Canadian Journal of Law & Jurisprudence XXXIII No.1 February 2020, 245-260

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Equity and Homelessness

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Introduction

What can the law do about homelessness? As I explain in this paper, the existing jurisprudence, which usually adopts a *Charter*-based approach, suggests that the answer is: not much.[1] Given this, in this paper, I wish to explore a private law approach. The approach I have in mind is based on equity, as distinct from the common law. My thesis is that homelessness calls for equitable intervention. The motivation for such intervention involves the state's provision of the system of property rights, which is responsible for but can also solve homelessness. The nature of the equitable interest responds to this motivation. There is a negative equitable right for the state—rather than, as I will explain, private actors—to not exercise its right to exclude people from state-owned property against homeless people. There is also a positive equitable right for the state to provide housing to the homeless, or at least take steps towards doing so. In what follows, I begin by adopting a definition of homelessness based on the lack of legal rights to property, and then explain the limitations of existing *Charter*-based attempts to address homelessness. This paves the way for exploring a private law approach based on equity. I discuss the motivation for equitable intervention, and then explore what equitable rights might arise.

Homelessness

35,000 Canadians are homeless every night, and 235,000 Canadians experience homelessness every year.[2] Those who lack a roof over their heads are left to shelter themselves from the elements, and even those in homeless shelters live under unenviable conditions.[3] Often, homeless people suffer from physical and mental illness, insufficient social support, and joblessness. In many contexts, given the disproportionate impact of regulation on homeless people, they have little choice but to break the law.[4] But what exactly is homelessness?

Thanks to Christopher Essert, as well as Manish Oza and an anonymous referee, for helpful feedback and discussion. Thanks also to the editors for generous support.

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].
2. See Stephen Gaetz, Erin Dej, Tim Richter & Melanie Redman, "The State of Homelessness in Canada 2016" (2016) Canadian Observatory on Homelessness Press at 5.
3. See Ben Spurr, "Five Homeless Youth Share Their Stories" *Toronto Star* (15 October 2015); Gladys Fonfield-Ayinla, "My Experience Parenting While Homeless" (2009) Canadian Observatory on Homelessness; Ronzig, "My Girlfriend Introduced Me to Crack Cocaine and That Was the Beginning of My Downfall" (2009) Canadian Observatory on Homelessness; Laura M Gillis, "Finding Her Voice" (2007) Canadian Observatory on Homelessness.
4. See Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43 Fordham Urb LJ 741. The idea is not so much that homeless people are necessarily bound to break the law. Rather, it is the more qualified idea that, given the cumulative effect of various

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There is wide consensus that homelessness consists in more than just lacking shelter.[5] On one view, homelessness consists in lacking "ontological security"—a subjective sense of well-being, identity, and belonging.[6] However, without denying that homelessness might contingently be linked to lacking ontological security, a risk is that identifying homelessness with it conflates homelessness with other issues. In this paper, I instead adopt a distinctively legal definition: homelessness consists in the lack of legal rights to property.[7]

A compelling thought motivates this definition: homelessness consists in unfreedom, where we understand freedom in the republican sense of non-domination, so that one is unfree insofar as one is subject to another's will.[8] The republican sense of unfreedom stresses potential interference rather than actual interference, as the master-slave relationship illustrates. Clearly, if the master physically restrains his slave, the master subjects his slave to actual interference (so that the slave is unfree at least in the negative sense). But even if the master does not actually physically restrain his slave, and lets his slave go to the market on his own, there remains an important sense in which the slave remains unfree. Insofar as the master can, when he wishes, impose constraints on the slave, the slave remains subject to potential interference even if not actual interference. The slave is dominated—subject to his master's will. He is unfree, in the republican sense.

The definition of homelessness I am adopting captures the link between homelessness and unfreedom in legal terms.[9] Homelessness consists in lacking legal rights to property. As Christopher Essert explains, "[t]o be homeless is to be under the power of others—to be dominated by them or dependent on them—in respect of where one may be."[10] Unlike homeowners, street homeless people,

laws—governing public behaviour, property, and quality of life—and their discretionary enforcement, homeless people are much more likely to break the law.

5. See Stephen Gaetz, Carolann Barr, Anita Friesen, Bradley Harris, Charlie Hill, Kathy Kovacs-Burns, Bernie Pauly, Bruce Pearce, Alina Turner & Allyson Marsolais, "Canadian Definition of Homelessness" (2017) Canadian Homelessness Research Network; Peter Somerville, "Understanding Homelessness" (2013) 30:4 Housing, Theory and Society 384 at 384; Deborah K Padgett, "There's No Place Like (a) Home: Ontological Security Among Persons with Serious Mental Illness in the United States" (2007) 64:9 Social Science & Medicine 1925 at 1926 [*Padgett*]; D Benjamin Barros, "Home as a Legal Concept" (2006) 46:2 Santa Clara L Rev 255 at 255.
6. See Peter Somerville, "Homelessness and the Meaning of Home: Rooflessness or Rootlessness?" (1992) 16:4 Int'l J Urb & Regional Research 529 at 532-34 and Padgett, *ibid*.
7. See Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Public Affairs 265 at 276-77; Jane B Baron, "Homelessness as a Property Problem" (2004) 36:2 Urb Law 273 at 278; Jane B Baron, "Property and 'No Property'" (2006) 42:5 Hous L Rev 142 at 1443. While Essert and Baron might not have exactly the same view, they both advocate versions of the view that homelessness consists in the lack of property rights.
8. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2013); Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L Rev 295 [Waldron, "Homelessness"]; Essert, *ibid* at 276-77.
9. See Waldron, "Homelessness," *ibid* at 296, 320-21 and Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297.
10. Essert, *supra* note 7 at 265.

