

Title: Housing as a Human Right: A proposed alternative institutional structure in Sacramento

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Abstract

The pandemic brought with it unprecedented job loss and increased financial insecurity, further exacerbating the housing affordability and eviction crisis. In a country that looks at housing as a privilege rather than a legal right, the subsequent rise in homelessness and general housing insecurity is alarming though unsurprising. Already, researchers have explored the importance of housing policy that reduces evictions as a means of mitigating the spread of deadly disease, linking the end of eviction moratoriums with increased incidence of COVID-19 infection and mortality. As moratoriums end and local governments find ways to deal with different elements of the housing crisis in lieu of federal intervention, some are proposing various forms of a “right to housing”. In this paper, we consider one such policy proposed in Sacramento, California in an attempt to highlight the complicated nature of the right (or in this case, bundle of rights). To this end, we use the Legal Economic Performance framework to briefly consider the potential performance implications of the proposed institutional change. We find that Sacramento’s proposal, while intended to address some aspects of the homelessness crisis in the city, does not in fact create a right to housing as traditionally described. Rather, it creates a complicated shifting of legal relations that result in only the most limited form of a right to temporary shelter as defined by the city being granted to homeless individuals. More notably, the ordinance will create a duty on homeless individuals to move (into shelter or designated camping areas), while exposing them to the city’s chosen methods of enforcement.

Introduction

The issues of housing security and housing rights in the United States continue to grow with recent shocks such as the 2020 pandemic highlighting the implications of the affordable housing crisis on human health and economic well-being. Eviction rates, though hard to measure (Desmond 2016, pp. 295–96), continue to be higher for those with less education and income, among people of color and the unemployed. The rent burden among low-income renters also continues to increase (Joint Center for Housing Studies, 2020; Desmond, 2018). The pandemic brought with it unprecedented job loss and increased financial insecurity, further exacerbating these crises. Census Bureau's Household Pulse Survey estimated that, nationwide, around 15% of renter-occupied households were not caught up on rent payments as of mid-October (U.S. Census Bureau, 2021). Given the survey structure and response rates, this number is likely to understate the percentage of households struggling to pay rent and potentially at higher risk of eviction. The U.S. Department of Housing and Urban Development (HUD) 2020 Annual Homeless Assessment Report estimated that 580,466 people experienced homelessness in the United States on a single night in 2020, an increase of 12,751 people, or 2.2 percent, from 2019 (HUD, 2021). This is the fourth consecutive annual increase in homelessness, following sustained reductions between 2010 and 2016 (*ibid*). The dataset for 2021 has not been released, but other indicators make it clear that the pandemic only exacerbated this problem.

These concerning trends have further emboldened efforts to bring attention to the necessity of reforming housing policy throughout the U.S. Already, researchers have explored the importance of policy that reduces evictions as a means of mitigating the spread of deadly disease. Evictions may accelerate disease transmission by increasing household crowding and decreasing individuals' ability to comply with social distancing directives (Benfer et al. 2021). The expiration of moratoriums has also been associated with increased COVID-19 incidence and mortality (Sheen et al. 2020; Liefheit et al 2021).

The Legal-Economic Performance framework (LEP) can help us understand the complexities of the legal relations at work in situations of human interdependence (Klammer & Scorsone 2022), housing rights among them. LEP is useful for analyzing proposed housing rights as it hones in on the issue of ubiquitous interdependence through the addition of a taxonomy of jural relations to describe and compare the proposed institutional structure to the previous status quo. In this paper we explore the current situation of housing rights in the U.S. before using LEP to conduct an Institutional impact analysis of the potential implications (in brief) of a proposed Sacramento "Right to Housing" Ordinance.

