a public park from being 'home' for someone is the very lack of "safety" and "predictability" created by the City's public space policy.

Finally, the Court of Appeal changed the disposition to refer not to "temporary shelter" but to "temporary overnight shelter."<sup>155</sup> Whereas Ross J speculated that the bylaws may be constitutional if the city were to limit the restriction to the daytime only or if it were to designate acceptable sleeping areas, she deliberately did not make that part of her disposition. In other

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principle of paramountcy holds that when federal and provincial laws regulating the same issue conflict, the federal law trumps or is paramount.

<sup>152</sup> *Adams BCCA* at para 166.

<sup>153</sup> *Ibid* at para 161.

<sup>154</sup> Presumably, a person with a private home who simply opts to camp out for a night (e.g. 'for fun') without a permit could be dismissed from the park by police or bylaw enforcement officers.

<sup>155</sup> *Adams BCCA* at para 166.

words, such temporal or spatial amendments would themselves have to be assessed in the courtroom for *Charter* compliance. The Court of Appeal summarized the “overnight” controversy as follows:

We are told that the phrase ‘temporary shelter’ has been a source of dispute. There has been disagreement as to whether ‘temporary’ refers to the nature of the shelter’s construction, or to the length of time that it is able to remain in place. The evidence in this case was directed at the need for homeless persons to erect temporary overnight shelter, in order to be able to sleep outside. The declaration granted should, therefore, refer to ‘temporary overnight shelter’ rather than simply to ‘temporary shelter.’ This should clarify the intention that the City is required to allow shelters to remain in place only for the overnight period.<sup>156</sup>

Fourteen months passed between the trial judgment and the appeal judgment, and the allowance of “temporary shelter” had been in place that entire time.

City council apparently asked Ross J to clarify whether she meant “overnight shelter” and she replied that she meant what she wrote.<sup>157</sup> In other words, she was not ruling out the possibility that some homeless people might need shelter during the day too. In fact, during this time, charges against Johnston and two others under the *Parks* Bylaw were dropped on the grounds that the bylaw was unenforceable in light of *Adams* “and was not saved by a daytime only enforcement policy.”<sup>158</sup> The Court of Appeal, however, turned her hypothetical into their disposition, and thereby foreclosed daytime shelter. David Arthur Johnston conceded that appellate level argument was indeed oriented to overnight shelter, since that tactic was most likely to preserve Ross J’s ruling. He stated in his journal at the time of litigation—when it was still anything but clear that any part of Ross J’s ruling would be upheld—that “it is obvious that we were caught in the glory of the Ross ruling and did not want to spoil it with more

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<sup>156</sup> *Ibid* at para 160.

<sup>157</sup> Johnston (2011) at 236.

<sup>158</sup> *R v Woodruff* (2009) qtd in *Johnston* BCSC at para 7.

complication.”<sup>159</sup> It was in this context that *Johnston* occurred, which was a challenge to the daytime ban. However, before turning to that case, I will first engage in a more radical (and less ‘immanent’) critique of elements of both *Adams* decisions.

## **B. The Radical Critique of *Adams*: Dissonance with Homeless Narratives**

To be ‘radical’ etymologically means to go “to the root” of the problem.<sup>160</sup> Rather than accepting the sedimented coordinates with a given discursive terrain, the idea is to challenge those coordinates themselves. In the legal judgments, it is assumed, among other things, that the positions of both the City and the homeless claimants are legitimate and that some compromise must be struck. However, critical legal thought does not have to accept this assumption. Challenging the naturalized ‘positions’ themselves before relativizing them demonstrates that the government’s orientation to urban space—ratified uncritically (or insufficiently critically) by the courts—is saturated with questions of power, rather than representing a good faith disagreement about what constitutes ‘equality’ for homeless citizens.

Ross J admirably included the voices of several homeless claimants and witnesses in her reasons. Strikingly, however, what they said often had naught to do with being allowed temporary overnight shelter. Although it is not clear that all homeless people desire tent cities, several in the trial transcript repeatedly insisted on the importance of collective and long-term urban camping. Shelters would be unacceptable even if they had sufficient space because they are disciplinary, violent, and *socially isolating*. Ravenhill explains that “homeless culture is characterized by [the] dense social networks and reciprocity... characteristic of poverty cultures in general.”<sup>161</sup> Mark Smith, a street person, explained:

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<sup>159</sup> Johnston (2011) at 268.

<sup>160</sup> M’Gonigle (draft manuscript) at 21.

<sup>161</sup> Ravenhill (2008) at 146.

I am afraid to sleep in shelters . . . there is no sense of community. . . I do not want to sleep in fear. I would rather sleep under the trees and with a *community* of friends who I can trust with my personal safety.<sup>162</sup>

Another street person named Faith, recorded as Amber Overall, added: “after being evicted from Tent City I continued to be homeless until April of 2006. My life was horrible. I still miss Tent City and consider it the only true *home* I have ever had.”<sup>163</sup> Granted, the claimants would no doubt rather have a box than no box, but their stories seem incidental to that outcome.

The outcome in *Adams* was importantly contingent on homelessness not being a “lifestyle choice” for the vast majority of homeless people. Given state reconfiguration and the number of homeless people who have been immiserated by the loss of their homes, involuntariness is important. However, homelessness is in fact a choice for some, like David Arthur Johnson, who left his unfulfilling work as a baker. Likewise, Tomiko Rae Koyama left her paid work on Salt Spring Island to “run the [Tent City] kitchen at Cridge park and help out.” Ross J states that “her evidence was consistent with a political aspect to her participation.”<sup>164</sup> Koyama deposed: “I feed people, give out blankets and try to remind people that people have lived outside for thousands of years and we are allowed to do this.” However, Koyama and Johnston’s testimony is acknowledged only as a caveat to predominant involuntariness.

Johnston and Koyama’s simultaneous rejection of the dominant order and affirmation of an alternative (and their deep *alterity*, to adopt Wendy Brown’s term),<sup>165</sup> has not so much a “political aspect” as it performs a politics radically at odds with the assumption that the City is sovereign in supposedly public spaces, subject only to the most minimal rights protections. In her “right to life” analysis, Ross J quoted legal scholar Martha Jackman:

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<sup>162</sup> *Adams* BCSC at para 51 [emphasis added].

<sup>163</sup> *Ibid* at para 54 [emphasis added].

<sup>164</sup> *Ibid* at para 63.

<sup>165</sup> Brown (1995) at 53.

Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence... [these rights and freedoms] can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income... ‘other rights are hollow without these rights.’

But this logic is problematic in that it requires someone to have moved beyond the basic struggle for existence in order to enjoy “civil and political” rights (in Jackman’s language) or to engage in politics (in my language). And yet, in Canada, there presently are no legal rights to shelter (aside from the minimal one established in *Adams*), and it is a *non sequitur* to register people like Johnston and Koyama as ‘pre-political’ until state institutions, such as courts, can get them the very indoor shelter that they reject. Ross J’s statement that homeless people are “among the most vulnerable and marginalized of the City’s residents” is accurate on one level, and the City has produced added vulnerability with the hypothermia risk, but this framing has a performative dimension that risks obscuring how at least some homeless people—like those included in the transcript—are also assertive political agents.<sup>166</sup> Koyama’s statement—whatever its veracity—that people have lived outdoors for thousands of years goes some way to relativizing the now-hegemonic indoor lifestyle. What does it mean for any of us to ‘choose’ indoor life, given that our very subjectivity has been shaped by indoor experiences from a young age?<sup>167</sup> Johnston and Koyama may well be to the ‘involuntary’ homeless population what radical housed critics of neoliberal life are to housed people for whom systemic transformation is neither thinkable nor

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<sup>166</sup> *Adams* BCSC at paras 5, 194.

<sup>167</sup> BRE, a Toronto homeless person provides another perspective on criminalizing not just outdoor ‘home-making,’ but essential homeless life functions, criminalization which he explains is only relatively new: “These are the same tactics the bosses have hit us with for centuries (they called them poor laws in 17th century England). The names change but the intentions remain the same. Along with programs like workfare and the reduction or elimination of social services, criminalization is about driving the poor, unemployed, and homeless, into wage slavery or death. Serve capital or go away!” BRE (2007) at 232.

desirable. Both sets of positions are inflected by the totality of the given,<sup>168</sup> and if radical transformation is a precondition for equality and/as anti-hierarchy, both marginal poles at least warrant consideration.

The decision was ultimately tied not to preferences of some for outdoor spaces regardless of the indoor alternatives, but to the paucity of shelter spaces, however disciplinary and miserable those spaces might in fact be. Ross J stated that the case would be “different and more difficult” if there were enough spaces and that an inquiry into the safety of the spaces would then be necessary. The Court of Appeal stated explicitly that if there were sufficient shelter spaces to accommodate all homeless people, a blanket prohibition of overhead shelter might be constitutional, without adding the caveat about safety.<sup>169</sup> Although this possibility remains speculative in Canada, Leonard Feldman discusses an American case in which the presence of a large but miserable shelter was actually used at trial to permit municipal anti-homeless laws including prohibitions on urban camping.<sup>170</sup> Although it was not litigated, to give an idea of how traumatic shelter conditions can be, an example from Sacramento, California proves cautionary. There, a tent city that emerged after the 2008 financial crash was cleared and the residents warehoused in a “wintertime emergency shelter . . . [that was] highly regulated, fenced and locked at night.” One resident enacted his equality by asking: “would *you* go anywhere where they are going to turn the key and lock you in at night? No.”<sup>171</sup> In other words, the presence of adequate shelter spaces might make matters even worse for those who understandably opt not to use shelters despite the availability of spaces; at that point, expert testimony related to

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<sup>168</sup> “In this way the very thing that should be understood . . . becomes the accepted principle by which to explain all phenomena . . . namely the unexplained . . . facticity of bourgeois existence as it is here and now and acquires the patina of an eternal law of nature . . . enduring for all time.” Lukács (1999) at 157.

<sup>169</sup> *Adams* BCCA at paras 74, 166.

<sup>170</sup> *Joel v Orlando* (2000) discussed in Feldman at 77.

<sup>171</sup> Gonzalez (2009) qtd in Mitchell (2013) at 75 [emphasis added].

hypothermia would save no one—not deferring to the city is arguably easier to justify when the number of shelter spaces is at issue than when the *nature* of those spaces is at issue. Here we see a glimmer of how easy it would be for a city to enact an even more aggressive ‘homeless-free’ aesthetic; if a brutal but minimally ‘safe’ warehouse with enough space for all homeless people were constructed, those whom police caught outside it at night could be harassed, fined, or imprisoned. And how closely would the Courts scrutinize the level of safety? The government might argue simply that the shelter, although not entirely safe, is safer than being on the very streets whose dangers are produced in part by state policy.

Two precedents in particular, relied upon at trial and then reiterated by the Court of Appeal, form the crucial basis for a right to overhead shelter understood in terms of personal “liberty” and “security.” First, Ross J uses the *Morgentaler* abortion decision to enlarge in physical space the zone of state ‘non-interference’ with homeless bodies.<sup>172</sup> She quoted Wilson J in *Morgentaler*’s statement that “the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an *invisible fence* over which the state will not be allowed to trespass.”<sup>173</sup> Although invisible fences keep police from overhead shelter confiscation that could result in hypothermia, those same fences prevent homeless citizens from making the enmeshed social connections they enacted in the Cridge Park Tent City. Those connections afforded far more community and security than an individualized overhead shelter allowance. The narrow claim to a box or tarp is made out at the expense of claimants’ actual immediate needs, which could only be met by collective encampment. Ross J also quoted *Morgentaler* to

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<sup>172</sup> *Morgentaler* (1988). This decision was used most prominently in the section regarding whether state action was the cause of the alleged rights abrogation, and in the separate section 7 “liberty” and “security” analyses. See paras 105-113, 146-148, and 149-155 respectively. *Morgentaler* gave doctors the right to perform abortions and women the right to undergo them at independent clinics. Previously, the *Criminal Code* permitted abortions only at accredited hospitals and only with proper certification from the hospital’s Therapeutic Abortion Committee.

<sup>173</sup> *Ibid* at 164 qtd in *Adams BCSC* at para 123 [emphasis added].

the effect that “the role of the courts is to map out, piece by piece, the parameters of the [invisible] fence.”<sup>174</sup> I return to questions of mapping below, but it is noteworthy that in this instance, the fences on the map run right through the potential connecting lines of homeless community.

Ross J’s available ‘tools’—prior case law steeped in atomizing liberal ideology—make unintelligible the claimants’ communal aspirations. Like *Rodriguez*, the other case Ross J cited in her preliminary inquiry into whether there was sufficient state action, *Morgentaler* naturalizes a condition that is said to be independent of any state action, but then declares unconstitutional the state’s attempt to interfere with individual rights (to life, liberty, and/or security of the person) given that condition. Ross J acknowledges the state’s role in producing homelessness but then recurrently invokes precedents that limit the state’s ability to interfere with (atomistic) rights. Essentially, she casts the state simultaneously as *implicated* in homelessness and as an entity that must not interfere with the homeless (therefore standing *apart* from homelessness as a discrete entity) to the extent of threatening their lives.<sup>175</sup> Her approach seems necessary to achieve the desired outcome, but there is a real tension. If the state produces or contributes to producing homelessness, then it has always already threatened people’s lives—just not on the ‘emergency’ time-scale of hypothermia—given that if nothing else, homelessness has myriad adverse health consequences, including shortened lifespan.

Second, Ross J conjoins the social atomism of invisible fences with a vocabulary of choice from the *Chaoulli* decision.<sup>176</sup> In that case, the Supreme Court of Canada allowed the purchase of private health insurance on the grounds that wait times in the public health system

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<sup>174</sup> *Ibid.*

<sup>175</sup> Wendy Brown explains that “the same device [rights] that confers legitimate boundary and privacy leaves the individual to struggle alone, in a self-blaming and depoliticized universe, with power that seeps past rights and with desire configured by power prior to rights.” Brown (1995) at 126.

<sup>176</sup> *Chaoulli* qtd in *Adams* BCSC at para 121.

exposed people to health risks contrary to the *Quebec Charter* and (for some judges) section 7 of the *Canadian Charter*. The decision was widely critiqued in academic commentary because it was seen both to compromise the long-term integrity of the public system and to open the way to two-tier healthcare.<sup>177</sup> My point here is not to rehearse the *Chaoulli* debate, but rather to note the way it is recruited in *Adams*, which Ross J declared perplexingly to have analogous facts.<sup>178</sup> She quoted McLachlin CJ and Major J for the majority in *Chaoulli*:

The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.<sup>179</sup>

Thus, the claimants in *Adams* are analogized given that they do not seek an order that the government provide permanent shelter space, but rather that they be allowed minimally to shelter themselves given the government's failure. However, whereas wealthy Canadians in *Chaoulli* are able to disadvantage everyone with no option other than to use public healthcare by compromising the long-term integrity of that program, it is the claimants in *Adams* who are maintained in a position of risk and isolation relative to other Canadians. Another *Chaoulli* quotation that Ross J invokes is telling:

Prohibiting health insurance that would permit *ordinary Canadians* to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.<sup>180</sup>

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<sup>177</sup> See e.g. Flood (2006); Jackman (2010); Marchildon (2005); and Prémont (2008).

<sup>178</sup> BCSC at para 120.

<sup>179</sup> *Chaoulli* qtd in *Adams* BCSC at para 121.

<sup>180</sup> McLachlin CJ and Major J in *Chaoulli* at paras 123-124 qtd in *Adams* BCSC at para 150 [emphasis added].

But who are these “ordinary” Canadians? Erasing the prohibition helps only those who can afford to buy private health insurance and in fact harms all those Canadians who cannot.<sup>181</sup> By invoking *Chaoulli*’s arch-liberal approach to choice, Ross J justifies the right to a box. However, she does so at the expense of effacing the relationality within the homeless community, as well as perhaps even between homeless people, on the one hand, and housed people, on the other.

Although *Chaoulli* is reinscribed for the way it casts ‘liberty,’ in a way that negates its (deeply political) economic assumptions, the government invokes economic considerations throughout the litigation. Neither Court specifically deems such considerations irrelevant altogether (however irrelevant they may be to the use of overhead shelter, at least at the trial level). For instance, “it is the City’s submission that absent the Bylaws, there will be an inevitable colonization of public spaces with a devastating impact to the economic viability of adjacent areas.”<sup>182</sup> Cities are intensely concerned with being ‘competitive’ economically, an objective that is threatened by the presence of homeless people, and this is particularly true in Victoria today. In his thoughtful and empirically rich Master’s thesis on urban architecture and homelessness in Victoria, John Franklin Koenig explains:

Victoria is mythologized as a ‘Garden of Eden’ and a ‘Heritage City’ where contemporary ‘urban Problems’ are deemed sinfully and anachronistically out of place. The primary function of these ideologies is to attenuate the contradiction of homelessness in a city that aggressively markets itself as a ‘City of Gardens’ and a paradisaal tourist destination.<sup>183</sup>

In *Adams*, the City submitted that “Tourism Victoria, the hotel and restaurant industry and the Downtown Victoria Business Association (DVBA) all report increased complaints from visitors

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<sup>181</sup> There is a more distal irony in that as disproportionate users of the Canadian public healthcare system, homeless people are harmed to the extent that *Chaoulli* compromises that system, but it is one of the precedents used to get them the right to a box.

<sup>182</sup> *Adams* BCSC at para 173; BCCA para 119. See also *Adams* BCSC at para 187 (“Where will businesses go and who will pay taxes when the tourists willing to pay for accommodation are gone?”), para 214 (“Tourism Victoria, the hotel and restaurant industry and the Downtown Victoria Business Association (DVBA) all report increased complaints from visitors about the visible homeless in the downtown.”)

<sup>183</sup> Koenig (2007) at 14.

about the visible homeless in the downtown.”<sup>184</sup> Koenig explains that “Victoria’s ‘narrative of regeneration’ has focused on revitalizing the downtown core, thereby signalling the exclusionary vision of downtown as a large ‘tourist bubble’ accessible only to the privileged classes.”<sup>185</sup> He adds that far from just fielding tourist complaints, the very same “Downtown Victoria Business Association [attempted] to ban social services from locating in the downtown core... [which] is testimony to the currency of this exclusionary vision.”<sup>186</sup> Homeless people are cast not as political agents but as political objects that interfere with the imperative of one city to compete with others for capital—tourists and consumers<sup>187</sup>—in a globalized economy that aggressively concentrates all capital, creating ever more intense inequality between and *within* countries.<sup>188</sup> The homelessness about which the DVBA complains is the index of the inequality it reproduces.

Finally, the overall framing of the *Adams* judgments at both levels is depoliticizing. At the very outset of the trial judgment, Ross J adopts the rhetoric of an American case with similar facts, framing the litigation as “...an *inevitable* conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.”<sup>189</sup> And this framing was restated at the beginning of the Appeal judgment.<sup>190</sup> One might add to the list of concerns related to order and aesthetics the aforementioned “responsibility” of the government to maintain ‘economic viability’ which is left unstated because it is not part of a proper rights

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<sup>184</sup> *Adams* BCSC at para 214. One gets the impression that the main problem is “visibility,” not that some people are roofless without being allowed a collective place in common space.

<sup>185</sup> Koenig (2007) at 125.

<sup>186</sup> *Ibid.*

<sup>187</sup> “Cities are sold just like any other consumer product. They have adopted image advertising [and] the product must plausibly resemble the representation.... To appeal to tourists, cities must be consciously molded to create a physical landscape that tourists wish to inhabit.... The constant transformation of the urban landscape to accommodate tourists has become a permanent feature of the political economy of cities.” Fainstein and Judd (1999) at 4-6 qtd in Koenig (2007) at 118.

<sup>188</sup> Harvey (2007).

<sup>189</sup> Senior District Judge Atkins in *Pottinger* (1992) qtd in *Adams* BCSC at para 1 [emphasis added].

<sup>190</sup> *Ibid* qtd in *Adams* BCCA at para 3.

analysis and/or it is so obviously tied (in a neoliberal era) to maintaining “order” and “aesthetics” that it need not be discussed. The “inevitable conflict” framing serves to naturalize the (presumed legitimate) litigation positions of both the homeless claimants and the state, and then attempts to find a compromise somewhere in ‘the middle.’<sup>191</sup> Pierre Schlag identifies a “centrism” in law school teaching that also seems relevant to adjudication: “Centrism celebrates moderation, reasonableness, good judgment, avoidance of extremes, following the norm, judicial minimalism, the passive virtues, balancing, and the middle of the bell curve.”<sup>192</sup> But this is problematic if one of the positions is in fact inherently not subject to compromise from the perspective of at least one of the parties.

In this case, what was not subject to compromise was the homeless claimants’ insistence on tent cities or at least the individual use of overhead shelter at any time of day, an insistence upon which David Arthur Johnston staked his life more than once with hunger strikes in jail.<sup>193</sup> Of course, given that homeless citizens have no private spaces to which to retreat, their existence in what are otherwise leisure or transport spaces puts the very t(r)opology of ‘public/parks’ versus ‘private/indoor homes’ into question. But another question is how it would ever be possible to commensurate park aesthetics and homeless lives, as long as some are forced to live in parks *or* choose to do so without also having private property. This makes the dichotomy insensitive to homeless narratives at best and a justification for homeless abjection at worst. Most importantly, *whose* aesthetics are under discussion? Posing the question with aesthetics

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<sup>191</sup> What if some park ‘damage’ had been necessary for homeless citizens to live on even remotely equal terms with housed citizens? Just how ecologically damaging are homeless habits compared to those of, say, the biggest consumers and property owners? What does it mean to consign the homeless to pristine spaces so that ecological plunder can proceed on private property? These are important questions that did not have to be asked in order to make out the overhead shelter claim, so they were not asked.

<sup>192</sup> Schlag (2007) at 575.

<sup>193</sup> MacLeod (2007) reproduced in Johnston (2011) at 16.

arrayed against homeless life reinscribes the mainstream cultural construction of homelessness in opposition to a (normalizing) phantomal housed/park-leisuring public.

Compromise or negotiation reasoning that naturalizes positions presumed legitimate was also at work in the “principles of fundamental justice” analysis and in the application of the *Oakes* test. Martin Loughlin explains that the instrumental rationality of balancing incommensurables using proportionality tests is paradigmatic of judicialized politics today: “All constitutional rights become conditional—conditional on a perception of their utility in ensuring the realization of the public aspirations of the political nation.”<sup>194</sup> And Wendy Brown argues that for nations, there is an unwritten paramount aspiration or ‘law’ of capital growth: “the *state must not simply concern itself with the market but think and behave like a market actor* across all of its functions, including law.”<sup>195</sup> Ultimately, *Adams* in many ways failed to accommodate homeless narratives that do not fit this market actor paradigm, and problems in the judgment have since radiated outwards into future cases in the common law edifice, one of which is *Johnston*, a challenge to the persisting daytime ban. *Johnston* is instructive not only because it examined the daytime question in (somewhat) greater detail, but because it demonstrated new ways in which homeless narratives were ‘lost in translation’ to courtroom legal discourse.

### **C. *Johnston*: Appealing the Daytime Shelter Ban**

After the Court of Appeal judgment in *Adams*, David Arthur Johnston and his friend David Shebib challenged the City’s amended bylaw, which still banned temporary overhead shelter in parks between 7:00 a.m. and 7:00 p.m. They argued that it was unconstitutional to prohibit daytime shelter as long as some homeless people sleep during the day and conscientiously acquire it. In his written submission, Johnston asserted that

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<sup>194</sup> Loughlin (2010) at 370.

<sup>195</sup> Brown (2005) at 43 [emphasis in text].

until the City can guarantee... each homeless person... the option of getting sleep enough to maintain [his or her] health[,] it is not Constitutional to prevent [the homeless] from, conscientiously, securing it for themselves. Period. It is not reasonable for the City to presume over 1000 people [will] adjust their schedules to [sleep only] when it is dark.<sup>196</sup>

However, the appellate disposition in *Adams* made it relatively straightforward in *Johnston*, at the trial level (in the BC Provincial Court) and at both appellate levels, in the Supreme Court and Court of Appeal, to deny the daytime claim.

Bracken J at the Supreme Court briefly summarized the *Adams* judgments. He rehearsed Ross J's findings of fact, including the key finding that "the lack of a tent or other structure to provide even a minimal degree of protection from the elements, light, and noise would result in even more disturbed and fragmented sleep, with... adverse health effects."<sup>197</sup> Bracken J stated, however, that "it is clear throughout both the trial and appeal decisions in *Adams* that ... the s. 7 *Charter* right sought to be protected was the right to erect a temporary shelter for sleeping in public places at night."<sup>198</sup> This was true at the Appeal level. However, as I discussed above, Ross J entertained the daytime ban hypothetical (along with the "designating a restricted area" hypothetical) as something that might be constitutional under the right circumstances. However, she deliberately specified no daytime restriction in her disposition, making 'temporary' refer to the quality of the shelter used and not to its absence during one mandatory period each day.<sup>199</sup> In any event, it was indeed the higher level judgment that was binding in *Johnston*, but Bracken J's framing elides some of the nuance with respect to the daytime question.