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who lack legal rights to property, are radically unfree. Their use of property—which they do not own—opens them to liability for trespass, or else it is contingent on the owner's authorization. They are everywhere subject to potential, if not actual, interference. Similarly, sheltered homeless people, who also lack legal rights to property, are unfree in that they are only at the shelter at the shelter's pleasure. If they are subject to rules governing when they can be there and what they can do when they are there, where failure to comply warrants eviction, they are clearly unfree. But even if they happen to live in relative comfort and no rules happen to be in place, they are still unfree. They are subject to potential interference. Homeless people lack legal property rights to be where they are or anywhere else where they are not subject to another's will.

Limitations of Existing *Charter*-Based Attempts to Address Homelessness

The existing legal attempts to address homelessness are based on sections 7 and 15 of the *Charter*. Section 7 guarantees the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice, while section 15 guarantees the right to equal treatment. However, these attempts demonstrate the limits of the *Charter*-based approach.

An illustrative case is *Adams*, where 70 homeless people set up a "tent city" in a public park in the City of Victoria despite by-laws prohibiting homeless people from erecting temporary overhead shelter at night.[11] The City sought a declaration and permanent injunction against the homeless people who violated the by-laws. The homeless people defended that the by-laws were unconstitutional. The Court found that the by-laws, which imposed serious health risks on vulnerable and marginalized people, violated section 7 (and was not saved by section 1).[12] However, the Court restricted the scope of its decision, in clarifying that it was not finding that homeless people had a positive right to housing or any other property right.[13] It declared the by-laws inoperative insofar as they applied to prohibit homeless people from erecting temporary overnight shelter in parks when there were more homeless people than available shelter beds.[14] The by-laws were not themselves unconstitutional, and the declaration depended on the shortage of shelter for homeless people.[15] Since the declaration referred to "temporary overnight shelter" rather than "temporary shelter," it still let the City prohibit homeless people from erecting shelter during daytime.[16]

Another illustrative case is *Tanudjaja*, where certain homeless people argued that the state's legislative scheme for addressing homelessness was inadequate

11. *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams*], aff'g 2008 BCSC 1363.
12. *Ibid* at 102-31.
13. *Ibid* at 90-01.
14. *Ibid* at 166.
15. *Ibid* at 132, 156, 162-66.
16. *Ibid* at 160. See also *Johnston v Victoria (City)*, 2011 BCCA 400.

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and even exacerbating the problem, so that it violated sections 7 and 15.[17] They did not challenge specific legislation, but sought to declare that those *Charter* provisions obliged the state to take steps to eliminate homelessness. A majority of the Ontario Court of Appeal dismissed the application on the narrow ground of non-justiciability.[18] In its view, the issue concerned the state's prioritization of homelessness, and the issue's political nature meant that courts could not subject state conduct to *Charter* scrutiny. Unlike in *Insite* and *Chaoulli*, there was no specific legislation in question.[19] Section 7 was unlikely to ground a freestanding right to housing, and given non-justiciability, it was unnecessary to consider whether section 15 could do so.[20] However, Feldman JA in dissent would have let the application continue.[21] In her view, while the issue was novel, it was justiciable.[22] Further, *Gosselin* left open the possibility that the *Charter* grounds positive rights.[23]

Adams and *Tanudjaja* exemplify the limits of *Charter*-based approaches.[24] Even if *Adams* secured a limited negative right to housing, it depended on the contingent fact that there was a shortage of shelter. In defining homeless people to be those lacking a fixed address and predictable safe residence to return to on a daily basis, the Court implicitly assumed that no sheltered person is homeless.[25] Thus, the Court would presumably have been satisfied if everyone happened to have shelter, even if they lacked property rights of their own. Meanwhile, *Tanudjaja* highlights the reluctance to take the *Charter* to ground a positive right to housing. While the Court of Appeal did not foreclose the possibility that the *Charter* could do so, the motion judge more clearly did so. In considering the section 7 claim, Lederer J found that "[t]here is no positive obligation on Canada or Ontario to act to reduce homelessness,"[26] and he repeated this finding in considering the section 15 claim.[27] He added that the section 15 claim could not succeed because homelessness was neither an enumerated nor an analogous ground of discrimination.[28] Thus, sections 7 and 15 give homeless people limited help.[29]