The Right (and Lack of Right) to Housing in the USA

The human right to housing, embodied in several international treaties, declarations, and constitutions, establishes that every person has a right to adequate housing and to the continuous improvement of living conditions (Alexander 2015). Yet digging into the right to housing as interpreted across legal regimes and jurisdictions reveals numerous confounding issues, described by Hohmann (2013). These include 1) a failure to consistently or completely

define the right, symptomatic of normative weakness in identifying what the right to housing *is*, who has claim to it, and the conditions under which claim may be laid; 2) interpretation that is overly procedural, privileging means at the expense of ends, and resulting in a right that appears to recede from the potential claimant's grasp; and 3) the right to housing fails to connect to the conditions of violation, suffering, and destitution that characterize the lives of those who it might be expected to protect.

Increases in evictions and homelessness underscore the reality of the bundle of housing rights as they currently stand in the United States. The U.S. legal system has generally been described as one that protects negative liberties and does not promote positive rights (Foscarinini, 2007; Alexander 2015). In this case, housing in the United States has been treated as a legal privilege and not a right nor even a legal entitlement. This has historically carried great implications for housing security in a fluctuating economy. While the Housing Act of 1937 established public housing in the U.S., today it is estimated to serve less than 2% of the population (Desmond, 2018). New laws¹ aimed at increasing tenant rights do grant some additional sticks to the bundle of existing housing rights (90-day warning to vacate, requirements pertaining to honoring existing leases, etc.), but do not grant any right to be housed beyond the confines of individual contract.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provided many forms of relief including provision for some temporary rent relief programs. Many states subsequently passed temporary eviction moratoriums. While the moratoriums and aid for those in precarious economic situations have helped many, these forms of assistance are only temporary and do not create a national right to housing. Indeed, in late August 2021 the Supreme Court rejected the Biden administration's attempt to extend the nationwide moratorium on evictions during the pandemic (*Alabama Association of Realtors v. Department of Health and Human Services*, 2021). Any future attempts will have to be authorized through Congress.

Today, the most promising support for a right to housing lies at the state and local level. State constitutions mention government housing requirements, providing a potential avenue for the right to be supported under state constitutional or statutory law (NLCHP, 2009). Attempts to create a housing "right" exist at the local level, especially as local governments respond to increased homelessness and other pressures in a post-pandemic world. These attempts however, are by no means equal and must each be considered carefully through a framework that examines both legal and economic variables. This is the only way to begin to understand what is truly being gained, or lost, through these institutional changes.

Legal-Economic Performance Framework and Housing Rights

The Legal-Economic Performance framework hones in on the issue of ubiquitous interdependence through the addition of Hohfeld's taxonomy of jural relations to describe and

¹ Examples include the Protecting Tenants at Foreclosure Act of 2009

compare institutional structures (Klammer and Scorson, 2022).² The framework as utilized in this paper can help overcome weaknesses in discussing and analyzing a right to housing as described by Hohman (2013) as it relies on a careful specification of the current situation (defining the right) as well as the alternative institutions of a right to housing and its institutional arrangements (procedures and rules) in terms of basic legal relations. Through using this framework, the right to housing can be defined in terms of its institutional structure before distributional outcomes for tenants, homeowners, landlords and other stakeholders such as residents and local governments are identified.

The United Nations has defined a right to housing (UN, 2014). The UN Committee on Social and Economic and Cultural rights specifically interprets the right to housing to include seven broad principles: (1) security of tenure; (2) availability of services, materials, facilities, and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy. A right to housing as described here would include both positive and negative rights because it requires participating countries to take affirmative steps, rather than to merely refrain from impairing freedoms. The UN failed to address the Hohfeldian correlative question of who has a duty to provide such access to housing, leaving it up to each responding nation.

The city of Sacramento is one of the first in the United States to offer a policy that is explained to be a right to housing. The City has recently moved to address some of the issue through the adoption of the Comprehensive Siting Plan to Address Homelessness (August, 2021). “The plan designates over 20 sites across the city to accommodate thousands of shelter beds, tiny homes, safe camping and parking spaces. It also includes strategies to expand shelter and permanent housing capacity through motel, conversions, vouchers, scattered sites, and large service-enriched campuses.” (City of Sacramento, 2021b). The Mayor subsequently proposed what the City is calling “first-in-the-nation right to housing and obligation to accept” (Vellinga, 2021). The proposal states,

“Mayor Darrell Steinberg proposes that the City of Sacramento establish a right to housing effective January 1, 2023, for every unsheltered resident who was previously housed for at least one year in the city limits. Each person offered at least two forms of shelter or housing would have an obligation to accept one.”

