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The Legal-Economic Performance Framework as a New Approach to Institutional Impact Analysis and Critical Thinking in Economics

Abstract: Institutional structure—or the rules and laws (both formal and informal) in use informing human interaction—is often held separate from mainstream economic research and analysis. The Legal Economic Performance (LEP) Framework, as developed and utilized by the author (with Eric Scorsone) in real-world extension work, centers on the analysis of human interdependence and its key legal components to consider the impacts of proposed or past changes to institutions. A language of legal relations—Hohfeldian analysis—is used to break down and describe the situation. Through this process, the key issue or issues of interdependence are identified, enabling the analyst to identify the structural options available to address it. Finally, the structural components of the institution, the distributional outcomes they give rise to, and assumptions about human conduct or behavior are considered. This paper introduces the LEP model and its uses by the wider heterodox community, with special attention to its application in the domain of housing rights and roadway congestion management.

Keywords: institutional analysis; impact analysis; right to housing; Hohfeldian legal analysis; legal-economic performance

I. Introduction

How do we make decisions? As researchers and professionals, we hope that we make them with an eye to all the relevant data and information that is available to us. We further anticipate that the decision made is sustainable, useful, and likely to provide the desired or predicted outcome. These hopes or criteria for a *good* decision are more or less intuitive. Yet individuals (and economists

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especially) are often responsible for making decisions that can bring forth unintended consequences, be it in our personal lives or in the public or social sphere. Often, these decisions can be traced back to shortcomings of the model or framework that was initially used to consider the potential impact of some proposed change in policy or structure. Cost benefit analysis, the efficiency criterion, and Pareto optimality have been dominant criteria for assessing policy effectiveness for much of the last century. Frameworks that rely on these criteria come with their limitations, most glaringly, their neglect of institutional structure and tendency to leave features of the status quo unquestioned (Samuels 1971; Schmid 2004).

For instance, many public agencies have used cost benefit analysis (CBA), linked to the familiar concepts of Pareto optimality and economic efficiency, to aid in decision making processes (Alder and Posner 2000).¹ CBA encourages the careful collection of background information and understanding of the situation and implicated groups that are necessary for analysis, but provides little guidance as to how to compare proposed institutional changes beyond some comparison of “costs and benefits” measured in monetary terms relative to the status quo or existing institutional structure. For instance, under CBA, it could be deemed not worthwhile to implement protocol and policy to reach disenfranchised voters simply because they are already disenfranchised (and therefore more expensive to empower). It similarly could be deemed too expensive to provide certain social services in an area simply because the populace is so poor and unable to generate requisite tax revenue (or other benefits) to cover the cost. This tendency to judge performance based on monetary valuation of costs and benefits from a fixed point in time, predictably, results in a number of recurrent problems, including the necessity of making normative (biased) judgments as to which factors are considered important in the project decision (that is, what are included as costs and to whom etc.) and the further affirmation of existing distributional issues. In the examples above, for instance, the decision not to undertake such projects means the disenfranchised become further disenfranchised or the poor become poorer. In contrast, by taking into account environmental and social costs, “social” CBA and advances like it include in the evaluation the effects of the project on all the individuals in society, not just the parties directly involved (the consumers and the producers of the project) (Brent 2006). This captures some of the broader impacts to society of undertaking certain projects but still leaves the status quo unquestioned.

Problematically, neither traditional CBA nor social CBA renders institutional structure, or the rights at work in all economic activity, sufficiently explicit that policy analysts would be able to evaluate them effectively (even in retrospect). As Warren Samuels explained as early as 1981, Pareto optimality was impervious to the broader power relations in society, a fact that made it ill-suited to identifying and problematizing the extant norms in a given society:

First, there is no unique Pareto optimal result or solution. Each Pareto optimal solution gives effect to the structure of power or rights which gives rise to it. Power structure₁ yields Pareto optimal result₁; power structure₂ yields Pareto optimal result₂; and so on. To speak then of a Pareto optimal solution is either to neglect the power structure on which it is based or to give effect to implicit normative premises as to power structure . . . Efficiency exists in terms of *some* rights or power structure; the choice is not between efficiency and equity but between

¹ Regulatory Impact Analysis (RIA), as used by The Organization for Economic Co-operation and Development (OECD) is one example. RIA has been useful in conducting impact assessments of proposed regulatory policies across countries. It does not, however, explicitly account for the legal relations present and changing at the core of human interdependence, present in each problem situation.