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<sup>196</sup> *Johnston* BCSC at para 31.

<sup>197</sup> *Ibid* at para 14.

<sup>198</sup> *Ibid* at para 22.

<sup>199</sup> The shelter may even have been temporary in duration, but not banned at the same time for all homeless people. In other words, if a police or bylaw enforcement officer knew that a particular homeless person slept during the day but dutifully packed up at night when awake, such conduct might be permitted under the wording of the trial level *Adams* disposition.

Bracken J determined that there was no conclusive evidence that there were insufficient daytime shelter spaces. Representatives from the Streetlink Emergency Shelter and from the Salvation Army testified via affidavit that there were a total of roughly 30 daytime cots available between those organizations.<sup>200</sup> The Cool Aid drop-in shelter is also open during the day for meals and showers, but did not offer cots.<sup>201</sup> Johnston and Shebib argued, based on the logic of *Adams*, that the daytime bed availability was insufficient given that there are more than 1000 homeless people in Victoria. Although most probably sleep during the night, that did not matter because no inquiry was made into the number of homeless people actually desiring nighttime shelter in *Adams*; that there were far fewer shelter spaces than homeless people was sufficient evidence of under-capacity, bolstered by the fact that many were turned away because shelters were full. In the relatively brief Supreme Court judgment, Bracken J repeated six times some close variation on the statement that there was “no evidence [in the Provincial Court trial transcript] that there is an unavailability of indoor locations to sleep during the daytime.”<sup>202</sup> Despite the Affidavit evidence from the three major shelters in Victoria, it seems he would have required evidence either that some people were being turned away or for the homeless population to be “broken down to identify those who want or need to sleep during the day.”<sup>203</sup> He found that although there was a section 7 violation (for which he provided no analysis), the daytime ban was saved by section 1.<sup>204</sup> This was surprising, however, if for no other reason than because as

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<sup>200</sup> The 21 beds at the Salvation Army are also closed each day for three hours for cleaning. *Johnston BCSC* at para 29.

<sup>201</sup> *Ibid* at paras 28-30.

<sup>202</sup> *Ibid* at para 33. Other instances include paras 34 (twice), 46, 47, 64.

<sup>203</sup> *Ibid* at para 34.

<sup>204</sup> Although the City of course made no concession on section 7, he wrote at para 5: “The City of Victoria... submits that the Bylaw prohibiting the erection of shelters during the day is a reasonable limit of the s. 7 right under s. 1 of the *Charter*.”

discussed above, the Supreme Court of Canada has never found a section 7 violation to be saved by section 1.<sup>205</sup>

Bracken J repeated the “inevitable conflict” framing from *Adams* and propagated the balancing rhetoric. He stated that there is “a need to balance the rights of the individual against the public interest.”<sup>206</sup> And he approvingly quoted the trial judge to the effect that:

The weakness of the defendants’ position... is the essential failure to recognize that in any community there must be accommodation, compromise. The City has now, although arguably belatedly, recognized that fact in the present Amended Bylaw. In doing so, the City has brought itself within the requirements for constitutionality.<sup>207</sup>

Adding yet another binary to be negotiated, he also described “the conflict” as one between “ordinary users of parks and public places . . . and homeless persons.”<sup>208</sup> He ultimately intoned that “no doubt there will be many more areas of conflict until the complex problem of homeless people is finally resolved.”<sup>209</sup> He added:

Until then governments must use great care in placing limits on those ‘essential life-sustaining acts’ homeless people necessarily carry out in public and which are found to be fundamental rights under the *Charter*. Once a s. 7 *Charter* right is established, the government is able to impose only those limits that it is able to demonstrate are ‘... justified in a free and democratic society.’<sup>210</sup>

Picking up what Schlag would call the ‘centrist’ framing from both *Adams* decisions, Bracken J cast the lis (or litigation conflict) as a clash between individual/homeless and public/ordinary park users. The City seems to be constituted transversally to the two sides, presiding over the ‘compromise’ in the name of the ‘community.’ This all sounds, well, reasonable. The

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<sup>205</sup> The same is likely true of all lower courts. As mentioned above, for a state measure to violate the principles of fundamental justice but nonetheless be saved because of some pressing public interest would require something like a natural disaster, war, or similar emergency (that is, if it ever came before a court).

<sup>206</sup> *Johnston* BCSC at para 49.

<sup>207</sup> *Ibid* at para 55.

<sup>208</sup> *Ibid* at para 56.

<sup>209</sup> *Ibid* at para 60.

<sup>210</sup> *Ibid* at para 61.

governments' very act of taking "great care" in limiting (as in, 'not abrogating?') the "essential life-sustaining acts" of the homeless in the name of freedom and democracy seems actually to make our society freer and more democratic. Not only that, but as rights-protecting supervisors of the government, it is courts that insist on a real "demonstration" that rights limitations are justified. Homeless people should feel doubly protected. But was the compromise struck in the case really one that asked no more of homeless people than the park-leisuring 'public'?

Before returning to that question, I will turn to the Court of Appeal judgment in *Johnston*, which denied Johnston's appeal (now without David Shebib) of the Supreme Court judgment.<sup>211</sup> This time, the Court repeated that there is "no evidence" about daytime shelter availability five times in a mere four pages.<sup>212</sup> However, it chided the Supreme Court for botching the Constitutional inquiry:

Counsel for the respondent, who represented the City throughout this case, denies conceding a s. 7 breach at any stage. No such concession appears in the trial transcript, yet curiously the appeal judge's reasons go directly to the s. 1 justification stage without addressing the existence of a breach of s. 7.

This lent some credibility to the (post)legal realist notion that judges decide on an outcome first and make the tests fit later (intuition precedes public justification).<sup>213</sup> Nonetheless, the Court of Appeal concurred with the outcome on a proper understanding of the judiciary's own tests, finding neither a section 7 nor section 1 violation. The Court insisted that *Adams* "did not grant the homeless a freestanding constitutional right to erect shelter in public parks" because it was

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<sup>211</sup> Shebib pursued his claim separately with a slightly different approach but an identical result. *Shebib* (2012). I will focus on *Johnston* for lack of space, because *Shebib* mostly concerned whether he properly complied with the Rules of Court, rather than his substantive claim, and because *Johnston* is a sustained thread in this thesis.

<sup>212</sup> *Johnston* BCCA at paras 4, 5, 7, 16, 17.

<sup>213</sup> Of course, this possibility is disavowed because if judges cannot stick to their own rules and apply them with sound reasoning, they lose their self-perceived ability to differentiate themselves from politicians or anyone else who might take it upon oneself to prescribe a norm designed to bring to a (provisional) close the law on some controversial social matter.

linked to the number of shelter beds *etc.*<sup>214</sup> When asked during litigation why the daytime ban violated section 7, Johnston suggested that preventing people from “erecting their own dwellings inflicts an indignity upon them.”<sup>215</sup> This seems like a reasonable impromptu response in the courtroom, especially in light of his submissions regarding the lack of daytime shelter spaces and the need for some homeless people to sleep outdoors, all part of the written record available to the Court. However, the Court ultimately was not moved:

As to the alleged affront to human dignity, more than a bare statement of the theory is required to take it seriously. Such a submission should be supported by social science and proof of facts demonstrating the harm alleged. There is nothing like that in this case.<sup>216</sup>

The impression one gets from the two judgments, taken together, is that the courts take the issue of homeless shelter seriously, but that the daytime shelter claim could not succeed because whereas the City was willing to ‘meet the homeless half way’ by allowing nighttime overhead shelter, the unreasonable self-represented homeless litigant was not so willing to be reasonable by simply sleeping at night like most people in order to open his ‘living room’ for housed people visiting parks during the day. But is the matter so simple?

Bracken J acknowledges some of the reasons why homeless people might need overhead shelter during the day. Although Johnston’s argument centred on sleep, Bracken J conceded that “there are times when homeless people are [sic] impacted by severe weather conditions between the hours of 7:00 a.m. and 7:00 p.m. During such times there may be a greater requirement for shelter.”<sup>217</sup> He dismisses the concern by adding that “the City also says there are alternate places for shelter where homeless people can find sanctuary from the elements; even if they are not able

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<sup>214</sup> *Johnston* BCCA at 12.

<sup>215</sup> *Ibid* at para 14.

<sup>216</sup> *Ibid* at para 17.

<sup>217</sup> *Johnston* BCSC at para 52.

to sleep in those places, they will at least be safe.”<sup>218</sup> Putting aside the unacceptability of sleep deprivation, will they be safe? Are these special sanctuaries somehow immune from the problems homeless people typically cite with respect to shelters?<sup>219</sup> To invert an incantation, where was the evidence of *that*?

Unsympathetic to weather concerns, Bracken J also rejected sleep-related concerns. He included in his reasons a contention put forth by Johnston and Shebib:

The appellants point out in their material that many of the people who are homeless in the Victoria area suffer from mental illness and by choice or necessity do not sleep at night and need to be able to sleep under shelter during the day.<sup>220</sup>

Although Bracken J ultimately did not accede to this justification, presumably because the claimants had not proven that it applied to them personally,<sup>221</sup> it makes sense, especially given the (non-negligible) base rates for sleep-disturbing “mental illness” (whether or not one accepts the medicalization paradigm) in the general population.<sup>222</sup> But there is another very compelling reason why someone may need to sleep during the day: many homeless people do in fact work. However, given their physical appearance and the difficulties associated with being homeless, they of course cannot get the most exclusive jobs. For instance, they may be more likely to work a ‘graveyard’ shift, which would then require daytime sleep. Alternatively, they may work during the day but the work may be so arduous (or their fatigue so severe in any event) that they need a nap before 7:00 p.m. Finally, it was not raised in either judgment, but in his journal Johnston recounts how unpleasant it is to be awoken by a police officer or bylaw enforcement officer at 7:00 a.m. every morning (after *Adams*, the City hired several such officers to make

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<sup>218</sup> *Ibid* at para 46.

<sup>219</sup> As discussed in the Introduction, these include violence, theft, cisnormativity, heteronormativity, lack of privacy, lack of space, gender segregation, familial segregation, refusal of pets, onerous rules, workfare requirements, behavioural reform requirements, *etc.*

<sup>220</sup> *Johnston BCSC* at para 12.

<sup>221</sup> See below at 77.

<sup>222</sup> Lader, Cardinali, and Pandi-Perumal (2006).

“morning sweeps”).<sup>223</sup> And as discussed above, it was an accepted fact in *Johnston* that long-term sleep deprivation had myriad adverse health consequences.

To make out his claim, Johnston was required to prove that there are insufficient shelter cots during the day. But should that not be irrelevant given that it presumes equivalence between shelter and outdoor space? Those who have private homes are not required to pack up their belongings and head to a shelter every time they need a daytime nap. But even the judges’ evidentiary criterion is worth interrogating. It has been noted for some time that who is to bear the onus of proof at various stages in *Charter* claims is unclear.<sup>224</sup> Rather than being a principled determination, it seems *ad hoc*. In *Adams*, the burden was understandably placed on the City to prove that sufficient night-time shelter spaces existed (it could not). However, here the burden is placed on Johnston to prove a negative,<sup>225</sup> the unavailability of day-time spaces. Beyond reiterating the evidence that there were only 40 daytime spaces for more than 1000 homeless people, would the homeless litigant have to provide comprehensive evidence of occupancy rates across all shelters during the day? (averaged over a week? Or a month? Or a year?).<sup>226</sup> Is it possible that the incantation about “no daytime shelter evidence,” repeated nine times across the two judgments, was a rhetorical strategy aimed to “shut down thought”<sup>227</sup>—to foreclose inquiry into why such proof was required and whether there really was *no* evidence despite the affidavits

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<sup>223</sup> Johnston (2011) at 301; Young (2009) at 111 fn40. A certain percentage of the population also has “delayed sleep phase syndrome,” in which one’s circadian rhythm (which governs organ activity and consciousness on a cellular level) shifts so that low cellular activity levels corresponding to sleep take place later; this may have a genetic component. Von Schantz et al (2006). The ideal time to sleep may be between 3:00 a.m. and 11:00 a.m. (or even later at both ends). So, waking someone up at 7:00 a.m. would be like waking someone with a standard sleep phase (beginning at midnight) at 4:00 a.m. Obviously, that would be disruptive.

<sup>224</sup> See e.g. Choudhry (2006) at 524.

<sup>225</sup> This is somewhat like saying, ‘prove that you have never been to the North Pole.’

<sup>226</sup> Johnston and/or Shebib would have to visit every shelter in the city, those shelters would have to have data about daytime usage, and they would have to be willing to share that data with people who looked more like ‘clients’ than ‘credible’ courtroom actors.

<sup>227</sup> Schlag (1995) at 1115. “The law of judges is thus given shape, not by a desire to produce insight or understanding, but rather by that law’s desire to hide from itself its own violent and destructive character... [it] institutes aesthetically, socially, and rhetorically all manner of assumptions, attitudes, and beliefs constructed to close off inquiry, constructed to shut down thought.”

from shelter staff? Likewise, the Court of Appeal requires not just “proofs of facts” but also “social science evidence.” However, was the relevant social science evidence not already part of the law because it was given judicial notice in *Adams*?

Bracken J suggests that someone using daytime shelter “legitimately” could apply to have any charges dropped under section 24(1) of the *Charter*. However, that was precisely the remedy rejected in *Adams* because if a law potentially violates fundamental rights (and the daytime ban *does* if one understands the need for *some* homeless people to use overhead shelter during the day at *some* times), it should not be left on the books, but found to be “of no force and effect” and either stricken or declared inoperative under section 52 of the *Charter* (again, it was the latter in *Adams*).

Whereas the City is always presumed to speak for a generic ‘public’, Johnston is unable to speak on behalf of his homeless community. Citing photos of Johnston and Shebib protesting in a park beside the Victoria City Hall without sleeping, Bracken J declared that “the appellants were simply seeking to test the restriction the City had imposed under the Amended Bylaw.”<sup>228</sup> He thereby individualizes Johnston’s claim before repeating the litany of homeless/public binaries, which serve to reinscribe Kawash’s deconstructible housed-homeless opposition. Here Schlag’s courtroom centrism reasserts itself with a vengeance. What sort of “compromise” is entailed in forcing those with no private property and those with the least energy for constant motion to be subject to coerced mobility? Having to listen to judges demand such compromise over and over might have contributed to Johnston finally losing his usual courtroom composure in a later hearing (in 2013) related to his continued urban camping activities. Judge Chaperon stated didactically that “‘we’re part of society. We respect the law because we respect the rights of others...’ [but] Johnston appeared to lose his temper, interrupted and yelled at Chaperon. ‘Just

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<sup>228</sup> *Johnston* BCSC at para 48.

sentence me. You're talking nonsense,' he said angrily."<sup>229</sup> A close reading of the right to shelter jurisprudence suggests that she *was* talking nonsense—albeit what Schlag would call institutionally “organized nonsense.”<sup>230</sup> Johnston’s anger is completely understandable.

Having begun a campaign in 2012 to raise national awareness about the right to sleep and to advocate for tent cities,<sup>231</sup> he seems no longer to see the courtroom as a potential site of justice. Rather, according to his last entry in the online version of his journal (posted after the publication of the book form), he feels he has a duty to *endure* the courtroom as a “martyr” for the right to sleep.<sup>232</sup> Although *Johnston* in its outcome ratified *Adams* at the Court of Appeal level, it illustrated the many additional ways in which homeless narratives fail to translate in the courtroom. For that reason, it is not just an event, but if read critically, rises to the level of a Berlantian case.

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<sup>229</sup> Dickinson (2013).

<sup>230</sup> Schlag (2007) at 580.

<sup>231</sup> Parsons (2012).

<sup>232</sup> Johnston (Online) at “May 2013”.

When [Cohen] opened the door of his apartment/office [Oedipa] saw him framed in a long succession or train of doorways, room after room receding in the general direction of Santa Monica, all soaked in rain-light... She glanced down the corridor of Cohen's rooms in the rain and saw, for the very first time, how far it might be possible to get lost in this.

—Thomas Pynchon, *The Crying of Lot 49*

Tent City is a symbol of our collective desire to move *out* of a system that denies life and into a way of being that affirms life.

—Kristen, *The Right to Sleep*

## Chapter 2: Interrogating the Normative Legal Commentary on the Right to Shelter

### Introduction

In Chapter 1, I examined the jurisprudence on the right to shelter understood as the ‘negative’ right to be free from state interference when one is homeless. I problematized *Adams* and *Johnston* for some of the assumptions that both cases reinstate from prior jurisprudence and, in doing so, for their discordance with homeless narratives. Now, in this part, I want to evaluate proposals that aim to reform the shelter jurisprudence so that it can better accommodate marginal narratives, such as those of homeless people, and thereby to help the courts ‘go further’ by recognizing obligations on the part of the government to provide housing *etc.* The idea is that jurisprudential achievements in the ‘emergency’ temporality of overhead shelter affirmation might be built upon, in what I termed (in the Introduction) a ‘long durée political temporality,’ to affirm new rights and thereby to involve the courtroom in a progressive political transformation toward a more egalitarian society. Although I agree that there have been significant courtroom victories on the emergency temporality, and that, within this temporality, the courtroom will likely be an important site in the future, it cannot be the site to achieve meaningful political

transformation with respect to shelter. To defend my ‘temporal disjuncture’ thesis, I will engage with the work of Margot Young, which provides what I view as the most sophisticated defence of ‘conjoined temporalities,’ alive to many difficulties therewith.

First, I will argue that although greater sensitivity to claimant context is a worthwhile law reform goal, certain structural factors will continue to prevent courts from translating homeless narratives into the discourse of rights. Here I will build on my discussion of homeless narratives in Chapter 1. Margot Young suggests that courts might improve their contextual analyses by becoming better attuned to identity intersectionality. However, I argue that homeless politics might best be figured in terms of shared struggle more than identitarian stratification. Young also argues that the category of ‘harm’ might best replace an inquiry into ‘choice’ but I note how this may performatively downplay homeless political agency. Second, I argue that courts will not order governments to provide some level of universal housing and then superintend that provision. To do so, I agree with Young and others that the positive-negative rights dichotomy relied upon in *Adams* is theoretically incoherent—all rights require ‘positive’ government action of one sort or another. However, I argue that it serves a political and structural rather than doctrinal function (or rather, a political *as doctrinal* function), one that is again radically incompatible with homeless narratives. Third, to illustrate this point, I will turn to one last right to shelter case, *Tanudjaja*. Whereas *Adams* and *Johnston* sought ‘negative’ rights to be free of state interference with their attempts to shelter themselves outdoors, in *Tanudjaja* constitutional law professors sharing Young’s perspective went to court to assert a positive state obligation to provide housing; the court’s inhospitability to the claim showed just how tenacious the positive-negative rights dichotomy can be, its theoretical incoherence notwithstanding.

### A. Normative Legal Commentary on Right to Shelter in Canada: Courtroom Activism

In Chapter 1, I critiqued *Adams* and *Johnston* in order to show how the right to shelter jurisprudence is incompatible—even in its most egalitarian moments—with the deep aims disclosed in homeless narratives. Now, I wish to evaluate the dominant approach to the right to shelter in the legal academy. A literature review suggests that positions advocated by Margot Young, Sarah Buehler, Martha Jackman, and Bruce Porter exhaust the spectrum of academic legal commentary on shelter in Canada. All share the claim that whatever else occurs in other institutions or in society generally, courts can and should be persuaded to recognize more expansive rights in the courtroom. This would bring our country in line with our international human rights commitments and improve the lives of possibly millions of the most disadvantaged Canadians.

Young recently articulated well the extent to which even modest egalitarian political goals have been eroded by neoliberal governments in Canada over the past two decades:

The triumph of neo-liberalism, and its attendant vision of the sturdy, calculating individual, ground many of these developments. Theorists chart both the ‘hollowing out’ and, then, the ‘filling in’ of the state as part of neo-liberal policies. The role of government is both reduced and expanded to serve the ‘rational, entrepreneurial, economic individual.’ The idea of ‘social’ citizenship is eviscerated: social issues are viewed as essentially economic problems and the economic order reaches to include all human activities within its logic. The state is no longer offered by our political elite as a resource for social justice and a facilitator of substantive equality and freedoms. The citizen stands alone, free to succeed or fail on his or her own.<sup>233</sup>

Young writes about her despair with respect to the clear need for change in “the political arena” and “unresponsiveness to calls for such change” in that arena (importantly, for her, the state and the political arena are coextensive).<sup>234</sup> At the same time, she acknowledges the “inevitable

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<sup>233</sup> Young (2014) at 2.

<sup>234</sup> Young (2009) at 317. Another example of this is when she frames the question of “progressive social change” as a choice between litigation and “organization within the legislative arena.” *Ibid* at 331.

capture and limitation of progressive litigation by a legal system only too well implicated in, and supportive of, current political, economic, and social arrangements.”<sup>235</sup> She acknowledges the dangers in being seduced by doctrinal reform as a mechanism for social change, but confesses that (for a law professor) “it is often unclear what else to do.”<sup>236</sup> She writes that “social movements seeking radical change seldom face anything but hostile forums. Yet, of course, the question still remains as to which hostile forum is most productively engaged with.”<sup>237</sup> Later, I will propose that what might in fact be most productive would be to open a new avenue of inquiry by declining to accept the premise that one must choose a target in the government-legal forum binary (in part because both are indeed branches of the same despair-provoking state, as the right to shelter jurisprudence makes clear). Instead, it may be illuminating to begin with marginal narratives, such as those of the homeless, and what a lawyer might term the *sui generis* law and politics they disclose.<sup>238</sup> However, I want to begin by demonstrating that, at least with respect to shelter, engaging with the legal forum can not only be ineffective in egalitarian struggles, but even counterproductive at times (and not just in functional terms).<sup>239</sup> This will make a new analytical vector especially warranted.

Young suggests that “section 7 [of the *Charter*] offers hope, perhaps, for anchoring a fundamental entitlement of well-being guaranteed to all residents of Canada.”<sup>240</sup> Although she acknowledges the importance of the *Adams* decision, she suggests that its lack of a request for

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<sup>235</sup> *Ibid* at 318.

<sup>236</sup> *Ibid*.

<sup>237</sup> *Ibid* at 321.

<sup>238</sup> *Sui generis* is a Latin phrase meaning “of its own kind or genus” and “unique in its characteristics.” OED.

<sup>239</sup> In legal discourse, the ‘functional’ dimension of law is often compared to its ‘symbolic’ dimension (although this is another deconstructable pair). ‘Functional’ refers to how law functions with respect to ordering society in the most instrumental way. For instance, the bylaws at issue in *Adams* were amended with the function of preventing overnight shelter. By contrast, the ‘symbolic’ dimension captures how law signifies within an intersubjective normative world. As discussed, this thesis strives for a critical account, in which the symbolism never strays too far from functional patterns (even on an epochal scale), especially when those patterns are simply oppressive and ought not to be recast as actually or potentially emancipatory in a (contrived) symbolic register.

<sup>240</sup> Young (2005) at 540.

more than overhead shelter illustrates the “need for strategic, systemically informed social and economic *Charter* rights claims by public interest third parties.”<sup>241</sup> Turning in her most recent work to the urban geography of poverty-related issues such as drug use and homelessness, she maintains a normative emphasis on courtroom rights: “we need to think about social and economic rights as often deeply located in local politics and as requiring a re-ordering and re-allocation, and thus a re-production, of spaces and civic geography.”<sup>242</sup> Sarah Buehler likewise says that although *Adams* was in many ways a victory, it is “cold comfort” to the homeless, who must still live in perilous urban spaces. She contends that “the challenge for anti-poverty advocates will be to continue to insist that section 7 must... include a positive state responsibility to end the crisis of homelessness.”<sup>243</sup> Along similar lines, Martha Jackman declares:

A remedial order requiring the government to take concrete steps to provide relief to those desperately in need of access to housing, and especially to those for whom sleeping out of doors was not an option, would have been far more consistent [than the narrow declaration in *Adams*] with the overarching values of the *Charter*.<sup>244</sup>

However, whereas Young and Buehler propose reforming section 7 doctrine, Jackman sees the positive-negative rights dichotomy as relatively entrenched. She proposes that cases such as *Adams* ought to be argued and decided under section 15(1) of the *Charter*.<sup>245</sup> Although they differ on the best doctrinal route, what is significant here is the consensus that doctrinal reform is a privileged site for producing social change.

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<sup>241</sup> Young (2009) at 112.

<sup>242</sup> Young (2014) at 28.

<sup>243</sup> Buehler (2009) at 225.

<sup>244</sup> Jackman (2009) at 299.

<sup>245</sup> Again, section 15(1) reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Below, I suggest that whether argument favours section 7 or section 15 is not important, given that the salient obstacles to wider rights recognition are political. Indeed, *Tanudjaja* involved both section 7 and section 15 argument, and neither section was viable.