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17. *Tanudjaja v Canada (AG)*, 2014 ONCA 852 at paras 9-15 [*Tanudjaja* CA], aff'g 2013 ONSC 4510 [*Tanudjaja* SC], leave to appeal to SCC refused, 2015 CarswellOnt 9613.
18. *Tanudjaja* CA, *ibid* at paras 19-21.
19. *Ibid* at paras 22-28; *PHS Community Services Society v Canada (AG)*, 2011 SCC 44 [*Insite*]; *Chaoulli c Québec (Procureur général)*, 2005 SCC 35.
20. *Tanudjaja* CA, *supra* note 17 at paras 30, 37.
21. *Ibid* at para 40-44, 86-89.
22. *Ibid* at paras 75-85.
23. *Ibid* at paras 51-74; *Gosselin c Québec (Procureur général)*, 2002 SCC 84.
24. See also *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz*].
25. *Adams*, *supra* note 11 at 161-62.
26. *Tanudjaja* SC, *supra* note 17 at para 82.
27. *Ibid* at para 103.
28. *Ibid* at paras 122-37.
29. For related criticism of *Adams* and *Tanudjaja*, see Margot E Young, "Case Comment: Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v Adams* (BCSC)" (2009) 164 BC Studies 103 and Margot E Young, "*Charter* Eviction: Litigating Out of House and Home" (2015) 24 JL & Soc Pol'y 46. For more general discussion of *Charter*-based approaches to protecting vulnerable groups, see Jennifer Koshan, "Redressing Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:Const Forum Const 31 and Scott McAlpine, "More Than Wishful Thinking: Recent Developments in

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Notwithstanding the difficulty of recognizing homelessness as an analogous ground of discrimination, sections 7 and 15 do not currently promise a positive right to housing.[30]

A Private Law Approach Based on Equity

Given the limitations of the *Charter*-based approach, I suggest looking to private law for solutions. One private law approach, according to Essert, is based on the common law. Essert argues that the common law of property aims to address homelessness, so that its success or failure depends on the extent to which it realizes this aim.[31] Homelessness consists in the lack of property rights, and property rights are justifiable because they can uniquely solve homelessness.[32] A key premise is that without property rights, everyone would be homeless, because everyone would be subject to another's effective power, in that no one would have a right that others not interfere with a location or what is happening there.[33] Property rights give people freedom from another's power by giving them the legally enforceable right to control or make decisions about their property without interference.[34] Since property rights help eliminate homelessness, they are justified as a response, but the form of this justification requires that the elimination be complete.[35] Thus, to the extent that there remain homeless people, the common law of property falls short of realizing its aim.[36]

Essert's common law approach provides the foundation for the equitable approach I propose, because equity appropriately responds to the deficiency that he identifies in the provision of common law property rights arising from the incomplete elimination of homelessness. But before I elaborate on how Essert's insight helps motivate equitable intervention, let me first outline equity's place in the law.

Equity, which developed as a flexible response to the perceived rigidity of the common law, is part of the law in the broad sense and supplements the common law.[37] While common law courts are now fused with courts of equity,[38] in that the same courts administer both the common law and equity, there remain discernible differences between the two systems of law. Without settling whether they are now substantively integrated, they are at least conceptually distinct.[39]

Recognizing the 'Right to Housing' Under S 7 of the Charter" (2017) 38:1 Windsor Rev Legal Soc Issues 1.

30. On the courts' reluctance to recognize homelessness as an analogous ground, see also *R v Banks*, 2007 ONCA 19 at paras 98-105, leave to appeal to SCC refused, 2007 CarswellOnt 5670; *Shantz*, *supra* note 24 at para 231 and Terry Skolnik, "Homelessness as an Analogous Ground of Discrimination" (2019) 15 JL & Equality 69.

31. Essert, *supra* note 7.

32. *Ibid* at 266.

33. *Ibid* at 266, 277-80.

34. *Ibid* at 274-76.

35. *Ibid* at 266-67.

36. *Ibid* at 267, 281, 289-95.

37. See Sarah Worthington, *Equity*, 2nd ed (Oxford University Press, 2003) at 8-13 [*Worthington*].

38. See, e.g., *Courts of Justice Act*, RSO 1990, c C.43, ss 11(2), 96(1).

39. Alastair Hudson, *Principles of Equity and Trusts* (Routledge, 2016) at 13-16 [*Hudson*].

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While the common law is concerned with applying general rules, equity helps ensure justice in particular cases by responding to conscience.[40] The differences concern both substantive law and remedies.[41] Substantively, equity recognizes legally enforceable interests even when the common law does not. The equitable doctrine of promissory estoppel takes my reasonable detrimental reliance on your promise to give me an equitable right preventing you from exercising your strict legal right against me.[42] Where your promise is gratuitous, the common law does not recognize me as having a right, but equity does so because of the injustice that would otherwise arise. This doctrine exemplifies characteristic features of equitable rights. Equitable rights act *in personam*, and they are rights against rights.[43] In terms of remedies, equity typically offers a wider range of remedies, which are discretionary. While common law remedies focus on monetary damages, equitable remedies—such as specific performance—focus on conduct.

Where common law and equity conflict, equity prevails.[44] However, equity complements rather than supplants the common law. As supplemental law, equity generates legal interests.[45]

The Origins of the Equitable Right

The motivation for equitable intervention involves the state's provision of the system of property rights (and its link to homelessness). There are three reasons why equity cares about this provision. The first two reasons resemble the differential treatment component in section 15 claims, insofar as they stress the unequal distribution of benefits and burdens.[46] The third reason stresses the gap between what property law aims to achieve and what it has achieved so far.

The first reason is that insofar as the state provides the system of property rights to benefit people, it is discriminatory—and thus unjust and inequitable—to benefit

40. See *Soulos v Korkontzilas*, [1997] 2 SCR 217 at 232-33; *Dudley v Dudley* (1705) 24 ER 118, 119 (Ch); *The Earl of Oxford's Case*, (1615) 1 Ch Rep 4; Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2019); Hudson, *supra* note 39 at 8; Aristotle, *Nicomachean Ethics*, revised ed by JL Ackrill & JO Urmson, translated by David Ross (Oxford University Press, 1980) at 132-34.

