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Making Time for Critique: Canadian 'Right to Shelter' Debates in a Chrono-Political Frame

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Résumé de l'article

Le présent article traite du discours canadien sur le « droit au logement », qui met l'accent sur les hypothèses partagées qui font un travail essentiel mais qui sont parfois inexprimées. Il offre un cadre « chrono-politique » permettant d'organiser diverses réclamations présentées en salle d'audience, dans les commentaires des professeurs de droit, ainsi que par les sans-abri eux-mêmes. Les personnes qui dorment dehors ont connu un succès remarquable devant les tribunaux, évitant ainsi des préjudices corporels immédiats. Cependant, la temporalité d'« urgence » dans ces affaires offre finalement un horizon politique limité. L'auteur évalue les propositions des professeurs de droit qui prescrivent donc des ordonnances judiciaires visant à transcender la protection d'urgence : l'État devrait fournir de façon proactive un certain niveau de logement minimal à tous, unissant ainsi la temporalité d'urgence à une temporalité « progressive » à plus long terme. Toutefois, il est soutenu que ces propositions exposent inadéquatement la façon dont les juges perçoivent leur rôle institutionnel et la mesure dans laquelle la doctrine de la salle d'audience peut réorienter des tendances néolibérales plus générales. Les hypothèses régulatrices au sujet d'une « amélioration graduelle » du droit doivent elles-mêmes être examinées. En tant qu'antipode de la temporalité d'urgence de la salle d'audience, une temporalité « dissensuelle » est étudiée, non pas comme « solution », mais comme politique déjà opérante, qui n'a pas encore été examinée dans les commentaires des professeurs de droit sur le « droit au logement ». Bien qu'il ne doive jamais être idéalisé, le village de tentes est néanmoins considéré comme mettant en œuvre ce que Jacques Rancière appelle la « dissension », dont les participants affichent leur égalité d'une manière qui remet en question l'arrangement existant de l'intelligibilité politique. Malgré les contraintes actuelles, la dissension révèle une vaste temporalité non linéaire, en canalisant les prédécesseurs égalitaires, en prenant des mesures réalisables dans le présent et en tentant de préfigurer un arrangement plus égal en matière de logement pour l'avenir.

Making Time for Critique: Canadian 'Right to Shelter' Debates in a Chrono-Political Frame

Mark Zion[*]

This article engages with Canadian 'right to shelter' discourse, with a focus on shared assumptions that do crucial work but are sometimes unstated. It offers a 'chrono-political' framework to organize various claims made in the courtroom, in legal academic commentary, and by homeless people themselves. People sleeping outdoors have had noteworthy success in court, preventing immediate bodily peril. However, the 'emergency' temporality in those cases ultimately offers a limited politics. The author evaluates proposals from legal academics who therefore prescribe court orders that aim to transcend emergency protection: the state ought proactively to provide some minimal level of shelter to everyone, thereby conjoining the emergency temporality with a longer term 'progressive' temporality. However, it is argued that these proposals insufficiently formulate how judges understand their institutional role and the extent to which courtroom doctrine can redirect wider neoliberal trends. Regulative assumptions about 'gradual improvement' in the law must themselves be interrogated. As an antipode for the courtroom emergency temporality, a 'dissensual' temporality is explored, not as a 'solution,' but as an already operant politics, one not previously explored in legal academic commentary on the 'right to shelter.' Never to be romanticized, the tent city is nonetheless seen to enact what Jacques Rancière terms 'dissensus,' in which participants stage their equality in a way that calls into question the existing arrangement of political intelligibility. Amidst present constraints, dissensus discloses an expansive nonlinear temporality that channels egalitarian predecessors, taking feasible action in the present and attempting to prefigure a more equal future dwelling arrangement.

Le présent article traite du discours canadien sur le « droit au logement », qui met l'accent sur les hypothèses partagées qui font un travail essentiel mais qui sont parfois inexprimées. Il offre un cadre « chrono-politique » permettant d'organiser diverses réclamations présentées en salle d'audience, dans les commentaires des professeurs de droit, ainsi que par les sans-abri eux-mêmes. Les personnes qui dorment dehors ont connu un succès remarquable devant les tribunaux, évitant ainsi des préjudices corporels immédiats. Cependant, la temporalité d'« urgence » dans ces affaires offre finalement un horizon politique limité. L'auteur évalue les propositions des professeurs de droit qui prescrivent donc des ordonnances judiciaires visant à transcender la protection d'urgence : l'État devrait fournir de façon proactive un certain niveau de logement minimal à tous, unissant ainsi la temporalité d'urgence à une temporalité « progressive » à plus long terme. Toutefois, il est soutenu que ces propositions exposent inadéquatement la façon dont les juges perçoivent leur rôle institutionnel et la mesure dans laquelle la doctrine de la salle d'audience peut réorienter des tendances néolibérales plus générales. Les hypothèses régulatrices au sujet d'une « amélioration graduelle » du droit doivent elles-mêmes être

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examinées. En tant qu'antipode de la temporalité d'urgence de la salle d'audience, une temporalité « dissensuelle » est étudiée, non pas comme « solution », mais comme politique déjà opérante, qui n'a pas encore été examinée dans les commentaires des professeurs de droit sur le « droit au logement ». Bien qu'il ne doive jamais être idéalisé, le village de tentes est néanmoins considéré comme mettant en œuvre ce que Jacques Rancière appelle la « dissension », dont les participants affichent leur égalité d'une manière qui remet en question l'arrangement existant de l'intelligibilité politique. Malgré les contraintes actuelles, la dissension révèle une vaste temporalité non linéaire, en canalisant les prédécesseurs égalitaires, en prenant des mesures réalisables dans le présent et en tentant de préfigurer un arrangement plus égal en matière de logement pour l'avenir.

I. INTRODUCTION[1]

Walking alongside the encampment that emerged on the lawn of Victoria's Provincial Courthouse in 2015, a rupture from the dominant urban property norms becomes palpable. A sea of tents makes the landscape look like something other than 'the City of Gardens,' as Victoria is known in the language of global marketing and tourism. Depicted in (often de-historicized, de-contextualized) media reports as a scene of lawlessness, crime, wilfully anti-social drug abuse, landscape blight, and chaos, closer inspection reveals something else. Residents mutually respect tent boundaries, as well as belongings like bikes and shopping carts outside tents. A path of warehouse pallets and mats serves as a walking corridor through the encampment. The site appears surprisingly clean, quiet, and ordered, given the lack of utilities and so on. The people within the encampment bear the marks of extended poverty and in some cases, years of outdoor life; they sometimes appear prematurely aged, struggling just to meet basic bodily needs. These people subsist as best they can—in a minimally enduring way—in one of the few available urban spaces, collectively refusing official commands to 'move on' into compliant spatial dispersion. Tent cities cannot be understood apart from the wider social (and/as legal) order that produces them, in which they are bound up, and which they may be seen to challenge. In any event, these refuges rarely last longer than a year before officials bow to public pressure and shut them down; this tent city disbanded in 2016, having lasted fifteen months.[2] With nowhere else to go, residents scattered into a relatively uncertain street existence.

A return to the lived, complicated, everyday scene of the tent city helps to raise questions about its legal and political significance, as well as how its inhabitants relate to their dwelling and to the wider social order with which it is continuous, but that it also interrupts. As a privileged outsider to homeless communities, my hope here is merely to create a preliminary space of chrono-political intelligibility for

[1] This paper is dedicated to the memory of David Graeber, whose thought, activism, and generosity serves as an ongoing inspiration in this time of multiple catastrophes. Thank you to Michael M'Gonigle and Hester Lessard for feedback on an earlier version, as well as to the participants in James Rowe's reading group. I am grateful to Rebecca Johnson and Warren Magnusson for their support and extensive feedback on my Master of Laws thesis, on which this paper is based. Thank you also to the anonymous reviewers for their helpful feedback. I acknowledge the support of the Social Sciences and Humanities Research Council.

[2] Whereas City lands after *Adams* must be vacated between 7am and 7pm, there is no such settled law governing provincial property. The courthouse lawn therefore existed in a 'legal loophole', and it took the provincial government an especially long time to formulate its response. *Victoria* (*City*) *v Adams* 2009 BCCA 563 [*Adams* BCCA]; 2008 BCSC 1363 [*Adams* BCSC].

tent city inhabitants within the specific realm of legal academic discourse. In the courtroom, tent cities are sometimes acknowledged, but are seldom treated as a legally significant alternative to indoor space, despite the limitations of that space in quantity and quality.[3] Instead, an individualized, temporary, outdoor shelter right is the most any judge will grant.[4] In legal academic commentary, there is agreement that such individualized rights are insufficient, but what is proposed instead is court-mandated state provision of sufficient indoor shelter space. Importantly, left out of the discussion is the desire, in its full context, of at least some homeless people to live together outdoors *in the now*.[5] This omission becomes all the more significant, given that far-reaching indoor shelter proposals are not likely to be realized any time soon in our neoliberal society of intensifying inequality. As elaborated below, I adopt political theorist Wendy Brown's formulation of neoliberalism as "a peculiar form of reason that configures all aspects of existence in economic terms,"[6] and as the "economization of everything and every sphere, including political life."[7] My emphasis in this paper differs from analyses whose purpose is a fine-grained categorization of contemporary governmentality,[8] and from empirical studies that compare municipal policy differences with respect to housing.[9] Likewise, although this paper is informed by the sociological literature on urban landscapes that are nowhere untouched by increasing social inequality, the emphasis is not on a sociology of urban camping. My concern is with the *chrono-political* significance of the tent city—read through the deeds and statements of some of their inhabitants—and what I argue is the tent city's deeply consequential misrecognition and/or absence specifically within Canadian case law and legal academic commentary on the right to shelter.

Too often dismissed as an unacceptable 'compromise' relative to universal indoor housing, the tent city might instead be perceived, or might *also* be perceived, as a political scene, in Jacques Rancière's sense. Politics, on this account, is a staging of equality; it is an interruption in the shared space of what can be seen and heard, calling for and possibly achieving a rearrangement of that space. There has been a growing

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3 See *infra* note 50 for a discussion of emergency shelter problems.