Bruce Porter, a housing activist who has co-written articles with Jackman, concurs that courts ought to go further. He discusses *Gosselin*, which was the case that upheld as constitutional a Quebec workfare law requiring people under 30 to find employment or enter employment training. Otherwise, they would receive one third the subsistence level welfare amount: “although the *Gosselin* decision was a disappointing loss, it nevertheless represents an important victory in the long term battle for adjudicative space for social rights claims related to poverty and the right to housing in Canada’s constitutional democracy.”<sup>246</sup> Going beyond recommendations for doctrinal reform, he argues that opening “adjudicative space” is one component in an overall institutional strategy with respect to housing and welfare policy that includes everything from scrutinizing landlord-tenant law at the provincial human rights commission level, to making presentations to UN human rights compliance reporting organizations, to amending the constitution to include housing (among other social and economic rights) as a distinct constitutionally protected right in Canadian law. He states that “housing rights advocates in Canada must continue to work to strengthen international mechanisms that enforce the right to adequate housing, while pressing for more effective domestic procedures and institutions to ensure access to domestic adjudication and remedy as well.”<sup>247</sup>

Whatever their differences, all four commentators share a singular focus on state institutions as the mediator between ‘emergency temporality’ successes such as *Adams* and more expansive future ‘long durée political temporality’ victories. They agree that courts ought to order governments to provide indoor housing, usually in consultation with those affected and with a court or provincial human rights commission monitoring for compliance; I have been unable to find an argument in Canadian legal academic commentary outside these coordinates, at

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<sup>246</sup> Porter (2003) at 16. This case will be discussed in greater detail below at 91.

<sup>247</sup> *Ibid* at 23.

least with respect to shelter. One prerequisite for such court orders is a proper assessment of claimant context. I problematize courts' ability to do that below, even along the lines of what I take to be the strongest reform proposal.

## **B. Courts Cannot Adequately Assess Claimant Context**

Margot Young is alive to the importance of attending to claimants' experiences. She argues that their "rich and dense circumstances" must always be understood.<sup>248</sup> However, judges' relative privilege poses a formidable barrier to understanding claimants in poverty-related cases. Young explains that "understanding poverty and its manifestations is a considerable challenge for judges, given their own social and economic position."<sup>249</sup> She adds that "the stories and experiences of the marginalized do not easily make their way into law and legal judgment."<sup>250</sup> And yet, Young argues the task is worth attempting. For her, "the ultimate question is whether the court 'gets' the context of the claimant in order to be able to make a sensible judgment."<sup>251</sup>

### 1. Assessing Structural Constraints

Legal rights claims confront the paradox that although they are typically advanced by individuals who cite a particular individual harm that they argue violates their constitutional rights (as individuals), the harm cannot be dissociated from the social field buffeting it, producing it, and making it legible. Young argues that understanding "the relationship between individual harm and systemic fields of social power is key to any social justice claim."<sup>252</sup> She praises the assessment of systemic harms—those *beyond* homeless people's control—related to

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<sup>248</sup> Young (2014) at 13.

<sup>249</sup> Young (2009) at 108.

<sup>250</sup> *Ibid.*

<sup>251</sup> Pothier qtd in Young (2009) at 108. As I discuss below, the limits of sensitivity to context are a function both of judges' typically differing social backgrounds and of how legal categories affect not just the ultimate encoding of claimant experience and narratives in law, but perhaps even how judges' daily immersion in liberal legal analysis structures how claimants are 'heard' in the first instance.

<sup>252</sup> Young (2013) at 674.

homelessness in *Adams*. As discussed in Chapter 1, these findings of fact include state social welfare changes, lack of sufficient shelter space, and the need for adequate improvised shelter when sleeping rough.

A key finding in *Adams* was that the number of available shelter spaces falls far below the number of homeless people in Victoria. However, what Young adds, and what is not assessed either by the lower court or court of appeal, is that the existent shelter spaces are not “available or appropriate for certain groups... shelters in Victoria do not accept children, few spaces are available for youth, and couples cannot gain access to shelter services together.”<sup>253</sup> There is also a gendered inequality with respect to shelter accessibility: “traditional shelters are considerably less safe for women than men,” making them a “less practical” alternative.<sup>254</sup> Young explains that women confront additional horrors:

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-only space within co-ed shelters.<sup>255</sup>

Young concludes that despite arguments made by intervenors in *Adams*, “the ramifications of gender—which shape both the desirability and the actual availability of shelter options for women—were left judicially unacknowledged.”<sup>256</sup> The Court’s focus on the number of shelter spaces alone neglected women’s especially difficult experience with existing spaces.

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<sup>253</sup> *Ibid.* Young does not mention that the judgments also do not acknowledge that many shelters ban pets, which is not trivial, given that pets often provide lasting and unconditional social bonds, perhaps especially for those whom Megan Ravenhill terms “loner” homeless people navigating a world of fleeting or absent attachments. Ravenhill (2008) at 153. Housed citizens who flatly condemn homeless people for having a pet despite their lack of resources may miss this consideration. See also Paul Auster’s novel, *Timbuktu*, which is narrated from the perspective of a dog with a homeless master.

<sup>254</sup> Young (2013) at 686.

<sup>255</sup> *Ibid* at 686-687.

<sup>256</sup> *Ibid* at 687.

Foregrounding such experiences might help to underwrite a claim that goes beyond overhead shelter to request housing provision of some sort, or even simply more (and better) emergency shelter space. Although Young does not discuss this, one might add that transgender people also experience added difficulties in the shelter system worthy of institutional change.<sup>257</sup>

Young's gendered critique raises the issue of identity-based oppression. It is difficult to circumscribe a particular harm as "individual:" "there is no 'ground zero' at which historical and social context and group membership are irrelevant. Social divisions structure and form the axes of social power, and actual, concrete people are caught up along these axes."<sup>258</sup> Even though section 7 does not trigger section 15's explicit group comparison analysis, according to Young, "claimant characteristics as recognized by the courts filter what is perceived to be at issue. Identity grounds the claims advanced."<sup>259</sup> At the same time, Young appropriately cautions against reifying various axes of oppression: "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>260</sup> The axes are meaningless without living 'substrates,' but legal discourse itself reflects and indeed constitutes subjectivity.

The present context of homelessness is one instance in which 'intersectionality'<sup>261</sup>—with respect to class (or housing status) in combination with one of the above-mentioned categories of gender, familial, age, or relationship status—risks diverting the analysis from what I argue is best

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<sup>257</sup> Pyne (2011). Some transgendered people are even given mandatory hormone therapy to express the gender with which they identify in order to conform to segregated facilities, such as single gender washrooms.

<sup>258</sup> Young (2013) at 687.

<sup>259</sup> *Ibid* at 685.

<sup>260</sup> *Ibid* at 678.

<sup>261</sup> Although 'intersectional' sorts of analyses have been done in one form or another for a long time, Kimberlé Crenshaw (1991) is widely regarded in the legal literature to have coined this neologism. See e.g. Spade (2011) at 31. It denotes experiences of black women that could be explained by neither the categories 'black' nor 'woman' alone but only in their intersecting operation.

understood as a shared harm or injustice that traverses these particular lines and must be set against the lack of housing options as a symptom of our neoliberal order; single adult males between 25 and 55 years old comprise 47.5% of Canada's homeless population,<sup>262</sup> and this sizeable segment *also* has legitimate reasons to find shelters unacceptable, despite their (only relatively) greater accessibility. People of all demographics cite concerns over their personal safety (few if any shelters have private rooms to which to retreat for sleeping), theft of their meagre possessions, *etc.*<sup>263</sup> As discussed in Chapter 1, shelters often tend to be disciplinary institutions, requiring forced drug and alcohol abstinence, and even mandatory behavioural contracts or workfare requirements. How might a wealthy home owner react to an institution that attempted to place them under such requirements? Although life on the street is considered an improvement over shelter adversity for many, outdoor spaces are of course also becoming more and more inhospitable to the homeless.

An emphasis on the common difficulties experienced by all homeless people helps to draw out an important vector of oppression absent in Young's intersectional approach, and it is especially relevant outside of shelters. Homeless oppression may be a function of physical appearance as much as the more official categories of gender, age, race, or even class, yet neither Young nor judges discuss it. Samira Kawash details how it is the *generic* "homeless body" that represents the material counterpart for the general public's symbolic constitution of its own housed "identity."<sup>264</sup> In the daytime, a police officer would be likely to awaken someone in a suit who was sleeping in a park in order to offer assistance on the assumption that something odd and possibly life-threatening must have happened, whereas an officer might either walk past a sleeping person who looked homeless or ask the person to move along if he or she were blocking

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<sup>262</sup> Gaetz et al (2013).

<sup>263</sup> *Adams BCSC* at paras 51-53.

<sup>264</sup> Kawash (1998) at 322.

a transportation corridor, camping in a busy park spot during the day, *etc.* Although this could be understood in terms of class (the homeless, as part of Marx's so-called *lumpenproletariat* have always faced discrimination in common),<sup>265</sup> it is physical appearance that betrays this (simplistic) 'class' membership.

Young contends that “the challenge is to persuade courts to understand ‘the day-to-day realities of living in poverty and to [appreciate] the enormous social constraints that structure the ‘options’ that are meaningfully available.’”<sup>266</sup> But in the present poverty context, are the day-to-day realities of all homeless people the same? Mariana Valverde cautions that “claiming allegiance to the everyday in general is sometimes a way of continuing to think abstractly and generically while imagining one is taking up the standpoint of concrete, living relations.”<sup>267</sup> That is, how relevant are differing aspirations within the group—say between those who seek access to indoor life and those who seek tent cities?<sup>268</sup> For Young, “the ultimate question is whether the court ‘gets’ the context of the claimant in order to be able to make a sensible judgment.”<sup>269</sup> That framing makes sense with respect to accounting for at least rhetorical differences between cases such as *Gosselin* and cases such as *Adams*. However, the actual and possible shape of the state-mediated nomosphere (the shared normative structure in a jurisdiction) must by its very logic exclude some politically loaded homeless narratives opposed (or transversal) to it.<sup>270</sup>

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<sup>265</sup> Marx (1963) at 75. This class included “vagabonds,” “tricksters,” and perhaps most amusingly, “literati,” all of whom were deemed too susceptible to aristocratic influence to be part of a proletarian revolution.

<sup>266</sup> Mosher (2002) qtd in Young (2009) at 108.

<sup>267</sup> Valverde (2003) at 91.

<sup>268</sup> These aspirational differences exist even if most (if not all) homeless people prefer tent cities to shelters or solitary night time boxes.

<sup>269</sup> Pothier qtd in Young (2009) at 108.

<sup>270</sup> Robert Cover draws out the extent to which every state norm suppresses rival possibilities that live on as “narratives” that are nonetheless themselves constituted in part by the reigning norm (an example would be how *Roe v Wade* galvanized a newly vitriolic narrative of reaction to abortion). He writes: “One constitutive element of a *nomos* is [an] ‘alterity:’ ‘the ‘other than the case,’ the counterfactual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence.” *Steiner* (1975) at 222 qtd in Cover (1982) at 9.

Given the impassioned statements from homeless people in *Adams* to the effect that only a tent city could count as home, some of Young's conclusions are difficult to understand. She declares that "the analytical results in [*Insite* and *Adams*]... depended upon judicial acceptance of subaltern stories about the activities involved."<sup>271</sup> However, the "invisible fences" framing from *Morgentaler* seems like something other than acceptance given that it negated the claimant's cardinal need for emplaced community (as in tent cities). Likewise, Young adds that "judicial framing allowed non-mainstream experiences to emerge as authoritative."<sup>272</sup> To the extent that the homeless claimants' argument was favoured over the government's argument with respect to the narrow question of overhead shelter, this is true. But what does "authoritative" mean if it has nothing to do with homeless peoples' ability to shape their daily lives in common?

## 2. Assessing Claimant 'Choice' Given Structural Constraints

Having drawn out Young's evaluation of Ross J's structural analysis—her findings related to those *legally relevant* factors over which homeless people were found to have no control—it is also productive to consider how Young approaches the question of homeless choice and responsibility given these constraints.

Young explains that the main strategy used by the government in all poverty litigation is to responsabilize the claimant and thereby erase its own implication in systemic oppression. Governments defending their policies tend to shift the blame for problems onto the people suffering from them. So, people who get sick or have accidents are blamed for not looking after themselves properly;<sup>273</sup> the unemployed are blamed for not getting the proper education or training, not being willing to move to look for work, or simply not looking hard enough for work

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<sup>271</sup> Young (2014) at 17.

<sup>272</sup> *Ibid.*

<sup>273</sup> See e.g. *Chaoulli*.

or being willing to take whatever work is available;<sup>274</sup> addicts are blamed for their own addictions;<sup>275</sup> *etc.* This deflects attention not only from the deficiencies of public policy, but also from the structural reasons for the problems in question. Even governments that avoid ‘blaming the victim’ in other contexts may let their lawyers do that in court, because it is an effective litigation strategy. It is a strategy that succeeds often in the courtroom, and one that Young has criticized effectively. For instance, in *Gosselin*, the Quebec government made the condition for full welfare payments to single adults under 30 years old contingent on participating in worker training programs. Those failing to meet workfare requirements would receive one-third of the full amount, or \$170 per month, which is striking given that the full amount of \$510 per month was the minimum that the legislature (or the bureaucracy) deemed necessary for subsistence. McLachlin CJ for the majority cited Louise Gosselin’s “personal” problems: “The case became one about ‘bad, individual choices ... overridden by state-imposed choice, purportedly in the interest of (future) dignity.’”<sup>276</sup> At the same time, she accepted the government’s stated legislative goal of cultivating self-sufficiency. Young explains that the “discourse [in the case was] ironic for its contradictory invocation of both individual responsibility and state paternalism.”<sup>277</sup> Conversely, L’Heureux Dube J in dissent pointed out that it is hard to participate in worker training programs when they are unavailable much of the time and when one cannot afford to subsist or maintain phone service, which is necessary to receive employment interview calls.<sup>278</sup>

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<sup>274</sup> See e.g. *Gosselin*.

<sup>275</sup> See e.g. *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44. (Health Minister in a new federal government ordered to extend previous government’s *Criminal Code* exemption for a safe injection site).

<sup>276</sup> McIntyre (2010) at 176 qtd in Young (2013) at 690.

<sup>277</sup> Young (2005) at 543.

<sup>278</sup> *Gosselin* at para 372.

*Adams* does better than *Gosselin*; to relieve the provincial and city governments of responsibility, the BC Attorney General and the City submitted evidence that people were sleeping in public parks “by choice” but judges at both the trial and appeal levels refused to responsabilize the homeless claimants *in general* for their lack of shelter.<sup>279</sup> Homeless people like Johnston and Koyama of course did choose an outdoor lifestyle, but even that choice does not eliminate their need for overhead shelter. One can choose to live outdoors even in the strong sense and still need protection from hypothermia.

Although *Adams* avoided the ascription of choice to claimants, Young argues that the category of choice poses dangers in courtroom assessments of social context. Choice presently serves as a “spoiler” in that judges allow governments to responsabilize individual claimants for social problems in order to dismiss claims (or at least with that consequence).<sup>280</sup> Whereas other commentators wish to draw attention to structural constraints on choice to keep the discussion focused on “meaningful” choice, Young wishes to “go further and reject completely the utility of reference to choice as a mechanism for rejecting a rights claim.”<sup>281</sup> She reasons that:

The greater the inequality or injustice that claimants face, the less meaningful ascription of choice may be... preferences might themselves be a result of deep-seated constraints within the social structure... [e]ven ‘meaningful’ choice often reflects oppressive background conditions and cannot be distilled from that oppression.<sup>282</sup>

In other words, Young argues that homeless and other poverty-related claimants face the most systemic oppression, and so their own life choices are least meaningful in accounting for the harms they face. Therefore, for Young it follows that with respect to establishing justiciable

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<sup>279</sup> Young (2009) at 110.

<sup>280</sup> Young (2013) at 688.

<sup>281</sup> *Ibid* at 693-4.

<sup>282</sup> *Ibid* at 692.

harm, deleting the category of choice across the board would help the most oppressed claimants, such as the homeless, most of all.

Young's argument to dispense with the category of choice actually depends on institutional capacity. She argues that "judges are ill-suited to disentangle the social and individual factors that shape, limit, or expand choice."<sup>283</sup> She elaborates that judges tend to be privileged so that claimants' experiences of "marginality and extreme disadvantage" may be insurmountably "alien" to them.<sup>284</sup> Although this compelling statement seems to sit awkwardly with her claim that judges are able to enrich their (non)analyses of intersectionality, her motivation seems to be to prevent future *Gosselin*-like decisions. Indeed, courts have relied on simple ascriptions of claimant choice and/or individualized defect as in *Gosselin* more often than foregrounding structure, as in *Adams*. Thus, removing choice as a category would in theory leave just outcomes such as those in the latter untouched while at least constructing another justificatory obstacle to unjust outcomes in the former (judges could not rely on simple ascriptions of claimant choice). Young points to a danger inherent in simple recourse to choice as an explanation for disadvantage:

The idea of choice denotes the popular image of the 'autonomous, liberal (legal) subject,' morally responsible for the outcomes of his or her actions.' 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 such power.<sup>285</sup>

Rather than appreciating the extent to which unconditional 'choice' is an *effect* of liberal ideology, judges too often reason from the assumption that we are all 'accountable' for our

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<sup>283</sup> *Ibid* at 688.

<sup>284</sup> *Ibid*.

<sup>285</sup> *Ibid* at 687.

actions,<sup>286</sup> whatever the context, to the attribution of responsibility for disadvantage that is in fact indissociably structural.

Young's suggestion to avoid the category of choice altogether is not without logic. So what should replace it? She argues that a shift to analyzing the harm faced by the claimant would be an improvement. For instance, the (proximal) harm in *Adams* relates to a lack of shelter space whereas the harm in *Gosselin* owes to living below a subsistence level income without adequate work or job training opportunities. However, Young recognizes that this would produce complications when the harm itself results from a non-negligible lack of choice at some level, however constrained.<sup>287</sup> The example of abortion comes to mind; framing the matter in terms of a woman's individual 'right to choose' (however much that elides the social power dynamics surrounding reproduction) is so deeply ingrained in the public imaginary that serious judicial contortions would be needed to escape it. Young seems to anticipate the abortion example when she writes that "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."<sup>288</sup> If removing choice would allow appropriate structural attributions, it might in other contexts inappropriately negate a claimant's (situated) autonomy. In an attempt to reconcile the many faces of the choice construct, Young turns to relationality theory.

Young recruits Jennifer Nedelsky to account for the tension between protecting important forms of self-determination and registering the vulnerability that ought to be understood to owe

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<sup>286</sup> I intend a resonance with bank 'accounts' or bar 'tabs' here, market relations characterized by a concern with 'the bottom line' in abstraction from social interdependence.

<sup>287</sup> A separate potential problem with respect to harm is that it has been taken as "harm to the community" (interpreted by judges based on moral intuition rather than evidence) rather than marginal groups. Valverde (2009) at 62. In the urban camping context, harm could apply to local businesses or housed park dwellers just as easily as homeless people.

<sup>288</sup> Young (2013) at 696; cf Brown (2001) at 25.

to structural disadvantage rather than choice. Nedelsky figures even ostensibly individual rights or choices as dependent on an extensive network of social enablement. For Young, Nedelsky helpfully responds to the way in which “the capacity for action, for agency, for freedom, and for human will are insistently ‘cherished and protected’ in Western culture.”<sup>289</sup> However, Nedelsky contests the underlying liberal image of atomistic rights-bearing agents protected from each other and from the state by firewall-like boundaries. She regards boundary imagery as anti-social:

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.’ In essence, we are both autonomous and dependent—characteristics that are, paradoxically, mutually enabling.<sup>290</sup>

These conceptual moves plotted by Nedelsky allow Young to schematize the double (or multiple) valences of choice by complicating the construct of autonomy on which it depends. Young argues 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*.”<sup>291</sup> She insists that “tolerating tension between independence and vulnerability as equal parts of the human condition allows for, and indeed demands, this.” The category of harm is recruited to do the work of differentiating accountable or ‘good’ from unaccountable or ‘bad’ invocations of choice. But does this change not merely defer the controversy to what constitutes a rights-relevant harm?

Young’s proposed shift from choice to harm raises two difficulties, which I will discuss in turn. First, if the choices made by those most oppressed (such as the homeless) ought to be

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<sup>289</sup> *Ibid.*

<sup>290</sup> Nedelsky (2011) at 115 qtd in Young (2013) at 697. For poststructuralists, this is well worn ground; our very entry into a language or symbolic structure and (semiotic) world that precedes us necessitates a relational understanding.

<sup>291</sup> Young (2013) at 697 [emphasis added]. One could ask why ‘coherence’ even matters. It is simply the default modernist aesthetic common to law and most legal commentary. Manderson (1996).

understood as the most structurally constrained, then this would leave the least scope for collective agency on the part of the oppressed, in the form of political action that might challenge the oppression itself. In other words, even though all agency is structurally constrained to one degree or another, persistently registering homeless citizens as powerless or without agency even solely with respect to the structural factors producing and sustaining homelessness (neoliberal state reconfiguration including an inadequate housing arrangement) has a performative dimension. It becomes difficult (albeit not impossible) to figure homeless citizens as political agents within their perilous conditions.

Ross J referred to homeless people as “among the most vulnerable,”<sup>292</sup> Martha Jackman argues that they must move beyond “the basic struggle for existence” before they can be political,<sup>293</sup> and Young refers to homeless people in one article as “the most socially marginalized and politically oppressed,”<sup>294</sup> and deems them “politically powerless” in another.<sup>295</sup> All of these statements are accurate on some level, for at least some homeless people, or perhaps for all homeless people at least some of the time. However, it is significant that the judge and both legal academics do not also present the (complicating) additional reality that many homeless people struggle against being vulnerable and oppressed every day.<sup>296</sup> Susan Ruddick’s extensive ethnographic work demonstrates that homeless people do not become oppressed victims simply as a result of being homeless (indeed, however miserable it is, it may be an improvement over domestic abuse *etc*, given an adequate care network on the street).<sup>297</sup> Rather,

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<sup>292</sup> *Adams BCSC* at para 194.

<sup>293</sup> Jackman (1988) at 326 qtd in *Adams BCSC* at para 143.

<sup>294</sup> Young (2013) at 698.

<sup>295</sup> Young (2009) at 113.

<sup>296</sup> As discussed in Chapter 1, Ross J does acknowledge the “political aspect” to Johnston and Koyama’s insistence upon outdoor life, but only to consign them to a ‘minority’ within a population for whom homelessness is neither chosen nor political (homelessness is the result of the failure of state institutions but tent cities cannot be interpreted in legal discourse as a means to contest that failure because they are not “prescribed by [state] law” *etc.*).

<sup>297</sup> Ravenhill (2008) at 143.

actively maintaining the housed-homeless dichotomy “reinforces the distinction between victims and agents, between those who are ‘homeless through incapacity’ and those who are ‘homeless by choice.’”<sup>298</sup> From the perspective of the phantomal housed public, homeless vulnerability and oppression can even reach the level of “social death.”<sup>299</sup>

Young and other legal commentators offer few resources for pre-empting a closed and categorical opposition between homelessness as social death and state-provided housing as social redemption (however perpetually deferred such state provision may be). However, Ruddick paints a strikingly different picture that resonates with Johnston’s narrative:

Homeless people often struggle against... social death—by being politically active, by asserting their citizenship, by organizing themselves in social groups, by developing social networks in the communities where they live, by actively creating alternative forms of living. Sometimes this has involved setting up collective campsites; organizing tents, or abandoned land along riverbeds... sharing tent sites and patrolling each other’s meagre possessions so they were safe while individuals were away at temporary work or begging... and homeless people... often develop tenuous social networks by offering what skills they have [such as] writing letters or translating documents for housed non-English speakers... but in so doing, in resisting this position as victim, they risk being castigated in the media as being ‘mere activists’ or people who cannot, *by definition*, be ‘really homeless,’ or not ‘homeless enough.’<sup>300</sup>

Leonard Feldman explains that the activist-homeless dichotomy exists not just in the media, but in legal discourse, where it is often takes the starker form of an outlaw-victim dichotomy.<sup>301</sup>

If one’s preferred solution (with Young) is for courts to order the state to provide more shelter space, homeless agency is indeed beside the point. However, if the focus is on existing homeless political performances, such as tent cities, agency *is* the point, even if it is insufficient

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<sup>298</sup> Ruddick (2002) at 56.

<sup>299</sup> Ruddick lists three features of social death that the homeless *are perceived* to share with slaves: they have no money, they exist outside of enfranchised community and support systems, and they are dishonoured. Unlike slaves, they are seen to have a fourth feature, which is that they are “not needed.” *Ibid* at 56-57.