41. Worthington, *supra* note 37 at 13-17.

42. *Ibid* at 224-26.

43. See Ben McFarlane & Robert Stevens, "The Nature of Equitable Property" (2010) 4:1 J Equity and Lionel Smith, "Trust and Patrimony" (2014) 38 RGD 379.

44. See, e.g., *Courts of Justice Act*, RSO 1990, c C43, s 96(2).

45. See Paul Miller, "Equity as Supplemental Law" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford University Press) [forthcoming]; Alan Brudner, *The Unity of the Common Law*, 2nd ed (Oxford University Press, 2014) at 30, 143; FW Maitland, *Equity* (Cambridge University Press, 1929) at 18-19.

46. See *Withler v Canada (AG)*, 2011 SCC 12 at para 62 and *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143 at paras 8, 19. In *Tanudjaja* SC, Lederer J considered such section 15 arguments involving the legislative scheme rather than the system of property rights. However, he rejected them on the grounds that section 15 does not ground positive rights and that homelessness is not an analogous ground: *supra* note 17 at paras 91-137.

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only some (property owners), and not others (homeless people).[47] The benefits of property rights, to those who have them, are clear: property owners have say-so over who can use their property, when they can do so, and what they can do with it.[48] In lacking property rights, homeless people do not get to enjoy these significant benefits. Granted, the state might not be obliged to provide this system in the first place. Property rights are not clearly protected under section 7 or anywhere else in the Canadian Constitution. But once the state has actively chosen to provide the system, as it has, it must provide the benefits equally. Of course, the state already provides the system of property rights to everyone in the sense that even homeless people have the opportunity to acquire property and thus benefit from the system. But as Waldron said, "to put it crudely, one cannot pee in an opportunity."[49] Since only property owners actually benefit from the system, providing the benefit equally means actually providing property to everyone.

The principle that once the state provides a system of benefits, it must do so equally, resembles, but goes beyond a similar principle in the section 15 jurisprudence. In *Eldridge*, the Supreme Court of Canada held that, whether the *Charter* grounds positive rights outright, once the state has chosen to provide benefits, it must do so equally.[50] The Court added that the state might have to take "positive action, for example by extending the scope of a benefit to a previously excluded class of persons," and without creating further inequality.[51] That section 15 principle might not apply to the system of property rights, since that principle depends on the applicability of the *Charter* to state conduct, but it is unclear that the *Charter* directly applies to the common law.[52] The principle I am invoking thus goes beyond the section 15 principle, in applying to the state's provision of the system of property rights even if the section 15 principle does not.

The second reason why the state's provision of the system of property rights is significant is linked to the first. Not only does the provision benefit only some, but in making possible a new form of domination, it also disproportionately burdens those lacking property—homeless people.[53]

Consider an analogy with the system of contract rights. Without the system of contract rights, people can make informal agreements with each other, but they cannot make legally binding agreements. Any agreement they might have does not create rights or corresponding duties. Neither you nor I have the right to make the other perform or the duty to keep our own promise. When you fail to keep

47. Thus, this benefit, which I later explain corresponds to a burden, is not the legislative scheme for addressing homelessness, which Lederer J in *Tanudjaja* SC found did not engage section 15: *supra* note 17 at paras 97-121.

48. See Larissa M Katz, "Property's Sovereignty" (2017) 18:2 Theor L 299 and Larissa M Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275.

49. Waldron, "Homelessness," *supra* note 8 at 322.

50. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras 73, 78 [*Eldridge*]. See also *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 42.

51. *Eldridge*, *supra* note 50. See also *Vriend v Alberta*, [1998] 1 SCR 493 at paras 55-64.

52. See *Charter*, *supra* note 1, s 32; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130; *Dolphin Delivery Ltd v RWDSU, Local 580* [1986] 2 SCR 573.

53. See Larissa M Katz, "Ownership and Social Solidarity" (2011) 17 Legal Theory 119.

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your promise, I lack legal recourse. The introduction of the system of contract rights changes the normative landscape. Once the system is in place, people can make legally binding agreements, which give each party the right to make the other perform and the duty to keep their own promise. When you fail to keep your promise, I can legally enforce the agreement. The system thus benefits the enforcing party. But the benefit for the enforcing party corresponds to a burden for the non-performing party. The law holds them liable to pay compensatory damages or specifically perform the contract. So, the system of contract rights introduces a new form of domination. Crucially, equity can mitigate such domination. Where there is unequal bargaining power and contractual terms are unreasonably harsh, equity can intervene.[54] While the common law might see no reason to interfere, and would hold the parties to their bargain, equity might deem the agreement unconscionable and thus unenforceable.

This analogy inspires a parallel argument involving the system of property rights.[55] Without the system of property rights, people cannot legally take something as one's own. Any taking one engages in does not create rights or corresponding duties. I do not have the right against anyone or the world to anything, and no one has the duty to respect my attempt to claim something. When others fail to respect my taking of something, I lack legal recourse. The introduction of property rights changes the normative landscape. Once the system is in place, people can legally acquire property, which gives the acquirer the right to exclude others, and so gives others the corresponding duty to respect the acquirer's property claim. I can legally enforce my right to exclude. The system thus benefits property owners. But the benefit for the owner corresponds to a burden for those subject to their property right—everyone else. The law prevents others from interfering with my property: if they do so, they are liable for trespass. So, the system of property rights introduces a new form of domination. While such domination might not be so unjust if everyone were equally vulnerable to it, it is unjust when homeless people are disproportionately subject to it.[56] Homeless people assume the distinct burden of being subject to others' property rights without having the benefit of enjoying property rights of their own.