4 I discuss *Adams* below in detail.

5 I will use the term 'homeless' as opposed to the more descriptive term, 'roofless,' throughout this paper to be consistent with the legal literature. It is also worth noting that for most in this category, rooflessness is a *temporary* position on the precarious housing spectrum.

6 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) at 17 [Brown 2015].

7 *Ibid* at 40. For political economist Stephen Gill, neoliberalism includes: "possessively individualist, materialistic and ecologically myopic modes of thought and action; the idea of 'limited' government [subordinated to] capital accumulation driven by market forces and corporate power; a monoculture dominated by capital and consumerism[;]… predominance of the commodity form of law, embodied in contracts and private property rights[;]… and the institutionalization of a hierarchical, disciplinary and materially unequal world order increasingly dominated by capital, reified as the 'international community' in the dominant discourses of global politics." "Market Civilization, New Constitutionalism and World Order" in Stephen Gill & A Claire Cutler, eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014) 29 at 30.

8 See e.g. Philip G Cerny, "In the Shadow of Ordoliberalism: The Paradox of Neoliberalism in the 21st Century" (2016) 1 ERIS 78; Kean Birch, "Neoliberalism: The Whys and Wherefores … and Future Directions: Neoliberalism" (2015) 9:7 Sociology Compass 571; Jane Jenson & Denis Saint-Martin, "New Routes to Social Cohesion? Citizenship and the Social Investment State" (2003) 28:1 Can J Sociology 77; N Brenner, J Peck & N Theodore, "Variegated Neoliberalization: Geographies, Modalities, Pathways" (2010) 10 Global Networks 182.

9 See e.g. B Hennigan, "House broken: Homelessness, Housing First, and Neoliberal Poverty Governance" (2017) 38:9 Urban Geography 1418; D Padgett, BF Henwood & SJ Tsemberis, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives* (New York, Oxford: Oxford University Press, 2016); and D Collins, "Homelessness in Canada and New Zealand: A Comparative Perspective on Numbers and Policy Responses" (2010) 31:7 Urban Geography 932.

engagement with Rancière in legal academic commentary,[10] and this paper aims to extend his framework to the Canadian 'right to shelter' context. In doing so, it will be necessary to 'begin again' with respect to questions of politics and temporality. Too often, fundamental questions about the state, law, historical progress, and the effectivity of our own discourse as academic commentators go unasked in the process of developing well-motivated reform proposals. The problems and solutions seem obvious and all that is lacking is 'political will' or 'institutional resolve.' Over the course of three years of exhaustive research on 'right to shelter' cases and commentary, sociological and (auto)ethnographic writing on homelessness, and political theory,[11] it became clear that how we define 'the problem' is in fact key to understanding present impasses.

Given that the move from 'reform' to 'critique' entails a methodological shift relative to the legal literature with which I am in conversation below, it will be worthwhile at the outset to say a bit more about what that practice entails. In the introductory chapter of *Left Legalism/Left Critique*, Wendy Brown and Janet Halley describe critique as 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.[12] The emphasis shifts from an argument about 'solutions' to an interrogation of the assumptions on which the solutions on offer depend and the realities they (often covertly) naturalize, not just those they aim overtly to transform. For example, what does the law reform project of getting everyone into indoor housing assume about the role of the state? What does it assume about the role of courts? What role, if any, does it allow for homeless people in jurisgenesis and political contestation? Brown and Halley respond to concerns that critique is just a 'negative' or 'ultratheoretical' practice that distracts from getting things done in the 'Real World.' There are many forms of critique, but in highlighting "the workings of ideology and power in the production of existing political and legal possibilities," 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."[13] Critique is not the negation of deeds in the world, but an aid to carrying them out responsibly.

Critique orients to surprising connections, patterns, gaps, and silences. It seeks out blockages and aporias rather than trying to circumvent them. For Eve Sedgwick, the aim of critique is not simple negation, but to "ungrasp [one's] hold on truths that used to be self-evident."[14] To ungrasp is not to lose anything—certainly not to forsake basic values that motivate the analysis[15]—but it is instead "the art of

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10 See e.g. Jonathan Goldberg-Hiller, "Deconstructing Law and Society: A Sociolegal Aesthetics" (2008) 41 Law Politics and Society 83; Monica Lopez Lerma & Julen Etxabe, eds, *Rancière and Law* (New York: Routledge, 2017).

11 What follows is a distillation of some key findings in my Master of Laws research, which was completed in the University of Victoria's Law and Society Program, Mark Zion, *What is a Right to Shelter in the Desert of Post-Democracy? Tracking Homeless Narratives from the Courtroom to Dissensus* (Master of Laws Thesis, University of Victoria, 2015) [Zion, *Right to Shelter*]. Several important questions were addressed in that longer contribution that cannot be addressed in this short space. They inform the analysis here and I will flag the relevant literatures as they arise.

12 Wendy Brown & Janet Halley, "Introduction" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Durham: Duke University Press, 2002) 1.

13 *Ibid* at 27. Costas Douzinas & 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." *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005) at 40.

14 Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2003) at 3.

15 See the discussion below of Rancière's axiomatic presupposition of equality.

loosing."[16] We might say that the goal of critique is thus not destruction, but 'deconstriction.'[17] Bringing the regulative assumptions of reformism into question allows otherwise repressed questions of justice to resurface; for Rebecca Johnson, critique aims to "make visible the ways law's identification of legal questions leaves important issues of justice beyond the court's capacity to address."[18] Rather than monologically prescribe a single 'ideal' shelter arrangement (one that is generated *for* those to be sheltered), my aim here is to make audible voices that are often lost and to amplify genuine differences. A closer examination of the range of homeless perspectives turns out to recast the very terms of the debate over shelter in Canada, making it more open and nuanced. Indeed, for Rancière, the "question 'How is this thinkable at all?' points to the question: 'who is qualified for thinking at all?'"[19] and it is this question that is fundamental in his political thought.

This particular critique unfolds via a temporal framework, ultimately coinciding with but also extending Rancière's remarks on temporality. I will suggest that persisting disjunctions between courtroom, legal academic, and lived tent city domains can be newly elucidated if understood to coincide with different, but not necessarily mutually exclusive governing temporal constraints and assumptions. I foreground the political properties of those temporal features, thereby developing a 'chrono-politics.' There is a helpful and growing literature on law and temporality,[20] and this is analysis is informed by relevant theoretical literature on temporality,[21] but here I primarily offer a formulation that was developed

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16 Sedgwick, *supra* note 14 at 3.

17 Although this particular paper does not engage explicitly with Derridean forms of deconstruction, it is informed by that literature, which draws attention to the tacit 'conditions of possibility' for naturalized systems of thought and practice. Deconstruction can also be understood here in the ordinary sense of 'a careful imaginary taking apart' (construction in reverse, rather than rapid demolition).

18 Rebecca Johnson, "Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film" (2012) 9 *NoFo* 68 at 92.

19 Jacques Rancière, "A Few Remarks on the Method of Jacques Rancière" (2009) 15:3 Parallax 114 [Rancière, "Remarks"] at 116.

20 See e.g. Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001). Keebet Benda-Beckmann, "Trust and the temporalities of law" (2014) 46 J Leg Pluralism & Unofficial L 1; Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge: Harvard University Press, 2005); Renisa Mawani, "The Times of Law" (2015) 40 Law & Soc Inquiry 253; Emmanuel Mellisaris, "The Chronology of the Legal" (2005) 50 McGill LJ 839; Carol Greenhouse, "Just in Time: Temporality and the Cultural Legitimation of Law" (1998) 98 Yale LJ 1631; Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (New York: Routledge, 2015) [Valverde, *Chronotopes*]; Mariana Valverde, "Time Thickens, Takes on Flesh" in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford Law Books, 2014) 53.

21 See e.g. Elizabeth Grosz, *The Nick of Time: Politics, Evolution, and the Untimely* (Crows Nest NSW, Australia: Allen & Unwin, 2004); Elizabeth Grosz, *Time Travels: Feminism, Nature, Power* (Crows Nest NSW, Australia: Allen & Unwin, 2005); Russell West-Pavlov, *Temporalities* (New York: Routledge, 2013); Gilles Deleuze, *Bergsonism*, translated by Hugh Tomlinson & Barbara Habberjam (New York: Zone Books, 1988); Gilles Deleuze, "Bergson's Conception of Difference" in *The New Bergson*, John Mullarkey, ed (Manchester, England: Manchester University Press, 1999) 42, Gilles Deleuze, *Cinema 2: The Time-Image*, translated by Hugh Tomlinson & Robert Galeta (Minneapolis: University of Minnesota Press, 1989), Gilles Deleuze, *Difference and Repetition*, translated by Paul Patton (New York: Columbia University Press, 1994); Henri Bergson, *Matter and Memory*, translated by NM Paul & WS Palmer (New York: Zone Books, 1988); Jacques Derrida, *Given Time: Counterfeit Money*, translated by Peggy Kamuf (Chicago: University of Chicago Press, 1992); Jacques Derrida, *Rogues*, translated by Pascale-Anne Brault & Michael Naas (Stanford: Stanford University Press, 2005); Jacques Derrida, *Politics of Friendship*, translated by George Collins (London: Verso, 1997); Jacque Derrida, *Specters of Marx*, translated by Peggy Kamuf (New York: Routledge, 1994); Barbara Adam, *Timewatch: The Social Analysis of Time* (Cambridge: Polity Press, 1995); Barbara Adam, *Future Matters: Action, Knowledge, Ethics* (Boston: Brill, 2007); Mark Rifkin, *Beyond Settler Time* (Durham: Duke University Press, 201

inductively, with close attention to specific cases, and the legal academic commentary on them, over the course of research.

