This paper analyzes the recent decision of the British Columbia Supreme Court in City of Victoria v. Adams. Specifically, the paper considers three interlocking themes that emerge from the decision: (1) the nature of “public space” in the context of homelessness; (2) the autonomy of homeless individuals; and (3) the meaning and value of the “homeless body.” With reference to each theme, the paper explores how the judgment in Adams grapples with the purportedly normative “Law and Economics”-type arguments put forth by the City of Victoria. By drawing on insights from Critical Legal Studies theory and feminist jurisprudence, the paper shows that Adams subverts and destabilizes certain “normative” perspectives about public space and homelessness. However, the paper goes on to argue that in its conflation of “cardboard box” shelters with the “invisible fences” envisioned by Justice Wilson in Morgentaler, Adams presents an ambiguous victory for anti-poverty advocates. The paper argues that the decision may serve to increase barriers for a broader and more progressive understanding of section 7 in the future.

Dans cet article, on analyse le jugement récent de la Cour Suprême de la Colombie Britannique dans City of Victoria v. Adams. Plus précisément, on considère trois thèmes qui ressortent du jugement et qui s’entrecroisent : (1) la nature d’« espace public » dans le contexte de l’itinérance; (2) l’autonomie des sans-abri; et (3) la signification et la valeur du « corps sans abri ». En rapport avec chaque thème, on explore comment l’arrêt Adams compose avec les arguments supposément normatifs du genre « La Loi et l’Économie » avancés par la ville de Victoria. En s’inspirant de perceptions tirées de la théorie des Critical Legal Studies et de la jurisprudence féministe, l’auteure démontre que l’arrêt Adams subvertit et déséquilibre certaines perspectives « normatives » au sujet de l’espace public et l’itinérance. Cependant, elle poursuit en arguant que de fondre les abris « en boîtes en carton » et les « barrières invisibles » contemplées par la juge Wilson dans Morgentaler, comme le fait l’arrêt Adams, présente une victoire ambiguë pour ceux et celles qui luttent contre la pauvreté. L’auteure soutient que le jugement pourrait contribuer à augmenter les barrières devant une compréhension plus large et plus progressive de l’article 7 à l’avenir.

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Private space is limited here, we are all trying to find a small bit of property to lay our heads on.\(^1\)

Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass.\(^2\)

I. INTRODUCTION

In *City of Victoria v. Adams*,\(^3\) an October 2008 decision alternately hailed as “ridiculous”\(^4\) and “a major victory for anti-poverty advocates,”\(^5\) Justice Carol Ross of the British Columbia Supreme Court struck down sections from two City of Victoria Bylaws that prohibited individuals from erecting temporary shelters in public parks. These sections of the Bylaws, Justice Ross found, violated the rights of homeless individuals to “life, liberty and security of the person” under section 7 of the *Canadian Charter of Rights and Freedoms*,\(^6\) contrary to the principles of fundamental justice and were not saved by section 1.

In this article, I argue that the significance of *Adams* for anti-poverty advocates lies in the ways in which the decision addresses dominant discourse about the choices, autonomy, and physical bodies of homeless people, and the place of homeless people in public space. This dominant discourse, which is reflected in *Adams* by the arguments of the City of Victoria, is characterized by a conception that homeless people stand in opposition to “the public,” and that their physical, embodied, presence in public space is threatening to the community at large. It is invariably hinged to normative economic claims that the value of public space is diminished when it is occupied by homeless people. It is my argument that Justice Ross’s decision in *Adams* subverts and destabilizes these dominant perspectives by envisioning homeless people as members of, rather than opposed to, the public, with a right ‘to be’ in public space and make choices about their lives and bodies within this space. This is significant for anti-poverty advocates, who have so often struggled against negative images of poverty and poor people.\(^7\)

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1 Kalanu, comment in an online discussion among homeless individuals and advocates about *Victoria (City) v. Adams* (see infra note 3 for citation of the decision), online: Homeless Nation <http://homelessnation.org/en/node/13731> (last modified 23 October 2008). The British Columbia Court of Appeal just released its decision in the case as this article was going to print, and upheld the trial court’s decision, with a slight variation to the remedy.
3 2008 BCSC 1363 (CanLII) [*Adams*].
However, I also argue that in its conflation of cardboard box shelters with the “invisible fences” envisioned by Justice Wilson in Morgentaler, Adams presents an ambiguous victory for anti-poverty advocates. This is because the decision ultimately does not challenge liberal conceptions about the relationship of the individual to the state, and the role of the Charter in this relationship. That is, section 7 is viewed as a shield, or “invisible fence” that serves to protect individuals from repressive state action, rather than as a guarantee that requires positive state interventions to address poverty and homelessness.