<sup>300</sup> *Ibid.*

<sup>301</sup> Feldman (2004) at 78. The government in *Adams* repeatedly attempted to cast homeless people as outlaws because some chose to live outdoors, and outlaws by definition had to be brought back ‘within the norm’ in part through intensified outdoor indignities. Ross J and Young instead favour the ‘victim’ pole, at least when they enter their respective legal discursive fields.

as a political determinant. It is agency that explodes fissures—however fleeting and/or partial—in the seeming gridlock of structural constraint. Here, the dissonance in the category of choice does not lie across separate issues, such as homelessness and abortion, but *within* the issue of homelessness. It is this dimension that is suppressed in both the case law and in Young’s commentary.

The point is not that the reformist legal literature deliberately distorts the reality of homelessness, but that—along the lines of Wendy Brown and Janet Halley’s discussion of left law reform projects that require a certain ‘bottom line’—in the rush to advocate and justify state-provided indoor housing, some relevant *political* features get lost. The need to contest responsabilizing discourses (adopted by the government in litigation) by representing all homeless people as (insufficiently complicated) victims in order to justify even the most minimal shelter protections in the present political landscape forecloses a full critique.

The second difficulty with Young’s proposed shift from ‘choice’ to ‘harm’ is that it seems unlikely that case outcomes might turn on the correct conceptual framing. After all, the Chief Justice of the Supreme Court of Canada has explained that “the best solution [to interpretive questions under the *Charter*] lies in seeking the dominant views being expressed in society at large on the question in issue.”<sup>302</sup> If judges aim to reflect this sort of ‘common sense,’ that would not bode well for poverty claimants in the era of what Stuart Hall and Alan O’Shea have termed “common sense neoliberalism.”<sup>303</sup> If a ‘harm’ framework had been used by the majority in *Gosselin*, it seems unlikely that the harm of living below a subsistence level would have been perceived *by those judges* (in stage four of the *Oakes* test, for example) to outweigh the legislative benefit—however speculative—of cultivating ‘self-sufficiency.’ Young’s

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<sup>302</sup> McLachlin (1991) qtd in Bakan (1997) at 103.

<sup>303</sup> Hall and O’Shea (2013) 15 Soundings 8.

argument implies that courtroom categories can be brought into a space of rational reconstruction, but those categories reflect the deep texture of legal discourse. The quality relevant here—contested effectively by Young but tenacious in the jurisprudence—is that individuals are assumed to be radically independent and free liberal agents, responsible for their choices even when those choices are heavily constrained by poverty or other structural factors. Particularly given the extent to which all courts, but lower courts in particular, are bound by finitely flexible precedent, liberal ideology seems more like the DNA of Canadian jurisprudence than a set of clothes judges can change at will.

### **C. Courts will not Order Governments to Provide Housing or Tent City Areas**

In the previous section, I argued that law reform based on a better judicial understanding of claimant context itself misses something of the nuance in context and overestimates the capacity of juridical discourse both to transform itself and to juggle contending narratives within the same normative field. Now, I wish to evaluate Young's defense of courtroom orders for governments to provide shelter as a 'positive' constitutional obligation, and thereby to break out of the 'emergency' temporality. Although an understanding of claimant context is a prerequisite for such orders, on Young's account, judges could in theory issue more expansive remedies demanding 'positive' state action even *without* a keen grasp on claimant context. For instance, a judge could order indoor shelter provision without understanding (or viewing as legitimate) the desire of some homeless people to remain outdoors. So, the question of how courts figure the difference between 'positive' and 'negative' legal obligations on the part of the state, to which I now turn, is at least analytically separable from the question of assessing claimant context.

In *Adams*, as in many other Canadian cases, a dichotomy is sustained between so-called negative and positive rights. Rights are said to be 'negative' in the sense that they require only

state forbearance, as in civil and political rights. They are said to be ‘positive’ when they require the state to spend money, as in social and economic rights. In *Adams*, the claim to temporary overnight shelter succeeds because it is cast as negative; Ross J explicitly distinguishes it from a claim to a tent city, which would have been “seeking a positive benefit.”<sup>304</sup> The Court of Appeal echoed that this case was not about the allocation of “scarce resources,” but about “the constitutionality of a prohibition contained in particular Bylaws.”<sup>305</sup> The language of “resources” applies both to budgetary allocations and park space in a discourse that encodes land (which has a “property value” and affects nearby property values) in the same market register as government budget revenue. An order for the government to designate an outdoor sleeping area for homeless people (as Johnston requested) and an order for it to provide housing were foreclosed for the same reason.

The Court of Appeal specified that the lower court decision did not require the government to take “any positive steps to address the issue of homelessness.”<sup>306</sup> *Gosselin*, which was discussed above, is frequently cited in judgments as the case that presently bars positive rights while leaving the door slightly ajar for future recognition (by the Supreme Court of Canada, and not a lower court):

One day [section] 7 may be interpreted to include positive obligations. To evoke Lord Sankey’s celebrated phrase in *Edwards v Attorney-General for Canada*, [1930] AC 124 (PC), at 136, the *Canadian Charter* must be viewed as ‘a living tree capable of growth and expansion within its natural limits’. . . I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.<sup>307</sup>

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<sup>304</sup> *Adams* BCSC at para 116.

<sup>305</sup> *Adams* BCCA at para 38.

<sup>306</sup> *Ibid* at para 95.

<sup>307</sup> *Gosselin* at para 82-83.

No “special circumstances” have arisen in the thirteen years since *Gosselin*;<sup>308</sup> when courts compel government expenditure, it is couched in ‘negative’ terms. For instance, the government may be ordered to spend money on a group that is uniquely disadvantaged not because the government must provide support for that group at some minimal level, but rather because not to spend money would be to disadvantage it relative to groups benefiting from the same program.<sup>309</sup>

Sandra Fredman explains that all rights, whether civil-political or social-economic imply a range of correlative duties.<sup>310</sup> The state cannot stand apart from ‘society’ within some carefully delimited field, regulating some aspects of life while forbearing in others. In fact, state regulations today occupy every area of life and often underwrite private activity that could not otherwise take place, such as ‘natural resource’ extraction.<sup>311</sup> Even as traditional a ‘negative’ right as the right to a fair trial requires the expenditure of state funds in the form of the entire courtroom apparatus, including the possible provision of counsel.<sup>312</sup> Justice Bastarache acknowledged precisely this fact in *Gosselin* but joined the chorus relying on the dichotomy (without explaining the apparent inconsistency); it does justificatory work that allows the court to safeguard what it sees as its (apolitical) institutional role.

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<sup>308</sup> Obviously, just because no special circumstances have *yet* arisen does not mean that they will *not* arise. The pattern, however, is that although the court can change direction significantly (even within a couple decades, as in *Carter*, the recent decision that reversed *Rodriguez* to permit physician-assisted suicide) on ‘negative’ rights, they stand firm on deferring to the (neoliberal) government—whatever political party, federal or provincial—with respect to ‘positive’ rights.

<sup>309</sup> Madhav Khosla (2010) has described the difference as one between a “minimum core” and “conditional” approach to rights in the Indian context, with the latter approach adopted in that jurisdiction. My reading of the Canadian and South African jurisprudence suggests that his distinction may generalize in common law jurisdictions. Canada’s conditional approach is well illustrated in *Chaoulli* at para 104: “The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.” And in *Eldridge* at para 73: “once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner”.

<sup>310</sup> Fredman (2008) at 9.

<sup>311</sup> See e.g. M’Gonigle and Takeda (2013).

<sup>312</sup> This is also acknowledged in *Adams* BCCA at para 96: “governments generally have to take some action to comply with the requirements of the *Charter*, which can involve some expenditures of public funds or legislative action, or both.”

The positive-negative distinction persists because it performs felicitously for judges eager to guard their perceived legitimacy by attempting to distinguish their function from that of legislators in a way that will be regarded as ‘reasonable’ (this recalls the discussion of what Schlag termed “centrism”). The *Adams* Court of Appeal stated that the trial judgment “only requires the City to *refrain from legislating* in a manner that interferes with the [section] 7 rights of the homeless.”<sup>313</sup> This linguistic contortion reflects the extent to which it is necessary to enforce an image of a state obligated simply to decline to interfere with homeless citizens in certain unacceptable ways. The state is of course deeply implicated in producing—through private property inequalities, income assistance cuts, *etc*—a condition far more complicated than abstention. Some judges, at some times, have acknowledged this reality and used it as leverage to justify expanded socioeconomic obligations on the part of the state.

Former Supreme Court Justice Louise Arbour, who found herself in dissent in *Gosselin* as the only judge open to positive section 7 obligations,<sup>314</sup> later commented as United Nations High Commissioner of Human Rights that “there is nothing to fear from the idea of socio-economic rights as real, enforceable, human rights on equal footing with all other human rights.”<sup>315</sup> But evidently, there is something to fear, and it is not based on some epistemic deficiency; the Poverty and Human Rights Centre—like many Intervenors in many prior cases—argued at length before the Court of Appeal in *Adams* that “all rights are positive to varying degrees.”<sup>316</sup> Young, echoing Arbour, makes it seem as if all the Courts need is a bit of courage to extend rights to new socioeconomic territory—to the Elysian fields of the ‘long durée political

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<sup>313</sup> *Ibid* at para 95 [emphasis added].

<sup>314</sup> What is noteworthy even here, however, is that although she found a section 7 violation, she concurred in the judgment with respect to denying a remedy (this element was unanimous across all nine judges), which would have cost the government of Quebec millions of dollars.

<sup>315</sup> Arbour (2005) qtd in Young (2009) at 108.

<sup>316</sup> *Adams* BCCA (Factum of the Intervenor, Poverty and Human Rights Centre at para 49) qtd in Young at 108.

temporality.<sup>317</sup> Young acknowledges that the difficulty is political and not strictly doctrinal, but then adds that “‘rights talk’ is resisted by the powerful... because it threatens (or promises) to rectify distributions of political, economic or social power that, under internationally agreed standards and values, are unjust.”<sup>318</sup> However, putting aside the question of the extent to which abstract international rights documents represent deep agreement” on various “distributions,” is “rights talk” so easily restricted to emancipatory projects? Many sorts of people engage in rights talk; landlords have rights just as tenants do. Corporations have used their ‘free speech’ rights with great success in Canada and the United States.<sup>319</sup> Although left law reform projects have at times invoked rights with emancipatory aims (or even results), and I will make the case for understanding some of Johnston’s (spatiotemporally specific) rights invocations in these terms below, constitutional rights are not *inherently* radically egalitarian or empowering, especially not when interpreted by judges.<sup>320</sup>

There is a discernible pattern with respect to just how far Canadian courts have been willing to go with respect to social and economic rights—and it is never so far as to effect even the modest egalitarian social change sought by Young and others.<sup>321</sup> Important factors include

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<sup>317</sup> Jackman praises the same Arbour quotation. Jackman (2009) at 301.

<sup>318</sup> Young (2009) at 112.

<sup>319</sup> See respectively *RJR-MacDonald* (government restrictions on tobacco advertising struck) and *Citizens United* (campaign finance is deemed ‘speech’).

<sup>320</sup> Nicholas Blomley puts the point this way, emphasizing rights’ spatial dimension: “Legal obligations and rights are understood in radically different ways by groups at different social and spatial locations.” (1994) at 42. Emphasizing rights’ historical dimension, Wendy Brown likewise notes “the impossibility of saying anything generic about the political value of rights: it makes little sense to argue for them or against them separately from an analysis of the historical conditions, social powers, and political discourses with which they converge or which they interdict.” (1995) at 98.

<sup>321</sup> I say ‘modest’ because there is a parallel between calls for ‘positive’ socioeconomic rights and the debate over the *Social Charter* in the early 1990’s, when there were three provincial New Democratic (social democratic) governments and implementation of such a *Charter* was not unimaginable. Bakan explains that even if one were to constitutionally entrench a right such as healthcare, that would not go to the root of the problem of economic maldistribution. People could get healthcare without a fee, but what would not change is the poverty-related maladies that cause some to need it to a greater extent, and which decrease lifespan. (1997) at 134-141.

the cost of the requested remedy (lower cost means a greater chance of success,<sup>322</sup> whereas higher cost means a lesser chance of success<sup>323</sup>), the existence of an already existing state program from which some have merely been excluded,<sup>324</sup> and expanding ‘liberty’ *qua* individual market exposure, however much that may *increase* economic inequality. In *Chaoulli*, that meant allowing relatively wealthy individuals to buy private healthcare to the detriment of the public system whereas in *Gosselin* it meant allowing the government to decrease welfare payments for young adults living in poverty to a level below subsistence in order to encourage them to enter the market as labourers, job unavailability notwithstanding. All of these factors bear on *Tanudjaja*, the recent right to shelter case that directly sought recognition of a positive housing obligation, to which I now turn briefly.

#### **D. *Tanudjaja*: The (Shelter) Revolution Will Not Be Funded**

*Tanudjaja* went beyond a simple request for overhead shelter *given* state reconfiguration (which has produced more homelessness) to challenge the reconfiguration itself. It argued that “beginning in the mid-1990’s, both Canada and Ontario [made] decisions that eroded access to affordable housing... without appropriately addressing their impact on homelessness and inadequate housing and without... alternative measures... to protect vulnerable groups from these effects.”<sup>325</sup> The claimants sought declarations that these changes violated both their section 7 and section 15 rights. With respect to the remedy, “the Application at trial sought mandatory orders that “strategies be developed and implemented ‘in consultation with affected groups’ and include ‘timetables, reporting and monitoring regimes, outcome measurements and complaints

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<sup>322</sup> See e.g. *Eldridge* (funding for interpreters for the deaf at medical appointments granted).

<sup>323</sup> See e.g. *Gosselin*; *Auton* (funding for childhood autism therapy denied); *Masse* (challenge to housing and other welfare cuts failed).

<sup>324</sup> See e.g. *Eldridge*, *Doucet-Boudreau* (government ordered to build one school to meet the French language education *Charter* guarantee).

<sup>325</sup> *Tanudjaja* ONSC at para 2.

mechanisms.”<sup>326</sup> As in *Doucet-Boudreau*, there was a request for the Court to retain “supervisory jurisdiction to address concerns regarding implementation of the order.”<sup>327</sup>

However, at the appellate level, the pleadings were amended to request declarations that the governments’ action violated sections 7 and 15 of the *Charter*, leaving it to the government to decide how (not whether) to remedy those violations.<sup>328</sup>

Regarding *Adams*, Young stated that “of course, one cannot fault either the claimants or their lawyers for arguing what is most likely to succeed in court, but it can be an unfortunate tactic from the perspective of long term *Charter* development.”<sup>329</sup> *Tanudjaja* would make no such pragmatic concessions. Launched in part by four constitutional law professors, including Martha Jackman, this was precisely the sort of claim Young favours. It sought a positive obligation using many intervenors who obtained public interest standing and there were detailed intersectional pleadings with lots of evidence: “the [right to shelter claimants] assembled a 16-volume record, totalling nearly 10,000 pages, which contains 19 affidavits, 13 of which were from experts.”<sup>330</sup> The case was anchored in the dense context of four compelling (which is to say, distressing) claimant narratives.<sup>331</sup> Whereas in *Adams* homeless narratives disclosed a preference for tent cities that Ross J and Young had to cast as aberrant, the homeless (including precariously housed) claimants in this case sought nothing other than dignified *indoor* housing.

So what happened?

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<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> *Tanudjaja* ONCA at para 15.

<sup>329</sup> Young (2009) at 112.

<sup>330</sup> *Tanudjaja* ONCA at para 66. This is a Kafkaesque bureaucratic feat; Wendy Brown asks “who, today, defends their rights without an army of lawyers and reams of complex legal documents? In this regard, rights . . . may subject us to intense forms of bureaucratic domination and regulatory power even at the moment that we assert them in our own defense.” (1995) at 118.

<sup>331</sup> There was a single mother with two sons whose rent was almost double the shelter allowance and who had been on the waiting list for subsidized housing for over two years; a man disabled in an industrial accident who had been on the waiting list for four years; a woman and her two sons who became homeless after her spouse died suddenly and who spends 64% of her income on rent; and someone with no roof at all after getting cancer, which makes it impossible for him to work and pay rent. *Tanudjaja* ONSC at para 13.

The trial judge and two of three judges at the Court of Appeal deemed *Tanudjaja* not only ineligible for a rights declaration or remedy, but not even justiciable, granting the Canada and Ontario governments' motion to strike the claim at an early stage of the proceedings. Although the Court empathized with the motivation behind the claim, it deemed the issue to be within legislative rather than judicial jurisdiction. Lederer J at trial asked:

Who could not be sympathetic to any proper effort to confront the issue of inadequate housing in all Canadian communities? The question is whether the court room is the proper place to resolve the issues involved. It is not; at least as it is being attempted on the Application.

Lederer J described the claim not as “incremental” (consistent with the oft-invoked image of the *Charter* as a “living tree”), but as a “Trojan Horse” that could result in court-supervised review of “all government policies” given that they all have a potential nexus with housing.<sup>332</sup> The case was specifically differentiated from *Adams*, where “no positive benefit was requested.”<sup>333</sup>

Feldman J at the Court of Appeal was the lone dissenting voice holding that the case at least warranted a full hearing, given that it was not hopeless.<sup>334</sup> She chided the trial court for making factual findings without reviewing the full factual record. For instance, returning to the governments' responsabilizing framing of choice, Lederer J asked “what of the concern that increased social assistance might be a disincentive for some to seek work?”<sup>335</sup> She also took issue with the motion judge's peremptory finding that the government could not be shown to have a “causal” role in homelessness. She stated that that was

the very issue that is intended to be addressed by an application judge on a full record, including the responses by the respondent governments. It is only based on such a record that reliable conclusions regarding causation can be drawn. With evidence, it may be that, even if the motion judge's statement is partly true, the governments' conduct is a contributing factor to the burden of being without

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<sup>332</sup> *Tanudjaja* ONCA at para 64.

<sup>333</sup> *Ibid* at para 79.

<sup>334</sup> *Ibid* at para 88.

<sup>335</sup> *Tanudjaja* ONSC at para 143.

adequate housing. It is not the role of a motion judge on a motion to strike to make factual findings that are not in the pleadings.<sup>336</sup>

Ultimately, Feldman J concluded that although the application was novel and requires a different “procedural lens,”<sup>337</sup> it ought to get a full hearing. She based that conclusion on the importance of the issues at stake, and the fact that the pleadings, once amended at the appellate level, asked not for extensive court supervision of the remedy, but simply a declaration of constitutional rights violation, for which there was precedent.<sup>338</sup> Finally, she reiterated that the claim was “supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and analysis. The appellants put together a significant record to support their application. That record should be put before the court.”<sup>339</sup> Although Feldman J’s reasons may be the most compelling—picking up on troubling elements in the trial judgment—it is difficult to disagree with the idea that the claim was in fact “hopeless,” not because the issues were not extremely important (they are) and not because this case did not involve positive government action with a demonstrable effect on the claimants and others in their situation (it did) but because of the pattern in the jurisprudence on socioeconomic rights claims and how most judges see their institutional role. Even if *Tanudjaja* opened some “adjudicative space” in Feldman J’s openness at least to a full hearing for this sort of claim, it also reinforced the pattern of closure in the jurisprudence. In any event, it is worth briefly noting some new problems that were opened up by the case before moving on.

First, there was some tactical myopia in that section 7 and section 15 were kept within their respective precedential silos, despite the fact that even some judges have interpreted their

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<sup>336</sup> *Tanudjaja* ONCA at para 71.

<sup>337</sup> *Ibid* at para 83.

<sup>338</sup> See e.g. *Canada v Khadr* (Canada government declared complicit in Guantanamo detainee rights violations but given latitude to decide how to remedy the violations).

<sup>339</sup> *Tanudjaja* ONCA at para 88. As I will discuss in Chapter 3, it seems more like rule by a group of Platonic philosopher kings than a democratic act for a judge to use the “institutional credibility” and “expertise” of the claimants’ lawyers as a reason for a full hearing (for the potential unilateral exercise of judicial authority).

respective “liberty” and “equality” guarantees to be connected.<sup>340</sup> Second, although four claimant narratives were included in the reasons (at least in rough outline), Bracken J stated that only one of the four claimants was “actually homeless,” which conflated rooflessness with homelessness;<sup>341</sup> all four in fact lived in such precarious dwellings that even those in apartments could not call those spaces ‘home’ in the full sense explored in the Introduction to this thesis. Third, by holding that the homeless claimants were not subject to “discrimination” under section 15 of the *Charter*, Bracken J reinscribed judicial non-acknowledgement of the state’s active role in the production of inequality: “it is not that these programs treat the homeless differently than they treat others in society, but that the homeless are being treated differently than they were before the changes were made.”<sup>342</sup> However, neoliberal changes certainly treat (constitute?) the poor—including and especially the homeless—differently from the wealthy.

Finally, not only did *Tanudjaja* not ‘build’ on the ‘progress’ made in *Adams*, it actually entrenched its limit status and offered an incorrect (and unhelpful) reading of *Johnston*. First, *Adams* was recruited not as a step towards a more equitable shelter arrangement but as crystalizing the dichotomy between negative and positive obligations.<sup>343</sup> Second, Bracken J asserted that *Johnston* held that “there were enough shelter beds available [during the day] for those who could not sleep at night and no need for the park to be available for this purpose.”<sup>344</sup> He thereby goes beyond *Johnston*’s (erroneous) statement that there was no evidence either way about daytime shelters to state positively (and even more inaccurately) that there *were* sufficient daytime shelters.

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<sup>340</sup> See e.g. L’Heureux Dube J in *Gosselin* at para 144.

<sup>341</sup> *Tanudjaja* ONSC at para 13.

<sup>342</sup> *Ibid* at para 107.

<sup>343</sup> *Ibid* at para 56.

<sup>344</sup> *Ibid* at para 80.

It seems that *Tanudjaja* largely forecloses on an empirical level proposals made by Young and others for courts to recognize positive state obligations with respect to shelter. But my qualifier ‘largely’ reflects the extent to which these commentators make their claims in a way that puts significant emphasis on the future; this makes sense for a normative mode focused not primarily on present constraints, but on how things *ought* to be and *may* be in the very future they hope to contribute to bringing about, and thereby to conjoin *Adams*’ ‘emergency’ temporality with the ‘long durée political temporality.’ In the next Chapter, I will evaluate certain deep political and epistemological assumptions about the relationship between courtroom doctrine and social/political change in the normative commentary. Because I believe these spatiotemporal assumptions to be regulative in right to shelter (meta)discourse, my aim is to problematize them as a prerequisite to presenting my (deregulative) picture of tent city law and politics as emplaced and pantemporal dissensus.

...the effort to ‘outlaw’ social injury powerfully legitimizes law and the state as appropriate protectors against injury and casts injured individuals as needing such protection by such protectors.

—Wendy Brown

The Twentieth century is really over.

—Slavoj Žižek

### **Chapter 3: From Jurisprudential Mapping to Dissensus on the Street**

#### **Introduction**

Having evaluated the right to shelter jurisprudence, as well as the normative legal commentary on the right to shelter, I now turn to evaluating some of the deep background assumptions in the latter. These include the idea that the courtroom may be used to advance a social democratic agenda and that our society is on a progressive historical course that will culminate in greater equality. Both of these assumptions are detectable in a sort of ‘master metaphor’ in the right to shelter commentary, which is that law is like a map of society—a representation with a (selective) mimetic correspondence. On this understanding, law can be made, on the one hand, to track society ever more closely, with increasing faithfulness to the diversity of homeless narratives, and on the other hand, to remake society in a way that is more just and egalitarian. Instead, I will argue that an emphasis on ‘building better maps’ may divert attention from how the maps we always already reproduce create new outliers once they are super-imposed via *implementation* on a complex world of subjects who are in important ways these maps’ objects, not their authors.

Having acknowledged that much of the ‘conjoined temporality’ thesis (the notion that victories on the emergency temporality, such as *Adams*, can be built upon to achieve progressive

political change) is explicitly motivated by despair about achieving progressive change in the legislative sphere, which I share, I wish to outline a new picture of rights and law in the shelter context that might leave considerable room for hope. In other words, if neither the courtroom nor other state institutions (whether city councils, legislatures, parliament, or executive branches and the bureaucracy at any level) can be expected to deliver egalitarian social transformation with respect to shelter simply by acting on the legal academy's best blueprint, is there anywhere left to turn? I will draw attention to how certain practices that are performed and advocated by homeless people such as David Arthur Johnston—e.g. the tent city—instantiate politics and extrastatal law (or law in the interstices of the state). Because these practices occur outside the state frame, they are easily overlooked by those who share the conjoined temporality thesis; in that narrative, the activities of experts in the courtroom and other 'branches' of state are taken to exhaust politics. For conjoined temporality advocates, practices like the tent city fall 'off the map' or appear in regions that might once have been marked 'here be dragons.'