This paper will proceed as follows. First, I will elaborate on the 'emergency' temporality. I will then evaluate the courtroom discourse on the right to shelter, noting how the tent city is considered only cursorily. In addition, 'emergency' claim resolution means that fundamental doctrinal distinctions, such as the one between 'positive' and 'negative' rights, must be reinscribed to the detriment of any deeper political achievement at the very moment that homeless people achieve an important legal breakthrough. Second, I will discuss the 'progressive' temporality, in which emergency courtroom victories are treated by legal academic commentators on the right to shelter as a 'first step' on the way to broader and more transformative court orders for the state to provide the necessary level of housing and/or social services. Instead, I will contend that there is a categorical difference between emergency claims and relatively transformative ones. The reform proposals do not sufficiently consider the chrono-political frame in which judges operate. Likewise, they rely on a secular faith in 'progress' belied—at least in this domain—especially by the last forty years of neoliberal social transformation. Finally, rather than conjoin the 'emergency' temporality of the courtroom with a more expansive (but speculative) progressive temporality, I will place alongside the emergency frame a 'dissensual' temporality. It is derived from the political dramaturgy of Jacques Rancière and his distinctive re-signification of 'rights.' On his account, rights are not to be filled out in the future by state institutions, but rather are *used now* by those who 'make a scene' as political subjects. The tent city is taken as an example of a political scene, and its orientation to past, present, and future reference frames is used to texture the dissenusal temporality, redeploying Rancière's framework in the Canadian right to shelter context. Rather than holding to 'progress' as ineluctable and distributed from above, it must be seen at least partly as a function of political *struggle* from below.

II. THE EMERGENCY TEMPORALITY: COURTROOM VICTORIES AND THEIR LIMITS

> 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

> 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 'emergency' temporality denotes a short-term, politically circumscribed orientation to time that predominates in the courtroom. At the level of everyday practice, time for courtroom argumentation is not unlimited and a judge's decision cannot be withheld indefinitely. Despite the various factors that can draw out the process for years, there is pressure to resolve a dispute so that those affected can move on.[22] This form of practice reflects and reinforces the tacit (liberal) political imaginary of the common law. Its temporal orientation is retrospective and 'reparative,' aiming to suture the social order, rather than remake

[22] See Valverde, *Chronotopes*, *supra* note 20 at 16-19 for a more detailed discussion of the courtroom 'chronotope' (time-space).

it. Even at the Supreme Court of Canada, where judicial discretion is in theory at its broadest, a narrow decision is preferred to a wide one, and a shallow one is preferred to a deep one.[23] The court has a well-known preference to defer to the government whenever possible to make a 'policy' decision (thereby *producing* the boundary between law and policy) and/or remedy a rights violation.[24] The temporal sense of 'defer' is also instructive, given that the guiding question is what must be decided *now*. Anything that can be put off for future resolution or decided elsewhere, is deferred.

Practical exigencies in adjudicative practice contribute to its 'emergency' quality, which is also a function of its evental orientation. Most cases begin with a triggering event, such as a ban on certain forms of shelter deemed to violate a municipal bylaw or a ticket for panhandling. The focus is not on the structural conditions that gave rise to the event—although these may be relevant to sentencing or the need to invalidate a legal norm—but on addressing the event itself. Because homelessness is a function of ongoing 'slow violence,'[25] which is non-evental and durative, in the courtroom it serves as a 'background condition' against which concrete events are considered. The institutional self-understanding of courts, as 'not legislative' (indeed as 'non-political'), with a limited range of remedies, determines retroactively what can be put in question. Ironically, conditions that might be deemed temporary 'emergencies' for normative populations and swiftly remedied are naturalized as 'realities' or everyday catastrophes for homeless people, and therefore not amenable to emergency resolution. Of course, judges may (and often do) sympathize with homeless claimants and cognize wider conditions, but because they are constrained ultimately to address the *legally encoded* event before them, they cannot intervene transformatively in the wider social reality that is its pretext and context. Although more might be said about the emergency temporality as the primary form of chrono-politics in the courtroom, the following discussion will further develop this temporal frame.[26]

It will be useful to consider *Victoria v Adams*,[27] Canada's leading case on 'the right to shelter,' in some depth. The case represents the 'limit' with respect to what homeless people have been able to achieve in the courtroom. *Adams'* 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

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23 Cass R Sunstein, "Beyond Judicial Minimalism" (2008) 43 Tulsa L Rev 825. 'Width' refers to the range of issues affected and 'depth' refers to the degree of philosophical or theoretical rationalization that a judge will engage.

24 See e.g. *Gosselin v Quebec (Attorney General)* 2002 SCC 84 [*Gosselin*]. Even when the Court does not defer, it is often careful to circumscribe the ruling, creating a minimally consequential precedent. See e.g. *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44 (ordering the Harper government to reverse its decision not to grant a criminal exemption to a Vancouver safe injection and drug treatment site but insisting that the decision was not to inform the operation of future sites that might open).

25 Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (London: Harvard University Press, 2011).

26 The courtroom emergency temporality may also be considered in light of the political thought on 'emergency' and its relation to sovereignty. Carl Schmitt, *Political Theology* (Cambridge: MIT Press, 1985); Georgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005). Critical theory texts also consider 'emergency.' Walter Benjamin famously refers to the endless "state of emergency in which we live." "Theses on the Philosophy of History" in *Illuminations*, translated by Harry Zohn (New York: Shocken, 1968) at 257. Finally, and relatedly, various cultural studies texts diagnose a widespread feeling of present-saturation and foreshortened temporal horizons in contemporary life (these analyses are not centered on the courtroom but help to illuminate its cultural context). See e.g. Jonathan Crary, *24/7: Late Capitalism and the Ends of Sleep* (London: Verso, 2013); Mark Fisher, *Ghosts of My Life* (Winchester: Zero Books, 2013); Frederic Jameson, *Postmodernism or The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991); Jean-Luc Nancy, *After Fukushima: The Equivalence of Catastrophes*, translated by Charlotte Mandell (New York: Fordham University Press, 2015); Tom Cohen, ed, *Telemorphosis: Theory in an Era of Climate Change* (Ann Arbor: University of Michigan, 2012).

27 *Adams* BCCA, *supra* note 2; *Adams* BCSC, *supra* note 2.

20 tents.[28] Before the aforementioned 2015 courthouse tent city, this was Victoria's largest ever encampment. The two bylaws at issue prohibited "loitering or taking up temporary abode overnight in public parks."[29] 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.[30] When the inhabitants did not respond,[31] the City applied for an interlocutory injunction empowering the police to clear the campers' tents and other belongings and to 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.[32] 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.[33]

Significant legal wrangling occurred before the full *Charter* trial took place. Before the trial began, the City amended its bylaw so that for sleeping purposes, homeless people were allowed ground cover (e.g. a sleeping bag), but were not allowed to use overhead shelter (e.g. a box or a tarp tied with string to a tree). The City attempted to discontinue the litigation, but that was not permitted because the *Charter* was engaged. Justice Carol Ross presided over months of proceedings in which she read thousands of pages of evidence and heard extensive testimony from experts and from the homeless claimants. The key factual finding was that there are far more homeless people in Victoria than available shelter spaces so some of them must sleep outside, where they require overhead shelter.[34] Even in the City's relatively warm climate, temperatures may drop below freezing at night and rain can soak clothes, ground cover, and sleeping bags; homeless people have suffered and have even died outdoors as a result of hypothermia, as they have in every major Canadian city.[35] Ultimately, the relevant bylaws were found to violate all three elements of section 7 of the *Charter* (life, liberty, and security of the person)[36] in a way that could not be saved by section 1.[37] The homeless claimants won the right to temporary overheard shelter, which by the end of the

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28 *Adams* BCSC, *supra* note 2 at para 6. The City relied on its authority under section 274(1)(a) of the British Columbia *Community Charter* SBC 2003, c 26 (the provincial statute laying out the City's powers) to bring legal proceedings enforcing its bylaws.

29 *Ibid* at para 8.

30 *Ibid* at para 9.

31 *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 relatively dissocialized existence on the streets.

32 *Ibid* at para 11. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

33 *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.

34 There are 141 permanent shelter beds in the City, expanded to 326 when the Extreme Weather Protocol is in effect, for an estimated 1500 homeless people. *Adams* BCSC, *supra* note 2 at para 45.

35 Street Corner Media Foundation, "Dying on the Streets: Homeless Deaths in British Columbia" (2014), online: Social Planning Council of Winnipeg <http://www.spcw.mb.ca/files/9914/1539/3362/HomelessnessVancouverReport.pdf>.

36 Section 7 of the *Charter* 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." *Charter*, *supra* note 32.

37 Section 1 of the *Charter* reads: "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." *Ibid*.

Court of Appeal decision, meant in practice that they could use a box or tarp between 7 p.m. and 7 a.m. only, before being awoken by police or a bylaw enforcement officer.[38]

I will highlight some commendable features of the case before moving on to some that were more troubling.[39] First, Ross J 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*,[40] 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.[41] 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.

Second, Ross J resisted some dubious arguments advanced by the City and the BC Attorney General, rather than 'deferring' to them, which might be tempting given the hotly polemicized nature of even this relatively minimal rights claim. The City assumed there would be a flood of new outdoor homeless 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 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?[42]

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38 Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v Adams (BCSC)*" (2009) 164 BC Studies 103 [Young, "Rights"] at 111.

39 For a full discussion of the mechanics of the section 7 and section 1 analyses, see Zion, *Right to Shelter*, *supra* note 11 at 45-59.

40 City of Victoria, *Mayor's Task Force on Breaking the Cycle of Mental Illness, Addictions and Homelessness Report* (19 October 2007), online: <http://www.victoria.ca/EN/main/city/mayor-council-committees/task-forces/homelessness.html>.

41 Adams BCSC, *supra* note 2 at para 59-66. See below at 25 for a discussion of neoliberalism, which underlies these trends.

42 *Ibid* at para 187.

Use of the word "colonized" is especially ironic given that the City lies on the unceded territory of various Indigenous Nations, such as the Songhees and Esquimalt.[43] In any event, Ross J found that any problems described by the City would be the result of the inevitable needs of people forced to live outdoors given the absence of sufficient indoor space, not their ability to use a box or tarp once already outdoors. The City also argued that banning overhead shelter was partly intended to serve as a deterrent, but Ross J found that "there is simply no evidence that people would flock to sleep in the parks" if allowed overhead shelter, which is "unlikely in the extreme and contrary to the evidence of the complex causes of homelessness…."[44] The City's slippery slope reasoning, based on cultivating housed people's fears, was rejected.