In order to illustrate my argument, I will consider in turn three interlocking themes that can be distilled from the Adams decision. These themes are: (1) the nature of “public space” in the context of homelessness; (2) the issue of the “free choice” and autonomy of homeless individuals; and (3) the meaning and value of the “homeless body.” With reference to each theme, I will explore how the judgment in Adams grapples with and subverts dominant discourse about homelessness, but ultimately fails to significantly shift prevailing liberal notions about the role of section 7. My exploration includes a closer look at theoretical underpinnings of the City’s arguments, as well as those manifested in Justice Ross’ reasoning. I turn first, however, to an overview of the decision.

II. OVERVIEW OF CITY OF VICTORIA V. ADAMS

In October of 2005, a group of homeless individuals set up a “tent city” in Cridge Park in the City of Victoria. The tent city consisted of more than twenty tents and about seventy people in total. After unsuccessfully attempting to remove the occupiers through signs and warnings, the City of Victoria (the City) applied for, and successfully obtained, an interlocutory injunction requiring the dismantling of the tent city. The injunction was obtained on the basis that the homeless individuals were violating municipal bylaws that at that time prohibited, inter alia, “loitering” (which was interpreted to include sleeping) or “taking up a temporary abode” in public parks. After the expiry of the injunction, the City applied for a permanent injunction. The homeless individuals responded with a Charter challenge, arguing that the Bylaws violated their rights to “life, liberty and security of the person” under section 7 of the Charter. By this time, the City had in fact repealed and replaced one of the impugned bylaws, and so it was no longer an offence to “loiter” on public property. The significance of this change was that it was no longer illegal for individuals to sleep on public property. In other words, “sleeping simpliciter” was no longer prohibited. However, “taking up temporary abode” remained illegal. The City’s policy with respect to the meaning of the Bylaws respecting “taking up temporary abode” was that tents, tarps strung up with string, cardboard boxes or

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8 This is a reference to the term used in Samira Kawash, “The Homeless Body” (1998) 10:2 Public Culture 319.
9 Adams, supra note 3 at para. 4.
10 Section 7 reads as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
11 Adams, supra note 3 at para. 18.
any other overhead structures were prohibited, whereas sleeping bags, blankets or other “soft material” were permissible. Thus, the issue before Justice Ross was essentially whether the prohibition on tents, cardboard boxes, and strung-up tarps constituted a violation of the homeless defendants’ “life, liberty and security of the person” under section 7.

In her lengthy decision, Justice Ross decided in favour of the homeless defendants. The issue to be determined, she found, was

in the present circumstances, in which the number of homeless people exceeds available shelter space, is it a breach of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter?

Justice Ross concluded that prohibiting homeless people from erecting temporary shelter was a violation of their right to life, liberty and security of the person and not in accordance with the principles of fundamental justice under section 7. Specifically, she stated the following findings of fact at paragraph 69 of the decision:

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

According to Justice Ross, this risk of death or severe health problems engaged the operation of section 7. She found, at paragraph 145, that “the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision “life.” With respect to the liberty interest, she found, at paragraph 148, that “[t]he state’s intrusion in this process interferes with the individuals’ choice to protect themselves and is a deprivation of liberty within the scope of s. 7.” Finally, the Bylaws engaged the security of the person of homeless individuals in that they “deprived the homeless of access to the shelter required for adequate protection from the elements” (paragraph 153). At paragraph 155, Justice Ross stated

12 Ibid. at para. 26.
13 Ibid. at para. 119.
[i]n summary, I have concluded that the prohibition in the Bylaws against the erection of temporary shelter in the form of tents, tarpaulns, cardboard boxes or other structures exposes the homeless to a risk of significant health problems or even death. The prohibition constitutes a deprivation of the rights to life, liberty and security of the persons protected under s. 7.

Justice Ross considered carefully, and then rejected, a series of arguments put forward by the City and the Attorney General, including that the homeless defendants were in fact attempting to claim positive economic rights under the Charter, that they were in fact attempting to assert “property rights;” and that there was no “risk of harm” such that section 7 would be triggered. In a detailed analysis, Justice Ross went on to find that the violation was not in accordance with the principles of fundamental justice and was not saved by section 1 of the Charter.