one rights structure or another, and that is a matter, inevitably, of equity. (Samuels 1981, 125, 126)

In the United States, a lack of critical analysis of changing rights structures in the process of impact analysis contributed to the current divides in economic power that we see across society today. The well-documented bias toward maintaining the status quo (Samuelson and Zeckhauser 1988; Fernandez and Rodrik 1991) coupled with other realities such as the sunk cost effect and the relatively short time horizons in which political actors make decisions, often render path-dependent effects particularly intense (Pierson 2000). One way to reverse this trend in ahistorical and falsely positivist decision making is to explicitly identify the institutional structure of the status quo and to assess its impact. This requires a language for describing and discussing structure.

All economic transactions are always embedded within a particular arrangement of legal rights, themselves enforceable under a given political regime. Thus, institutions and the law cannot be separated from economic analysis (Samuels 1989; 1971). Institutions are “sets (networks) of ordered relationships (connections) among people that define their rights, their exposure to the rights of others, their privileges, and their responsibilities” (Schmid 2004, 6). Institutions, like the human interdependence they inform, are not “secondary” features of economic systems-- they are ubiquitous. Institutional structure is partly comprised of the legal structure of any jurisdiction, including operational laws, organizational rules, and rules which guide the way institutions can be used. These rules form the upstream institutional context in which choices are made (Klammer and Scorsone 2022). A change in law or to institutions will yield a change to the entire situation of interest.

The ubiquity of both formal and informal institutions means that economic relationships are more about bundles of rights at play in a specific situation rather than goods themselves (Samuels, 1989). As observed by Medema (2015), scholars such as Wesley Hohfeld (1913) and John R. Commons (1924) showed us over a century ago that the real resources at play in the market are rights. Recognized rights within our society constrain our opportunity sets—or determine our disablement or enablement to act. The pricing mechanism, or the “free market” forces of supply and demand, constitutes the current institutional structure that allocates the vast majority of rights in our current economy. However, even the capitalistic institutional structure differs greatly across borders, depending on the makeup of existing upstream rules for making rules or capacity of enforcement.

To gain a sense of the pervasiveness with which rights determine market structure, consider the case of a pizza. Person A gains the right to eat the pizza when they purchase it, and by extension, others have the duty to not interfere with A’s consumption of the pizza. The purchase is thus necessarily relational. This right/duty relationship is a classic legal relation. But there are also situations where persons B and C bring a pizza in to work to share (not clear with whom). Anyone may have a slice, if they can grab one, but they have no right to noninterference by others who might eat the pizza before them or take more than an equal share (assuming this office has no existing pizza-sharing rules). In this case, A has some kind of right to the pizza, and would violate no rights if they were to help themselves to a slice. At the same time, B and C are not bound by any duty to limit their consumption and leave a slice for A.² A is exposed to this behavior. In this case it is clear that it is rights, not the pizza (the good), that is the primary object of analysis for economic interaction. This mode of analysis has the advantage of breaking human interdependence—in this case related to ownership of a pizza—

² This example pays homage to Hohfeld’s (1913) comments on an example given by John Chipman Gray regarding shrimp salad.

into fundamental legal relations that outline the choices each party has available to them, providing a clearer avenue for analyzing distributional outcomes and potential meaningful alternatives.

Categorizing and describing each of these legal relations clearly in a way that is useful for analysis comes with its own challenges, however. As described by Singer (1982, 984),

The central issue in the history of analytical theory is the debate about the definitions of legal rights and legal liberties. Although the jurists claimed that their definitions of legal conceptions were merely formal, those definitions had substance built into them. The history of analytical definitions of rights and liberties is best understood as the construction of a theory whose purpose was to mediate the fundamental contradiction between freedom of action and security. The jurists did this by describing and implicitly justifying the legal rules in force in ways that lessened the sense of contradiction.

For classical jurists, the prevailing legitimating principle for rules in force lay in the distinction between acts that harm others and those that do not. Modern jurists noted, by contrast, that there were limits to the protection granted virtually every legally protected interest or that law is always dual-sided (*ibid*). To this end, Hohfeldian legal analysis, developed in the early twentieth century, distinguishes between different types of legal rights that captured this idea of legal relational reciprocity (Hohfeld 1913; Singer 1982) and ultimately contributed to the subversion of the idea of absolute property rights (Horwitz 1992; Fiorito 2010). The relational nature of Hohfeld's system permits us to reimagine rights as constituting a global normative order created through the collective action of many and supported by the same process. Rights do not emerge on their own as from God, Nature, or even leadership from above, but are a social creation (Epp 1998).