Whereas the Defendants counterpose the homeless population—which must be moved indoors—to a housed population *qua* 'the public,' for Ross J the homeless *are* part of the public. Allowing homeless people to keep themselves alive when inevitably consigned to park spaces also furthers the City's stated bylaw objective, which is 'maintaining public parks.'[45] 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 Court of Appeal modified certain elements of the ruling, but upheld it almost in its entirety.[46]

Fully granting *Adams'* success on an emergency temporality with respect to preventing the worst bodily suffering for homeless people, it is also important to assess some troubling *discursive* features of the case. The point in discursive analysis is not to 'put character on trial,' but to open new possibilities.[47] To be clear, Ross J may well have written the best possible judgment given the precedents at her disposal and her temporal constraints. Nonetheless, academic critique affords the luxury of "allow[ing] chaos to slow enough for new thinking to emerge."[48] Upon reflection, there were several problematic features of the case,[49] but for now, I will focus on two that will illustrate the operation of the emergency temporality.

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43 Indigenous people are also dramatically overrepresented among the homeless. 4% of the population is Indigenous but roughly 35% of homeless people are Indigenous. Gordon Laird, *Homelessness in a Growth Economy: Canada's 21st Century Paradox* (Calgary: Sheldon Shumir Foundation for Ethics in Leadership, 2007) at 12.

44 Adams BCSC, *supra* note 2 at para 192.

45 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.

46 See Zion, *Right to Shelter*, *supra* note 11 at 53-59 for a full discussion of this decision.

47 Although the approach here is compatible with it, I am not engaged in a methodologically formalized social science form of discourse analysis. See e.g. Norman Fairclough, *Critical Discourse Analysis*, 2 ed (New York: Routledge, 2010). Rather, my approach combines critical doctrinal analysis with chrono-politics. Building on the discussion of 'critique' in the Introduction, this discursive analysis orients not to the rational choices made by actors such as judges, but on the 'background' assumptions shared by experts in dialogue who 'speak the same language.' Critique involves foregrounding those background assumptions so that they may be de-naturalized and possibly reconfigured. Methodologically, whether reading legal judgments or legal academic commentary, my approach entails the ordinary humanities practice of 'close reading' to map patterns in texts that may be orthogonal to their explicit judgments or arguments. These patterns may indicate assumptions that can be questioned, which of course then has consequences for the explicit claims.

48 Gilles Deleuze & Felix Guattari. *What Is Philosophy?* translated by Hugh Tomlinson & Graham Burchell (New York: Columbia University Press, 1994) at 118.

49 For a critique of atomism and economization in *Adams*, as well as how it focused on the number of shelter spaces rather than *nature* of spaces etc, see Zion, *Right to Shelter*, *supra* note 11 at 59-69.

Although Ross J admirably included the voices of several homeless claimants and witnesses in her reasons, what they said often and strikingly had naught to do with being allowed temporary overnight shelter. In fact, the case's origins in a tent city often seemed to evanesce in the lengthy judgment focused on overhead 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*.[50] Megan Ravenhill, a sociologist, explains that "homeless culture is characterized by [the] dense social networks and reciprocity… characteristic of poverty cultures in general."[51] Mark Smith, a street person, stated:

> 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.[52]

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.[53] My life was horrible. I still miss Tent City and consider it the only true *home* I have ever had."[54] Granted, the claimants would no doubt prefer to have a box than no box, but their stories seem incidental to that emergency outcome. It is the emergency context itself that silences any articulation of their deeper aims.

Another limitation in *Adams*, as in many other *Charter* section 7 cases, is that 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.[55] 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."[56] 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."[57] A reference to "scarce resources" deliberately avoids questions about how resources became scarce in the first instance, naturalizing the spending choices made by the state. A focus on "particular Bylaws" correspondingly keeps the temporal frame within the emergency mode.[58]

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50 Problems with shelters include theft, cisnormativity, heteronormativity, lack of privacy, lack of space, gender segregation, familial segregation, refusal of pets, onerous rules, workfare requirements, behavioural reform requirements, *etc*. See e.g. Jake Pyne, "Unsuitable Bodies: Trans People and Cisnormativity in Shelter Services" (2011) 28 Canadian Social Work 129; Megan Ravenhill, *The Culture of Homelessness* (Hampshire: Ashgate, 2008); Talmadge Wright, *Out of Place: Homeless Mobilizations, Subcities, and Contested Landscapes* (Albany: State University of New York Press, 1997); Leonard Feldman, *Citizens without Shelter* (Ithaca: Cornell University Press, 2004).

51 Ravenhill*, ibid,* at 146.

52 *Adams* BCSC, *supra* note 2 at para 51 [emphasis added].

53 The lack of a definite article, 'the,' before 'Tent City' frames it more like a specific permanent city than a fleeting and anonymous space (e.g. "Victoria," not "the Victoria").

54 *Adams* BCSC, *supra* note 2 at para 54 [emphasis added]. In this sense, roofless people become truly 'homeless' only when rooflessness is made unlivable. It is helpful to think of home as an active thread of felt belonging, rather than as a particular place. J Macgregor Wise, "Home: Territory and Identity" (2000) 14 Cultural Studies 295; Zion, *Right to Shelter*, *supra* note 11 at 8-12.

55 *Gosselin*, *supra* note 24 at para 82-83.

56 *Adams* BCSC, *supra* note 2 at para 116.

57 *Adams* BCCA, *supra* note 2 at para 38.

58 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.

To help crystallize the (all too deconstructible) positive-negative rights distinction, Ross J invoked a vocabulary of choice from the *Chaoulli* decision.[59] 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 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.[60] 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.[61] 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.[62]

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 precarity relative to other Canadians. Another *Chaoulli* quotation that Ross J relies upon 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*.[63]

But who are these "ordinary" Canadians? Ending the prohibition helps only those who can afford to buy private health insurance and in fact harms all those Canadians who cannot.[64]

By invoking *Chaoulli*'s atomistic and structurally naturalizing approach to choice, Ross J justifies the right to a box. She 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

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An order for the government to designate an outdoor sleeping area for homeless people (as one claimant requested) and an order for it to provide housing were foreclosed for the same reason.

59 *Chaoulli v Quebec (Attorney General)* 2005 SCC 35 qtd in *Adams* BCSC, *supra* note 2 at para 121 [*Chaoulli*].

60 See e.g. Colleen Flood, "*Chaoulli*'s Legacy for the Future of Canadian Health Care Policy" (2006) 44 Osgoode Hall LJ 273; Martha Jackman, "Charter Review as a Health Care Accountability Mechanism in Canada" (2010) 18 Health LJ 1; Gregory Marchildon, "The *Chaoulli* Case: A Two-Tier Magna Carta?" (2005) 8 Healthcare Q 49; Marie-Claude Prémont, "Clearing the Path for Private Health Markets in Post-Chaoulli Quebec" (2008) (Special Ed) Health LJ 237. When the Court does make decisions that implicate a longer temporal horizon, the consequences are as or more likely to be retrogressive than progressive. See e.g. Harry Arthurs & Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev Const Stud 37 at 116.

61 *Adams* BCSC, *supra* note 2 at para 120.

62 *Chaoulli*, *supra* note 59 qtd in *ibid* at para 121 [emphasis added].

63 McLachlin CJ & Major J in *Chaoulli*, *supra* note 59 at paras 123-124 qtd in *Adams* BCSC, *supra* note 2 at para 150 [emphasis added].

64 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.

simultaneously as *implicated* in homelessness (via its withdrawal of social services etc.) and as an entity that must not interfere with the homeless to the extent of threatening their lives, thereby *standing apart* from homelessness.[65] Her approach seems necessary to achieve the desired outcome (and it was upheld on appeal), but the tension is irreducible. 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. If nothing else, homelessness has myriad adverse health consequences, including shortened lifespan.[66] It is this broader temporal canvas that courtroom discourse must elide in formulating emergency decisions.

Registered in historical context, institutional and (anti)political factors combine to generate the 'emergency' temporality. Just as a paramedic—a practitioner of 'emergency' medicine—is tasked with stabilizing a patient, rather than addressing the root cause of an injury, the courtroom allows a claim to be resolved within naturalized political coordinates; the claim's root causes are not taken to be the object of redress.[67] In fact, the everyday emergencies that make manifest the failures of (neo)liberal governance serve ultimately as occasions to (re)suture it. Events that might otherwise destabilize the status quo are recast in ways that drain them of their potentiality.

Before moving on to proposals that aim to transcend the emergency temporality from within the courtroom, it is worth briefly touching on subsequent developments that entrenched *Adams'* limit status and exposed courtroom limitations *even within* the emergency temporality. *Johnston* was a failed challenge to the daytime ban on shelter after the *Adams* Court of Appeal ruling permitting temporary shelter only at night.[68] I lack the space to treat this important case here,[69] but it was noteworthy for its dissonance with the homeless claimant's narrative. It dismissed reasonable arguments that shelter was necessary during the day both for weather protection and because some homeless people sleep at that time.[70] Even the contingent night-time shelter right established in *Adams* has now been rejected by the

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65 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 & Halley, *supra* note 12 at 126.

66 Ruth Wilson Gilmore defines racism as "the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death." *Golden Gulag* (Berkeley and Los Angeles: University of California Press) at 25. Particularly given the over-representation of Indigenous people among the homeless, the connections between racism and forms of group-differentiated vulnerability to premature death that are not a function of racism alone (such as homelessness) warrant further investigation.

67 The 're' in redress underscores the retrospective, reparative, temporal orientation.

68 *Johnston v Victoria (City),* 2011 BCCA 400 [*Johnston* BCCA]; 2010 BCSC 1707 [*Johnston* BCSC].

69 See Zion, *Right to Shelter*, *supra* note 11 at 69-78. As far as I can tell, the only article to remark on the case more than askance is Marie-Ève Sylvestre, "The Redistributive Potential of Section 7 of the Charter" (2011) 42:3 Ottawa L Rev 389 at 404-405. However, Sylvestre does not consider the extent to which the trial judgment fails even on the terms of constitutional discourse, as the Court of Appeal acknowledged. *Johnston* BCCA, *ibid*, at para 13-16. For instance, Bracken J holds that a daytime ban on shelter in parks violates section 7 but is saved by section 1. However, it is a commonplace in constitutional law scholarship that a measure that violates section 7 (with its 'internal' limitation clause in the form of "principles of fundamental justice"), that is, a measure so egregious it that violates the principles of fundamental justice, cannot then be saved in a section 1 analysis because it serves some compelling state interest. Although this outcome has obtained on occasion with lower level judges such as Bracken J (who presumably lack public law experience), it has never happened at the Supreme Court of Canada level. The speculation is that only war or some national emergency could allow a section 7 violation to be saved by section 1. See e.g. Mark Zion, "Effecting Balance: *Oakes* Analysis Restaged" (2013) 43 Ottawa L Rev 431.