In terms of remedy, Justice Ross declared the impugned sections of the Bylaws to be “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.”14 In other words, the homeless defendants were not granted the right to maintain their “tent city” in a permanent fashion, and the City retained the ability to require that the structures be dismantled each morning. Indeed, media reports have stated that police have performed routine morning “sweeps” of public parks in Victoria in the wake of the decision.15

III. THEME 1: COLONIZERS OR COMMUNITY MEMBERS? THE PLACE OF HOMELESS PEOPLE IN PUBLIC SPACE

In its arguments before the Court, the City attempted to present an alarming scenario. It warned the Court that if it were to side with the homeless defendants and strike down the prohibitions in the Bylaws, a process of “inevitable colonization” would result, with homeless people overwhelming public parks, impoverishing the community at large, and ultimately devastating the local economy. A succinct summary of the arguments is presented by Justice Ross at paragraph 173 of the decision:

The City submits that parks and public spaces positively affect the quality of urban life, contributing tangible and intangible benefits to the community. If these spaces are not protected and maintained for all, and these benefits are lost, the vitality

14 Ibid. at para. 239.
15 Police were reportedly enforcing a new City policy in the wake of Adams that shelters must be dismantled by 7 am each day. See Andrew MacLeod “Lawyers point out error of Victoria’s anti-camping policy” The Tyee (3 November 2008), online: The Tyee <http://thetyee.ca/Blogs/TheHook/Housing/2008/10/30/BylawFreePolicy/> and Andrew MacLeod, “Activists say Victoria in contempt of Court for more anti-camping arrests” The Tyee (30 October 2008), online: The Tyee <http://thetyee.ca/Blogs/TheHook/Housing/2008/11/03/VictorianContempt/>.
of a community’s commercial and residential life is weakened, as is its desirability as a place to live, work or visit. *It is the City’s submission that absent the Bylaws, there will be an inevitable colonization of public spaces with a devastating impact to the economic viability of adjacent areas.* (Emphasis added).

In other words, the notion of an “inevitable conflict” over the use of public space is set out, and the Court is beseeched to intervene on behalf of the “public.”

By framing its argument in economic terms; that is, by referring to concepts such as “benefits,” “commercial life” and “economic viability,” the City draws from the Law and Economics school of jurisprudential theory. Law and Economics theorists attempt to put forth a “generalized jurisprudential theory that purports to explain the law as a system susceptible to the logic of economics.” The universal goal of law and legal rules, according to this theory, is to “maximize wealth in society” and to thus assist the relentless search for “efficiency” that is assumed to be the engine for all human and societal endeavours. Adherents to Law and Economics posit that given “zero transaction costs,” every right would end up vested in the person who values it most – value being determined by each party’s willingness to pay. The role of law is to impose the “efficient solution” where transaction costs frustrate such re-allocations. For the purposes of this paper, it is important to emphasize that for Law and Economics, wealth is understood as incorporating more than money or material goods, but extends also to intangible goods and services, such as leisure or aesthetic pleasure.

The arguments of the City and Attorney General are reminiscent of Robert Ellickson’s Law and Economics analysis of homelessness and public space. In his article “Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public Space Zoning,” Ellickson weighs the “benefits” and “harm” of certain actions of homeless people within public space, such as panhandling and sleeping on the streets. For Ellickson, the economic “harm”

16 Indeed, *Adams, supra note* 3 at para. 1, Justice Ross framed the dispute before her by quoting an earlier American decision dealing with the regulation of public space and homelessness: *Pottinger v. City of Miami,* 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992). In that decision, the issue before the court was described as the “inevitable conflict between the need of homeless individuals to perform essential life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.”


18 Transaction costs are defined as “the costs of resource-maximizing transactions that are not included in the transaction’s price, such as the difficulties of gathering information related to the transaction, and negotiating, implementing, and monitoring it.” Martha T. McCluskey, “The Politics of Economics in Welfare Reform” in Fineman & Dougherty, *ibid.*, 193 at 209.


21 Thus, according to Posner, “leisure has value, and is part of wealth, even though it is not bought and sold” As quoted in Ken Cooper-Stephenson, “Economic Analysis, Substantive Equality and Tort Law” in Ken Cooper-Stephenson and Elaine Gibson., eds., *Tort Theory* (North York: Captus Press, 1993) 131 at 134, n. 23.

of these activities outweigh the benefits to homeless people of being permitted to continue with such “chronic misconduct,” justifying legal prohibition or regulation of these activities in public space. The harms of “bench squatting,” or sleeping on public property, according to Ellickson, consist chiefly of “distress” and “annoyance” to pedestrians, a series of small harms that he says compound to weigh heavily in his economic efficiency calculation. In contrast, the benefits to homeless people of being permitted to sleep on the streets is relatively small given a range of “next best alternatives” available, including cycling among a number of public places, or “voluntarily initiating institutionalization.” In addition, the benefit of public space is significant to Ellickson, who notes that public spaces are “precious because they enable city residents to move about and engage in recreation and face-to-face communication.” Ultimately, Ellickson’s economic calculus leads him to conclude that public space should be regulated to limit or ban certain activities of homeless individuals in that space.