This shift in analysis is important, because it draws our attention to the omnipresent nature of human interdependence. In a world where interdependence between people is ubiquitous, developing a sense of institutions and a method for evaluating them and discussing them is a necessary first step toward beginning to understand and make decisions involving their structure and development (Klammer and Scorsone 2022). All too often, we see institutional structure relegated to the introduction or discussion sections of economic work. The fact that it is subordinated to cost-benefit analysis or treated as an afterthought signifies a concerning trend in the economics profession. Measures of performance that do not carefully consider the status quo rules at work fail to acknowledge the power the status quo possesses cannot be considered critical. To redress this enduring failure to assess the effects of the status quo, in the following pages we present a framework for breaking down institutional structure—both of the status quo and alternatives—that we believe better illuminates the way policy affects differently situated parties and distributional outcomes.

This article introduces the Legal-Economic Performance framework as an alternative method for conducting impact analysis.³ The Legal-Economic Performance framework, or LEP, as described in Klammer and Scorsone (2022) builds both on the important legal work of Wesley Hohfeld and on the Situation-Structure-Performance framework of economist A. Allan Schmid (2004) to hone in on the situation of interdependence (and the current institutional structure that shapes it) as a unit of analysis.

³ The term “impact analysis” is not to imply that only down-stream impacts of policy or firm decision-making can be analyzed using LEP. The “impact” of higher-order rules for making rules in government or firms can also be analyzed. These would each be separate analyses.

The article is organized as follows. First, the article introduces each of the three components of LEP: (1) Situation/Interdependence, (2) Structure, and (3) Performance. Special attention is given to the fundamentals of the use of Hohfeld's legal relations. In the third section, I provide examples of the framework's application in real-world research and extension work that showcase the general functionality of the framework.⁴ The article closes with a brief conclusion summarizing the benefits of the framework with regard to the critical thinking process.

A. *Legal-Economic Performance*

The Legal-Economic Performance framework is built on traditional techniques of investigative research. It starts with the identification of a situation where agents are interacting with or in interdependence with each other where some aspect of the situation (including formal or informal rules) needs to be sorted out. A language of legal relations—Hohfeldian analysis—is then used to break down and describe the situation and subsequent alternative structures in reciprocal terms. Through this process, the key issue or issues of interdependence are identified, and the next step is for the analyst to identify the structural options available to address it. Finally, distributional outcomes from the intersection of the situation, the structural components, and assumptions about human conduct or behavior are considered.

LEP begins with an assessment of the situation and the key human interdependence(s) present. Interdependence is simply the fact that parties can take actions and those actions will impact, positively and negatively, the reality facing the other parties in the situation (Klammer and Scorsone 2022; Schmid 2008). Assessing interdependence involves defining and understanding the extant institutional structure, both the rules in use and the rules for making rules predicating them, to understand current human conduct.

Interdependence may originate from several sources and in several forms. For example, party A may seek to change party B's conduct, perhaps due to some physical change in the world which has changed the way things are playing out for a going concern, or there may be some question of existing rules that may be unclear or up for debate more explicitly. In all cases, however, there will always be some existing structure of "rights" present—it will never be an issue of assigning rights where there are none. Rather, LEP focuses on analyzing the mixture of existing legal relations present and the impacts of potential modifications (or none) as they pertain to those affected.

To this end, LEP relies on making the *implicit* structural (institutional) components of a situation and any proposed changes in that situation *explicit*.⁵ The framework thus requires investigation and understanding of the formal and informal rules that are creating interdependence among individuals and going concerns. Rather than focusing on a list of disparate rules and laws at work, the LEP model focuses primarily on providing descriptors for the formal legal relationships that guide or structure our interdependence with others that are created by these institutions. This Hohfeldian legal analysis can be thought of as a series of legal relations action verbs expressed as rights and duties in establishing

⁴ We strongly encourage interested readers to see Klammer and Scorsone (2022a) if interested in an in-depth explanation and walk-through of the framework. The text is written to be accessible to advanced undergraduates, graduate students, and interested heterodox individuals alike.