70 For example, many homeless people work. However, given their physical appearance and the difficulties associated with being homeless, their labour choices are limited. 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.

City of Vancouver, only 100 km away, with respect to nearly identical legislation and a similar shelter situation.[71] Ultimately, claims for freedom from state interference in *Adams* and *Johnston* find mixed success within the courtroom emergency temporality. But what of more ambitious claims that centre not just on unwarranted state interference and its emergency resolution, but *proactive* state provision of shelter and other services? It is that question to which I turn in the next section.

III. THE 'PROGRESSIVE' TEMPORALITY: LEGAL ACADEMIC COMMENTARY ON SHELTER

> If I could help you, you wouldn't have to ask.
>
> —Bad Books (an indie-folk band)

In this section, I evaluate normative proposals from Canadian legal academics who call for courts to order states to provide some minimal level of shelter for everyone, thereby conjoining the emergency temporality with a social democratic narrative that discloses a 'progressive' temporality with a relatively extended horizon. These proposals are 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.[72] I contend that the 'emergency' temporality, including the structuring division between positive and negative rights, may be less open to rearrangement than my interlocutors suggest.

If the emergency temporality were to be transcended within the courtroom, judges would have to abandon the present structural distinction between positive and negative rights, which was established in *Gosselin* and reinscribed in *Adams*.[73] Sandra Fredman shows how all rights, whether civil-political or social-economic imply a range of correlative duties.[74] The state cannot stand apart from 'society' within some carefully delimited field, regulating some aspects of life while forbearing in others. *Adams* extended the field of possibility for negative rights partly by distinguishing them from positive rights, but what precisely takes place when a positive (or socioeconomic) rights claim *is* made?

In the shelter context specifically, *Tanudjaja* went beyond a simple request for overhead shelter *given* state reconfiguration (which has exacerbated inequality, including with respect to shelter) to challenge the reconfiguration itself.[75] The claimants 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

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71 Pivot Legal Society has been helping a homeless Vancouver man to challenge the situation in Court. Pivot Legal Society, "Vancouver Man Sues City over Ticketing of Homeless People" (22 November 2012), online: <http://www.pivotlegal.org/vancouver_man_sues_city_over_ticketing_of_homeless_people>. Cities seem to be forcing homeless people and/or legal advocacy organizations to marshal the extensive and city-specific factual record compiled in *Adams* about numbers of homeless people, shelter spaces *etc* in each locality, within and outside BC. It is homeless people who must bear the frustration and expense of this municipal strategy.

72 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).

73 For an extended discussion of socioeconomic rights doctrine in Canada, with a comparative dimension, see Zion, *Right to Shelter*, *supra* note 11 at 99-104.

74 Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008) at 9.

75 *Tanudjaja v Attorney General (Canada) (Application)* 2013 ONSC 5410 [Tanudjaja ONSC]; *Tanudjaja v Attorney General (Canada) (Application)* 2014 ONCA 852 [Tanudjaja ONCA].

groups from these effects."[76] The claimants sought declarations that these changes violated both their section 7 and section 15 rights.[77] As a remedy, they requested that the government consult "affected groups" with respect to program design and timetables, a process over which courts would retain supervisory jurisdiction, as in *Doucet-Boudreau*.[78]

Launched with the support of four constitutional law professors, *Tanudjaja* sought courtroom recognition of a positive duty on the part of the state. It relied on many intervenors who obtained public interest standing and there were detailed intersectional pleadings with abundant 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."[79] The case was anchored in the dense context of four suitably distressing claimant narratives.[80] Whereas in *Adams* homeless claimants stated a preference for tent cities—at least absent other alternatives in the present—which Ross J problematically cast as aberrant, the homeless (including precariously housed) claimants in this case sought nothing other than dignified *indoor* housing. Although the outcome made national news,[81] with the preliminary justiciability case eventually reaching the Supreme Court of Canada, the claim's reception was all too predictable.

Despite a compelling single dissent at the Ontario Appeal Court level,[82] judges at all levels 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

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76 *Ibid* at para 2.

77 Section 15 reads:

> "(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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Charter*, *supra* note 32.

78 Tanudjaja ONCA, *supra* note 75 at para 15. In *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62, the court retained supervisory jurisdiction to ensure that the government built a French language school in compliance with its duties to provide minority language education under section 23 of the *Charter*. It had previously disobeyed a court order to do so.

79 *Ibid* 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." *States of Injury* (Princeton: Princeton University Press, 1995) at 118.

80 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 suffering with cancer who had no roof at all because his condition makes working and paying rent impossible. *Tanudjaja* ONSC, *supra* note 75 at para 13.

81 See e.g. Laurie Monsebraaten, "Court dismisses landmark Charter challenge on behalf of homeless Canadians", *Toronto Star* (6 September 2013), online: <http://www.thestar.com/news/gta/2013/09/06/judge_rules_legislatures_not_courts_right_place_combat_homelessness.html>.

82 For a full discussion, see Zion, *Right to Shelter*, *supra* note 11 at 106-107.

> place to resolve the issues involved. It is not; at least as it is being attempted on the Application.[83]

Lederer J described the claim not as "incremental" 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.[84] The case was specifically differentiated from *Adams*, where "no positive benefit was requested."[85] "Incrementalism" becomes the watchword for the judicial minimalism of the emergency temporality. It is tautologically consistent with the '*Charter* as a living tree' mantra, and imports a minimally progressive self-understanding into the emergency domain, but it differs fundamentally from the notion of 'progress' held by the right to shelter commentators.[86]

The positive-negative distinction performs felicitously for judges who are 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.' After all, the former 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."[87] The paradox of socioeconomic rights claims is that—to riff on the Bad Books lyrics with which I opened this section—if courts could help claimants, they would not have to ask. In other words, if adequate state social provisions were "common sense," it would not be necessary to go to court at all. The problem is chrono-political, not simply doctrinal. 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."[88] 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, and other policies *of relatively long duration*—a condition far more complicated than abstention.[89] The question remains as to how *retrogressive* state reconfiguration, immune from courtroom intervention other than in emergency contexts, came about in the first instance.

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83 *Tanudjaja* ONCA, *supra* note 75 at para 4.

84 *Ibid* at para 64.

85 *Ibid* at para 79.

86 The 'living tree' serves as a metaphor for the law's 'evolution' in step with 'society.' Contrasted with the textual incoherence of Originalist constitutionalism, which serves in effect to reproduce hierarchy, the metaphor is suggestive enough. But what constitutes the requisite nature and extent of 'evolution' in a certain context? Here, judges and the normative commentators disagree (and not subtly) on that. How are abstract views held by 'society' to be assessed? How are they to be written into laws binding on all?

87 Beverly McLachlin, "The *Charter*: A New Role for the Judiciary" (1991) 29 Alta L Rev 540 qtd in Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 103.

88 *Tanudjaja* ONCA, *supra* note 75 at para 95 [emphasis added].

89 Released in 2018, the Government of Canada's National Housing Strategy will aim to halve rates of chronic homelessness within ten years. Canada Mortgage and Housing Corporation, "National Housing Strategy: What is the Strategy?" (2 May 2018), online: https://www.cmhc-schl.gc.ca/en/nhs/guidepage-strategy. Although a strategy at the federal level is commendable, targets of this sort have fallen far short of realization in the past. Even if the rate of chronic homelessness were in fact reduced by 50% (street counts even within one city are notoriously difficult), it would still be far higher than the national level in 1990. For a more detailed preliminary critique, see Kerry Gold, "They've Taken Baby Steps: Professor Slams Ottawa's Housing Strategy", *The Globe and Mail* (2 May 2019), online: <https://www.theglobeandmail.com/real-estate/vancouver/article-theyve-taken-baby-steps-housing-professor-slams-liberals-approach/>. The article quotes David Hulchanski, Professor of Housing and Community Development at the University of Toronto, confirming that the government has chosen to "leave it to the market."

It is commonplace in the academic literature within and beyond law that neoliberal transformations, especially over the past three 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 sufficient for the purposes of the case, these trends provide a surface description that cannot explain *why* or *how* the culture, state, and economy have transformed. For Wendy Brown, neoliberalism is a heterogeneous, spatially differentiated, but nonetheless importantly coherent epochal order of political reason, which is 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.[90] Institutionalized politics has reached a consensus at least on this *de facto* 'grundnorm,'[91] which is what Jacques Rancière calls "post-democracy."[92]

Law professor Margot Young articulates well the extent to which even modest egalitarian political goals have been eroded by the neoliberal state over the past two decades:

> The triumph of neo-liberalism, and its attendant vision of the sturdy, calculating individual, ground many of these developments . . . 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 citizen stands alone, free to succeed or fail on his or her own.[93]

Young writes about her despair with respect to the clear need for change in "the political arena" and its "unresponsiveness to calls for such change" (importantly, for her, the state and the political arena are coextensive).[94] She likewise laments the "inevitable capture and limitation of progressive litigation by a legal system only too well implicated in, and supportive of, current political, economic, and social arrangements."[95] Acknowledging the danger of being seduced by doctrinal reform as a mechanism for social change, she nonetheless confesses that (for a law professor) "it is often unclear what else to do."[96] 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."[97] But sometimes the phrase 'of course' alerts us to what may be a defense against what may not, after all, be so certain. Yet another question remains: must we remain locked within the government-legal forum binary?[98]

Whatever their differences, all Canadian legal academic commentators share a singular focus on state institutions as the mediator between 'emergency temporality' successes, such as *Adams*, and the Elysian

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90 Brown 2015, *supra* note 6.

91 This is a constitutional theory term referring to a 'master' or 'ground' norm; here it is redeployed ironically, not as that which assures the autonomy of the legal domain, but as a gesture toward its often under-appreciated heteronomy.

92 Jacques Rancière, *Disagreement: Politics and Philosophy*, translated by Julie Rose (Minneapolis: University of Minnesota Press, 1999) at 95.

93 "Sleeping Rough and Shooting Up: Taking British Columbia's Urban Justice Issues to Court" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 412 at 414.