Similarly, the City clearly appeals to the notion that public space that is “orderly” and “aesthetically pleasing” is valued highly by members of the public. The argument rests on the unarticulated assumption that signs of homelessness, and in particular temporary shelters, such as tents, strung-up tarps, or cardboard boxes, represent the antithesis of “order.” It would seem that the City’s argument also rests on the assumption that the existence of tents, tarps and cardboard boxes in public space would create sufficient anxiety, distress, and aggravation to “the public” such as to seriously diminish the ability of the public to utilize and enjoy public space. In this way, the tangible marks of homelessness in city parks is constituted as a direct economic threat to the community at large. According to the argument, this economic harm would not only flow to immediate users of public space, but also would spread to adjacent areas and businesses, posing a threat to the stability and viability of the surrounding community.

Although the City attempts to present its position in normative economic terms, its arguments in fact uncritically adopt and reproduce much of the dominant discourse in media and politics about homelessness and the place of homeless people in public space. In other words, these arguments are based not on a neutral set of facts but rather on concepts that are thoroughly political. As Critical Legal Studies scholar Alan Hutchinson points out, such an economic calculus is based on deeply indeterminate and moveable assumptions: “The crunch question is what costs are to be included in the social calculus … there is no technical or objective way in which to assign or formulate such costs.”

23 Ibid. at 1183.
24 He writes that the “magnitude [of the benefit] depends on the quality of the bench squatter’s next best alternatives. These might include: squatting in another public locale better suited to long-term stays; cycling among a number of public places … spending more daylight hours indoors (perhaps in a board-and-care facility, a drop-in center, a rented apartment, or a relative’s home); and voluntarily initiating institutionalization. Because the first alternatives listed are close substitutes, the benefits of an entitlement to bench squat in a particular location … are apt to be small.” Ibid. at 1179.
25 Ibid. at 1168.
26 4 See Adams, supra note 3 para. 1.
27 “Crisis and Cricket: A Deconstructive Spin (Or Was it a Googly?)” in R.F. Devlin, ed., Canadian
So what, then, are the dominant assumptions about public space and the place of homeless individuals within this space that form the basis for the economic analysis performed by the City in Adams? First, public space is often constituted in dominant discourse as space for the use of “the community” or “the public.” Although this rhetoric about “the public” appeals on its surface to notions of inclusivity, it quickly becomes apparent that certain groups are not included within its meaning. As Anne Bottomley writes, when dominant groups refer to the “public,” they are all too often referring to those who are “similar-to-us” and “therefore composed only of ones we choose to live with.” Indeed, discussion about the nature of public space “too quickly becomes an account of a lost ‘urban idyll’, which too easily suppresses the extent to which the use of urban public space is contested.” In this way, notions of public space work to reinforce existing power relationships in society, deny difference and diversity, and reinforce and legitimize the exclusion of individuals who are seen as undesirable.

Conceptions of homeless people play a particularly significant role in the constitution of public space as the proper sphere of the “bourgeois public.” As Samira Kawash explains, homeless people are conceived in dominant rhetoric as existing in fundamental opposition to the community; homelessness, then, is understood not as a phenomenon that occurs within the public, or as a result of the actions of society, but rather as a threat that comes unbidden from elsewhere. Thus, homeless people are imagined as “colonizers” who threaten to harm the public by their very presence in public spaces.

Public space, within this dominant conception, is space that is available for certain acceptable uses, including the leisure and activities of those deemed to be part of “the community.” Thus, walking, cycling, and “informal ball games” are understood as acceptable activities in public space, whereas activities such as sleeping, cooking, or urinating are seen as behaviours that should be performed only in private spaces. Jeremy Waldron points out that this conception of public space relies on a notion of “complementarity” between public and private spaces, where it is assumed that all people have a private space in which to perform so-called “private” activities.

Dominant understandings about acceptable uses and users of public space, as described above, tend to reinforce existing power relations by justifying the increasing regulation of public spaces in the interests of dominant groups. Kawash notes that the increasingly violent forms of exclusion of the homeless
from public spaces correspond to

a rigorously normative definition of the public that views the
propertyless and displacement experiences by the homeless as
a threat to the property and place possessed and controlled in
the name of the public.35

Thus, homeless people are forced to navigate an endless series of real and symbolic
“evictions” from public space at every turn.36 The result is the construction of
a reality where homeless people have “no place to perform elementary human
activities,”37 leaving them with literally no right to exist.38 In this way, the ongoing
real and symbolic “eviction” of homeless people from public space is justified.