I hope to introduce a new perspective in the Canadian right to shelter context by suggesting that homeless practices should not (only) somehow be ingested by controlling maps; rather, they might be seen differently—as spatiotemporal interruptions in the configuration that has been so doggedly mapped by experts, whether in the courtroom, the bureaucracy, or the academy. To do so, I will draw on the work of Jacques Rancière, whose political "dramaturgy"<sup>345</sup> provides what I view as a productive way to figure the tent city as a form of politics, one in which "the part that has no part" in society *stages* its equality, rather than asking for it in court or before another state institution. In this way, the temporal disjuncture remains, only now it is not a disjuncture between an 'emergency' temporality of the 'now' and the

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<sup>345</sup> Emphasizing the aesthetic concern animating all of his work, Rancière refers not to his political 'theory' but to his "dramaturgy." Rancière (2009) at 119.

‘political’ temporality of the future (one in which everyone has somehow been moved *by institutions* beyond “the basic struggle for existence”) but between the courtroom and the street. The logical disjuncture is between the ‘emergency’ temporality of the hypothermic now, and what I will term an ‘insurgent *pantemporality*’—past, present, and future-oriented—of emplaced equality *asserted*.

### A. Statist Progressivism’s Spatiotemporality

It is commonplace in the academic literature within and beyond law that neoliberal transformations, especially over the past two decades, have been dramatic for those worst off, such as the homeless. State welfare measures that assist those with insecure housing have eroded, with devastating consequences in the form of increased homelessness *etc.* Although Ross J’s list of neoliberal policy and economic trends was thorough and more than adequate to the purposes of the case, they are a surface description that cannot explain *why* or *how* these changes are occurring. Bruce Porter explains that in 1994, then-Finance Minister Paul Martin received two letters. One was from the UN Commission on Human Rights and it chastised the federal government for its dismal failure amidst relative prosperity to live up to its international treaty commitments to housing, food, and income assistance. The second letter was confidential and it was from the International Monetary Fund, recommending wide-ranging cuts in social services.<sup>346</sup> It is now clear which letter Martin took more seriously. However, such a moralizing frame, focused on particular figures and perhaps particular political parties at particular levels of government, risks eliding the broader (anti)political situation. Wendy Brown explains neoliberalism (of which Paul Martin is just one symptom) as a heterogeneous, spatially differentiated, but nonetheless importantly coherent epochal order of political reason, which is

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<sup>346</sup> Porter (2003) at 23.

remaking us as subjects. States, firms, and individual human beings are all caught up in a managerial paradigm in which the overriding objective is economic growth.<sup>347</sup> Institutionalized politics has reached a consensus at least on this *de facto* ‘grundnorm’,<sup>348</sup> which is what Jacques Rancière calls “post-democracy.”<sup>349</sup>

Given this neoliberal background, I wish to problematize two assumptions in the normative academic commentary before moving on to how they underlie ‘map’ metaphors in legal discourse. First, there is the widely shared assumption that neoliberal changes can be reversed by the same state apparatus that initiated them: “rights litigation can be part of a larger, directly political struggle, as one moment in a larger strategy;”<sup>350</sup> and the goal of this strategy is realizing a “social democratic agenda.”<sup>351</sup> The field of possibilities is restricted to ‘legislate or litigate’ and the normative commentators see litigation as a lever for ‘progressive’ legislation. Second, there is a shared progressive teleology culminating in a relatively equal future society. For the normative commentators, the long march of history is already headed toward the progress that they want courts to deliver, so they might as well ‘get on board’. It is in this way that *Adams*’ (polysemous) ‘victory’ in an ‘emergency temporality’ is conjoined with projected future housing victories in a ‘long durée political temporality.’ To develop these assumptions, I will synthesize significant quotations across several texts—mostly but not exclusively Margot Young’s. I refer to ‘assumptions’ rather than ‘arguments’ or defeasible ‘claims’ because they appear as premises that are never in themselves justified.

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<sup>347</sup> Brown (2015).

<sup>348</sup> This is a constitutional theory term referring to a ‘master’ or ‘ground’ norm.

<sup>349</sup> Rancière (1999) at 95.

<sup>350</sup> Young (2007) at 321.

<sup>351</sup> Young (2005) at 557.

## 1. The Social Democratic Assumption

Young argues for courtroom action with respect to shelter because the state (and mainstream discourse about the state) is not presently open to calls for spending on poverty-related programs, including housing. And this closure results from the reality that “(unequal) concentrations of power—usually the potent combination of control of wealth and control of coercive force—are protected and expanded by institutionalized beliefs and rituals that confirm the justice and the inevitability of the ‘way things are.’”<sup>352</sup> In this situation, it is difficult for those who are most disadvantaged to effect large scale change. Young quotes Frances Fox Piven, a political scientist and sociologist, and Richard Cloward, a sociologist:

Fox Piven and Cloward argue that the ‘political docility’ of those who suffer from this inequality is socially or culturally structured. The result is that ‘protest is usually structurally precluded.’ While [they] go on to detail those rare circumstances when, in American political history, protest movements from among the ranks of the poor have arisen, their point that ‘opportunities for protest among the lower classes’ are slim is... certainly relevant to the Canadian context.<sup>353</sup>

Young goes on to cite a particular need for litigation in these circumstances, explaining that marginalized narratives do not “resonate strongly in elite politics, which is why, of course, these claims end up as constitutional challenges.”<sup>354</sup> We have seen, and Young has acknowledged, however, that the judiciary too is an “elite” institution. Wendy Brown calls into question Piven and Cloward’s approach. She notes that whereas left thinkers in a prior era were concerned with “critical analysis of state paternalism and state management of capitalism’s inequities,” the attack on social welfare programs (and corporate/financial regulations) by the Right since the beginning of the Reagan-Thatcher era has motivated defensive apologies for that state. The normative legal literature is indeed part of this trend. Brown explains that Piven and Cloward

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<sup>352</sup> Young (2007) at 319.

<sup>353</sup> *Ibid.*

<sup>354</sup> Young (2009) at 108 fn29.

“decline to consider the state as a vehicle of domination or to reflect on ‘protection’ as a technique of domination.”<sup>355</sup> That the state can be such a vehicle has been clear in my discussion of various cases, the conditions in shelters, as well as anti-homeless bylaws that affect outdoor homeless life, and not just those barring overhead shelter; state domination is also a concern with respect to what might happen to people like Johnston if adequate indoor space were used to render constitutional (in the courtroom) even harsher measures in outdoor spaces.

Although the limitations of the welfare state are important, I also wish to address from a new angle the reciprocal assumption that people like the homeless evince “political docility.”<sup>356</sup> As discussed, Ruddick explains how the homeless assert political agency in ways ranging from newspaper writing to organizing encampments together. And the Occupy Movement, which emerged after Young’s article was written, calls into question just how rare and minor protest movements among the poor may be.<sup>357</sup> JC Scott goes even further in problematizing political docility as a justification for large scale action by a powerful state. For some people, the objective is not to get help from the state, but to assert their equality in part by staying off its radar altogether. Scott explains that throughout history “quiet, unassuming, quotidian insubordination, because it usually flies below the archival radar, waves no banners, has no officeholders, writes no manifestos, and has no permanent organization, escapes notice.”<sup>358</sup> It is not so much that struggles by the “powerless” have seldom occurred, but that they have

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<sup>355</sup> Brown (1995) at 15.

<sup>356</sup> A mainstay in the social democratic literature, this assumption was stated by Fox-Piven and Cloward and cited approvingly by Young in the previous paragraph.

<sup>357</sup> The Occupy movement involved a broad coalition between what David Graeber (one of the initial movement organizers) has called “the least alienated” (such as academics) and “the most oppressed” (such as the homeless). Graeber (2004) at 76. Whatever its long term effects will be, it certainly had an effect on media discourses about inequality *etc.*, even if was widely misunderstood by elites because it challenged the system itself rather than proposing reform from within. Even this movement is complicated; I witnessed two homeless people be forcibly removed from an Occupy gathering in Edmonton (for being disruptive), despite that it was their spaces which were often occupied.

<sup>358</sup> Scott (2012) at 12.

deliberately occurred on a smaller scale. Scott quotes Tolstoy to the effect that “history is written by learned men, and so it is natural and agreeable for them to think that the activity of their class supplies the basis of the movement of all humanity.”<sup>359</sup> And if that class tends to ‘think big,’ finer grained political struggles may fall off the radar precisely because they appear as political docility *by design*. Furthermore, Young’s invocation of Piven and Cloward may have the social movement causation backward:

Organized social movements are usually the product, not the cause, of uncoordinated protests and demonstrations, and... the great emancipatory gains for human freedom have not been the result of orderly, institutional procedures but of disorderly, unpredictable, spontaneous action cracking open the social order from below.<sup>360</sup>

I will have more to say about an analysis that begins with such “spontaneous action.” But for now I also want to call into question just how much even an ‘egalitarian’ social democratic state might be able to do.

Young wishes to adopt Janine Brodie’s notion of ‘social justice,’ which “signifies claims for more just distribution, recognition, and empowerment.”<sup>361</sup> However, to the extent that it is the state doing the distributing (of resources within a system whose means of production remain unchanged) and recognizing (of identity groups somehow constituted prior to the entry of the state apparatus on the scene), domination is instated in the very act of “empowerment.” Brown argues that discourses of “empowerment” provide a false sense of an individual’s ability to transcend structures that require collective transformation and which in fact produce the desires of individuals supposedly powerful enough to transcend them.<sup>362</sup> There are limits and contradictions in social democratic state action that are insufficiently explored by the normative

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<sup>359</sup> *Ibid* at 129.

<sup>360</sup> *Ibid* at 141.

<sup>361</sup> Young (2013) at 672.

<sup>362</sup> Brown (1995) at 26.

legal literature, whatever its temporal orientation. However, the matter is further complicated by the progressive teleology latent in the discourse.

## 2. The Centrist Progressive Assumption

Young is not alone in orienting her proposals to “long term” change and to the future. Bruce Porter refers to the “*long term* battle for adjudicative space for social rights claims.”<sup>363</sup> Martha Jackman says that “the contrast between negative and positive rights, ‘long abandoned under international human rights law and increasingly rejected in other constitutional democracies,’ lives on in Canadian constitutional discourse,”<sup>364</sup> and suggests that “surely it is *past time* for the Canadian *Charter* to wake up from under its box?”<sup>365</sup> I have already noted Young’s emphasis on “long term *Charter* development.”<sup>366</sup> Elsewhere she states that “we remind ourselves that change comes incrementally and slowly and that constitutional rights litigation is as much about public education and political agenda setting as winning—and enthusiasm and optimism for further court challenges mount again.”<sup>367</sup> At other times she downplays the performative dimension but retains the future orientation: “like tea leaf readers, progressive students of Supreme Court of Canada decisions pour over judgments looking for signs of positive future outcomes.”<sup>368</sup> There are numerous such examples.<sup>369</sup>

I do not want to cast aspersions on legal and political optimism in a neoliberal epoch that makes such a positive outlook difficult enough.<sup>370</sup> But I want to be optimistic only about

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<sup>363</sup> Porter (2010) at 16.

<sup>364</sup> Jackman (2009) qtd in Young (2005) at 106-107.

<sup>365</sup> Jackman (2009) at 301 [emphasis added].

<sup>366</sup> Young (2009) at 112.

<sup>367</sup> Young (2007) at 322.

<sup>368</sup> *Ibid* at 322.

<sup>369</sup> See e.g. Young (2005) at 560; Young (2013) at 670, 673.

<sup>370</sup> There is a growing literature on the complicity between constant injunctions to ‘positivity’ and/or ‘happiness,’ as in the positive psychology movement, and neoliberal individualization/depoliticization (a most anxiety or unhappiness-producing combination). See e.g. Ahmed (2010). Brown and Halley’s preference for critique (which can bring joy) as opposed to suffer mongering in the service of a political cause reminds us that there is nothing

phenomena that better withstand scrutiny. Like courtroom rhetoric that casts the *Charter* as a living tree that corresponds to an ever-changing society, with improvement all around in the long term, the normative commentary suggests that it is only a matter of time before society progresses enough to realize the egalitarian arrangements that may seem radical today. On this “centrist progress narrative,”<sup>371</sup> any present courtroom setbacks are aberrations on the way forward on the ship of state into a bright future delivered by existing institutions with a firm set of expert hands on the tiller. But there are two problems with the centrist progress narrative.

First, genealogical approaches such as those of Nietzsche and Foucault emphasize the extent to which social progress may be a function of a secularized eschatology rather than a demonstrable linear process of global social improvement (i.e. in both the global North and global South). Wendy Brown argues that history has now thrown into question the Hegelian metanarrative at the core of Marxist historiography.<sup>372</sup> Although Brown sees herself as “too much of a Marxist” to deem all progressive notions of history fictional retroactively (e.g. the transition from feudalism to capitalism), it seems for her that in our time “progressive historiography” has collapsed. Present neoliberal trends that produce greater homelessness each year are intensifying despite abundant calls for a social democratic agenda inside and outside the courtroom. And even these calls tend sometimes eerily to adopt neoliberal discourses of ‘best practices,’ ‘investment,’ *etc.* This reflects how neoliberalism has animated subjectivity itself;

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wrong with attempting to maintain a positive outlook in itself. And the anarchist literature suggests that as a practical matter, political movements based too much in martyring self-sacrifice tend not to last long; practices that prefigure a desired (therefore, not bleak) future arrangement endure better. See e.g. Graeber (2012); Critchley (2012).

<sup>371</sup> Here I refer both to Schlag’s legal “centrism” that abhors intemperate extremes and to what Rancière has termed “the Centre:” “a new configuration of political space, the free development of a consensual force adequate to the free and apolitical development of production and circulation.” Rancière (1995) at 6. In state institutions today, neoliberal politics converges on a basic set of coordinates in which the imperative of ‘economic growth’ reigns supreme (those on the ‘left’ argue for ‘capitalism with a human face’—capital growth and its attendant extreme inequality combined with some minimal social protections for those *perennially* ‘at the bottom’ whereas those on the ‘right’ argue for an uncompromised ‘free market,’ downplaying massive state structuring of that market, as well as spending on ‘defense’ (war machines), bank bailouts, *etc.*).

<sup>372</sup> Brown (1995) at 117.

discursive tendencies track the displacement of *homo politicus* by *homo economicus*, newly reconfigured as self-investing human capital.<sup>373</sup> This does not mean that no progress is possible, and that we should throw up our hands nihilistically, but that if one waits (while advocating) for the state properly to address homelessness and/or economic inequality generally in the future, one could be waiting a long time.

Second, such waiting means something different for housed and homeless people. Leonard Feldman explains that those insisting on “plan[s] to end homelessness at some distant point in the future [give] little thought to what homeless street persons should do now... [and] are able to do [now], given the legally sanctioned attempts to prevent them from dwelling.”<sup>374</sup> By deferring equality to a future that never seems to arrive, egalitarian developments in the present, such as tent cities, may be overlooked because of the extent to which they fail to conform to an ideal future blueprint (e.g. putting everyone in dignified indoor housing). This is ironic in that such action stages what at least *may* be the most viable route to greater overall equality. Homeless people enacting egalitarian transformation in the ‘now’ may become legally and politically unintelligible by instantiating a derailing ‘compromise’ of longer term goals, but it is this very unintelligibility that forecloses a democratic future. Perceiving shelter politics from below requires figuring courtroom victories such as *Adams* as something other than ‘steps’ along a linear timeline on the way to grander courtroom victories of the sort sought in *Tanudjaja*, if for no other reason than *Adams* itself was recruited to underwrite *Tanudjaja*’s inhospitality to a more ambitious social democratic agenda.

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<sup>373</sup> Brown (2015).

<sup>374</sup> Feldman (2004) at 146.

## B. The Map Trap

Both the social democratic (statist) and temporal assumptions are detectable in metaphors that cast law as a map able to track ‘society’ ever more closely. On the ‘input’ side, I build on the discussion in the ‘homeless narratives’ section in Chapter 2; there is the assumption that homeless narratives can be added to law’s map, resulting in a better representation of the social world that housed and homeless people share. On the ‘output’ side, I build on the discussion in the ‘courts will not order governments to provide shelter’ section in Chapter 2; there is the assumption that improved maps can translate into a more egalitarian and universally inclusive society. I will discuss each of these processes in turn.

As discussed in Chapters 1 and 2, Ross J quoted *Morgentaler* to the effect that “the role of the courts is to map out, piece by piece, the parameters of the [invisible] fence.”<sup>375</sup> This cartography separated homeless people from each other,<sup>376</sup> and even these fences were retracted during each day with respect to the police and bylaw enforcement officers. But the mapping metaphor runs deep in legal discourse. Young argues that adjudication requires navigating a complicated social world with legal categories that cannot ever capture that complexity fully. It is in the context of the *Charter* era, which heralds unprecedented judicial entanglement with the social, that Young wishes to assist judges to conduct their analyses better. She proposes a cartographic analogy:

In a sense... court judgments are like maps. Boaventura de Sousa Santos writes that maps, in order to meet their purpose, must ‘inevitably distort reality.’ 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

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<sup>375</sup> *Morgentaler* at para 164 qtd in *Adams* BCSC at para 123.

<sup>376</sup> There is a parallel with use of seemingly ‘neutral’ hedgerows during British Enclosure. Blomley (2013) at 41.

are not) conventionally determined.’ Cases, as artefacts of law, share these features.<sup>377</sup>

This passage recalls Borges’s fragment, “On Exactitude in Science,” describing an ancient map that was able to coincide point for point with the world it represented, but which therefore became so large as to be useless.<sup>378</sup> I believe Young’s is a good analogy with respect to judges’ role consciousness, but perhaps not one that is easily compatible with the case for sufficient courtroom sensitivity to context.<sup>379</sup> With her discussion of maps, Young invokes a mimetic modernist aesthetic.<sup>380</sup> It is also a temporally static aesthetic, given that judgments are more like paper maps than Google maps;<sup>381</sup> the image clashes with her emphasis on progress.

Nicholas Blomley discusses how prior to the Norman conquest, English law was not easily mapped. It was “profoundly decentralized... pluralistic... and often extrastatal.”<sup>382</sup> It was Edmund Coke who wished to have law treatises serve as “general maps” of the law. He aimed to create a “disembedded superstructure” of law—one abstracted from the diverse local sites in which the law initially acquired meaning. His legal map was “unitary... centralized... [and] *common* to all Englishmen, wherever they live.”<sup>383</sup> “Stern men” such as Coke himself would

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<sup>377</sup> Young (2013) at 698.

<sup>378</sup> The fragment is short enough to reproduce here: “. . . In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast map was Useless, and not without some Pitiableness was it, that they delivered it up to the Inclemencies of Sun and Winters. In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography.” Borges (1975).

<sup>379</sup> Perhaps cases are additionally distorting in that, as (subsumed) ‘artefacts’ of law, they are not coextensive with law, whatever ‘law’ is. For Santos, a legal pluralist, law importantly includes far more than jurisprudence. Marc Galanter, another pluralist states: “saying that law only exists in the courtroom is like saying health only exists in hospitals.” Galanter (1981) qtd in Manderson (1996) at 1064.

<sup>380</sup> See e.g. Brody (1982) especially at 34-48.

<sup>381</sup> Because not all harmful laws are challenged in court and because those that are challenged may take years to reach resolution, the legal map does not update instantly or with any patterned regularity.

<sup>382</sup> Blomley (1994) at 77-78.

<sup>383</sup> *Ibid* at 75 [emphasis in text].

specify timeless, rational principles inherent in the very fabric of a law without interstices.<sup>384</sup>

These principles would just happen to serve the interests of the business class. Official histories often elide that Coke's enterprise met with ferocious opposition from radical Leveller social movements who argued that "the law must be wrested 'from the custody of a clique of mandarins and thrown open to the comprehension (and therefore control) of the meanest English commoner.'"<sup>385</sup> Blomley explains that it was "of course" Coke's approach that was institutionalized.<sup>386</sup> Perhaps it is more a testament to the extent to which, in Canada, centralized law (courtroom law) has been naturalized than its egalitarianism that today's Leveller analogues, such as David Arthur Johnston, have sought recognition therein.

The courtroom's inability to capture homeless claimants' context may better be understood as a constitutive feature of centralized state law than a contingent feature amenable to correction with the right academic intervention. Young inevitably reprises a normative register:

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.<sup>387</sup>

This argument will face insurmountable difficulties as long as courtroom constraints are beyond the grasp of rational self-correction. What does it mean that the vast terrain of neoliberal non-justiciability—the *Charter* only applies to matters with a sufficient state nexus —falls off the map altogether,<sup>388</sup> receiving not even so much as Ross J's surficial gloss of neoliberal policy

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<sup>384</sup> *Ibid* at 74-84.

<sup>385</sup> Hill (1958) at 81 qtd in Blomley (1994) at 81.

<sup>386</sup> Blomley (1994) at 81.

<sup>387</sup> Young (2013) at 698.

<sup>388</sup> See e.g. Hutchinson and Petter (1988).

transformations? If homeless narratives insistent on tent cities fall off the map for Young as much as they do for judges, how likely is it in the foreseeable future that judges will be able to change their precedent-inflected worldview enough to appreciate ‘the’ context of homelessness, which in any event is a context that is not *one*?

Young acknowledges that it is challenging to produce subtle maps at helicopter heights. She explains that it is difficult to navigate “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.”<sup>389</sup> But is there a difference between the work of social, legal, and political theorists, and that of judges, whose hermeneutics are not only brisker, but take place in what Robert Cover terms “a field of pain and death?”<sup>390</sup> By this phrase, Cover means *inter alia* that judgments are backed by the ever-present violence of the state, which is certainly encoded in anti-homeless laws.<sup>391</sup> An academic critique that highlights the materially violent dimension of law, as opposed to its hermeneutic dimension, might clarify the nature of adjudication within the “dense and sticky” social matrix. The courtroom is no doubt indispensable when confronted with immediate state violence, such as overhead shelter confiscation. In those instances, the interpretive violence of the courtroom (e.g. “invisible fences” and equivalence with the right of the wealthy to purchase private healthcare) must sometimes be endured. One would simply not wish to lose sight of the violence of invisible fences themselves and marketized liberty. With Cover, “we are left, then, in this actual world of

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<sup>389</sup> Young (2013) at 697.

<sup>390</sup> Cover (1993) at 1601.

<sup>391</sup> If magic is the conversion of signs directly into material effects without mediation, then the standing implementation capacity diffused through the officials of the centralized state with its “monopoly” on violence makes adjudication appear close to magical. Cover argues that this standing violence makes judges “different from poets, from critics, from artists. It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real—a naïve but immediate reality, in need of no interpretation, no critic to reveal it.” *Ibid* at 1609. One could agree with Cover about the immediate reality of judgments without necessarily hierarchizing judicial violence over that of poets, whom Plato comically banished after all.

the organization of law-as-violence with decisions whose meaning is not likely to be coherent if it is common, and not likely to be common if it is coherent.”<sup>392</sup> *Adams* (the ‘best’ outcome in the shelter jurisprudence to date) produces meaning that is common in its protection from bodily suffering at the expense of reinscribing homeless powerlessness against structural injustice. But it is incoherent to the extent that homeless people collectively desire far more than the agency vindicated in putting up a box.

Turning to mapping’s output side, I have already discussed the limited extent to which properly reformed case law might initiate egalitarian social change, but here the mimetic mapping relationship assumed between law and society runs aground even with respect to the emergency temporality. The Court of Appeal stated that although Ross J’s ruling was “narrow in scope, it takes on wide meaning and implications for all.”<sup>393</sup> However, because the government did not seek leave to appeal to the Supreme Court of Canada, *Adams* is not binding on the country as a whole. Even the contingent night-time shelter right established in *Adams* has now been rejected by the City of Vancouver, only 100 km away, with respect to nearly identical legislation and a similar shelter situation.<sup>394</sup> The strategy therefore seems to be to force homeless people and/or legal advocacy organizations to marshal the extensive factual record compiled in *Adams* about shelter spaces *etc* in each locality. This strategy could be replicated in every BC municipality, and especially outside BC. Such a stance is given some protection by the Court of Appeal in *Johnston*, which insisted that *Adams* “did not create a ‘right’” to do anything, [and] neither did it declare the bylaw unenforceable for all purposes.”<sup>395</sup> And *Tanudjaja* in turn read *Johnston* to say positively that there were enough daytime shelter spaces for the homeless when

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<sup>392</sup> Cover (1993) at 1629.

<sup>393</sup> *Adams* BCCA at para 4.

<sup>394</sup> Pivot Legal Society has been helping a homeless Vancouver man to challenge the situation in Court. Pivot Legal Society (2012).