94 Young, *supra* note 38 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.

95 *Ibid* at 318.

96 *Ibid*.

97 *Ibid* at 321.

98 See the next section for a new line of inquiry.

fields of the 'progressive' temporality.[99] These commentators may differ on the best institutional or doctrinal route,[100] but 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 least with respect to shelter. Bruce Porter refers to the "*long term* battle for adjudicative space for social rights claims."[101] 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,"[102] and suggests that "surely it is *past time* for the Canadian *Charter* to wake up from under its box?"[103] I have already noted Young's emphasis on "long term *Charter* development."[104] 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."[105] 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."[106] There are numerous such examples.[107] The overall image in the legal academic discourse on the right to shelter is one of a society on a coherent trajectory, setbacks notwithstanding, toward shelter justice.

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99 See Margot Young "Section 7 and the Politics of Social Justice" (2005) 38 UBC L Rev 539 [Young, "Section 7"]; Margot Young, "Why Rights Now? Law and Desperation" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) 317 [Young, "Why Rights Now?"]; Young, "Rights", *supra* note 38; Margot Young, "Social Justice and the Charter" (2013) 50 Osgoode Hall L J 669 [Young, "Social Justice"]; Bruce Porter, "The Right to Adequate Housing in Canada" in S Leckie, ed, *National Perspectives on Housing Rights* (New York: Kluwer-Nijhoff, 2003) [Porter, "Adequate Housing"] 93; Bruce Porter, "Homelessness, Human Rights, Litigation and Law Reform: A View From Canada" (2004) 10 Austl J HR 133; Bruce Porter & Martha Jackman, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework" (November 2012) Ottawa Faculty of Law Working Paper No 2013-10; Martha Jackman, "Open Justice or 'Just Us': The Poor, the Courts and the Charter," in Yves-Marie Morissette, Wade MacLauchlan & Monique Ouellette, *Open Justice/La Transparence dans le Système Judiciaire* (Montreal: Les Editions Themis/Canadian Institute for the Advancement of Justice, 1994) 281; Martha Jackman, "Charter Remedies for Socioeconomic Rights Violations: Sleeping Under a Box?" in Kent Roach & Robert J Sharpe, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2009) [Jackman, "Charter Remedies"] 280; Sarah Buhler, "Cardboard Boxes and Invisible Fences: Homelessness and Public Space in *City of Victoria v Adams*" (2009) 27 Windsor YB Access Just 209; and Sylvestre, *supra* note 69.

100 Whereas Margot Young and Sarah Buhler propose reforming section 7 doctrine, Martha 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.* Jackman, "Charter Remedies", 2009 *ibid* at 299. Sylvestre suggests pursuing both routes at the same time. Sylvestre, *supra* note 69 at 406. In addition to courtroom activism, Bruce Porter favours institutional approaches ranging 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. Porter, "Adequate Housing", *ibid*.

101 *Ibid* at 16.

102 Jackman, "Charter Remedies", *supra* note 99 qtd in Young, "Section 7", *supra* note 99 at 106-107.

103 *Ibid* at 301 [emphasis added].

104 Young, "Rights", *supra* note 38 at 112.

105 Young, "Why Rights Now?", *supra* note 99 at 322.

106 *Ibid* at 322.

107 See e.g. Young, "Section 7", *supra* note 99 at 560; Young, "Social Justice, *supra* note 99 at 670, 673.

I do not want to cast aspersions on legal and political optimism in a neoliberal epoch that makes such a positive outlook difficult enough.[108] But I want to be optimistic (or hopeful) only about phenomena that better withstand scrutiny.[109] Otherwise, there is the risk of "cruel optimism," in which fixation on a certain object actually impedes the aim motivating its engagement.[110] The legal academic commentary on the right to shelter suggests that it is only a matter of time before society 'advances' enough to realize the egalitarian arrangements that may seem radical today. On this "centrist progress narrative,"[111] 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 this centrist progress narrative.

First, insisting that certain solutions be delivered in the future means something different for housed and homeless people. Leonard Feldman argues 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."[112] By deferring equality to a future that never seems to arrive, *relatively* egalitarian eruptions 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, desired or not).[113] Homeless people taking egalitarian action in the 'now' may become legally and politically unintelligible by threatening a derailing 'compromise' of longer term goals, but as I elaborate below, it is this very unintelligibility that truncates the chrono-political spectrum. Courtroom victories such as *Adams* are difficult to depict as '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.

Second, and more broadly, 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,

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[108] 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. Sarah Ahmed, *The Promise of Happiness* (Durham and London: Duke University Press, 2010).

[109] See Part IV of this paper for a discussion of political action 'from below' that warrants (qualified) hope.

[110] Lauren Berlant, *Cruel Optimism* (Durham and London: Duke University Press, 2011).

[111] Here I refer both to Pierre Schlag's legal "centrism" that abhors 'intemperate' extremes, valid or not, 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." 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 constitutive inequality and ecological devastation 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' (permanent war), bank bailouts, *etc*.). Pierre Schlag, "The Anxiety of the Law Student at the Socratic Impasse" (2007) 31 NYU Rev L & Soc Change 575; Rancière, *On the Shores of Politics*, translated by Liz Heron (London: Verso, 1995) at 6.

[112] Feldman, *supra* note 50 at 146.

[113] For a discussion of the relation between 'maps,' which "purport to represent an existing reality," and 'blueprints,' which capture "a vision of a reality that might be [and] can be brought into existence only through the participation of others," see Rebecca Johnson, "The Persuasive Cartographer" in Gayle M MacDonald, ed, *Social Context and Social Location in the Sociology of Law* (Peterborough, ON: Broadview, 2002).

for those at the top of urban towers and those sleeping outside their base).[114] Wendy Brown argues that history has now thrown into question the Hegelian metanarrative at the core of post-Hegelian (e.g. Marxist) historiography.[115] 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 eerily to adopt neoliberal discourses of 'best practices,' 'investment,' *etc*. This discursive shift reflects how neoliberalism has animated subjectivity itself; *homo politicus* becomes displaced by *homo economicus*, newly reconfigured as self-investing human capital.[116] This does not mean that no progress is possible (indeed, see Part IV of this paper), and that we should throw up our hands nihilistically, but that if one waits, while advocating, for the state to address homelessness and/or economic inequality generally in the future in a way that preserves the political audibility of a diverse range of homeless people, one could be waiting a long time. Although achieving the right to a local and temporary box is significant, the real question, as Young and others point out, is why anyone ever had to go to court in the first instance to achieve such a minimal protection. To begin to address that question, I turn to one final temporality.

IV. DISSENSUAL TEMPORALITY: REDEPLOYING JACQUES RANCIÈRE'S POLITICAL DRAMATURGY

> 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.
>
> —Jacques Rancière

Whatever their differences, both the 'emergency' temporality and the 'progressive' temporality naturalize certain normative conceptions of home, and relatedly, they naturalize 'top down' state and/as legal action. The 'dissensual temporality' conversely begins with the 'bottom up' narratives of homeless people themselves, which are diverse, and do not correspond unproblematically with any single dwelling 'solution.' State institutions have been unable to accommodate homeless narratives and performances, such as the tent city, which likewise remain unintelligible *as politics* in right to shelter commentators' calls for courtroom-mediated reform.

Let us return briefly to where this paper began, to homeless narratives in *Adams,* and the case's (lost) origins as a tent city. As discussed in Part II, Amber Overall (Faith) and Mark Smith stated that they could only be at home in encampments with their friends. One key difference within the homeless community is that whereas some people cannot acquire indoor housing despite their best efforts, others categorically reject it, choosing to live outdoors.

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 remains a key category. However,

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[114] Walter Benjamin likewise casts progress as a storm that rages while a growing pile of historical debris grows skyward. Benjamin, *supra* note 26 at 258.

[115] Brown 1995, *supra* note 79 at 117.

[116] Brown 2015, *supra* note 6.

homelessness is in fact a choice for some, like *Adams* claimant David Arthur Johnston, who in his journal recounts leaving his unfulfilling work as a baker to live outdoors.[117] Insistent on having tent city spaces where people have 'the right to sleep,' he has endured being forcibly relocated by police, being harassed by security guards, and numerous court appearances and jail terms. He states that "society, for so long, has accepted the tourism/developer monopoly on sleep that its forgotten what it is to sleep for free… how many people have been having nervous breakdowns trying to make next month's rent?"[118] This politics is not simply a "lifestyle choice" akin to buying clothes or starting a new workout regimen. Like Johnston, Tomiko Rae Koyama left her paid work on Salt Spring Island to "run the [Tent City] kitchen at Cridge park and help out."[119] Ross J states that "her evidence was consistent with a political aspect to her participation."[120] 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."[121] However, Koyama and Johnston's testimony is acknowledged only as a (quickly dismissed) exception to predominant involuntary homelessness.

Johnston and Koyama's simultaneous rejection of the dominant order and affirmation of an alternative (their deep political *alterity*), indeed performs a politics at odds with the assumption that the City is sovereign in supposedly public spaces, subject only to the most minimal rights protections.[122] 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? Would the choice to live outdoors seem so incomprehensible if it were not made so precarious by today's neoliberal context?

Despite the richness of their analyses, judges and legal academics sometimes risk casting homeless people as de-politicized victims. Ross J referred to homeless people as "among the most vulnerable,"[123] Martha Jackman argues that they must move beyond "the basic struggle for existence" before they can be political,[124] and Young refers to homeless people in one article as "the most socially marginalized and politically oppressed,"[125] and deems them "politically powerless" in another.[126] All of these statements are accurate on some level, for at least some homeless people, or perhaps for all of them—like all housed people—at least some of the time. Indeed, the City heightened homeless people's vulnerability by exposing them to hypothermia risks; it poured fertilizer smelling of rotting fish on known sleeping

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117 David Arthur Johnston, *The Right to Sleep* (Victoria, BC: LB Word Works, 2011) at 4.

118 *Ibid* at 241.

119 *Adams* BCSC, *supra* note 2 at para 63.

120 *Ibid*.