Justice Ross’s reasoning in Adams disrupts this dominant discourse about
the place of homeless individuals in public space. Rather than accepting the
argument that homeless people in public space constitute a threat to the public,
she instead embraces an understanding of homeless individuals as being “part
of the community.”39 With this, homeless people shift discursively from being
“outsiders” and colonizers of public space to being equally entitled to utilize
public space in a way that corresponds to their unique circumstances. With
this shift, it becomes possible for Justice Ross to perform a completely different
kind of economic analysis, where public space is seen as not a resource that is
“colonized” by homeless people and therefore unavailable for the rest of society,
but rather as available to benefit everyone. Thus, she notes that

[u]nlke the distribution of public funds, the use of park space
by an individual does not necessarily involve a deprivation of
another person’s ability to utilize the same “resource”… There
is simply no evidence that there is any competition for the public
“resource” which the homeless seek to utilize, or that the resource
will not remain available to others if the homeless can utilize it.40
(emphasis added)

This discursive shift makes possible an understanding that the benefits of
public parks to homeless individuals and to others are not necessarily mutually
exclusive. The reasoning in Adams thereby destabilizes the very notion of an
“inevitable conflict” between homeless people and the public regarding public
space. In this way, it confirms Maria Foscinaris’s observation that ultimately
“everyone has an interest in public places and that no one has an interest in
living on the street.”41

35 Kawash, supra note 8 at 320.
36 Ibid. at 323.
37 Waldron, “Homelessness,” supra note 33 at 301.
38 Ibid at 310.
39 Para. 181.
40 Para. 130.
41 Maria Foscinaris, “Downward Spiral: Homelessness and its Criminalization” (1996) 14 Yale Law
and Pol’y Rev. 1 at 3.
At paragraph 181 of the decision, Justice Ross directly addresses the dominant conception that the very existence of homeless people in public space inflicts the harm of anxiety and distress on members of the public. She states:

The Defendants submit that while some people may be uncomfortable in parks because of homeless people living there, this is not related to the form of shelter that the homeless people are allowed to create, but to their very existence. In addition, the parks are of fundamental importance to the homeless people, who are also part of the community. (Emphasis added).

This pragmatic reiteration of the Defendants’ arguments underscores the reality that homeless people must live in public space, and simultaneously challenges the prevailing attitudes that contribute to their marginalization. In this way, the reasoning in Adams reflects Waldron’s observation that in a society where homelessness exists, “[f]airness demands that public spaces be regulated in light of the recognition that large numbers of people have no alternative but to be and remain and live all their lives in public.”42

By envisioning homeless people as part of the community and as entitled to exist in public space,43 Justice Ross’ reasons reflect Iris Young’s feminist notion of “the public” as “being amongst strangers” which is a recognition that our social composition is made up of a diverse range of social actors all of whom hold, with me/us, a right to share in the ‘common good’ of public space and that it is in public space that we encounter (however uncomfortably) these strangers...44

However, despite its subversion of dominant discourse about homelessness, Adams unfortunately does not fundamentally challenge the concept of the public/private divide that is at the heart of liberal philosophy and which is related to the conception that rights function as a “bulwark” against state action rather than as “positive guarantees of an activist redistributive government.”45 Rather, Justice Ross’s reasoning simply transports the concept of “privacy” out to the public park to the places where homeless people are sleeping. Using the liberal concept that Charter rights function as an “invisible fence”46 to protect individuals from repressive state intervention, Justice Ross conceives of the cardboard boxes, tents and strung up tarps as places where homeless individuals can retreat from the

43 Justice Ross notes that public space is of “fundamental importance” to homeless people: See Adams, supra note 3 at para. 179.
44 Iris Young, as described in Bottomley, supra note 28 at 71, 72.
46 Para. 123.
public sphere and obtain “a measure of privacy.”47 The problem here is that the “invisible fence” is shown to be very flimsy indeed in that it offers virtually no real protection from literal state intervention. After all, as discussed above, police in Victoria, apparently enforcing a new City policy in the wake of Adams, have been performing “sweeps” of parks to remove overhead structures each morning, and have also arrested several homeless individuals.48 In addition, by embracing the liberal notion of section 7 as an “invisible fence” which permits homeless individuals to fend for themselves, free from state interference, Adams arguably bolsters doctrinal barriers to a conception that section 7 can require positive anti-poverty policies and actions by the state.49

IV. THEME 2: URBAN CAMPERS OR AUTONOMOUS AGENTS? ISSUES OF CHOICE AND AUTONOMY

In its submissions to the Court, the City focused heavily on the issue of “choice,” arguing that some homeless people choose so-called “urban camping” as a lifestyle, rather than avail themselves of shelter spaces, or actively seek housing.50 The argument was that the impugned Bylaws could not be the source of any harm to homeless individuals when many of these individuals freely choose their life situation. Ironically, these arguments were made in the context of evidence before the Court that the number of homeless people in Victoria at the time of the hearing far exceeded the available shelter beds. However, this did not deter the City from arguing that given the opportunity, many people would choose “urban camping” rather than going to a shelter. Indeed, the very use of the phrase “urban camping” connotes a lifestyle choice, suggestive of a notion that homeless people choose to sleep outdoors, just as some vacationers do in the summer. Justice Ross summarized the argument in this regard as follows at paragraph 174:

[t]he City submits that the evidence indicates that for many people urban camping creates a viable option to seeking help through shelters operating within the City. It seems clear the City submitted that, if permitted, many urban campers would choose to congregate in one area …

The City’s arguments were that certain homeless people choose to sleep in parks rather than in shelters despite the operation of the Bylaws (which, as described above, did permit sleeping in parks under blankets or in sleeping bags). Given the opportunity to sleep in parks in tents, cardboard boxes or under strung-up tarps, the argument continues, many more homeless people

47 See Adams, supra note 3 at para. 29.
48 As discussed at Macleod, supra note 15.
50 Written argument of City of Victoria, accessed at The Tyee (20 June 2008), online: The Tyee <http://thetyee.ca/News/2008/06/20/Commons/>.
would choose to do so. In this section, I explore the theoretical underpinnings of the City’s rhetoric of homeless people’s “choices” about shelter, and the ways in which the judgment in Adams addresses this rhetoric.

The concept of choice and freedom of individuals is a fundamental tenet of western liberal philosophy.\(^{51}\) The Law and Economics tradition adds to the rhetoric of the importance of “free choice” the concept of rationality, positing as its subject *homo economicus* or “economic man,” who is understood as a “rational maximiser of his satisfactions.”\(^{52}\) Ellickson, who, as described above, is a firm proponent of Law and Economics theory, promotes the view that homeless or poor people have agency and choices about their situation, stating that

> while no one’s will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition … that an individual is generally responsible for his behavior.\(^{53}\)

The implication of this reasoning about the choices of homeless people is that homeless individuals are responsible generally for their homeless state and specifically for their “behaviours,” including sleeping outdoors or performing other activities in public space. Indeed, the City directly argued that this was the case.\(^{54}\)

Certainly, the problems with the emphasis on rational free choice are myriad.\(^{55}\) Significantly, Law and Economics tends to ignore preexisting imbalances of wealth and power in society.\(^{56}\) It therefore fails to adequately recognize that the choices of individuals are constrained and shaped by their relative wealth and social circumstances.\(^{57}\) In this way, the concept of “free choice” is revealed to be an ideological mirage, especially in relation to the choices or lack of choices of people living in poverty.

While it is the case that power imbalances and inequalities affect the lives and available choices of homeless individuals, it also may be problematic to adopt a theory that homeless people are constrained by their circumstances to the point where they no longer have any agency or control over their lives. Wes Daniels describes the inherent dangers of an approach that portrays homeless people as “victims of misfortune, or as people burdened by structural forces beyond their control,”\(^{58}\) as is sometimes done in homelessness litigation. Such an approach tends to deny the agency and autonomy of poor people, who daily

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52 Harris, supra note 19 at 46.
53 Ellickson, supra note 22 at 1187.
54 Adams, supra note 3 at para. 63.
55 See Cooper-Stephenson, supra note 21 for examples.
56 Ibid. at 143.
57 Ibid at 146.
resist demeaning and oppressive hierarchies.\textsuperscript{59} Homeless individuals who do not exemplify “weakness, helplessness and despair”\textsuperscript{60} will be disadvantaged by this approach. Furthermore, homeless litigants will be disadvantaged if a judge can find that a “choice” of shelter exists – even if this choice is unacceptable. Daniels suggests that a better litigation strategy would be to put forward the argument that homelessness or sleeping outside rather than in a shelter, may in fact be a “voluntary choice” made from a range of unacceptable options.\textsuperscript{61}

Justice Ross does justify her decision on the evidentiary finding that in fact the majority of homeless individuals in Victoria did not have a choice regarding shelter because there were far more homeless individuals than available shelter beds.\textsuperscript{62} However, she also acknowledges that a minority of homeless individuals may indeed make a choice not to stay in shelters:

There is a substantial and growing population of people in Victoria who because of complex social, economic and personal factors are homeless. While there may be some people for whom urban camping is a lifestyle choice, it is clear that this is not the situation of the majority of the population of Victoria’s homeless. Rather, these are people who do not have practicable alternatives.\textsuperscript{63}

Thus, Justice Ross accepts the notion that for some homeless individuals, public shelters might be a legitimately unacceptable alternative. She also emphasizes the concept that homelessness itself is created by larger systemic and social forces rather than by individual choice. Within this larger context, she envisions homeless individuals making the “choice to protect themselves” through the construction of overhead shelters.\textsuperscript{64} By envisioning homeless people as autonomous agents, exerting their independence and free choice to construct shelter within a constraining social context, Justice Ross destabilizes dominant conceptions of homeless individuals as either victims or as being responsible for their homelessness.