Equity can mitigate the new form of domination and its disproportionate impact on homeless people. Granted, one might think that given the creation of such domination, we should respond by eliminating the system of property rights. But I reject this response. Where homelessness consists in the lack of property rights, the provision of the system of property rights is the unique solution to homelessness. As Essert explains, eliminating the system would exacerbate the problem, since it would render everyone homeless.[57] In a world without property rights, everyone would be under another's effective power, even if they would not

54. See Worthington, *supra* note 37 at 199-202.
55. For this kind of suggestion, see Brudner, *supra* note 45 at 235, 355.
56. See Jeremy Waldron, "Community and Property: For Those Who Have Neither" (2009) 10:1 Theor Inq L 161 at 165-67, 171.
57. Essert, *supra* note 7 at 266, 277-80.

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be under another's legal power. No one would have the right for others not to interfere with where they are. Thus, eliminating the system of property rights is not the appropriate response. Rather, as Essert suggests, the appropriate response is to extend the benefits of the system of property rights to everyone, by ensuring that everyone has property.[58] In a world where everyone has property rights, everyone has somewhere over which they have full control and so are not under another's power.

This brings us to the third reason why the state's provision of the system of property rights is significant: as supplemental law, equity fills the gap in the incomplete provision of property rights. As Essert suggests, the common law of property aims to address homelessness, and the only way to fully realize this aim is for everyone to actually have property rights. Insofar as the common law of property fails to realize its aim, equity fills the gap—the absence of legal property rights for everyone—by recognizing equitable property rights.

Gap-filling is not unknown to equity. In trust law, where the settlor does everything within their power to transfer property to the trustee, equity perfects incomplete transfers by imposing a constructive trust to fill the gap before an express trust takes effect.[59] The kind of gap-filling I am proposing here might go beyond that more familiar kind of gap-filling. But it accords with the characterization of equity as ensuring that the law realizes its aims.[60] It also dovetails with the characterization of equity as completing and improving the law.[61] The kind of gap-filling I have in mind is plausibly analogous to how equity introduced trusts and restrictive covenants to fill gaps in the common law. Since beneficiaries lacked protection from delinquent trustees at common law, equity gave beneficiaries an equitable right over the relevant property and thus introduced trusts.[62] Similarly, since the grantor of a restrictive covenant could not enforce it at common law, equity gave the grantor an equitable right over the relevant property and thus introduced equitable easements.[63]

To summarize, there are three reasons why the state's provision of the system of property rights motivates equitable intervention. First, the system benefits property owners but not homeless people. Second, the system creates a new form of domination, which disproportionately burdens homeless people. Third, the system remains incomplete insofar as homelessness remains. The first two of these reasons, involving the unequal distribution of benefits and burdens, amount to discriminatory conduct on the part of the state. Since we are outside the *Charter* context, we can recognize this discrimination even though the courts

58. *Ibid* at 277-81.
59. See *Re Rose*, [1952] EWCA Civ 4.
60. See Henry E Smith, "Property, Equity, and the Rule of Law" (2014) in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford University Press, 2014) 244.
61. See Miller, *supra* note 45.
62. David J Seipp, "Trust and Fiduciary Duty in the Early Common Law" (2011) 91 BU L Rev 1011 at 1016-18.
63. See Carl Callaway, "Enforcement of Restrictive Covenants in Tract Developments" (1951) 3:1 Hastings LJ 50 at 52-53; *Noble v Alley*, [1951] SCR 64 at paras 15, 17, 31; *Tulk v Moxhay*, [1848] EWHC Ch J34.

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have not recognized homelessness as an analogous ground under s. 15 of the *Charter*. But, to be clear, the discrimination does not merely arise from the state's inaction. Rather, it arises partly because the state has actively chosen to provide the system of property rights. Bringing this system into existence does not itself amount to discrimination, but bringing this system into existence and then failing to ensure that the benefits and burdens are equally distributed does.

The Nature of the Equitable Right

Since equity grants remedies to wrongs, what remedy is appropriate for the wrongs to homeless people arising from the state's provision of the system of property rights?[64] In other words, given the motivation for an equitable right to housing, what is the nature of this right?

At a minimum, I suggest, an equitable right to housing yields a negative right to housing, which prevents the state from holding homeless people liable for trespass on public property like parks, so that they have an "equitable licence" to shelter themselves on such property.[65] Since the state is the one responsible for providing the system of property rights, the right is held against the state rather than all property owners. This avoids Lord Denning's worry that "[i]f homelessness were once admitted as a defence to trespass, no one's house could be safe."[66] While one might disagree with Lord Denning, and think instead that there is reason to limit the exercise of property rights no matter who the property owner is, it seems to me that the state's unique role suggests making it bear the weight of responsibility. It is the state's provision of the system of property rights that makes possible the kind of domination and unfreedom that homeless people currently experience. The state's provision of this system, rather than the conduct of any private actor, is what gives rise to the unequal distribution of benefits and burdens, or discrimination. To be sure, there may well be motivation elsewhere for recognizing something like a right to roam, which some countries recognize, or for recognizing some other limitation on private property owners' property rights. The present point is just that the motivation for recognizing an equitable right to housing, which yields at least a negative right to housing, targets the state in particular rather than all property owners.