⁵ This is in contrast to economic models that treat institutional structure as exogenous to the model.

the position of the parties to one another (Klammer and Scorsone 2022a). We call these jural correlatives, or more generally, the fundamental building blocks of all legal relations.⁶

Hohfeld observed that jurists conflate various meanings of the term *right*, often using different meanings in the same sentence or thought. The purpose of Hohfeld's taxonomy is to clarify this muddled language of rights so that they have some agreed upon meaning. Nyquist (2002) gives an example of four disparate ways the word *right* has been used:

- (1) A party to a binding contract has a right to the other party's performance.
- (2) Since flag burning is protected speech, a person has a right to burn a flag.
- (3) The state of Massachusetts has a right to call me to jury duty (since Massachusetts is my domicile).
- (4) I have a right not to be called to jury duty in Rhode Island (since Rhode Island is not my domicile).

Hohfeld's vocabulary captures each of these four different uses. It is this system that clarified that (1) rights are nothing but duties on others and (2) duties cannot be deduced from mere legal liberties or privileges, which remain distinct from a right. See Table 1.

Table 1. Jural Correlatives: Fundamental Building Blocks of Legal Relations⁷

| Entitlements | Disablements |
|--|--|
| Right: A claim that Beta must do or not do something in relation to Alpha. | Duty: The other end of a right. An obligation that Beta must do or not do something in relation to Alpha. |
| Privilege: Ability of Alpha to act in a certain manner without being held liable for damages to others (Beta(s)). | Exposure: Beta is subject to damages from Alpha's actions without legal remedy. |
| Power: Alpha's ability to change their legal relationship with Beta. | Liability: Beta's relationship to Alpha is susceptible to being changed. |
| Immunity: Beta's relations to Alpha cannot be legally altered by Alpha. | Disability: Alpha is unable to change their legal relationship with Beta. |

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) and include one entitlement (left) and one disablement (right). Each jural correlative is best described in terms of the party or agents impacted, or in other terms, the person on the other end of the stick. A *right* is more about the *duty* some other party B has

⁶ Hohfeldian legal relations are defined and discussed at length in chapters 2 and 3 of *The Legal Foundations of Micro-Institutional Performance* (2022).

⁷ Table taken from Klammer and Scorsone (2022), Chapter 2.

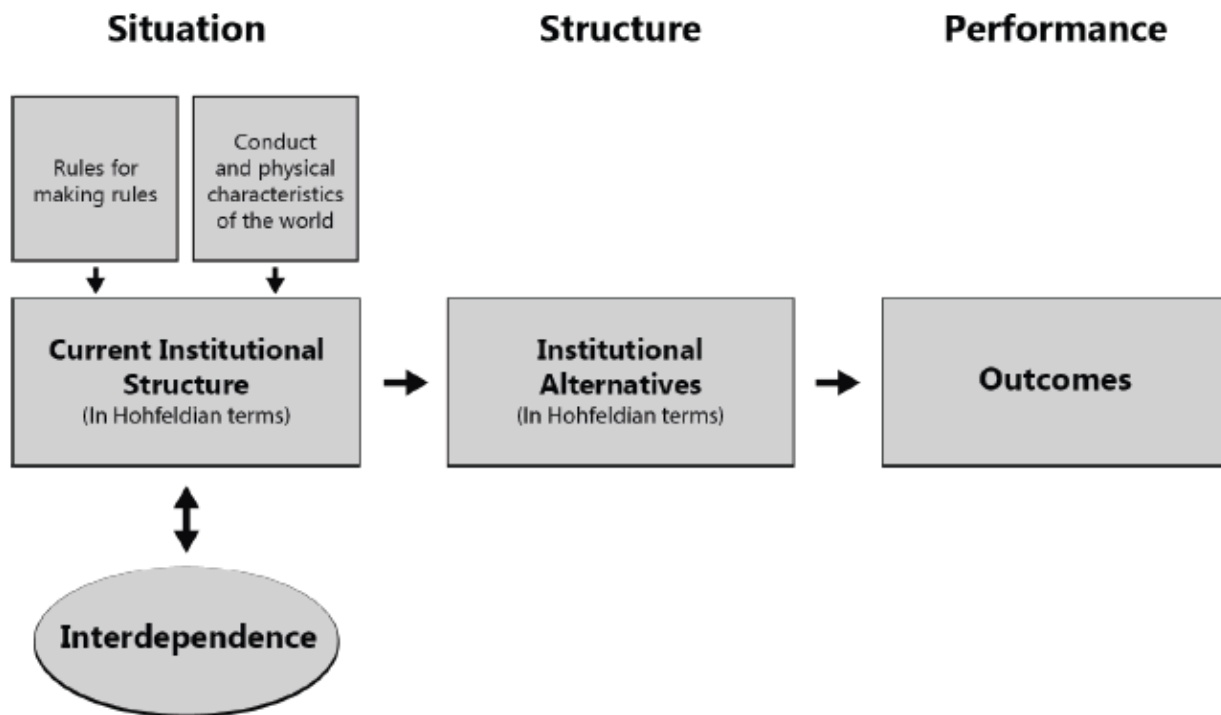
to agent A, such as a duty to not trespass, correlating to A's right to not be trespassed against in the context of some aspect of a piece of land or other property. So goes for the other relations.