<sup>395</sup> *Johnston* BCCA at para 10.

the reality is likely the opposite. This underscores the limitation of legal remedies without corresponding cultural changes. Even though courtroom activism is venerated for its pragmatic incrementalism, Frank Ruda explains that incremental changes in a neoliberal epoch have allowed everything to remain the same: “the privileging of the possible [or the actual] implies that one has always already opted for one particular model of change: change as an extension of the possible.”<sup>396</sup>

Young contends that “the *Charter* era has ‘shifted a significant class of personal interests from the domain of politics to that of law;” she adds that “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>397</sup> Litigation has not only failed to change daily homeless life, but has at times affirmed problematic stereotypes about the homeless in the courtroom process and erroneously equated their ‘liberty’ with wealthy private healthcare purchasers *etc.* Harry Arthurs and Brent Arnold argue that what has mattered most since the advent of the *Charter* is “political economy... above all, but not political economy alone: geo-political forces increasingly determine the inclination and capacity of states to make good on what their constitutions proclaim and their legislators promise.”<sup>398</sup> I would hasten to add that constitutions do not proclaim (by *prosopopeia*) precise measures and I would add that politicians in a post-democratic era no longer make promises (other than guiding the ship of state over the choppy waters between the present and ever greater economic growth).<sup>399</sup> Arthurs and Arnold conclude that “the *Charter* does not much matter in the precise sense that it has not—for whatever reason—

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<sup>396</sup> Ruda (2013) at 145.

<sup>397</sup> Young (2013) at 671.

<sup>398</sup> Arthurs and Arnold (2005) at 116.

<sup>399</sup> Rancière (1995) at 5-6.

significantly altered the reality of life in Canada.”<sup>400</sup> This is certainly true for homeless people. Although again, the right to a temporary box is significant, the real question, as Young and others point out, is why they ever had to go to court in the first place to achieve such a minimal protection. In the next section, I want to shift from a meticulous account of disabling constraints and limits to an approach to law and politics that puts enabling democratic eruptions of shelter equality at the centre of the analysis.

### C. Beyond Courtroom Activism: The Subject of Rights as the Subject of Dissensus

You know what a miracle is[?]. . . another world’s intrusion into this one.

—Thomas Pynchon, *The Crying of Lot 49*

This is what I call a dissensus: putting two worlds in one and the same world. A political subject, as I understand it, is a capacity for staging such scenes of dissensus... The very difference between man and citizen is... the opening of an interval for political subjectivization... Political subjects ... not only confront the inscriptions of rights to situations of denial; they put together the world where those rights are valid and the world where they are not. They put together a relation of inclusion and a relation of exclusion.

—Jacques Rancière

*Shall I project a world?* If not project then at least flash some arrow on the dome to skitter among constellations and trace out your Dragon, Whale, Southern Cross. Anything might help.

—Thomas Pynchon, *The Crying of Lot 49*

Up to this point, I have confronted the problem that state institutions have been unable to accommodate homeless narratives. Even going to court to compel the state to provide shelter reinscribes homeless peoples’ inequality in various ways. My aim is therefore to broaden the field of legal inquiry. I contend that homeless tent city dwellers either overtly (as in Johnston’s

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<sup>400</sup> Arthurs and Arnold (2005) at 54.

case) or tacitly enter law's amorphous 'orbit' in at least two ways. First, rights are not just things declared by the courts: they are claims enacted in various ways, many if not most of them extra-judicial. Second, the homeless are not a lawless group; on the contrary, they generate their own law in their own ways. Therefore, the claims of the homeless to their own space have to be understood on their own (legal) terms, and not just in relation to what the courts say or might say. To open a new 'line of flight' from the normative commentary on the right to shelter, I draw on the anti-disciplinary work of Jacques Rancière,<sup>401</sup> combining his notions of 'the police order,' 'politics,' 'rights' and 'dissensus' with my own theoretical synthesis related specifically to the shelter context.

Rancière takes the principle that everyone is equal as a fundamental axiom. His reference to "equality of intelligence" does not mean that people are literally equal in intelligence, ability, *etc.*<sup>402</sup> But it insists that with respect to partaking in ordering our lives in common, no one's will should be subordinated to someone else's strictly by virtue of superior wealth, age, merit (however that is assessed, and arguably not so well today with neoliberal 'metrics' that pervade workplaces, schools, and other bureaucracies), *etc.* Furthermore, it suggests that everyone is equally able to understand what is at stake in political decision-making; i.e. someone who has simply read a lot should not be presumed to have a greater understanding.

Much of Rancière's conceptual lexicon comes from reclassifying key terms whose popular meaning needs to be problematized in order to reprise their historical and/or etymological origins. He redesignates as 'police' legislatures, bureaucracy, courts and all those

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<sup>401</sup> Rancière states: "I don't speak for members of a particular body or discipline. I write to shatter the boundaries that separate specialists." (2007) at 258. Whereas both inter-disciplinary and trans-disciplinary approaches take existing disciplinary lines largely for granted, and in fact strengthen existing disciplines (including their definitive boundaries) to the extent that they 'succeed,' in anti-disciplinary projects, the researcher brings tools from many disciplines (where they must presently be found) to bear on the object of inquiry, but the process of inquiry reconfigures and ideally erodes the disciplinary lines themselves. See e.g. Mowitt (1992).

<sup>402</sup> Rancière (2010) at 80.

official state institutions mainstream legal commentators usually associate with ‘politics.’ In this epoch, the relevant police order is the global neoliberal one, which for Wendy Brown is a coherent order of political reason, despite its spatiotemporal differentiation, contradictions, cohabiting logics, *etc.*<sup>403</sup> As in the title of this Thesis, Rancière typically refers to ‘post-democracy’ in a homologous way. In this instance, he would probably refer to ‘police reason’ rather than ‘political reason,’ if ‘reason’ is itself not too epistemological (relative to his own emphasis on *aesthetics*).

The principle of police is consensus. This names not just the neoliberal interest group jockeying for ‘pieces of the pie’ around a conference table. Rather, the police order distributes bodies in allocated places with nothing left over and it polices what can be seen and what can be heard—what counts as a political utterance or act. It is the “distribution of the sensible.”<sup>404</sup> The aesthetic here is one of bipartisanship, politesse, courtesy, *etc* within, and insensibility (e.g. invisibility and/or inaudibility) without.

Rancière also redesignates ‘democracy’. What we typically call ‘democracy’ he calls ‘oligarchy’ (rule by an elite group). For him, democracy is not a set of institutions or a state regime. It is the anarchic rule of anyone and everyone—including those who lack every one of Plato’s “proper” qualifications or entitlements to rule (age, wealth, knowledge, slaveholding, *etc*).<sup>405</sup> Democracy is based on everyone having an equal chance to govern, or the *absence* of specific qualifications (in Plato’s disparaging connotation, such rule was found in the drawing of lots).<sup>406</sup> Politics is for Rancière the implementation of the democratic principle. We know that

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<sup>403</sup> Brown (2015).

<sup>404</sup> Rancière (2010) at 36.

<sup>405</sup> *Ibid* at 30-31.

<sup>406</sup> Rancière (1995) at xii. “The scandal of democracy” for Plato refers not to a scandal within the democratic regime, but the scandal that democracy itself represented in its departure from rule by philosopher kings (which, in the Blomley discussion above, is like the Diggers and Levellers’ scandalous demand to wrest interpretation of law from the clique of mandarin “stern men” like Coke).

today it happens not via the drawing of lots—there is obviously no Powerball-like televised random selection for people to hold political/bureaucratic positions. Rather, for Rancière, it is an interruption in the police order’s distribution of the sensible by “the part with no part.”<sup>407</sup>

The part that has no part is not simply a group like the poor. The poor can be given a part in the police order, say by falling below a certain income line. Rather, the “part with no part” is ‘the people,’ the generic and universal *demos*, which is defined by a lack of entitlement to govern. It cannot be represented in the police order and often appears with the name of a lack—an anomic name—such as *sans papiers*, or in the present context, the homeless.

Politics takes place through ‘dissensus,’ which is *how* the part that has no part interrupts the consensus order’s distribution of the sensible. It is the enactment or staging of equality (the testing or verification in a new and concrete situation of the aforementioned universal equality of intelligence that we must always presuppose). It is not dissent (a conflict of overt opinions, usually stated back to power in its own register, *etc*), but rather the insertion of a *division* in ‘common sense.’ Dissensus is “a dispute over what is given and about the frame within which we see something as given.”<sup>408</sup> For example, when Johnston and others camped in Cridge Park, contrary to the positive law (law posited by the state), they engaged in dissensus, staging their equality. Their direct action might be interpreted to pose the question: ‘If wealthy people can have sprawling private estates in Oak Bay, why can’t we at least have tents in the only spaces (park spaces and transportation corridors) in which we are allowed to exist?’ They created a division in common sense by supplementing the unified frame or picture (held by the phantomal housed public) that parks are for leisure and sidewalks are for walking with a contradictory

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<sup>407</sup> *Ibid* at 32.

<sup>408</sup> *Ibid* at 69.

picture in the same sensory field.<sup>409</sup> The police order works on a suturing logic that aims to have a place for everything and everything in its place (a total arrangement of parts or what Foucault would call the ‘disposition of things’) whereas politics works on a *dividing* logic. The aesthetic here is one of a passion for equality manifesting in defiance and interruption (e.g. interruption of neoliberal officials ‘just doing their jobs’ by those fighting for their lives and their future via direct action).<sup>410</sup>

Dissensus shows that people can always open gaps in the police order and that even if police orders for Rancière will always be with us,<sup>411</sup> they can be changed, resulting in a new distribution of the sensible, which will in turn be open to dissensus, and so on. Even if Rancière’s *demos* makes claims based on universal equality, the ineradicability of the police order means that heterogeneity is the *de facto* ‘best outcome;’ the addition of constant eruptions of discordant equality within an overall order that works on a relative logic of domination results in at best a ‘mix’ of equality and domination in any one time and jurisdiction. This is the case even if dissensus may push the police order toward relatively greater equality, and even if only in a series of ‘short terms’ on a genealogical timeline that may also include serious reversals, disjunctures, *etc.*

Rancière foregrounds the interruption of familiar institutions rather than philosophically justifying their key coordinates or making normative reform proposals. This is obviously a dramatic shift for those used to formulating institutional maps ‘from above,’ however attentive those maps may attempt to be to voices ‘from below.’ However, Rancière initially fashioned this

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<sup>409</sup> Where there was initially one ‘common sense,’ and homeless people did little actively to challenge it in urban space, their dissensus enacted a deviation from the common sense picture, proving that it was not so ‘common’ and inviting even housed people opposed to urban camping not to take the leisure/transport picture for granted.

<sup>410</sup> For a beautiful discussion of the contrast between the (liberal) aesthetics of Rawls and the (poststructural) aesthetics of Rancière, see Panagia (2006).

<sup>411</sup> Chambers (2012) at 10-11.

approach by analysing workers' archives,<sup>412</sup> and it proves especially powerful with respect to understanding homeless narratives. It follows from the politics/police reclassification that 'political philosophy' (of the sort ranging from Plato to Aristotle to Rawls) has as its goal the elimination of politics (by rationalizing the police order institutions whose logic of inertial inequality is opposed to the logic of politics, which is equality); as stated above, Rancière therefore refers to his "dramaturgy" rather than his philosophy or even theory.

### 1. The Subject of Rights

In "Who is the Subject of the Rights of Man?" Rancière considers how constitutional rights function as political signifiers to which narratives of the *demos* (such as the homeless) might orient. He discusses theorists such as Hannah Arendt, Giorgio Agamben, and Jean François Lyotard in the course of the paper, but for my purposes here, I want to draw out how Rancière's conception of rights differs from that in the normative legal commentary on shelter. Rights for Rancière are distilled succinctly in a key if gnomic (enigmatic and aphoristic) sentence: "the Rights of Man are the rights of those who have not the rights they have and have the rights they have not."<sup>413</sup> Here Olympia de Gouges, one of many female activists in the French Revolution, provides a clear example. She noted the conspicuous absence of women in the supposedly universal suffrage clause in the 1791 Constitution, despite the fact that some activists were put to death for their *political* activity (a contradiction given that women, as evinced by their disenfranchisement, were deemed apolitical). She declared that "if women were entitled to go to the scaffold, they were entitled to go to the assembly."<sup>414</sup> Rancière explains that:

Women, as political subjects, set out to make a two-fold statement: they demonstrated that they were deprived of the rights they had thanks to the

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<sup>412</sup> See e.g. Rancière (2012).

<sup>413</sup> Rancière (2010) at 67.

<sup>414</sup> *Ibid* at 69.

Declaration of Rights and through their public action, that they *had* the rights denied them by the constitution, that they could *enact* those rights.<sup>415</sup>

The example shows that rather than proceeding within a pure political sphere, politics—*rights* politics, at any rate—is always about the dividing line between private and public itself. And this is particularly clear with respect to Johnston citing his right to sleep, a ‘private’ behaviour in ‘public’ space. When he partook in the tent city to protest the lack of what he took to be his constitutional rights, including the right to sleep, he had not the rights he had (he did not have the “liberty” and “equality” guaranteed to him in the *Charter*) and he had the rights he had not (he made a case for his constitutional liberty and equality via the direct action of camping).

The foregoing discussion raises the titular question: “who *is* the subject of the rights of man?” It is actually not a pre-existing subject—a member of a determinate population—and even more, it is not ‘man’ or a transcendental ‘human.’ The subject of the rights of man is the *demos*, but subjectivation is a process or a capacity. The subject only emerges in historically specific contests over a gap between the abstract inscription of a right (e.g. in a constitution or the UN Declaration of Human Rights) and cases or stagings that attempt to test or verify the right (and correct the ‘wrong’, the lack of equality that is *exposed* in the police order). These stagings enact the universal presupposition of equality because the rights instruments themselves purport to be universal. De Gouges either became a political subject the moment she wrote her tract or when her death was retrospectively narrativized to inaugurate women’s public demand for equality. She was not acting within her rights on the terms of legal discourse—precisely the opposite. To the police order, she simply did not know her place, and her reasons for being out of place were unintelligible (because they challenged its coordinates rather than making claims within them).

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<sup>415</sup> *Ibid.*

Young and other right to shelter commentators figure rights syllogistically. In this dominant shared account, all Canadians have clear and determinate rights to housing and a certain basic standard of living under international human rights norms and under a certain reading of the *Charter*, and those rights will be altogether hollow until courts order states to fulfill them. Conversely, Rancière's logic is paratactic ('side by side') because subjects simultaneously have and do not have rights. The question is not whether institutions can deliver rights, but whether the homeless can make *use* of them by staging their equality via direct action.

From a Rancièrian perspective, Young risks invisibilizing or marginalizing people like Olympia De Gouges and Johnston (who are part of a *collective* politics that makes them culturally visible both before and after their dissensus—recall in Johnston's case the 70 other people camping in Cridge Park prior to *Adams*). Conversely, like Susan Ruddick, Rancière wants to emphasize the extent to which various axes of structural power cannot saturate the political field, producing us as totally docile bodies, or these courageous collectives (which we often narrativize with heroic individual names like De Gouges or Rosa Parks) could not 'pop up' in the first place, usually in a way that takes people by surprise.

Rancière wishes to emphasize the crucial gap that always exists between law and fact—between the abstract literalness of rights and the 'polemic'<sup>416</sup> over their verification (the use of the word 'polemic' seems appropriate given the interrupting—perhaps even rowdy—aesthetic of dissensus). But what does consensus do? Especially in these neoliberal times, it attempts to shrink the gap to nothing. Reminiscent of the mapping discussion, in which law was held by normative legal commentators to bear a mimetic (if always approximate and selective) relationship to society, state officials' goal of making law 'reflect' society suggests an attempt to eliminate the (ineliminable) gap between the (abstract) constitutional inscription of rights and

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<sup>416</sup> Rancière (1999) at 41.

their concrete staging. Politicians, as part of the police order, cannot brook the dissensus of the homeless in public space. One tent city after the next has been disbanded across Canada.<sup>417</sup> Likewise, Chief Justice McLachlin sees her job as trying to “reflect the dominant views in society,” and my discussion of cases such as *Gosselin* showed that these supposedly dominant views bear a striking resemblance to those of Kawash’s phantomal housed public. Also in *Gosselin*, McLachlin CJ observed that in any legislative scheme, some people will inevitably “fall through the cracks.”<sup>418</sup> This is no doubt true, but if the story ends there, one must confront the problem that those who fall through the cracks are “always the same ones”—people like Louise Gosselin, Nathalie Adams, and David Arthur Johnston, who lack a part in the police order.<sup>419</sup> This imagery of people falling through the social safety ‘net’ (which is porous but unbroken) once again evokes the police order’s suturing aesthetic. This stands in contrast to Rancière’s dividing aesthetic, which is shared by JC Scott, who I quoted above, referring (uncannily) to “disorderly, unpredictable, spontaneous action *cracking open* the social order from below.”<sup>420</sup> Dissensus not only aspires to spatial and narratological heterogeneity,<sup>421</sup> but succeeds precisely by cracking open the totalizing police order, acquiring a foothold in the cracks that that order itself inevitably generates faster than it can close.

I argued in Chapter 2 that courts will not order states to provide housing, but it is worth emphasizing that even if judges could be convinced to use their power for egalitarian purposes, domination and inequality would be reinscribed in the very act of prescribing greater equality. Because of their professional commitments, lawyers and legal academics may wish to use the

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<sup>417</sup> See e.g. Black (2010); Koenig (2008); Johnston (2011).

<sup>418</sup> *Gosselin* at para 72.

<sup>419</sup> Foucault (1977) at 224: “the universal punishments of the law are applied selectively to certain individuals and *always the same ones*” [emphasis added].

<sup>420</sup> Scott (2012) at 141.

<sup>421</sup> Donna Haraway similarly refers to an “infidel heteroglossia.” Haraway (1991) at 181.

only tools at their disposal and the ones they know best to achieve the goal of egalitarian reform, but tend to under-appreciate how the *means* used to achieve that end reproduce the very social hierarchy that is at the root of the problem. The purpose of transferring authority to courts is in fact to put some matters ‘beyond politics.’ Not only is authority vested in a supposedly neutral, apolitical body, but people who engage with that body are encouraged to give up other activities in favour of the court process.<sup>422</sup> As a literal example of this, after helping to disband the tent city in Cridge Park, David Johnston did not return there to camp because of his understanding that he would get a full trial. Even if there is no formal requirement or pressure to pick a single route to contest shelter injustices, people do not have unlimited time and money; energy spent on the demanding courtroom process may leave little left over for other routes. In any event, activists may come to see their own issues in narrowly legal terms, rather than in the terms they themselves would have chosen. Here there is a tension in Johnston’s own rhetoric, in which he both struggles to adopt legal jargon to achieve his relatively narrow goals in court, and at the same time, refers to legal concepts such as ‘rights’ to justify his tent city goal and to inspire others to join him. Too much judicial norm-setting might result in political lassitude among the general public. Empowering an elite of legal professionals undercuts the democratization (the equal partaking in governing our lives in common) that is the condition of possibility for truly egalitarian political change.

Rancière concludes his paper by urging us to focus on actual subjects’ actual orientations to inscribed rights—to focus on their unpredictable acts of dissensus rather than on specifying (or mapping) perfect normative principles for police order procedures—and thereby to “rethink politics today, even if out its very lack.”<sup>423</sup> With this conceptual architecture in place, I want to

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<sup>422</sup> See e.g. Mandel (1994).

<sup>423</sup> Rancière (2010) at 75.

texture dissensus in the right to shelter context. To do so, I will evaluate how dissensus operates across both space and time. Whereas consensus works spatiotemporally to *compress* homeless subjectivity with the (unrealizable) *telos* of eliminating it entirely, dissensus works *explosively* to assert homeless subjectivity. Of course, space and time operate together, but I will proceed analytically in a contrapuntal movement with respect to each.

First, I will draw on Kawash again to show how the phantomal housed public orients to the homeless in a way that constricts the homeless body to a vanishing point in urban space. Here, homeless dissensus resists constriction by occupying a larger physical place and in a more collective, enduring, secure way. Second, I will reprise the temporal register from section ‘A’ in this Chapter, in which I problematized the centrist progress narrative’s conjoined temporality. Having already addressed *Adams*’ ‘emergency’ (courtroom) temporality, I now wish to develop the contrasting (if coexisting) ‘insurgent pantemporality’ of homeless dissensus. For this purpose, I draw on Melanie Loehwing, for whom the housed public (corresponding to Kawash’s phantomal housed public) constructs (constricts) homeless temporal subjectivity as “the unforgiving minute of the present.”<sup>424</sup> Here, homeless dissensus resists constriction by operating pantemporally, which can be illustrated by examining past, present and future reference frames: homeless dissensus cites historical egalitarian predecessors, including prior tent cities; it proclaims that the homeless are here now, unwilling to wait for experts to deliver a better future; and by serving as an egalitarian mechanism in the present, it both prefigures a more egalitarian future world within this inegalitarian world and gestures toward myriad possible future shelter permutations, all of which have greater potential for equality.

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<sup>424</sup> Loehwing (2010).

## 2. The Phantomal Housed Public and Spatialized Dissensus

Courtroom law tends to present our urban spaces as abstract and undifferentiated. I described above how, historically, the centralized common law subsumed variegated local geographies in lofty rational legal structures. And this approach to space has become normative (if not universal) in legal circles today. Blomley cites Wesley Pue's work to the effect that:

Western legal reasoning is celebrated as utopic, divorced from the specificities and bonds of place and community... legal relations and obligations... are frequently thought of by courts and other legal agencies as existing in a purely conceptual space, with little recognition of the spatiality and diversity of material circumstance... 'general principles must outweigh specific considerations.... This juridical 'common sense,' however, piles abstraction on abstraction—it is geographical nonsense—*anti geography*.'<sup>425</sup>

Even in *Adams*, the specific tent city site of Cridge Park and the specific nature of that encampment had to give way to a generalized overhead shelter norm that was to apply to all public spaces in the city.

The normative commentators typically turn to law not to foster a finer-grained urban map, but to extend progressive institutional arrangements as far as possible, based on the most macroscopic norms (*Charter* rights and international human rights).<sup>426</sup> Kawash explains that progressive legal scholars are not idiosyncratic in their 'everyone indoors' logic; societies have a tendency to seek organic unity and closure, resonating with Rancière's figuration of the police order. This unifying tendency is reflected in univocal map metaphors, but also in courtroom discourses examined in Chapter 1, which constantly invoke 'expectations when one lives in society' or 'intentions of policymakers and city planners' and the threat of 'anarchy.' Here 'anarchy' connotes not 'the absence of rule' (which is the etymology), but rather chaos, which is

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<sup>425</sup> Blomley (1994) at 53 [emphasis in text].

<sup>426</sup> An exception is Young (2014), in which she turns to the human geography of Victoria and Vancouver as they relate to *Adams* and *PHS* (concerning a safe injection site for drug users in Vancouver's downtown east side). However, she remains focused on doctrinal analysis and adds a foray into "the right to the city."

presumed to ensue whenever rulers are absent. However, the homeless body interferes with rule from above; it is the “material, substantial, fleshy barrier to the unity of society.”<sup>427</sup> For Kawash, the homeless body is the stubborn material fact that prevents (as if by centrifugal force) the symbolic housed public from achieving the conceptual integrity towards which it tends. The phantomal housed public’s unrealizable telos of closure/totality is the same as that of the police order. She explains that the “‘war on the homeless’ must also be seen as a mechanism for constituting and securing a public, establishing the boundaries of inclusion, and producing an abject body against which the proper, public body of the citizen can stand.”<sup>428</sup>

The homeless body simultaneously constitutes the normalized housed public via its exclusion and prevents the completion of that public given that it is a perennial remainder that cannot be included. Kawash details how public space is becoming increasingly inhospitable to the homeless body.<sup>429</sup> She notes an irony in that it is the homeless who are constantly being asked by police to ‘move along’ in public space when they are the ones who have nowhere to go (as a result of a spatial allocation that the police take part in producing). The housed public orients spatially to homeless citizens in ways that compress the homeless body in the hope that it will vanish.<sup>430</sup> In addition to anti-panhandling and anti-squeegeeing laws, this includes designing public transportation so that homeless people cannot sleep on it, putting locks on dumpsters to prevent foraging or even poisoning their contents, not providing public toilets, *etc*:

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<sup>427</sup> Kawash (1998) at 329.

<sup>428</sup> *Ibid* at 325.

<sup>429</sup> Kawash cites four forms of homeless criminalization: (1) imposing restrictions on homeless people’s use of public space for activities such as sitting and sleeping; (2) conducting police sweeps designed to remove homeless people from public places; (3) enacting or enforcing restrictions on begging; and (4) targeting homeless people for selective enforcement of generally applicable laws. *Ibid* at 327 fn10. (1), (2), and (4) are particularly relevant to the urban camping context discussed here. For a discussion of (3), see Mosher (2002), describing how the Ontario and BC Safe Streets Acts have criminalized panhandling, squeegeeing, and other activities that used to allow homeless people to stay alive.