This negative equitable right to housing provides an alternate ground for decisions like *Adams*, which arguably found that there was a negative right to housing (although it did not characterize it as such). The *Adams* decision invites an analysis in terms of equity. Like the *Charter*, equity stops the state from preventing homeless people from erecting temporary overnight shelter. Instead of taking a *Charter* provision to stop the state from applying the restrictive by-law to homeless people, however, equity takes the state's role in homelessness to stop the state from doing so. Notably, the Court in *Adams* did not simply strike down

64. See Hudson, *supra* note 39 at 19.
65. Thus, the decision in *British Columbia v Adamson*, 2016 BCSC 584 is correct.
66. See *Southwark London Borough Council v Williams et al*, [1971] Ch 734 at 179.

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the by-law. Rather, it circumscribed its application so as not to prevent homeless people from erecting temporary overnight shelter in parks when there are more homeless people than available shelter beds. The Court did not hold that the state could not validly pass the by-law, but rather held that it could not enforce the by-law against homeless people. This remedy has the structure of an equitable remedy, in providing what amounts to an *in personam* right—one held against the state's legal right to enforce the by-law. While the state might continue to enforce the by-law in other contexts, it is estopped from enforcing it against homeless people. The negative equitable right to housing provides an alternate ground for the result in *Adams*.

But, I suggest, the negative equitable right can also ground a stronger remedy than the one in *Adams*. In *Adams*, the Court only let homeless people erect temporary overnight shelter, and it stopped short of characterizing the right as a property right.[67] The equitable right can, in my view, go further than this. Specifically, the equitable right can let homeless people erect even permanent shelter, and so have something that looks more proprietary. Thus, the equitable right to housing guarantees at least the result in *Adams*, while more clearly recognizing a property right. The equitable right to housing also goes beyond the result in *Adams*, in letting homeless people erect not only temporary overnight shelter but also permanent shelter. However, all of this is compatible with the equitable right to housing being merely a negative right.

It is reassuring that equity can ground a negative right to housing, just as the *Charter* can, but can it also ground a positive right to housing? After all, we are looking to equity because the *Charter* seems unlikely to ground a positive right to housing. A possibility is that the negative equitable right to housing effectively secures a positive equitable right to housing. For the negative equitable right holds that the state cannot stop homeless people from sheltering themselves on public property. Homeless people can shelter themselves on public property like parks, where they can conceivably make themselves at home and remain indefinitely. Only someone with better title could evict them. While the state has better title, it cannot evict them because it would be inequitable for it to enforce its property right against them. But no one else has better title, so no one else could evict them. Thus, perhaps although homeless people lack full property rights to be where they are, they are effectively entitled to be there, having something like a positive right to be there. That no one can enforce better title against them might give them effective ownership.[68] While intriguing, however, I will not pursue this possibility—the possibility of grounding something like a positive right to housing in what initially looks like only a negative right to housing—further. It is unclear that whatever entitlement results is robust enough of a property right for us to properly deem those with the entitlement no longer homeless. The resulting entitlement might not ensure the exclusivity over decision-making that is

67. *Adams*, *supra* note 11 at para 100.

68. For this kind of argument based on the relativity of title, see *Hunter v Canary Wharf Ltd*, [1998] 30 HLR 409; Ben McFarlane, *The Structure of Property Law* (Hart, 2008) at 5-14.

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required for genuine ownership.[69] More importantly, in my view, equity can directly ground a positive right to housing—without having to invoke the relativity of title.

I suggest that the motivation for equitable intervention grounds a positive right to housing, which corresponds to the state's positive duty to provide housing. The right holds against the state because the state is responsible for providing the system of property rights. While equity does not always create positive rights (let alone rights in property), it can clearly do so, as trust law illustrates.[70] The trustee, who has legal title in property, holds the property on trust for the beneficiary, who has equitable title. At the core of the trust is the trustee's fiduciary duty to act in the beneficiary's interest, so that the beneficiary has the corresponding right to enforce the trust by holding the trustee to account.[71] The fiduciary duty that equity imposes on the trustee is a positive duty, since the trustee must exercise their legal powers in the beneficiary's favour. The beneficiary's corresponding right is also positive.

Perhaps the equitable right to housing warrants making the state the trustee of a constructive trust over certain public property in favour of homeless people. Such a trust would be consistent with older Supreme Court of Canada jurisprudence suggesting that the state owns common property in trust for the public.[72] But the equitable right to housing is also compatible with other views of state-owned property, including more recent Supreme Court jurisprudence suggesting that the state owns common property just as a private owner owns their property.[73] Even if the equitable right to housing does not yield a trust in favour of homeless people, it might still impose a fiduciary duty (outside of a trust) on the state to act in favour of homeless people. This duty might resemble the one that the Supreme Court has held, based on expressly equitable considerations, the state owes to Indigenous peoples.[74]

Further, even if the duty is not fiduciary, equity might still impose a positive duty on the state—to take steps to provide everyone with housing. The precise nature and scope of the duty depends on the factual context, and could range from

69. See Larissa M Katz, "The Concept of Ownership and the Relativity of Title" (2011) 2:1 Jurisprudence 191 at 199 and Larissa M Katz, "Relativity of Title and Causa Possessionis" in Henry Smith & James E Penner, eds, *The Philosophical Foundations of Property Law* (Oxford University Press, 2013).