The proposed ordinance would require the City to meet the numeric goals of the siting plan by Jan. 1, 2023, the same date that the right to housing would take effect for Sacramento’s unsheltered residents. Per the text of the proposal and siting plan, this means that Sacramento plans to have enough permanent housing by that date. The proposal’s definition of housing includes “permanent dwellings, such as a house, apartment, or hotel room as well as temporary shelters, including tents, RVs, trailers or tiny homes in City approved locations. Temporary housing would qualify only if the placement includes a plan for each person to attain permanent

² The basic Hohfeldian framework consists of four pairs of jural correlatives: right/duties, privilege/exposure, power/liability, and immunity/disability. These four relationships are both universal and irreducible (Hohfeld, 1913, *supra* note 1, at 58), and include one entitlement (left) and one disablement (right). See Hohfeld (1913) or Klammer and Scorson (2022) chapter 2 for further detail.

housing.”(City of Sacramento 2021b). The ordinance would not impose criminal or civil penalties for those who refuse, but would allow the city to enforce a prohibition on camping.

Given the constraints of this paper, we consider certain background rules to be held constant, offering one potential alternative structure available under these overarching rules. In this case, the rules held constant include the U.S. federal law and relevant California state law. Currently, Sacramento faces unprecedented numbers of homeless individuals, exacerbated by the COVID-19 pandemic. During 2019, an estimated 10,000 to 11,000 individuals experienced homelessness over the course of the year. Approximately 93 percent are originally from Sacramento or long-term residents (City of Sacramento, 2021a). The city is limited by recent legal decisions in how it can address them. The 2019 U.S. Ninth Circuit Court of Appeals opinion in *Martin v. City of Boise* restricts a jurisdiction’s ability to enforce anti-camping laws if it does not have enough homes or shelter beds to offer those living outdoors. Moreover, in an effort to minimize spread of the virus during the pandemic the Sacramento County Public Health Officer ordered local governments to refrain from disrupting people living outdoors in camps or in their vehicles. This led to the growth of large encampments and streets lined with persons living in vehicles across all parts of the city (City of Sacramento, 2021b).

Using LEP, we can break down this proposed city of Sacramento “right to housing” into its hohfeldian relations. Notably, in the case of this proposal, we see that the “right” described here is coupled with a duty on the other side of the homeless population itself to act. Therefore, we have multiple hohfeldian relations being shifted at the same time. These shifts will raise questions about what real economic and social performance implications this policy and those like it could have on the various stakeholders in this process.

Comparison of Legal Relations and Performance

The LEP model starts with an assessment of the current situation or status quo. Currently in Sacramento, there is no right to housing. In other words, no duty is imposed on government or other officials to provide housing. It is estimated that over 5,000 people on any given night are sleeping outside or in campsites in Sacramento. Those people who are homeless do have a right to camp in areas of public domain or public ownership if there are not enough beds or shelters for everyone in the city at any given time. This right ends and switches to a hohfeldian exposure if there are enough beds and shelter spaces. At that point, the city officials (or city residents calling on officials) have a “legal privilege” to enforce eviction from those public properties.