<sup>430</sup> To make this point vividly, Kawash opens the paper with a discussion of a homeless body she encountered slumped on a bus seat not designed for spreading out, utterly harmless and yet with a zone of empty space (a compression buffer) around it in which no housed passengers entered. *Ibid* at 319-320.

The body of the homeless is refigured to conform with the configuration of an urban geography designed to exclude it... the destination points of the trajectories of street life are no longer the officially functional locations that order the operation of the city (bus station, library, church, café) but bodily functions that must be attended to (toilet, rest, warmth).<sup>431</sup>

Ultimately, the (sometimes literally) compressing effects of public spatial marginalization on the homeless body rests on pure physical violence.

John Franklin Koenig details spatial mechanisms used to hinder daily homeless life (or which have that consequence) in Victoria specifically. After *Adams*, some defended the City's outdoor sleeping deterrence policies because Victoria is thought to attract homeless people from other jurisdictions, given its especially hospitable climate. The mayor at the time stated that "if we were to welcome these people to Victoria with open arms you can be assured it will attract others from Kelowna, Vancouver, Quebec and everywhere else."<sup>432</sup> However, Koenig explains that "an analysis of a one-night count of absolute homeless people in Victoria has revealed that most people sleeping in the rough on the night of the survey were indeed from the city."<sup>433</sup> Harsh urban measures may be an instance of the phantomal housed public's NIMBY (or "not in my backyard") attitude, which holds that "'homeless people are out of place in Victoria; they are 'the external enemy' and 'a threat that appears from elsewhere.'"<sup>434</sup>

Various spatial features could not be brought into the courtroom discussion in *Adams*, but are arguably as relevant as more "macro" level neoliberal trends, and very much related to them. Gentrification has been conceived as neoliberalism's "urban" scale and homelessness has been conceived as its "bodily" scale.<sup>435</sup> In addition to the eviction of the Cridge Park residents before *Adams*, at the same time that some of Victoria's historic downtown buildings were being

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<sup>431</sup> *Ibid* at 333.

<sup>432</sup> Koenig (2008) at 148.

<sup>433</sup> *Ibid* at 149.

<sup>434</sup> *Ibid*.

<sup>435</sup> See e.g. Amster (2004) at 206.

converted into expensive lofts, Koenig lists five similar encampment evictions since 2001, ranging from half a dozen to fifty urban campers.<sup>436</sup> Tear gas has been used to smoke squatters out of abandoned buildings sitting empty.<sup>437</sup> Also, in 2001 roughly fifty homeless youth were evicted from Spiral Island on Discovery St., a building leased by anti-poverty activist Ron Lund. This was because a City Bylaw Enforcement officer deemed Spiral Island an “unlicensed homeless shelter;” to justify the eviction, officials cited zoning regulations, safety issues, and potential legal liability.<sup>438</sup> Koenig notes the irony that “citizens struggling to survive *outside* on city streets... pose *less* of a liability for the city.”<sup>439</sup> The choice for homeless people helped by Lund was not between his ‘illegal’ shelter space and a nice apartment, or even an emergency shelter space, but between his building and the street. Note that once again it is a state official who decides on a matter that could not be more important to a group of homeless people on a daily basis. When these homeless youth moved outdoors, they were once again told to relocate (but where?): “many of the citizens evicted from Spiral Island had moved-on to the City Hall breezeway by Centennial Square, where they were promptly evicted *again* through a court injunction, this time to make way for an upcoming festival in the square.”<sup>440</sup> Whereas people with private spaces have certain legal rights, homeless people can be displaced at the whim of City officials who prioritize urban ‘revitalization,’ which is a euphemism for tourist and consumer enticement as part of a city’s global competitiveness imperative.<sup>441</sup>

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<sup>436</sup> Koenig (2008) at 147: “In 2001 forty citizens were evicted from the precinct of Christ Church Cathedral... in 2002 fifty were evicted from the front lawns of the Parliament Buildings... in 2003 a half dozen campers were evicted from Harris Green... [and] in 2004 about a dozen homeless citizens were evicted from the precinct of St. Ann’s Academy.”

<sup>437</sup> *Ibid* at 149.

<sup>438</sup> *Ibid* at 148.

<sup>439</sup> *Ibid*.

<sup>440</sup> *Ibid* [emphasis in text].

<sup>441</sup> Erin Black notes likewise that a tent city in Edmonton “threatened the potential of attracting investors, consumers, and workers to Edmonton, as well as private property values.” Black (2010) at 167.

When homeless people are forced to subsist on the street, they encounter architectural mechanisms that reinforce evicting officials' message that they ought to disappear. Victoria began to install "new Arts and Crafts style benches" in 1999, which have armrests that prevent people from lying flat to sleep. Large planters that could be used for sitting have been removed or fenced off with metal parapets.<sup>442</sup> Rotting fertilizer is used to deter homeless people from sleeping on the ground in some places.<sup>443</sup> Ubiquitous fences keep homeless people from sleeping in certain areas; Koenig details how a fence was used to keep a group of homeless people known as the "Apple Street Gang" from congregating under the Johnson Street Bridge.<sup>444</sup> Koenig concludes that to sustain Victoria's tourist image as a "City of Gardens" with a "narrative of regeneration," "the *visibility* of homeless citizens on the street must be regulated and structured, if not annihilated altogether."<sup>445</sup> It is difficult for homeless people in Victoria to contest these spatial exclusions *through any official channel*, not just in court. Koenig notes how "'public debate' concerning issues of urban or social planning typically excludes homeless citizens from the decision-making process, except as tokens for the benefit of political optics."<sup>446</sup>

In Victoria and beyond, discourses of "security" proliferate with respect to safeguarding the goods and spaces of the privileged against the homeless and others who "threaten" such goods and spaces. The more the violence of homeless spatial exclusion intensifies (and it is intensifying), the easier it is to expose and thereby to challenge. Kawash's most hopeful (and most Rancièrian) note is along these lines: "perhaps it is the visibility of the violence of security through which the homeless body emerges, rather than the visibility of the homeless as such, that

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<sup>442</sup> Koenig (2008) at 153, 155.

<sup>443</sup> Johnston (2011) at 1.

<sup>444</sup> Koenig (2008) at 152.

<sup>445</sup> *Ibid* at 126 [emphasis added].

<sup>446</sup> *Ibid* at 139.

holds some promise for *interrupting* the exclusionary imagination of the public.”<sup>447</sup> Blomley likewise holds that it is important to consider not just law’s oddly despatialized and oppressive mapping, but also to analyze “geographies of opposition” to that oppression.<sup>448</sup> It is in the midst of the intensification of spatial closure that dissensus, which interrupts the distribution of the sensible, emerges and may become easier to sense (for non-participants).

By staging tent cities, homeless people (who are thereby citizens in Rancière’s sense) contest disciplinary shelters and the forced peripatetic existence of outdoor life. If housed citizens have the privacy, freedom, and social belonging that comes from spaces of private property, homeless citizens may at least be free from state discipline in the only spaces available to those who have no private spaces of their own. When Ross J in *Adams* incorporated Wilson J’s reference in *Morgentaler* to “invisible fences” around each individual body with respect to state interference, she also reinscribed a liberal spatial imaginary that prevents homeless communities from living in place together in meaningful ways. What homeless activists demonstrate and what courts cannot affirm discursively—because they are part of the police order—is that community, privacy, security, and citizenship are bound together in (anti)property arrangements such as the tent city.<sup>449</sup> Constitutional rights such as “liberty,” “equality,” and those which may be understood as their derivative rights, such as “freedom of expression,” and even “freedom of mobility,” are made actual in tent cities in a way that they cannot be made actual either in courtroom discourse or in local political processes that include homeless people only as political tokens.

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<sup>447</sup> Kawash (1998) at 337. [emphasis added].

<sup>448</sup> Blomley (1994) at 56.

<sup>449</sup> A popular single variable essentialist definition of property is ‘the right to exclude.’ Tent cities for the homeless (subject to certain rules and expectations) instantiate the right *not* to be excluded. More nuanced (e.g. nominalist) definitions of property might be made to include the tent city.

By all accounts, the tent city that emerged in Cridge Park in Victoria prior to the *Adams* trial was cooperative, non-violent, and well-integrated into the city.<sup>450</sup> Although he struggled for “the right to sleep” in *Adams* and *Johnston*, Johnston explains—echoing homeless people like Mark Smith, Amber Overall and others who testified during the *Adams* litigation—that “community... is more important than sleep.”<sup>451</sup> He states that “equality is our motto.”<sup>452</sup> All emphasized that the tent city was *home*. Erin Black, in her illuminating ethnographic Master’s thesis on a tent city that emerged in Edmonton in the summer of 2007, with 200 residents at its peak, provides an analysis with many instructive parallels. Black explains that “the organic character of the community contrasted with the institutionalized nature of the shelter system and other homeless services; this also contributed to the ease with which residents felt able to respect and protect others.”<sup>453</sup> Residents would watch each other’s belongings while others left to work during the day.<sup>454</sup> They often related to one another on familial terms. One interviewee “spoke of protecting her ‘grandmother’ and ‘grandfather.’” She became a sort of matriarch: “the weirdest thing about it all [sic] is that everybody calls me their mom. I was well-respected in the community. That’s what was nice.”<sup>455</sup> Others emphasized common concern about solidarity, safety, and *order*: “Behave yourself. This is where we live. This is where you live... Don’t make a big scene because you wanna come here and cause some chaos, because we live here.”<sup>456</sup>

There is a parallel between the substance of life within the tent city and its genesis out of collective effort. Black explains that the “tent City was a manifestation of [residents’] own

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<sup>450</sup> See e.g. MacLeod (2007) in Johnston (2011) at 161.

<sup>451</sup> Johnston (2011) at 168.

<sup>452</sup> *Ibid* at 203.

<sup>453</sup> Black (2010) at 67.

<sup>454</sup> *Ibid* at 66.

<sup>455</sup> *Ibid* at 68.

<sup>456</sup> *Ibid* at 70.

efforts and agency.”<sup>457</sup> This recalls Colin Ward’s discussion of World War II veterans in Britain who squatted in their former barracks (then abandoned) after the war ended. Those who arrived first, violating state law requiring them to wait in (endless) housing queues, set to work repairing the structures and making them livable. They were self-sufficient, cooperative, and generally rather content. Ward calls them “goats.” Later, seeing that the squat was working well, the government abandoned its stance that it was illegal, and sent many people waiting in the queues to live there. These people, there as a result of a state directive rather than their own initiative, often declined to make even simple repairs and often became quite depressed. Ward calls them “sheep.” The point is not to privilege this sort of physical self-sufficiency as a universal ideal (it is simply impossible for some people), but rather that those who assert control over their own daily lives, despite myriad obstacles, often fare well—perhaps even better than those who live more comfortably but without much collective autonomy.<sup>458</sup>

In the Edmonton tent city, an informal leadership structure emerged and the “mayor” took pride in keeping the grounds clean and free of drug paraphernalia. His wife explained, however, that: “we’re not the boss or nothing. But we’re there to go walk around and make sure everybody’s under control, and no violence. It was pretty good for a while.”<sup>459</sup> She says “for a while” because the mayor “overextended his reach of authority and tried to assume more power than the community was comfortable with, leading other residents to reject his leadership and membership in the community.”<sup>460</sup> Whereas they have no place in the police order, all had a place in the tent city, subject to respecting the paramount value of equality, which entails

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<sup>457</sup> *Ibid* at 67.

<sup>458</sup> Ward (1983) reproduced in Wilbert and Damian (2011) at 67.

<sup>459</sup> *Ibid* at 71.

<sup>460</sup> *Ibid* at 72.

nonviolence, anti-domination, and to the extent that it does not interfere with the equality of others, free expression, free movement, *etc.*

Tent cities make homeless people more visible by occupying a larger space collectively, disrupting conventional urban maps and resisting the compression to which Kawash refers. In Edmonton, housed residents (including nuns) brought supplies to the site and engaged in supportive conversations with residents.<sup>461</sup> This was similar to how the adjacent church provided support to the Cridge Park tent city. Whereas housed residents may pass by individual homeless people scattered on the street, they are more likely to see tent cities as organized communities able to use donated items more effectively and to see those tent cities as political formations that challenge the very land distributions that once rendered their residents “out of place.”<sup>462</sup>

Once staged, tent cities not only maintain order with caring and solidarity norms, but with specific rules. One example comes from the aforementioned Edmonton tent city. A resident of that tent city catalogued the rules therein:

(1) No weapons; (2) No drug activity in common areas (meaning anywhere outside a tent); (3) No fire pits; (4) No public intoxication; (5) No fighting; (6) No campers under the age of 18; (7) No visitors after 11pm; (8) No hoarding.<sup>463</sup>

This demonstrates a robust interstitial normativity (a set of norms within the territory of the state but diverging from state law if for no other reason than such encampments violate bylaws); these rules allowed residents to coexist collectively without being subject to authoritarian and normalizing forms of state control.<sup>464</sup> Note the ‘horizontal’ or ‘egalitarian’ spatial aesthetic in the tent city as compared with the courtroom. In the former, no one has an absolutely superior place, whereas in the latter, the judge sits ‘on high’ to pronounce ‘the final word’ on homeless

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<sup>461</sup> Black (2010) at 66.

<sup>462</sup> This is Talmadge Wright’s titular phrase and it recurs frequently in the homelessness literature. Wright (1997).

<sup>463</sup> Black (2010) at 96.

<sup>464</sup> Cover argues that “the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among smallish groups.” (1986) at 1602 [emphasis in text]. The tent city might be one such group.

spatial claims. Judges are positioned at spatial ‘micro-apexes’ to dispense despatialized norms binding throughout their jurisdiction whereas tent city residents observe no spatial hierarchy in places that aspire to deviate, to the extent possible, from centralized law (such as bylaws).

Obviously, residents are still subject to the *Criminal Code* and other state laws, but tent cities enact a degree of emplaced autonomy similar to that enjoyed by those in private spaces such as suburban houses, even if the latter work on an anti-commons rather than a commons principle.<sup>465</sup> After all, as Faith, a litigant in *Adams* testified, the tent city was the only *true* home she ever had.

Johnston anticipates objections that saw both Victoria and Edmonton officials eventually shut down the respective tent cities, despite support from many altruistic housed residents. He notes that when any tent city gains traction, the phantomal housed public (e.g. in state and media discourses and in contradistinction to altruistic housed residents) “will justify [its] laziness by suggesting visions of a tent city turned slum where crime and needles run rampant.”<sup>466</sup> However, the Edmonton tent city disproves such concerns and Johnston counters that “this is a vision of current day Victoria.”<sup>467</sup> That is, a Victoria without tent cities. Johnston returns us to the logic in *Adams*; Ross J castigated the government for confusing problems related to homelessness with problems related to the need of some homeless people to live outdoors. He suggests that “once people see that they don’t have to pay rent anymore, they won’t.”<sup>468</sup> This statement about tent cities attracting people presently paying rent (and his reference above to public “laziness”) is problematic in that many renters with children or who insist on indoor spaces for any reason may reject even dignified tent city life. However, Johnston draws attention to how the tent city—at

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<sup>465</sup> Black likewise notes how tent city residents often reproduced “middle class” public-private norms within the state or “public” (e.g. park) space of the tent city, sharing common areas but respecting each other’s privacy and guarding each other’s belongings within tents. (2010) at 70.

<sup>466</sup> Johnston (2011) at 16.

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid.*

least for homeless people like him—performatively contests the fact that so many poor people have to pay excessive rent just to have shelter. A homeless person and tent city advocate in Tempe, Arizona stated: “I choose to be on the street right now. I’d rather die than give them the power—landlords, corporations, police.”<sup>469</sup> Although many homeless people are on the street not because of choice, but often “as the end result of emotional breakdown, losing one’s job, alcoholism, and the elimination of [affordable] housing,” *once homeless*, they cite daily advantages such as “avoiding the repetitiveness of ‘work’” and given the abuse they have suffered at the hand of institutions over the years, many “enjoy rejecting institutions.”<sup>470</sup> Especially given the high cost of shelter (some claimants in *Tanudjaja* were paying half or more of their income on rent), many must work excessive hours at unpleasant jobs just to pay the bills. Such a situation is profoundly inegalitarian because it is poverty that compels (de-politicizing) wage slavery.<sup>471</sup> And ours is a system in which people born wealthy never have to worry about rent or unpleasant jobs, but may instead own apartments and watch their savings grow as renters pay them each month, the latter able to put aside no surplus of their own. Obviously, one might question the extent to which tent city performances might rise to a sufficiently hegemonic level to change systemic realities, but questions of effectiveness can be separated from an understanding of the political critique underlying Johnston and others’ tent city advocacy and enactment.

Tent cities can be self-regulating interstitial spaces, and state regulation (apart from service provision) may simply disrupt rather than add order to those spaces. In a journal entry

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<sup>469</sup> Amster (2004) at 78.

<sup>470</sup> *Ibid* at 79.

<sup>471</sup> People are not likely to have much energy for political action if all of their energy is expended by working and doing daily subsistence chores.

entitled “pop culture reference,” Johnston provides an imaginative tent city analogy in his discussion of the film *Contact*, based on Carl Sagan’s book:

In [the movie], aliens from a faraway star system send blueprints for an interstellar travel system. The government, in building it, adds a chair inside the [device] which was not in the blueprints. When the first test run is made[,] Jodie Foster’s character gets injured by the chair [when it] shakes from its bolts. They find that the chair was hindering the use of the [device] because the occupant is supposed to be free inside and not strapped down. Now, I know that tent-cities (or if semantics are your thing you can call it ‘temporary transitional housing’) work. There is a life there rarely seen and the thing takes care of itself. With... government regulation [of] lengths of stay or registration[,] the efficiency of the thing is hampered and will injure the occupants because of fear of not having control. The point is that the blueprint for tent-cities is simple and only requires freedom to work at highest efficiency and by adding ‘security’ it is only going to injure the residents through lack of trust. [Perhaps], like in the movie, the security will be tried and observed as failed, only to be corrected after the injury. It would be nice to learn from past experience, though, even if it is fictional.<sup>472</sup>

In this passage, Johnston uses *Contact* as an allegory to explain how state measures and laws aimed at ordering and improving participants’ lives often instead often have the opposite effect, disrupting organic dynamics and even injuring those they are supposed to assist. Whereas the normative legal commentators typically view state involvement as a prerequisite for homeless equality, many homeless people themselves see the state not as an emancipatory force to be courted but as an oppressive force to be dodged or avoided. Nonetheless, there is a tension in Johnston’s rhetoric. He rejects all use of money, he refers to a “slave existence” in which “people are forcibly herded into the welfare state,”<sup>473</sup> and he is opposed to state security measures in tent cities. However, he grounds his claims in what he refers to at one point as the “sacredness” of the *Charter of Rights and Freedoms*,<sup>474</sup> a state legal document, and he would be open to having the City acquire land for a tent city, which it would then construct or help to construct.<sup>475</sup> It is both

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<sup>472</sup> Johnston (2011) at 251.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid* at 316.

<sup>475</sup> *Ibid* at 321.

common and understandable for homeless people to be opposed to state “security” measures but open to receiving assistance from the state *on their own terms*, the most important of which is to be treated as equals.

Tent cities often receive state support in addition to community support once they are enacted.<sup>476</sup> Dignity Village in Portland is an example of a small encampment in which residents have semi-permanent shacks, which many have personally decorated (see figure 4), as well as state water and electricity supply. Residents spend a lot of time on lawn chairs and tending small gardens or flower pots in outdoor common areas (see figure 5) and at one time, there was even a common shack with a TV viewing area.<sup>477</sup> The village is located on Portland’s periphery, somewhat far from downtown and it is limited to a small lot that may not exceed 60 residents (see figures 6 and 7).<sup>478</sup> It is far from a complete solution, given the Portland tri-metropolitan area homeless population of 8000. The village “chair,” David Samson explains that, “I consider myself quite lucky to be living at Dignity Village—a place to sleep, shower, prepare meals, and stay in contact with the real world.”<sup>479</sup> Samson states that “I can never be too comfortable knowing that there are many... going without even the most basic of needs being met.”<sup>480</sup> Nonetheless, Dignity Village represents a real improvement over street and shelter life, and one that may provide a generalizable model.<sup>481</sup> Tent cities must be created—*in violation of the law*—before services are provided; before tent cities form, officials do not supply drinking water or washrooms, both of which become possible only once they are staged. Tent cities in this way

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<sup>476</sup> In Edmonton, “drinking water and toilets were delivered to the site in order to ensure that basic sanitation standards were being met. Capital Health Authority visited the site daily to deal with any potential diseases or illnesses and to try to mitigate concerns about health liability issues.” Black (2010) at 97.

<sup>477</sup> Dignity Village website (accessed August 8, 2014). Online: <<http://www.outofthedorways.org/>>.

<sup>478</sup> Samson (2010) at 57.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

<sup>481</sup> A presentation was made on May 11, 2015 in Victoria on micro-housing as one possible solution to homelessness, which discussed Dignity village as an important example. Garbanzo (Online).

become part of the police order to some extent, but it is a police order that has been pushed via dissensus in a more egalitarian direction.

The point is not to romanticize tent cities as a political panacea that might instantly achieve equal status for their occupants. Without more than tent city pockets, the overall inequalitarian order that both reproduces homelessness and makes roofless life difficult persists. Tent cities, in our society as it is presently constituted, have potential problems of their own; these *may* include those related to hygiene and attracting violent crime (e.g. gangs), as well as a hard drug culture, especially with larger tent cities.<sup>482</sup> Although racial issues tend not to be pronounced in tent cities (especially relative to the wider culture),<sup>483</sup> serious gender-based domination *may* occur.<sup>484</sup> However, the question remains as to whether these problems are greater than those that exist when tent cities are disallowed (i.e. when insufficient shelter options are available, and when urban space is so inhospitable to homeless people, preventing them from living together in the way that at least many of them prefer). That question can only be answered on an emplaced case-by-case basis, and if homeless people's desires about so basic a matter are to be overridden, that may occur for many reasons, but none of them may be called 'democratic' when democracy is understood as rule by *anyone* and *everyone* over his or her daily life in common. In the next section, I turn to the temporal dimension of the tent city; in addition to its spatial dimension, it also always discloses a (pan)temporality.

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<sup>482</sup> Black (2009) at 99.

<sup>483</sup> Mitchell (2013) at 68; cf Smith (2014) at 41 (noting that contemporary US tent cities may nonetheless segregate along racial lines in a way that parallels the wider culture).

<sup>484</sup> Smith (2014) at 51. Although the prevalence of male 'leaders' may owe simply to the fact that a greater proportion of the homeless population is male, there have been reports of women being abused in tent cities (although this would be atypical, given the mutual caring norms *etc*), and some men may maintain sexual power over women in exchange for protecting them from other men.



Figure 15: *Dignity Village residents may customize their shacks or 'micro-houses' with paint, exterior decorations, etc. Photo taken from "Dignity Village," Wikipedia. (Accessed May 15, 2015). Online: <[https://en.wikipedia.org/wiki/Dignity\\_Village](https://en.wikipedia.org/wiki/Dignity_Village)>.*



Figure 16: A view of Dignity Village showing a group of personalized houses, a basketball net, flowers, small gardens, and lawn chairs that allow residents to interact in common space, etc. Photo taken from "Home for the Homeless?" Ridenbaugh.com (Accessed May 15, 2015). Online: <<http://www.ridenbaugh.com/index.php/2005/12/27/home-for-the-homeless/>>.