The portrayal in Adams of homeless individuals as autonomous individuals is an important antidote to many dehumanizing and harmful portrayals that have sometimes appeared in judicial decisions and certainly appear in mainstream media and discourse.\textsuperscript{65} However, just as Justice Ross’s conceptions of the place of homeless people in public space did not fundamentally challenge liberal notions


\textsuperscript{60} Daniels, \textit{supra} note 58 at 688.

\textsuperscript{61} \textit{Ibid} at 690.

\textsuperscript{62} Adams, \textit{supra} note 3 at para. 58.

\textsuperscript{63} \textit{Ibid}. para. 66.

\textsuperscript{64} Adams, \textit{supra} note 3 at para. 148.

\textsuperscript{65} Litigants in anti-poverty litigation must overcome significant stereotypes that are applied to them in social life and in the law itself: see Cochran, \textit{supra} note 7.
about the public/private divide and the role of the state in addressing social inequalities, her discussion of the choices and autonomy of homeless individuals may also stymie the potential of section 7 to be used as a tool for broader and more meaningful public responsibility to address poverty in Canada. That is, Justice Ross envisions the state as a repressive actor, which must stand back in order to permit homeless people to exercise their choice to erect shelter. Indeed, at paragraph 142, Justice Ross states

\[t\]he Bylaws prohibit the use of a shelter that is erected including a tent, tarp that is strung up or a cardboard box. I find that compliance with the Bylaws exposes homeless people to a risk of serious harm, including death from hypothermia. \textit{This risk does not flow from the state of homelessness, but from the state action in prohibiting the erection of shelter.} (Emphasis added)

In other words, section 7 is seen not as a tool to address the root causes of homelessness by requiring positive state intervention,, but rather as a shield to enable homeless individuals to make the choice to fend for themselves without state interference. The problem with this approach is, in the words of Margot Young, that “choice, in conditions of oppression, exploitation, or subordination … tells us nothing necessarily about the justice or equality of its outcome.”

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V. THEME 3: DEGENERATE OR DIGNIFIED? THE VALUE AND MEANING OF “THE HOMELESS BODY”

By envisioning an “invisible fence” around the bodies of homeless individuals, Justice Ross’s decision displays a remarkable concern for the bodily integrity and physical wellbeing of homeless individuals. Indeed, the decision is significant in its emphasis on the corporeal reality of people who are homeless. Thus, Justice Ross finds that an inability of homeless individuals to provide themselves with adequate temporary shelter leads to an increased risk of disease, hypothermia and death. She writes about the cold and shivering bodies lying underneath “a multitude of wet blankets.” She is concerned about the fact that homeless individuals are forced to perform “life-sustaining acts” in public. Indeed, her attention to bodily suffering leads her to a finding that sleep and adequate overhead shelter are necessary preconditions for life, liberty and security of the person:

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In addition, sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing. I have concluded that the prohibition on taking a temporary abode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people.  

\footnote{66 Young, \textit{supra} note 45 at 330.}
\footnote{67 See para. 1.}
\footnote{68 \textit{Adams, supra} note 3 at para. 5.}
The significance of the concern for human bodies shown in *Adams* is underscored when it is recognized that traditional jurisprudence has paid very little attention to the actual embodied human experience, instead positing a legal subject who “is manifested only in the assumption of disembodied individuality and rationality.” This denial of lived realities and bodies has permitted traditional jurisprudence to be blind to differences between people and the reality of inequality in society.

At the same time, as some feminist theorists have pointed out, the corollary of the liberal conception of the “disembodied” and rational legal subject is that women and other subordinated groups turn out to be the “repositories of the affective and bodily realms.” This concept has worked to justify their marginalization and exclusion from the public realm. This observation is reminiscent of Michel Foucault’s idea that bodies of poor people have historically been “marked” as “degenerate,” justifying the relegation of poor people to spaces where they were to be regulated and reformed. It also brings to mind Kawash’s idea of the “homeless body” as a “specific mode of embodiment” in dominant discourse. Kawash shows how the idea of an “abject” homeless body is ideologically and materially constituted in dominant discourse, such that the “the proper, public body of the citizen” is imagined as standing in opposition to the homeless body.

The City’s portrayal of the physical bodies of homeless people in *Adams* reflects dominant discourse regarding the homeless body. For example, the arguments described earlier about homeless people constituting a threat to public space reflects the discourse described by Kawash about the homeless body as a threat to the public. Further, the City makes much of the potential for homeless people to trample plants and otherwise damage the park, eliciting images of chaotic, irresponsible and hurtful physical bodies. Finally, the City associates homeless bodies with the spread of diseases, poor sanitation and poor hygiene, as well as “drug abuse, crime, self-destruction, disease, and death.”