We return to the four scenarios presented by Nyquist (2002), this time using Hohfeld's vocabulary to lend more specificity to the situations. We see now that the legal relations have been clarified.

- (1) A party to a binding contract has a **right** to the other party's performance.
- (2) Since flag burning is protected speech, a person has a **privilege** to burn a flag.
- (3) The state of Massachusetts has a **power** to call me to jury duty (since Massachusetts is my domicile).
- (4) I have an **immunity** from being called to jury duty in Rhode Island (since Rhode Island is not my domicile).

Each jural correlative also has its opposite. If an agent is identified as having a specific Hohfeldian position, then that party cannot also be in the opposite position. If A has the aforementioned right against trespass for some property, they cannot also be exposed to damages from B's privilege to trespass on that same property. Likewise, B's aforementioned duty means that they cannot also bear a privilege for the same act or issue. Similarly, if some party B has a duty to provide some level of performance, they cannot also possess a privilege to perform however they prefer. Understanding these rules helps inform expectations between parties.

These relations specify the formal institutions at work in a situation. Once this piece of the puzzle is understood, changes in institutional structure can be considered with a careful eye to changes in relations and those subsequent distributional impacts, formalizing the process. For instance, a university may change procedure so that they are no longer obligated to provide in-person support to students for public safety concerns. Whereas the university public safety body previously had a duty to provide some form of in-person support and students had the right to access it, a change in procedure (a power the university may possess) may result in the termination of that duty and right. Students now have an exposure to the implications of the body's actions, should the new procedure be reliance on a ticket submission system, or perhaps a process that will benefit students. The new relations can be examined. Figure 1 shows how this language of jural relations fits into the LEP framework.

Figure 1: The Legal-Economic Performance Framework (from Klammer and Scorsone 2022a)

From there, the LEP framework considers subsequent conduct and resulting economic performance. It is important to highlight that the existing, current, or “status quo” structure, is included in the analysis of performance outcomes. The key to the model is that it does not measure performance relative to the current institutional structure, but each in substantive terms of what each party gets. In the university safety example above for instance, LEP analysis, in addition to considering the new ruling(s), would expand the focus to include an analysis of the performance outcomes of requiring in-person support for public safety concerns (including any and all data gathered during life of the program).

So how does all of this matter in assessing economic performance? The answer lies in the asymmetric distribution of rights, duties, privileges, and power inherent in all institutional choices—economic or otherwise. American lawyer and economist Robert Lee Hale provided a reconceptualization of the institution of property as a delegation of state power to private citizens. As he wrote in “Rate Making and the Revision of the Property Concept” (1922, 214):

Let us analyze the legal nature of property somewhat more closely. The right of ownership in a manufacturing plant is, to use Hohfeld’s terms, a privilege to operate the plant, plus a privilege not to operate it, plus a right to keep others from operating it, plus a power to acquire all the rights of ownership in the products. The analysis is not meant to be exhaustive. Having exercised his power to acquire ownership of the products, the owner has a privilege to use them, plus a much more significant right to keep others from using them, plus a power to change the duty thereby implied in the others, into a privilege coupled with rights. This power is a power to release a pressure which the law of property exerts on the liberty of the others. If the pressure is great, the owner may be able to compel the others to pay him a big price for

their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government—the law. The law has delegated to him a discretionary power over the rights and duties of others. (Quoted in Fiorito 2010, 274)⁸

Thus, for Hale, the bundle of rights described above irrevocably influences the potential behavior—or conduct—available to the agents in question. This institutional structure, again chosen by society, and coupled with conduct, determines predicted or realized outcomes and economic performance. Per Figure 1, we have the current institutional structure and then we have the way people behave or act, creating interdependence. When we consider potential alternatives, we again must look at how people act—or how we predict they will act—to estimate performance. Sometimes there may be many potential behavioral outcomes or scenarios to consider. Sometimes we might rely on a similar change that has taken place elsewhere to estimate the outcome. The idea is to get as close as possible to a realistic result as in any critical thinking process.