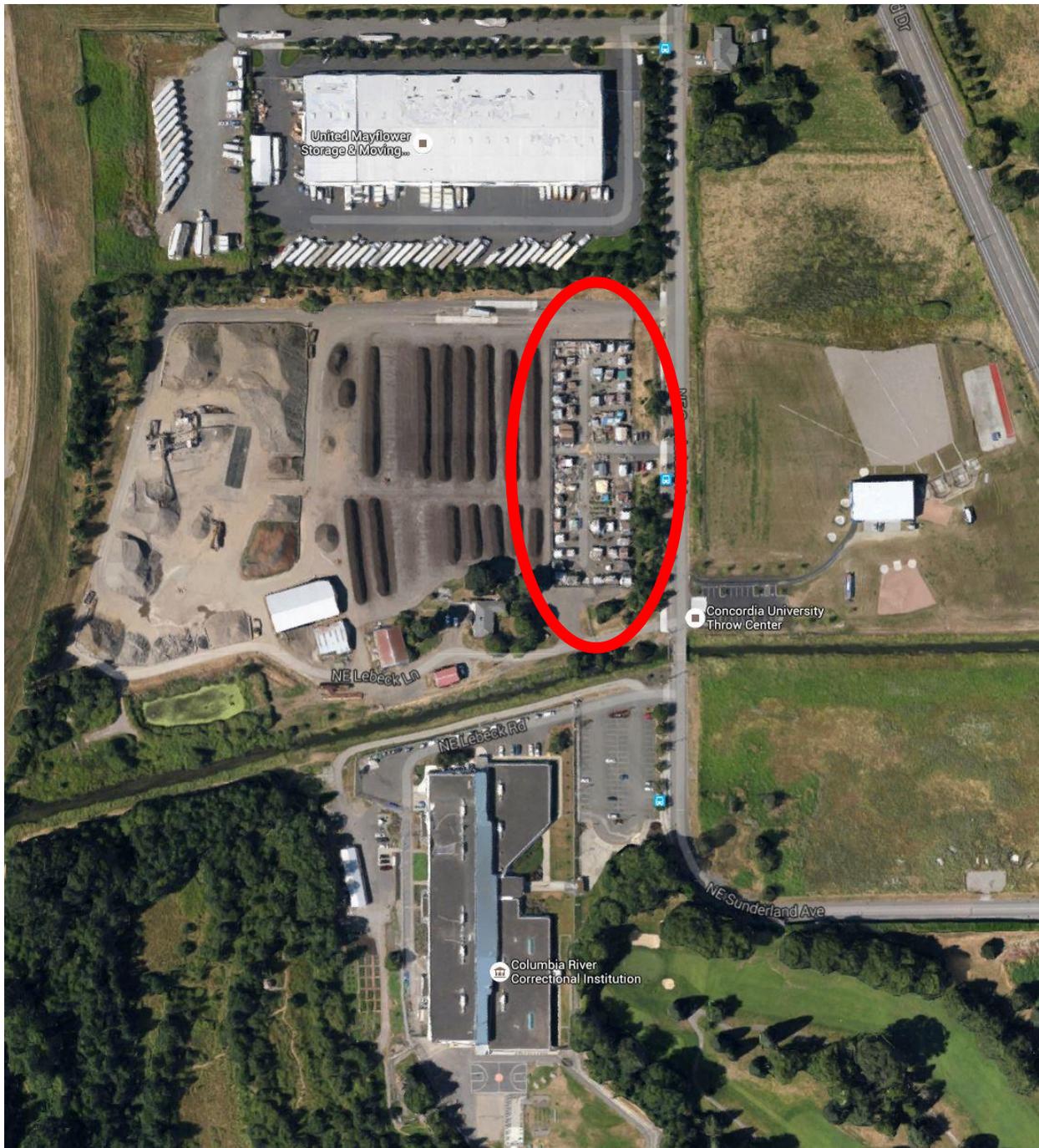


Figure 17: A view of Dignity Village in its entirety, circled, with diverse land uses in the vicinity, including (clockwise from the top) a storage business, the Concordia University Throw Center (for javelin, hammer, discus, and shotput), a country club golf course, and a “minimum security work camp” prison. Photo taken from Google Maps.

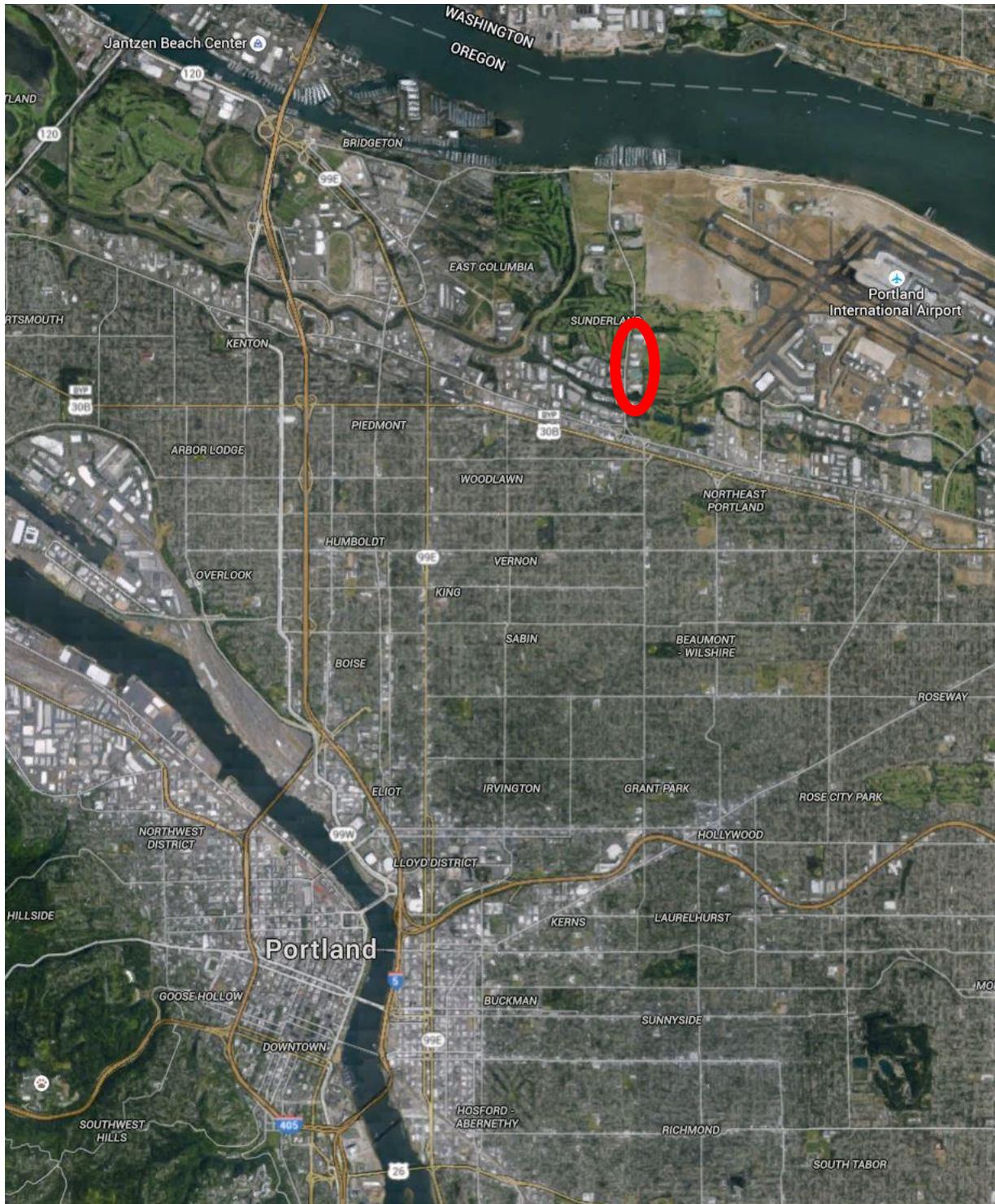


Figure 18: A view of Dignity Village, again circled, on the outskirts of Portland, near the airport, in an industrial area not far from a residential area, with downtown Portland relatively far away (bottom left). Photo taken from Google Maps.

### 3. Homeless Dissensus as Insurgent Pantemporality

It is important to figure time and space as mutually generative dimensions in any legal critique; they are only analytically separable. Blomley's aforementioned analysis of early legal cartography was both a critical legal geography and a critical legal history. However, Mariana Valverde cautions that despite such exceptions, "law and society scholars... have as a group experienced great trouble analyzing temporal and spatial dimensions of governance at the same time."<sup>485</sup> To counteract this tendency, she borrows Mikhail Bakhtin's notion of the literary *chronotope*: "*Time, as it were, thickens, takes on flesh, becomes artistically visible; likewise, space becomes charged and responsive to the movements of time, plot, and history.*"<sup>486</sup> Valverde uses the *chronotope* to add a temporal dimension to familiar discussions of courtroom space that reveal "how certain notions of the majesty of law are given architectural form."<sup>487</sup> She sees a "thickening of time" within the space of the courtroom in that "the majesty of law" is also generated (among other ways) by the judge saying "all rise" whenever he or she happens to enter—even if that is long after the courtroom opens at 9 a.m.—to begin a "court time" that differs from "clock time." Like court space, court time centers on the judge as the living and depersonalized instrument of state law.

Homeless people living in tent cities have no need to defer to "court time" therein, but as soon as they turn to the courtroom to contest tent city closures by the state (to contest being consigned to 'non-space' and 'non-time'), they too must adopt the rhythm of the judge. And that rhythm can be inhospitable not only with respect to (possibly late) judicial entrances cueing ritual gestures of subordination. We saw in *Johnston* how David Johnston responded to the question about why the prohibition on sleeping outdoors during the day was constitutionally

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<sup>485</sup> Valverde (2014) at 61.

<sup>486</sup> *Ibid* at 67 [emphasis in text].

<sup>487</sup> *Ibid* at 69.

unacceptable: it was an affront to his dignity. But Bracken J rejected that response, requiring more than such a “bare assertion.” This was despite that the question was posed impromptu—on the judge’s *time*, with institutional pressure not to think indefinitely (it would have been difficult to take a prolonged look through his materials or even to request an adjournment) or answer indefinitely—and there was considerable evidence supporting Johnston’s claim already on the record. Providing daytime shelter occupancy evidence and social science evidence of the sort that the trial and appellate courts demanded would have taken *time*, and it is the judge who controls time during litigation.<sup>488</sup>

Whereas homeless claims take place on (housed) judges’ time, in judges’ spaces of control, homeless people within the tent city generally interact on an *open-ended* and relatively *enduring* basis without anyone having ‘the final say.’ Although a *modus vivendi* may at times be necessary to live together (such as settling on a “no hard drugs” rule), bringing disagreement to a provisional close, this temporal closure is decentered and can be achieved on a relatively egalitarian basis. The tent city thereby differs from the courtroom not only with respect to its spatial horizontality (as discussed in the prior section) but also, indissociably, with respect to its temporal horizontality; there is no ‘elevated’ authority figure who dictates unilaterally the rhythm of the day therein. When tent cities do have *de facto* ‘mayors’ or a ‘chair,’ as in the Edmonton tent city and Dignity Village respectively, those leaders do not last a long *time* if they are too authoritarian; the mayor in Edmonton had his tent slashed, sending a message (which he received) that it was time for him to leave.<sup>489</sup>

Homeless dissensus not only explodes courtroom temporality, but performatively refutes a common popular construction of homeless subjectivity (inside and outside the courtroom) as

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<sup>488</sup> I quoted Young above to the effect that adjudication requires “simple and *expeditious* analysis,” to which I added Cover’s violent dimension.

<sup>489</sup> Black (2010) at 72.

what Melanie Loehwing has termed “the unforgiving minute of the present.”<sup>490</sup> Loehwing explains that the homeless are situated by the housed public to define itself negatively not only spatially (as those who are ‘lucky’ if for no other reason than they *have* private homes) but temporally: as proper consumers presently acquiring wealth against the long-term uncertainties of the neoliberal state. Homeless citizens are perceived as stuck in a present-saturated subsistence existence. This is true to the extent that urban law/space reproduces homeless people who must worry about little other than finding the next meal or restroom. However, Johnston and others demonstrate that homeless citizens are capable of democratic citizenship that works along an expansive temporal register rooted in the present, but extending ‘backward’ into more egalitarian predecessors in the past and into a more equal imagined future.

When she defended tent cities by stating that “people have lived [outdoors] for thousands of years,” Tomiko Rae Koyama’s narrative explicitly cited (pre)history to gain critical distance from routinized modern assumptions about the necessity not just of indoor life, but of the unique levels of inequality, ecological exploitation,<sup>491</sup> and other ills that attend it. But even when history is not cited explicitly, it informs tent city action. The history of tent cities in America has shown that they function as powerful political signifiers.<sup>492</sup> Don Mitchell’s historical geography begins just after the American Civil War. At that time, there existed a plurality of housing options for “tramps” (predominantly male migratory workers) including single room occupancy hotels, lumber and farm worker’s bunks, *etc.* However, the hobo “jungle” was of special significance. These spaces were located on the periphery of towns close enough to general stores but far

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<sup>490</sup> Loehwing (2010).

<sup>491</sup> Rose (2014); Smith (2014).

<sup>492</sup> I have been unable to find academic literature on tent cities in Canada going back more than ten years. However, there are indications that our history at least roughly parallels the American experience.

enough away to avoid official attention.<sup>493</sup> Frequently multiracial long before the Civil Rights movement, the “jungle code” was one of reciprocal altruism given everyone’s precarity. The International Workers of the World (the IWW or “Wobblies”) saw the jungle hobos as a potential revolutionary class and frequently organized those who were despised and abjected by the bourgeois as “beggars, mental inferiors, habitual drunks, and lousy workers.”<sup>494</sup> Mobilizing took the form of large marches, as well as encampments in state capitols, city streets, *etc.*<sup>495</sup> Jungles were therefore perceived as radical enough to those in power that the state sought to eliminate both the IWW and the jungles during the First World War.<sup>496</sup> A lingering “tramp scare” persisted into the 1940’s. However, after the Second World War, labour became decasualized and previously unsettled areas became more developed, such that interstitial living lost critical mass politically. With Skid Rows gentrifying and Mexican temporary labourer programs designed to “drive . . . domestic labour out of the field”,<sup>497</sup> hobo jungles all but vanished, but not for long.

The beginning of American neoliberalism saw “neo-jungles” return with ubiquity, if not with a political vengeance. The Reagan administration slashed the federal housing budget immediately and continued to cut it, ultimately to well below half of the 1980 level. Widely variable tent cities began to emerge all over the country, some of which were fenced off, policed by security guards, and made subject to infantilizing disciplinarity.<sup>498</sup> In Sacramento, after the 2008 financial ‘crisis’ in which millions of people lost their homes,<sup>499</sup> a large tent city erupted.<sup>500</sup>

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<sup>493</sup> Mitchell (2013) at 68. This recalls Ruddick’s citation of homeless people’s preference for a good combination of prime and marginal space.

<sup>494</sup> Monkkonen (1984) qtd in Mitchell (2013) at 68.

<sup>495</sup> Mitchell (2013) at 70.

<sup>496</sup> *Ibid* at 69.

<sup>497</sup> *Ibid* at 71.

<sup>498</sup> *Ibid* at 73.

<sup>499</sup> David Harvey predicted the 2008 housing bubble collapse; he explains that crises are endemic to capitalism. See e.g. Harvey (2010).

A homeless activist described a condition of “self-governance” in which people helped each other, sharing tents with those who lacked them during a set of serious storms; she cautioned that the conditions in the camp ought not to be romanticized, but that at least there was a sense of community.<sup>501</sup> However, the camp was featured on the Oprah show and received global attention, causing those in power to clamp down—just as their counterparts had with the jungles of yore. As discussed in Chapter 1, the city was to be cleared and the residents warehoused in a “wintertime emergency shelter . . . [that was] highly regulated, fenced and locked at night.” Rejecting this coercive non-solution, one resident staged his equality perfectly by asking: “would *you* go anywhere where they are going to turn the key and lock you in at night? No.”<sup>502</sup> Myriad similar forced encampments have sprung up across the US with varying degrees of cruelty.

Mitchell explains that interstitial places are not only about bare survival, but are championed by many on the left because they channel a deeply rooted history of autonomy and grassroots organizing. He quotes one activist to the effect that “tent city is not the crisis; it’s the conditions that caused tent city [sic] that’s the crisis.”<sup>503</sup> Officials, their powerful big business constituents (and donors), akin to the Downtown Victoria Business Association (discussed in Chapter 1), and even some well-meaning “progressive” people use forced encampments and tent city bans “precisely as a means of quelling more radical demands by homeless people and their advocates.”<sup>504</sup> Every destruction of a tent city is also the destruction of a “*political* community.”<sup>505</sup> Mitchell explains:

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<sup>500</sup> Mitchell (2013) at 75.

<sup>501</sup> *Ibid.*

<sup>502</sup> Gonzalez (2009) qtd in Mitchell (2013) at 75 [emphasis added].

<sup>503</sup> Mitchell (2013) at 81.

<sup>504</sup> *Ibid.*

<sup>505</sup> *Ibid* [emphasis in text]. See also Rebecca Johnson’s discussion of the Inuit experience after contact with white settlers: “the elders tell of their relocation, of the steam rollers that rolled their furs and tents into the ground, destroying their tools and their food caches, leaving only enough time for the men to gather their few remaining sled dogs as the people were loaded directly onto airplanes and flown 200 miles further north.” Johnson (2012).

As a taking of land, as a non-commodified and cooperative form of property and social relations, as (potentially) an organization space, tent cities, and their progenitors like the hobo jungle, have much to teach us.

Johnston and other tent city occupants channel a significant egalitarian history.

In the present, tent cities allow homeless people to live together without waiting for the state or perhaps an NGO to deliver housing. Elements of Mitchell's history prove instructive with respect to tent cities that have emerged recently and closer to home, as discussed in the previous section, which figured tent cities emerging in present spaces that represent interstitial distance—i.e. spatial and legal—within the state. Tent cities not only expand homeless subjectivity in space, but in time, given that they endure in one place far longer than individual homeless people forced either to 'move along' when they stay in one place 'too long' or to pack up their minimal shelters every morning at 7 a.m., ready or not.

With respect to their orientation to the future, tent cities stage a more egalitarian future world in the present world, which is the *sine qua non* of Rancièrian dissensus. If courts were open to ordering governments to provide universal indoor housing, a discussion of how that might efface some homeless narratives while being compatible with other narratives would be especially important. However, the fact is that courts are not open to such orders and show no sign of becoming open. Governments, at the same time, are if anything retreating from social welfare provision to an even greater extent than they have already. Given this institutional impasse, attending to how homeless people stage their equality in tent cities may be particularly helpful in that it cuts across the indoor-outdoor divide. In other words, even if those who seek indoor as opposed to outdoor housing have differing narratives and disparate aims, both sets of narratives may converge on the need for tent cities *now*. All would benefit from a more equal shelter arrangement and from taking it upon themselves to *take* that arrangement, rather than being at the mercy of the very institutions that have heretofore proven unable to accommodate

their narratives. This might have a wide range of benefits in the future (which is not to say that new challenges might not also arise). Those who seek permanent, safe, dignified state (or NGO-provided) housing that leaves street social networks intact might benefit from tent city action to the extent that it galvanizes state provision (e.g. because of public outcry at the presence of tent cities and officials' concerns about how these might decrease tourist and consumer revenue in the urban core). At the same time, those who wish to live permanently outdoors might gain some new understanding from the public and illustrate a viable alternative to the indoor lifestyle (once outdoor living is not so difficult) and/or gain some state service provision on a relatively enduring basis, such as washrooms, water, and/or electricity, as in Dignity Village. As spatiotemporal compression of the homeless body on the street intensifies, it is impossible to forecast a future housed public response to tent city stagings (apart from permitting the existing general pattern of state toleration before forced closure), and that response could be as varied, ambiguous, and contestable as homeless narratives themselves.

Democracy . . . is not based on any nature of things nor guaranteed by any institutional form. It is not borne along by any historical necessity and does not bear any. It is only entrusted to the constancy of its specific acts. This can provoke fear, and so hatred, among those who are used to exercising the magisterium of thought. But among those who know how to share with anybody and everybody the equal power of intelligence, it can conversely inspire courage, and hence joy.

—Jacques Rancière, *Hatred of Democracy*

## Conclusion

Striking critical possibilities arise when one begins with homeless narratives and performances. Because these narratives and performances are diverse, they do not lend themselves to general rules that might be conducive to political advocacy and/or law reform from above (i.e. change that is initiated by people other than the intended beneficiaries). The fact is that *some* people choose to be homeless. However, questions of choice are least interesting and least useful with respect to assigning responsibility to homeless people. At the same time, such questions should not be dismissed simply because they threaten to constrict the state's duty to provide shelter; the 'progressive' fear is that if even some people are acknowledged to choose outdoor dwelling, the state cannot be said to have contributed to homelessness in every case, and so it has no duty to remedy such homelessness by providing shelter. Instead, we might ask *why* some in our polity choose rooflessness. Perhaps the thick relationality in homeless communities is preferable to abusive indoor home lives. Perhaps it offers a way of life that is more ecologically sustainable, or less regimented, or less materialistic. Or perhaps some people do not choose rooflessness, but once roofless, nonetheless appreciate the caring norms in the homeless community, leading a simpler life, *etc, when they are able to exercise collective autonomy.*

As I have worked on this thesis, homeless people like David Arthur Johnston have reminded me of the fascinating characters in Werner Herzog's documentaries, such as *Lessons of*

*Darkness, Happy People* or *Encounters at the End of the World*. How do they provide such extraordinary critical distance from routinized modern assumptions? It has been said that if one truly wishes to understand the law, one might approach it from an anarchist perspective, which takes centralized (and hierarchical) state law not as a necessity, but a historical contingency that has been absent in myriad well-ordered (and at least relatively egalitarian) historical communities. Similarly, if one wishes to understand contemporary indoor life, one might approach it from a homeless perspective. Not coincidentally, the latter perspective is often at best ambivalent about state law and state action generally. When the phantom housed public looks on the roofless Other as living a present-saturated subsistence existence, perhaps it aims negatively to define itself in a way that disavows the generalized insecurity and uncertain future we all face in the age of the anthropocene and neoliberal austerity. The homeless are not pariahs (as they are cast in some rigorously normative conservative media commentary) and I have striven to listen to homeless narratives without adopting the left/romantic or ‘pariah as messiah’ genre of criticism that finds in the homeless some ‘deeper truth’; many homeless people have their own problems and are caught up in the same ideological deadlocks as the rest of us.

I have been attentive to questions that are sometimes suppressed not only during adjudication but in normative legal commentary. Although the latter is less ‘expeditious’, it risks uncritically adopting the perspective of a judge-made (or state-made) law without interstices that must settle upon the ‘correct’ dwelling norm. Are moralizing statist discourses such as ‘human rights’ (to housing and beyond) which promise to order an increasingly complex world in which people feel themselves to have ever lesser democratic effect, not the supreme seduction of our time? There are serious limitations to the ‘change from above’ master project. For instance, if the courtroom normative ‘dream mapping’ of court orders for the state to provide universal indoor

housing were achieved, what would happen to people like David Arthur Johnston for whom continued outdoor life would become if anything even more difficult? *Does he matter?* If we aspire to universal justice, it must (paradoxically) confront (without absorbing or superficially celebrating) deep alterity—those who perennially exist outside a norm, especially when dominant norms themselves may shift, expand, or reveal themselves to be based on the powerful undertow of sedimented tradition rather than some deep transhistorically just arrangement. Despite the familiar popular conflation, access to (courtroom) law is not access to justice. Courtroom law is ‘political’ in the Critical Legal Studies sense that it is suffused with the dominant political ideology—an ideology rife with powerful norms that produce significant (and often wounded) remainders. Although courtroom law has much to teach us about our culture and although it will continue to have a role for homeless people in the most trying of times, it cannot be understood as an exhaustive or sufficient political forum if politics is rendered as democracy: the equal partaking of everyone in the daily ordering of our lives in common.

In order to constellate the various perspectives and aims in the cases, in the normative legal commentary, and in homeless narratives, I introduced a temporal register. On the ‘emergency’ temporality, *Adams* was a success in that it prevented the worst forms of immediate bodily suffering. However, even on this score, the same cannot be said with respect to the case’s effect beyond the city of Victoria or with respect to *Johnston*. In the normative legal commentary, I located an implicit ‘long durée political temporality’ in which ‘successes’ such as *Adams* might be ‘built upon’ in a long term struggle for shelter justice. However, such ‘conjoining’ of the emergency and long durée temporalities seemed neither borne out by the historical record nor agency-enhancing for the homeless. Precedents in *Adams* that reinscribe social atomism and marketized liberty make it a Pyrrhic victory; they are not the building blocks

for an egalitarian future. There is a crucial difference between adopting a supplicant's posture to safeguard bare life and attempting to act as a perdurable egalitarian agent. Furthermore, *Tanudjaja* demonstrated that courts simply do not see the constitutionalization of ambitious indoor housing policies as part of their political (as avowedly anti-political) role. Perhaps most problematically, the conjoint temporality assumption tends to assign to a future that is perpetually deferred a 'solution' from above (indoor housing) that at least some homeless people (like Johnston) categorically reject, leaving the homeless democratically adrift in the present.

In the ruins of the conjoint temporality assumption, I proposed a coexisting antipode for the courtroom emergency temporality, which I termed 'insurgent pantemporality.' It is possible to acknowledge the important work that courtroom actors (like Ross J) may do on the emergency temporality *while* keeping one eye on the horizon, toward the law and shelter politics beyond it. In the narratives and deeds of homeless people themselves, we see the insurgent staging of an equality we must always presuppose. It is in this staging—however fleeting—that roofless people lose their anomic name as a supplementary part to the total arrangement of parts in the police order; beyond reducing their precarity of dwelling, they emerge as citizens who have altered the meaning of *home* for all of us. Dissensual performances such as the tent city make us see, hear, and at best *feel* something different because they assert a *collective* political subjectivity in places that they *make* more equal. They do so with rich spatiotemporal texture: they channel egalitarian precursors, and they stage a universalizable more equal world—one possible future world—within the spatial interstices of our present world. For that reason, they have much to teach us if we read them—and ourselves—against the grain, which is to say, critically.

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