70. Another illustration involves proprietary estoppel. See Worthington, *supra* note 37 at 226-27.

71. Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, 8th ed, *Oosterhoff on Trusts: Text, Commentary and Materials* (Carswell, 2014) at 19.

72. See *Vancouver (City of) v Burchill*, [1932] SCR 620 at 625; *The Committee of the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 [*Commonwealth*]; Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365 at 390-91; Sarah E Hamill, "Private Property Rights and Public Responsibility: Leaving Room for the Homeless" (2011) 30 Windsor Rev Legal Soc Issues 91. See also CB Macpherson, "The Meaning of Property" in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) at 4-11.

73. See *Commonwealth*, *ibid. Adams*, *supra* note 11; *Vancouver (City of) v Zhang*, 2010 BCCA 450; *Batty v Toronto (City of)*, 2011 ONSC 6862.

74. See *Guerin v R*, [1984] 2 SCR 335.

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a more demanding, substantive duty to a less demanding, more procedural one.[75] On the more substantive end of the spectrum, the duty could be to actually provide housing or otherwise ensure that there is accessible housing by combining public and private approaches, like subsidized housing projects, rent control, and housing vouchers.[76] Access should be unconditional, in not depending on one's personal, financial, or employment situation. If we understand property rights broadly to include rights to possess, use, and alienate property, the equitable right to housing could include all these rights in full or perhaps limited versions of them.[77] The right could range from fee simple absolute to a tenant's right to reasonable control over their residence.[78] On the more procedural end of the spectrum, the duty could be to take steps to reduce financial and other barriers to housing, or to progressively realize housing for all. Given Canada's recent commitment to the National Housing Strategy, Canada might already be in a position to meet the duty to progressively realize housing for all.[79]

In any case, the equitable right to housing encourages the state to do more than it is currently doing. Consider residential tenancy legislation, which already incorporates equitable principles, in letting adjudicators refuse a landlord's attempt to evict a tenant unless it would be unfair to do so.[80] This discretion only sometimes favours tenants risking eviction.[81] In one case, the tribunal let a public housing provider evict a tenant who was constantly late in paying rent.[82] Although the tribunal acknowledged that the tenant, who had two children in school, was "hard-working and well-meaning," it considered that many other families were waiting for housing.[83] Similarly, while policies that suggest eviction only as a last resort are a welcome first step, they still implicitly assume that

75. See José E Alvarez, "The Human Right of Property" (2018) 72 U Miami L Rev 580 and UN General Assembly, "Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context" (15 Jan 2018) A/HRC/37/53.

76. See, generally, *Housing Services Act*, 2011, SO 2011, c 6, Sched 1; Matthew Desmond & Monica Bell, "Housing, Poverty, and the Law" (2015) 11 Ann Rev L Soc Sci 11-15; Alex Schwartz, "Public Housing and Vouchers" in Daniel Béland, Kimberly J Morgan & Christopher Howard, eds, *Oxford Handbook of US Social Policy* (Oxford University Press, 2014). On subsidized housing projects, see Robert C Ellickson, "The False Promise of the Mixed-Income Housing Project" (2010) 57:5 UCLA L Rev 983. On rent control, see Margaret Jane Radin, "Residential Rent Control" (1986) 15:4 Philosophy & Public Affairs 350. On vouchers, see Robert C Ellickson, "The Homelessness Muddle" (1990) 99 Pub Interest 45.

77. See Essert, *supra* note 7 at 281-86, 289-95.

78. For a proposal dubbed "lease rights," see Katy Wells, "The Right to Housing" 67:2 Political Studies [forthcoming].

79. Canada, "Canada's National Housing Strategy."

80. See *Residential Tenancies Act, 2006*, SO 2006, c 17, s 83(1)(a); *Tenant Protection Act, 1997*, SO 1997, c 24, s 84(1)(a), as repealed and *Landlord and Tenant Act*, RSO 1980, c 232, s 121(2)(a), as repealed.

81. See, e.g., *Jaffer v Sachdev*, 1989 CarswellOnt 589; *File No SWL-47347-SA (Re)*, [2003] ORHTD No 105; *TNL-63022 (Re)*, [2005] ORHTD No 83; *Caputo v Newberg*, [2009] O.J No 2659; *TEL-42868-13 (Re)*, 2014 LNONLTB 504.

82. *File No EAT-05672 (Re)*, [2004] ORHTD No 41.

83. *Ibid* at paras 5-6.

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housing is more a privilege than a right.[84] Once we recognize the equitable positive right to housing (perhaps just as we recognize the rights to healthcare and education), a tribunal should avoid eviction when eviction would render a tenant homeless. Judgments about who "deserves" housing have no place in determining access.[85] Nonetheless, the discretionary nature of equitable remedies, including the equitable right to housing, means that adjudicators can appropriately respond to a range of considerations, as the circumstances require. This need not detract from a generally principled and consistent approach to adjudication, since prior decisions may remain persuasive, even if not binding, in a given case. This is only to recognize that equity properly responds to the particular circumstances.