Table 1: Legal Economic Performance Sacramento, CA Housing

Situation	Interdependence (Status quo)	Structure (Housing/Shelters provided)	Performance
<p>11,000 homeless individuals in sacramento</p> <p>Sacramento does not have adequate housing; Martin v. City of Boise means no-camping laws cannot be enforced</p> <p>Homeless villages creating conflict with local business, residents, etc</p> <p>Numerous health and social concerns as well</p>	<p>Homeless have right to camp. City has duty to not enforce anti-camping laws if not enough shelter beds/alternatives.</p> <p>Homeless have exposure to city's privilege to removal if enough housing/shelter beds are supplied</p>	<p>Homeless have right to shelter as defined by the city. City has duty to provide.</p> <p>Homeless pop have duty to move (either into the "housing" or out of current location into designated areas) if offered 2 options if they have lived in city previously for 1 year.</p> <p>If not a prior resident, homeless individuals have the duty to move to designated homeless areas determined by the city (or to a shelter bed).</p> <p>City has right to enforce anti-camping laws if there are adequate places.</p> <p>Homeless are exposed to the methods of enforcement used by city (city has privilege to enforce)</p>	<p><u>Homeless population:</u></p> <p>Decrease, more stable. Dependent on quality of housing/whether they accept</p> <p>May face consequences of variable enforcement by city: civil or criminal charges, forced removal, etc.</p> <p>Likely greater access to shelter and resources of increased quality. Benefit entirely dependent on sustainability of program (including funding and behavioral aspects)</p> <p><u>City & Residents:</u></p> <p>Homelessness levels will decrease. Benefit will depend on sustainability of the program. Likely to benefit private property owners closest to current encampments.</p> <p>Project likely to be largely funded through one-time sources.³ How will maintenance be paid for? How about enforcement?</p>

³ Given space constraints we could not explore this aspect further here, but funding plans for the proposed project as of writing are vague. The current proposed plan includes using American Rescue Plan funds as well as other potential one-time or short-term sources of funding. This of course raises the question of where funds might be used instead, or who will bear the burden of future maintenance expenditures and expansions of housing.

There are several potential alternative institutional structures, but in this case we will focus on the proposed 2021 “right to housing” ordinance. The new city ordinance proposed by the Mayor represents a shift in legal relations with economic and social performance concerns. The city government would be required or under a duty to build enough shelters to house everyone based on a regular count of the homeless population by 2023. This portion of the law does create a right to temporary shelter for those without shelter who meet certain conditions. At the same time, the right to housing is coupled with a duty on homeless persons to accept shelter if it is available. If a person refuses to oblige by this new legal duty, the city can evict them from a campsite they are occupying. A refusal to accept the duty places the person in a situation of a Hohfeldian exposure to damages without compensation.

If the ordinance is passed, homelessness in Sacramento will likely decrease for the population that has previously resided in the city. Transient homeless populations are likely to remain unchanged from current levels, though could be moved into targeted areas of the city under anti-camping protocol. This means that the change in homelessness will be largely dependent on the makeup of the population in these two groups. The latter transient population is unlikely to benefit from this rule change, aside from increased access to temporary shelter beds (the benefit of which will be entirely dependent on quality of the new resources and whether these individuals choose or are able to use them). Once adequate beds are provided, however, they may suffer from being forced to move.

The more concerning performance implications revolve around the methods of enforcement that the city may employ. The Mayor has stated that there will not be criminal and civil charges brought against those that refuse housing, but that they may be forced to move. Whether or not enforcement is carried out as the mayor stated, forced removal carries with it its own potential of harm, not limited to emotional trauma and potential charges that may result from subsequent alterations resulting from removal. While the city has stated plans to involve non-police in carrying out the ordinance, this does not ensure harmless implementation.

Conclusion

The global Covid pandemic brought many existing issues to the forefront of public discourse. The right to housing, or lack of it, in the United States and other countries is one of those issues. It is not enough to simply declare a “right to housing” and assume interdependence is resolved. It is critical to assess the institutional details of any alternative being examined and the implications of the alternatives being proposed before each can be evaluated. In the case of Sacramento, the city is attempting to shift legal relations by instituting both a constrictive right to housing with a duty on city government to provide such housing and a correlative duty on those without housing to accept such city provided housing or face eviction from makeshift campsites. While the analysis above is by no means comprehensive, it is reasonable to conclude that the added burden of exposure to possible forced removal, in addition to the possible temporary aspects of the housing, would undermine attributes of a housing right under the UN’s definition,

and certainly under many others. It is also unclear whether the ordinance would provide a solution to homelessness over the long-term, as it does nothing to address the issues of growing housing insecurity among the population.

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