121 *Ibid.*

122 Here there is a resonance with Indigenous struggles for their unceded territory. Although this raises a set of issues of paramount importance that warrant their own treatment and cannot be addressed here, it is noteworthy that when the City of Vancouver told Indigenous people in Oppenheimer Park to disband their tent city, they sent the City an eviction notice of their own. Duncan McCue, "Vancouver's Oppenheimer Park protest raises question of aboriginal title to urban centres" (22 Jul 2014), online: CBC News <http://www.cbc.ca/news/indigenous/vancouver-s-oppenheimer-park-protest-raises-question-of-aboriginal-title-to-urban-centres-1.2714731>.

123 *Adams* BCSC, *supra* note 2 at para 194.

124 Martha Jackman, "The Protection of Welfare Rights under the *Charter*" (1988) 20:2 Ottawa L Rev 257 at 326 qtd in *Adams* BCSC, *supra* note 2 at para 143.

125 Young, "Social Justice", *supra* note 99 at 698.

126 Young, "Rights", *supra* note 38 at 113.

grounds,[127] and it presided over various other 'anti-homeless' features of Victoria's urban architecture.[128] However, this is only part of the story. Susan Ruddick highlights another dimension of street life:

> Homeless people [demonstrate that they are] 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 [services such as] writing letters or translating documents for housed non-English speakers….[129]

Although homeless people face difficulties on an emergency temporality, their *political* struggles against being reduced to that temporality are significant.

If Ross J mentions the politics of the tent city askance in her reasons, that dimension is conspicuously absent in the normative legal commentary. In her "right to life" analysis, Ross J quoted Martha Jackman:

> 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.'

On one level, this statement is compelling; it resists variations of liberal formal equality that efface the material preconditions for meaningful equality. But this logic is *temporally* problematic; 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.

Part of the reason for the unintelligibility of homeless politics in the normative legal discourse is that it assumes that 'the realm of politics' is coextensive with 'the state.' However, this assumption will have to be loosened if another temporality of shelter law and politics is to emerge. To develop it, I will turn to the work of Jacques Rancière, redeploying his notions of 'politics,' 'dissensus,' and 'rights' to address the shelter context.[130] As discussed below, Rancière's reconceptualization of those key terms will illuminate the ways in which some homeless people engage in politics and enact their rights not because of, but often in spite of, legal institutions.

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127 Johnston, *supra* note 117 at 263.

128 John Franklin Koenig, "Spaces of Denial and the Denial of Place: The Architectural Geography of Homelessness in Victoria, BC" (MA Thesis, University of Victoria, 2007), online: UVicSPACE <https://dspace.library.uvic.ca:8443/handle/1828/2511> at 14, 147-149. 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. Ubiquitous fences keep homeless people from sleeping in certain areas. Tear gas has been used to smoke squatters out of abandoned buildings sitting empty.

129 Susan Ruddick, "*Metamorphosis* Revisited: Restricting Discourses of Citizenship" in Joe Hermer & Janet Mosher, eds, *Disorderly People* (Halifax: Fernwood Publishing, 2002) at 56.

130 For an extended discussion, see Zion, *Right to Shelter*, *supra* note 11 at 126-136.

Rancière refers not to his political theory, but to his 'dramaturgy.'[131] What he offers is not a philosophical system, but rather a lens through which to view scenes such as the tent city. This dramaturgy is simultaneously political and aesthetic: "aesthetic knowledge forms a broad horizon, including the forms, images, tropes, perceptions, and sensibilities" that frame practices such as law.[132] The connection between political and aesthetic dimensions is significant because the scholarly task shifts from rational prescription rooted in what is believed to be possible (the realm of the 'ought') to seeing and developing previously unexplored possibilities ('what might be').[133]

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 official state institutions that we, in legal commentary, usually associate with 'politics.'[134] For Rancière, the police order operates on a logic of *consensus*, which refers to an *aesthetic* continuity wherein those without a part in the arrangement of social parts are not simply oppressed, but absent to the senses. There is a general 'convergence' on a certain 'sense' of society and its possibilities that makes alternatives impossible to see.

Rancière argues that politics, in his sense, only begins when 'dissensus' takes place. Dissensus is an interruption in the present distribution of the sensible by the part (such as the homeless) that has no part in the existing consensus, or taken-for-granted arrangement of parts. In other words, politics could be seen to take place when homeless people stage a tent city, challenging the usual urban order, and making themselves visible as those who are contesting a wrong, which entails the denial of their equality. They call into question the very order that assigns them the role of quietly moving from place to place in the city until asked to move again, or occupying a bed in an emergency shelter (if available), or receiving indoor housing (if available). Crucially, dissensus comes not from theorizing about end states of equality or redistributing resources to create equality, but asserting equality as a foundational presupposition of politics: it is *staged* by those presently being dominated or treated as unequal.[135]

The model for democratic action is not formulating a state policy that can *give* people equality; rather it is someone like Rosa Parks, who did not politely relinquish her seat on the bus, but simply *presupposed her equal entitlement* to that seat and *took* it. Whereas analyses of neoliberalism explain some important mutual transformations in society and subjectivity over the past decades, Rancière's dramaturgy holds that various axes of structural power cannot saturate the political field, producing us merely as specks of human

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131 Rancière, "Remarks", *supra* note 19 at 119.

132 Pierre Schlag, "The Aesthetics of American Law" (2002) 115 Harvard L Rev 1047.

133 Julen Etxabe, "Jacques Rancière and the Dramaturgy of Law" in Etxabe & Lerma, *supra* note 10 at 7. At the same time, the task is not simple description ('what is') because no analysis can proceed from a world-encompassing Archimedean point and because certain values are brought to the analysis. I will discuss one such value, the 'presupposition of equality,' below.

134 The phrase 'liberal democracy' may seem awkward for many in the legal community. Indeed, for Rancière, liberalism and democracy work according to fundamentally different logics. Within the police order, liberalism is naturalized; it is predicated on order, Whig history, watertight divisions between law and politics, etc. It presumes social hierarchy and assigns pre-determined roles and places to different social actors. Democracy, on the other hand, operates to challenge hierarchies and inequalities of all sorts; it is unpredictable, interruptive, and has no pre-determined institutional form. See e.g. Davide Panagia, *The Poetics of Political Thinking* (Durham, London: Duke University Press, 2006); Miguel Abensour, *Democracy Against the State*, translated by Max Blechman & Martin Breaugh (Cambridge: Polity, 2011).

135 Although some homeless people may have no express 'political' purpose in joining a tent city—seeking only a relatively congenial place to reside for the time being—its very existence invites us to read even that deed with the presupposition of equality in mind.

capital, or these courageous collectives (which we often narrativize with heroic individual names like Rosa Parks) could not 'pop up' in the first instance, usually in a way that takes people by surprise.[136] Rancière's reformulation of politics has consequences for how we think about rights. In "Who is the Subject of the Rights of Man?" Rancière considers how constitutional rights function as political signifiers that anyone may invoke. He discusses Hannah Arendt, Georgio 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. Analyzing this distinction will help to develop a formulation that is especially well suited to the shelter context.

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."[137] This formula suggests a paradox in which laws that exclude individuals from possessing certain rights counter-intuitively highlight how these individuals have actually had to possess those rights all along. Here an example will be helpful. Olympia de Gouges, one of many female activists in the French Revolution, noted the conspicuous absence of women in the supposedly universal suffrage clause in the 1791 Constitution, despite the fact that some female activists were put to death for their *political* activity. This was a contradiction given that women, as disenfranchised, were deemed apolitical, banned from the 'public' realm and consigned to the 'private' realm. De Gouges declared that "if women were entitled to go to the scaffold, they were entitled to go to the assembly."[138] 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 Declaration of Rights and through their public action, that they *had* the rights denied them by the constitution, that they could *enact* those rights.[139]

The example shows that rather than proceeding within a pure public sphere, politics—*rights* politics, at any rate—calls into question the dividing line between private and public itself.[140]

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136 Note that this approach brackets questions of efficacy. Given that those expected to stage their equality often have difficulty doing so for deeply transindividual reasons, this is a serious problem. However, the point is an aesthetic one. It has to do with perceiving already operant performances as stagings of equality in a way that is often otherwise missed. Such perceptibility may open the way for many sorts of collective democratic action.

137 Jacques Rancière, *Dissensus: On Politics and Aesthetics,* translated by Steven Corcoran (London: Continuum International Publishing Group, 2010) at 67.

138 *Ibid* at 69.

139 *Ibid.*

140 This reference to the public-private distinction is made in order to draw out Rancière's notion of rights, which will then have implications for the dissensual temporality. Like many of Rancière's conceptual pairs, this opposition is used schematically, to highlight what 'collides' in his fundamentally antagonistic formulation of politics. The literature on the public-private distinction is voluminous. Many formulations after Arendt, especially in the feminist literature, deconstruct the idea that such 'spheres' even exist as coherent essences. See e.g. Hannah Arendt, *The Human Condition*, 2ed (Chicago and London: University of Chicago Press, 1998) at 22-78; Eli Zaretsky, "Hannah Arendt and the Meaning of the Public/Private Distinction" in Craig Calhoun & John McGowan, eds, *Hannah Arendt and the Meaning of Politics* (Minneapolis: University of Minnesota Press, 1997), 224-25; Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2005) at 21-65; Nancy Fraser, "Rethinking the Public Sphere: A Contribution to a Critique of Actually Existing Democracy" in Craig Calhoun, ed, *Habermas and the Public Sphere* (Cambridge, MA: MIT Press 1992), 109-42; Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy" in *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford, CA: Stanford University Press, 1989), 118; Joan Wallach Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, MA: Harvard University Press, 1996).

Contestation over the public-private division is particularly clear in the case of Johnston, who cited his right to sleep, a 'private' behaviour in 'public' space. When he partook in a 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 campers' direct action might be interpreted to pose the question: 'If some people can have sprawling private estates (possibly via inheritance), why can't we at least have tents in the only spaces (park spaces and transportation corridors) in which we are allowed to exist?' The campers created a division in common sense by supplementing the unified frame or picture (held by the normative housed public) that parks are for leisure and sidewalks are for walking with a contradictory picture in the same sensory field.[141]

The foregoing discussion raises the titular (albeit archaically gendered) question: "who *is* the subject of the rights of man?" For Rancière, the answer is that 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 people' or the *demos*, but subjectivation is a process or a capacity. In other words, there is not a subject with stable properties that pre-exists a rights demonstration. Rather, 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).[142] 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).