Justice Ross rejects these conceptions of homeless bodies as degenerate or threatening. Rather, she focuses on the dignity of the bodies of homeless individuals, and the importance of “rudimentary shelter that would actually...
provide them with warmth, protection from wind, snow and rain, and perhaps even a measure of privacy.”\textsuperscript{77} She counters the “public health” arguments of the City by exhibiting a concern for the physical wellbeing of homeless people, noting that

[i]n deed, allowing homeless people to erect some form of effective shelter will reduce public health concerns since it will reduce the health risks associated with sleeping without protection.\textsuperscript{78}

Section 7 speaks of “life, liberty and security of the person”, and thus lends itself to a reading that is sensitive to the physical needs and embodied reality of humanity. It would appear that Justice Ross’s reading of section 7, then, imports a conception of human dignity that is rooted in a conception of the crucial importance of the human body and the need of human beings for physical shelter to protect their bodies.

In its apparent concern for the human suffering of homeless people, Adams arguably reveals the workings of an “ethic of care.” Carol Gilligan introduced the concept of the ethic of care to describe a mode of moral reasoning that is contrasted with the male-dominated “ethic of justice.”\textsuperscript{79} The ethic of care is characterized by an emphasis on relationship rather than on abstract rights, and it gives precedence to context and particularity of a problem.\textsuperscript{80} Feminist legal theorists have taken Gilligan’s theory as a basis for a critique of disembodied male-dominated models of justice.\textsuperscript{81} Indeed, Jennifer Nedelsky draws on the writings of Gilligan, as well as Iris Young and Elizabeth Spelman, in putting forward “a feminist call for a rethinking of the role of the body with all its difference and particularity.”\textsuperscript{82}

Another approach that values the embodied human experience and that is arguably reflected in Adams is put forward by feminist philosopher Martha Nussbaum, who proposes an “essentialist” approach for ethical judgments based in an understanding of “the shape of the human form of life.” She proposes that legislation and policies can be assessed with reference to whether they promote respect for various features that she identifies as being central to human life. One of the common attributes that all humans share, says Nussbaum, is that all humans live in physical bodies, and all have a need for shelter. Thus,

A recurrent theme in myths of humanness is the nakedness of the human being its relative susceptibility to heat, cold, and

\textsuperscript{77} Ibid. at para. 179.
\textsuperscript{78} Ibid. at para. 180.
\textsuperscript{79} Nedelsky, supra note 70 at 415.
\textsuperscript{80} Ibid.
\textsuperscript{82} Nedelsky, supra note 70 at 422.
the ravages of the elements… much of our life is constituted by the “need to find refuge from the cold.”

The image of a human body seeking refuge from the elements animates the reasoning in Adams. Indeed, Justice Ross’s “ethic of care” and concern for human bodies and human suffering allow her to see past both disembodied approaches to jurisprudence and negative stereotypes of homeless bodies as degraded and dangerous. Her approach to the bodies of homeless individuals instead shows a concern for dignity and bodily integrity, and a holistic understanding that shelter is a necessary precondition for any human flourishing.

However, the emphasis in Adams that homeless people do not have the positive right to shelter provided by the state, but simply the right to fend for themselves by erecting flimsy overhead structures raises questions about the extent to which Justice Ross’s concern for homeless bodies translates into real warmth and security. Indeed, a focus on the dignity of and care for individual human bodies runs the risk of obfuscating the need for a focus on the larger social and systemic forces that create the conditions leading to homelessness in the first place.

VI. CONCLUSION

The decision in Adams illuminates how dominant discourse about homelessness is reliant on prevailing stereotypes and assumptions about the choices, autonomy and physical bodies of homeless people, and their place in public space. Justice Ross’s reasons destabilize these dominant understandings, and in so doing reveal their indeterminacy and political underpinnings. Thus, the decision subverts dominant conceptions of homeless people as colonizers of public space by portraying homeless individuals as members of the “public” with an entitlement to exist in public space. Similarly, the decision challenges conceptions that homeless individuals are responsible for their homelessness and choose “urban camping” as a lifestyle choice by adopting a conception of homeless individuals as autonomous agents who, in the face of larger social forces, choose to protect themselves by constructing shelters. Finally, Justice Ross’s reasons display a remarkable concern for the physical bodies and wellbeing of homeless individuals. In this regard, Adams clearly rejects dominant images of the “abject” and “degenerate” homeless body. However, by remaining tied to liberal concepts of the role of section 7 as an “invisible fence” permitting homeless individuals to fend for themselves and protect their own bodies without state interference, Justice Ross’s decision ultimately represents an ambiguous anti-poverty victory and cold comfort for homeless people. The challenge for anti-poverty advocates will be to continue to insist that section 7 must be stronger than an invisible fence or a cardboard box sheltering a homeless body; and that it must include a positive state responsibility to end the crisis of homelessness.