In closing, I wish to address two concerns about the nature of the equitable right. First, I have suggested that the equitable right is a right to housing, and not merely a right to have the means to access housing, but why must this be so? One might suppose that, instead of the state actually having to ensure that homeless people have housing, it is sufficient for the state to merely ensure that homeless people have the money to access housing. The state might then be able to discharge its responsibility by implementing universal basic income. However, I think the state must actually provide housing rather than merely the means to access housing, because it is housing itself that matters and not merely the means to access housing. I do not object to universal basic income, but it falls short on its own, as far as housing is concerned, because there is no guarantee that homeless people will use their income to access housing. Granted, one might respond that choosing to spend their income on expenses other than housing is their prerogative, and the state has no business in interfering with their freedom to choose how to spend their money. Nonetheless, while I agree that it should be up to people to decide how they want to spend their income, the shortcoming of universal basic income as a solution to homelessness is that it does not pay sufficient attention to the domination or unfreedom that homeless people experience. Homelessness often coincides with poverty, so homeless people may well wish to spend their income on other expenses, such as food, or to pay off loans, thus rendering their income insufficient to afford housing. What if the state provides not just a universal basic income, but also enough income so that everyone can afford housing? Perhaps doing so might obviate the need for the state to actually provide housing. However, I suspect that such a program would be so costly for the state that it would be cheaper just to provide housing itself.

Second, given the worry involving institutional competence in *Tanudjaja*, what if anything makes the equity-based approach I am proposing more effective than the *Charter*-based approach in *Tanudjaja*? Recall that a majority of the Court of Appeal in *Tanudjaja* suggested that the political nature of the issue

84. See Toronto Community Housing, "Eviction Prevention Policy for Non-payment of Rent (Arrears)" (July 2014); Toronto Community Housing, "Evictions for Cause Policy" (1 May 2015).

85. See Elizabeth Anderson, "What is the Point of Equality?" (1999) 109:2 Ethics 287.

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and the absence of a challenge to specific legislation made the state's role in homelessness immune from *Charter* scrutiny. One might reasonably wonder whether similar concerns might impede the success of the equity-based approach, as opposed to the *Charter*-based approach. As an institutional matter, it might not be appropriate for the courts to dictate how the state should spend its resources.

In response to this second concern, I want to acknowledge from the outset that the worry here is quite legitimate, and the complexity of the matter means that I can likely do no more than flag the worry and offer a brief response here. Nonetheless, I think there is reason for optimism with the equity-based approach. To start with, moving away from the *Charter* context releases us from the constraints of the *Charter*-based approach. We need not work within the jurisprudence on specific provisions, such as ss. 7 and 15, or s. 1, and the absence of a challenge to specific legislation—which might spell trouble for the *Charter*-based approach—is of less relevance to equity. More importantly, while the institutional concerns might still limit the ability of courts to allocate the distribution of resources, the equity-based approach offers the courts a fresh opportunity to recognize homelessness as a legal problem. With respect to the majority of the Court of Appeal in *Tanudjaja*, the mere fact that homelessness might have a political dimension does not insulate it from judicial scrutiny. Many issues that courts appropriately adjudicate on have a political dimension—*Insite* concerned a minister's exercise of discretion. Accordingly, courts can appropriately adjudicate on the state's role in homelessness and invoke its equitable jurisdiction in doing so. While enforcing the equitable right to housing would be the preferable remedy, the next-best remedy might be to declare that the state has violated homeless people's equitable right to housing and leave it to the state to adopt remedial action. Such a remedy would be similar to what happened in *Khadr*, where the Supreme Court of Canada declared that Canada violated Omar Khadr's *Charter* rights but left it to the state to adopt remedial action.[86] The Court in that case concluded that a declaration, which is a discretionary remedy, was appropriate given the courts' institutional limitations in reviewing royal prerogative over foreign relations. In the case of homelessness, a court could issue a declaration, a discretionary and equitable remedy, for a similar reason. Doing so would strike a balance between recognizing both courts' institutional limitations and the state's wronging of homeless people. Compared to the Court of Appeal's approach in *Tanudjaja*, a declaration would at least vindicate homeless people's rights by recognizing that they have rights and that the state has violated them.

Conclusion

Citing Lord Denning's suggestion for "a new age and a new equity," Kevin Gray highlighted the development of "equitable property," which "impresses new rights upon the pre-existing estate under the mandate of the controlled conscience

86. *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

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of equity."[87] Equitable property, which focuses on empowering access to the commonwealth, mitigates legal property, which focuses on exclusion:[88] "recognition of the intensely interdependent character of property relationships may hold . . . our only hope of creating a new commonwealth of dignity and equality. . . . [T]here is assuredly more equitable property waiting to be claimed."[89] In this spirit, I have proposed recognizing an equitable right to housing. The state's provision of the system of property rights can eliminate homelessness, but only if everyone partakes in its benefits and burdens—the rights and duties of property ownership. Insofar as the system falls short of realizing its aim, there is room for equitable intervention.

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87. Lord Denning, "The Need for a New Equity" (1952) 5 Current Leg Probs 1 at 10 and Kevin Gray, "Equitable Property" (1994) 47:2 Current Leg Probs 157 at 163. See also Hudson, *supra* note 39 at 557.
88. Gray, *supra* note 87 at 171-72.
89. *Ibid* at 214.

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