II. Applying LEP to the Real World

We provide several examples for how the framework can be used, either to supplement other models, on its own, or as a tool to assist in critical thinking. One timely application of this framework is its illumination of the issue of power in the economy and society. When we propose structural change with an eye toward some social good, power (both of the Hohfeldian variety and more generally) is too often ignored. For instance, we apply LEP to consider the impacts of a proposed rule change to institute a “right to housing” in Sacramento, California, to show that it will result in both gains and losses for the homeless population falling short of a true right to housing as defined by the UN and other bodies. The LEP framework makes these gains in rights, privilege, and power—which in another form of analysis might be taken for granted—explicit. To round out this introduction to the LEP framework, we also include a brief application of the model to a hypothetical road congestion situation, showing how the model may be applied in situations where rights, duties, and the law more generally are not explicitly named.

A. *A Proposed Right to Housing in Sacramento, California*

Klammer and Scorsone (2022b) discuss a proposed “right to housing” ordinance in Sacramento. Per LEP, we first assess the problem and the underlying situation of interdependence. This includes assessing the present order of rulemaking, the current institutional structure, and individual conduct that operates within it. We then consider two alternatives: the distributional consequences of (1) maintaining the status quo, and (2) of implementing the proposed ordinance. This juxtaposes the different bundles of rights present in each, further highlighting what is at stake for involved parties. LEP can also be used to look at additional alternatives that address changing jural relations in more desirable ways, though that is up to the analyst.

There are several details relevant to this analysis. First, we consider what a right to housing might mean, in this case by referencing standards put forth by the United Nations Committee on Economic, Social and Cultural Rights. According to the Committee, the right to housing includes seven broad

⁸ This discussion is closely related to the question of enforcement, treated as a second-level Hohfeldian analysis in Klammer and Scorsone (2022) in Chapter 3, though not exhaustive.

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 (UN 2014). A right to housing as described here requires participating countries to take affirmative steps, rather than to merely refrain from impairing freedoms. The US legal system has generally been described as one that protects negative liberties (the latter) and does not promote positive rights (the former) (Foscarinis 2007; Alexander 2015). In keeping with this, housing in the United States has been treated as a legal privilege—not a right, nor even a legal entitlement (Klammer and Scorsone 2022b).

With evictions and homelessness on the rise, this lack of housing rights—or legal protections for the homeless—means that US cities are facing crisis. What little public housing exists is estimated to serve less than 2% of the US population (Desmond 2018), and increases in tenant rights through the years do not grant any larger right to be housed beyond the confines of individual contract. Eviction moratoriums, while helpful in times of crisis like the COVID-19 pandemic, are only temporary. State and local governments are largely on their own to come up with ways to address rising homelessness levels.

In Sacramento specifically, an estimated 10,000 to 11,000 individuals experienced homelessness over the course of 2019. As of late 2021, an estimated 5000 individuals were sleeping outside or in campsites in the city on any given night. Per Klammer and Scorsone (2022b, 526):

Approximately 93 percent are originally from Sacramento or long-term residents. 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*⁹ 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. (Citations omitted)

To address the crisis, Sacramento's City Council adopted a Comprehensive Siting Plan to Address Homelessness (the Plan) in the fall of 2021. The Plan involves designation of additional shelter sites, tiny homes, safe camping and parking spaces, as well as plans to expand shelter and permanent housing capacity (City of Sacramento 2021b). On top of this, the mayor proposed an ordinance that would require the city to meet the numeric goals of the Siting Plan by January 1, 2023, and subsequently establish on that same date a "right to housing" 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. Shelter, as defined by the proposal 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

⁹ 920 F.3d 684 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 674 (2019). Since the completion of this article, the Ninth Circuit's decision in *Martin* has been subject to further judicial review. While the Ninth Circuit ruled that enforcement of anti-camping ordinances against individuals experiencing homelessness violates the Eighth Amendment of the US Constitution if no alternatives to sleeping in public are available, subsequent review (and related decisions such as *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022)) will continue to test the limits of this decision. It will take time to define the scope of municipal regulatory authority in this developing area of law, but for the purposes of this article, Sacramento's ability to enforce anti-camping ordinances is considered severely limited.

qualify only if the placement includes a plan for each person to attain permanent housing” (City of Sacramento 2021b).