Rancière's intervention can now be compared to those of the right to shelter commentators canvassed in Part III of this paper. Young and others 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 particular reading of the *Charter*, and those rights will be altogether hollow *until* courts order states to fulfill them in the future. Conversely, Rancière's logic is paratactic ('side by side') because subjects simultaneously have and do not have rights. The question is not (or is not only) whether institutions can deliver rights *in the future*, but whether the homeless can make *use* of them *in the present* by staging their equality via direct action.[143] Importantly, this 'present' is not one that merely 'lives for the moment,' but actually can be read to harbour a more expansive chrono-political imaginary: the 'dissensual temporality.'

Having developed the structure of Rancièrean rights, it is possible to explore the distinctive temporality that they disclose in the shelter context. In doing so, I am not 'applying' Rancière so much as responding

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[141] 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.

[142] This differs from abstract invocations of 'popular sovereignty,' which is said by some to exist as a foundational quality in a given polity no matter what specific people do.

[143] Rancière's approach differs both from invocations of rights that valorize them uncritically, without regard for their (often hierarchical and atomizing) liberal moorings, and from Marxist accounts that see them *only* as a bourgeois mystification. Rancière's approach is therefore especially useful for generously interpreting stagings and popular invocations of rights (such as those of David Johnston with respect to his 'right to sleep') and their orienting role (whatever their ultimate effects) in emancipatory struggles across history.

to his call. Indeed, the objective for him is not to develop a fixed system, but to (re)build a "moving map of a moving landscape."[144] Politics for Rancière is about a conflict of temporal worlds: "the idea of modernity would like there to be only one meaning and direction in history, whereas the temporality specific to the aesthetic regime is a co-presence of heterogeneous temporalities."[145] What is the structure of dissensual temporality? It operates in the present, but is weighted with thick histories and prefigures future sensory-spatial arrangements. It is not historically transcendent, but emphasizes resonant if not cyclical political dynamics across history. To illustrate this temporal mode, I will briefly examine how encampments, as stagings of equality, *can be seen* to channel egalitarian histories, to transcend a temporally constricting existence in the present, and to prefigure greater dwelling equality in the future.

Histories of resistance to the privatization of common spaces date back at least as far as British enclosure.[146] The logic of commons practices precisely inverts neoliberal rationality, which seeks to intensify a gapless and unequal network of exclusive, partitioned, privatized spaces.[147] Tent cities can be seen as an instance of this broad egalitarian commoning pattern and they have their own fascinating history. Although the Canadian record is relatively sparse, Don Mitchell's American historical geography begins long before the present wave of tent cities that has ebbed and flowed since the Reagan administration cut the federal housing budget in half. Just after the Civil War, the "hobo jungle" was of special significance. These spaces were located on the periphery of towns close enough to general stores but far enough away to avoid official attention.[148] 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."[149] Mobilizing took the form of large marches, as well as

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144 Rancière, "Remarks", *supra* note 131 at 120.

145 Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, translated by G Rockhill (London: Continuum, 2004) at 27.

146 See e.g. Nicholas Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford, 1994), documenting the struggles of Diggers and Levellers against the legally sanctioned, centralized enclosure of the commons; Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014), arguing that for his own Dene people, land was to be held in common and is part of a 'mode of life,' not a commodity; JK Gibson-Graham, *A Postcapitalist Politics* (Minneapolis: University of Minnesota Press, 2006), documenting commons practices in community economies, as well as historical destruction of the commons in the West and in colonial contexts; Kristin Ross, *Communal Luxury* (London: Verso, 2015), using Rancière to rethink the Paris Commune of 1871; Douglas Hamilton and Darlene Kay Olesko, *Accidental Eden* (Halfmoon Bay, BC: Caitlin Press, 2014), detailing a commons refuge on Lasqueti Island, off the coast of Vancouver Island, in the 1970s; and Colin Ward, *Cotters and Squatters* (Nottingham: Five Leaves Publications, 2002) at 5-12 ("There is a belief around the world that if you can build a house between sunset and sunrise, then the owner of the land cannot expel you … nobody knows where this ancient subversive legend [originated]").

147 Brown 2015, *supra* note 6 at 216: "We are enjoined to sacrifice to the economy as the supreme power and to sacrifice for 'recovery' or balanced budgets…the call implies overcoming self-interest for the good of the team. Yet the devastation of human well-being entailed in slashed jobs, pay, benefits, and services brings no immediate returns to those who sacrifice or are sacrificed. Rather, the putative aim is restoration of economic and state fiscal 'health,' a return from the brink of bankruptcy, currency collapse, debt default, or credit downgrade."

148 Don Mitchell, "Tent Cities as Interstitial Spaces of Survival" in Andrea Brighenti, ed, *Urban Interstices: The Aesthetics and the Politics of the In-Between* (Surrey, Burlington: Ashgate, 2013) 65 at 68.

149 *Ibid*. Although not part of respectable public speech today, this sentiment finds echoes in views that attribute homelessness simply to people's personal defects, such as addiction and mental health problems; in fact, it is just as likely that homelessness arises from being unable to afford a home and/or survive in unlivable emergency shelters. Once one has to live on the streets, mental distress is hardly surprising and the use of alcohol and other drugs may be understood as a rational response to being in some level of pain at all times.

encampments in state capitols, city streets, *etc*.[150] 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.[151] Mitchell 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."[152] Rather than operating as a discrete "lifestyle choice," tent cities, if viewed as their participants intend, have always contained a political critique of the broader inegalitarian order.

In the present, homeless encampments performatively refute a common popular construction of homeless subjectivity (inside and outside the courtroom) as what Melanie Loehwing has termed "the unforgiving minute of the present."[153] Loehwing explains that the housed public convokes the homeless 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. Encampments contest that restricted temporality by enduring 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 possible world in the present world, which is the *sine qua non* of Rancièrean dissensus. What is important in the dissensual temporality is a concept of home that operates more like an active and polymorphous thread than a fixed normative point.[154] So, people like Johnston and Koyama who choose outdoor life perform a future in which that choice is less arduous on a daily basis. At the same time, people like the claimants in *Tanudjaja*, who desperately seek indoor space, may also benefit from encampments in the future. Ironically, the direct action left untheorized by right to shelter commentators may galvanize state provision of shelter (e.g. because of public outcry at the presence of tent cities and because of officials' concerns about how these might decrease tourist and consumer revenue in the urban core). In fact, although it falls far short of the demand, the City of Victoria has committed to a previously unprecedented level of shelter provision as a direct result of the Courthouse tent city.

Whether dissensual temporality orients to outdoor or indoor living, what is important is its constant staging of relative equality. For Rancière, equality is neither a philosophical puzzle to be solved independent of time and space, nor a criterion of legitimacy for naturalized institutions in their 'progressive' striving. Equality is, rather, a fundamental axiom or presupposition to be verified in the constancy of its specific acts. With certain assumptions about temporality, home, the state, rights, and the role of the legal commentator denaturalized, those acts begin to appear all around us.

V. CONCLUSION

Throughout this paper, I have striven to reflect on the conditions of possibility for critical legal thought. Serious limitations to calls for ambitious courtroom action must be confronted. Austin Sarat and Susan Silbey long ago warned academics about succumbing to "the pull of the policy audience,"[155] and those dangers seem magnified when policy prescriptions are to be channelled through the judiciary, which is

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150 *Ibid* at 70.
151 *Ibid* at 69.
152 *Ibid* at 81.
153 Melanie Loehwing, "Homelessness as the Unforgiving Minute of the Present: The Rhetorical Tenses of Democratic Citizenship" (2010) 96 Quarterly J Speech 1380.
154 Wise, *supra* note 54.
155 "The Pull of the Policy Audience" (1988) 10 Law & Pol'y 97.

conservative in its temporality if not simply in its membership. 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."[156] Indeed, litigation 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."[157] One might hasten to add that constitutions do not proclaim (by prosopopeia) precise measures and that politicians today no longer make promises (other than guiding the ship of state over the choppy waters between the present and ever greater economic growth).[158] Arthurs and Arnold conclude that "the *Charter* does not much matter in the precise sense that it has not—for whatever reason—significantly altered the reality of life in Canada."[159] This seems accurate with respect to the courtroom struggles of homeless people.

What does it mean for legal academic commentators on the right to shelter 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 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 objective has not been to 'trash' sincere reform efforts—any relative improvement in the availability of social services and indoor housing *for those who desire them* is surely to be welcomed—but rather simultaneously to problematize their unstated assumptions and to open new lines of visibility and inquiry.

In order to constellate the various perspectives and aims in the cases, in the normative legal commentary, and in homeless narratives, I introduced a chrono-political 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 a 'progressive' temporality in which 'successes' such as *Adams* might be 'built upon' in a longer term struggle for shelter justice. However, such 'conjoining' of the emergency and progressive temporalities seemed neither borne out by the historical record nor compatible with the desires of some homeless people. 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. Moreover, *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. To conjoin 'emergency' and 'progressive' temporalities is to assign to a future that is perpetually deferred a 'solution' from above (indoor housing) that at least some homeless people categorically reject, producing a generalized democratic aporia in the present.

Having loosened the conjoint temporality assumption, I proposed a coexisting antipode for the courtroom emergency temporality, extending Rancière, which I termed 'dissensual temporality.' It is

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156 Young, "Social Justice", *supra* note 99 at 671.
157 Harry Arthurs & Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev Const Stud 37 at 116.
158 Rancière 1995, *supra* note 111 at 5-6. We might today add an exception for asinine promises about building walls.
159 Arthurs & Arnold, *supra* note 157 at 54.

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. Urban campers are not pariahs (as they are cast in some rigorously normative media commentary) and I have striven to listen to homeless narratives without adopting the 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 (post)modern deadlocks as the rest of us. Nonetheless, they are *political actors* with their own temporal coordinates.

In the narratives and deeds of homeless people themselves, it is possible to see the dissensual staging of an equality that one must presuppose. It is in this staging—however fleeting—that 'homeless' 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 act as citizens who have altered the meaning of home for all of us. Amidst the constrains of the political order that has given rise to the tent city and made it so often fleeting and unlivable, dissensual performances such as the these 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 more equal world—one possible future world—within the space-time interstices of our present world. If critique offers even a glimmer of this possibility and all that it justly refuses, it is worth our limited time.