It is important to note that this plan, if completed, will allow Sacramento police to enforce anti-camping laws. The ordinance does not provide concrete details of what the consequences will be for those who refuse to move or to accept the shelter offered. Table 2 works through this situation using the general LEP framework.

Table 2: Legal Economic Performance of Housing Structures in Sacramento, CA (modified from Klammer and Scorsone 2022b)

| Situation | Interdependence (parties/current structure) | | Structure | Performance |
|--|--|--|--|---|
| <p>There are 11,000 homeless individuals in Sacramento. There are numerous local business, residential, and health and safety concerns.</p> <p>Sacramento does not have adequate housing; <i>Martin v. City of Boise</i> means no-camping laws cannot be enforced</p> <p>Homeless villages creating conflict with local business, residents, etc</p> | <p>Homeless v. City</p> <p>Homeless v. non-homeless citizens</p> <p>City v. Citizens</p> | <p>No Siting Plan/RTH Ordinance:</p> <p><i>Martin v. Boise</i> means homeless have privilege to camp. Citizens exposed. (Privilege limited by duty to stay off private property, which owners retain right to)</p> <p>City has duty to not enforce anti-camping laws. Homeless have right to not be moved from public property by city officials.</p> | <p>Siting Plan & RTH Ordinance:</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 by moving homeless into housing or alternatives if there are adequate shelter beds (per <i>Martin v. Boise</i>).</p> <p>Homeless are exposed to the methods of enforcement used by city. City has privilege to enforce how it deems fit.</p> | <p>No Siting Plan/RTH Ordinance:</p> <p>Homeless population may stabilize post-pandemic, but likely to continue growing.</p> <p>Current homeless villages will remain unchanged, and unable to be moved unless city can increase # of shelter beds to meet numbers.</p> <p>Non-homeless residents face issues created by presence of large homeless populations near to home and work.</p> <p>City (and residents) must operate around homeless camps and bear costs associated.</p> <p>Siting Plan & RTH Ordinance:</p> <p>Homeless population likely to decrease, more stable. Dependent on sustainability and quality of housing/whether they accept. Likely to benefit private property owners closest to current encampments.</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>Project likely to be largely funded through one-time sources. How will maintenance be paid for? How about enforcement?</p> |

If the Siting Plan and ordinance are not completed, the City of Sacramento will have no obligation to provide housing to the homeless. At the same time, however, the homeless population will retain their privilege to camp in public areas, so long as there is a shortage of adequate shelter beds per *Martin v. City of Boise*, 920 F.3d 684 (9th Cir. 2019), cert. denied, 140 S.Ct. 674 (2019). Non-homeless residents will similarly bear costs associated with the homeless individuals' privilege to camp in the city (also known as a Hohfeldian exposure). If this continues, existing social services will continue to face extreme stress. Homelessness will not only continue at current levels, but is likely to continue to increase, especially following the end of eviction moratoriums following the COVID-19 pandemic. The current conflict between residents and business owners disturbed by the homeless villages and population will continue, along with all of the health, safety, financial and social well-being concerns they entail.

Under the Siting Plan coupled with the mayor's ordinance, past residents of the city who are homeless (accounting for 90% of the homeless population) will gain a right to shelter as defined by the city. The city gains the duty to provide this shelter. Under the plan, however, homeless individuals also gain a duty to accept shelter or to move if the city demands it. In this way their right is limited while also coupled with a duty to act. The city further gains a right to move them where they see fit, coupled with a privilege to enforce this new rule, and the homeless individuals are exposed to their methods (ranging from fines to forced removal).

Under this RTH structure, homelessness in Sacramento will likely decrease for the population that has previously resided in the city. Sacramento police could move homeless individuals into designated areas of the city via anti-camping protocol. Business owners and those residing near current encampments are likely to benefit the most from removal. How much homeless individuals benefit will depend entirely on the quality and characteristics of the shelter offered, tempered by the possibility of the negatives associated with forced removal. While the mayor has stated that there will be no criminal or civil charges brought against those who refuse housing under the RTH Ordinance, they have not provided detailed alternatives for addressing the issue.

Funding plans for the program will also need to be further explored to accurately estimate impacts. The current proposed plan includes using various American Rescue Plan funds as well as other potential one-time or short-term sources of funding. This raises the question of where funds might be found instead, or who will bear the burden of future maintenance expenditures and expansions to housing (Klammer and Scorsone 2022b).

There are other structural scenarios that could be considered as well. Should the city undertake a third option of providing adequate shelter beds as outlined in the siting plan or some other plan without enacting the RTH Ordinance in tandem, the homeless populations' privilege to camp will switch to a Hohfeldian exposure as city officials gain the legal privilege to enforce anti-camping laws. Homeless individuals will then be forced to move to designated areas or shelters. Or, perhaps the city might continue to develop the current plan with greater detail to more permanent housing solutions and enforcement that truly does not harm homeless individuals if it can be achieved. The Structure chosen will depend on whose interests count.

There are several interesting elements revealed in this analysis. First, there is the issue of language used in proposing and implementing this policy. A "right to housing" and some offer of "shelter," likely temporary, are very different things. Through the use of LEP, we are able to see that the mix of rights

has shifted. There is no clear “right to housing” gained in the Sacramento case. Most importantly, we also see the gains and losses present to the individuals involved. It could be argued that this ordinance hurts the very people it positions itself as setting out to protect. Finally, notably, prior to and under the proposed ordinance, the city also maintains a large degree of power over these individuals, as they can change some aspects of these legal relations and the homeless, when compared to a less distressed citizen, has limited recourse (and arguably much greater liability). In this case, the use of jural relations is beneficial in detailing how interdependence is addressed (or not). LEP helps us move beyond the posturing and confusing language to get at the heart of the interdependence present and what potential structural changes could mean for those involved.

B. LEP As It Might Apply to Municipal Road Issues

The LEP framework can also be applied to more traditional microeconomic issues. It can be used to analyze the potential choices available to firms in massive online marketplaces dealing with counterfeiting of products or in considering management of common-pool resources (Klammer and Scorsone 2022a). It can also be used to tackle everyday municipal issues with an eye to the available possibilities, such as how to go about addressing a congested stretch of road. We consider a hypothetical impact assessment concerning the latter.

Suppose traffic congestion on the main road of a busy downtown area is rapidly becoming a major source of concern. The effects of growing congestion range from lengthy traffic delays, increased incidence of accidents, increased noise and other forms of pollution, and the inability of ambulance and other first responders to respond to emergencies. The local government unit has been evaluating potential solutions to the problem, chief among them potential road-pricing systems. Other alternatives include expanding the existing road infrastructure in key areas, adding a lane, and updating streetlight systems.

Using LEP, we begin to address this situation by thinking about the higher-level institutions informing interdependence and the options available. Notably, these options include process rules and law for how the government may go about addressing the issue, including public domain process and the relevant legal processes for establishing new programs such as a city-center congestion zone charge. For brevity, we assume that the city can implement any of these. In reality, these would differ between jurisdictions and would need to be considered carefully.

Interdependence in this case is tied to an “incompatible use” issue with regards to the public roadway. Currently, anyone abiding by existing traffic and licensing laws can use the roads. This includes commuters, suppliers, service providers, etc. The use of the road by one party is impeding desired attributes of use for others. Roads are the primary method of transportation in this city, where most individuals either have their own car or take the bus. There is no other public transit system.

Currently, all drivers have the privilege to access and utilize downtown roads within existing rules. All other drivers, residents, and business owners are exposed to impacts, be it congestion, pollution, etc., regardless of if they utilize the roadway system or not. Notably in this case, property owners and renters downtown have the usual right to their property use and enjoyment but, as is typical in the US, their rights are limited and do not include a right to quiet streets, guaranteed parking (unless contracted otherwise), reasonable traffic flows to get from A to B, low air pollution, etc. This indicates limited duties going the opposite direction. These rights are also limited by any existing powers to change the

legal relation, in this case the power of eminent domain through the Takings Clause of the fifth amendment of the US Constitution. Property owners in areas adjacent to roadways are liable to potentially having their right to their property changed should the government use this power. Table 3 works through this situation using the contextual details and the two alternatives mentioned above.

Table 3. Legal-Economic Performance of City Transport Plans

| Situation | Interdependence (parties/current structure) | | Structure (change only) | Performance |
|---|--|--|---|--|
| <p>Congestion in City’s downtown is creating traffic delays, increased incidence of accidents, increased noise and other forms of pollution, and the inability of ambulance and other first responders to respond to issues downtown in a timely manner.</p> <p>Existing rules and laws allow planner to utilize space around roads if needed through takings clause of the Fifth Amendment as well as enact fee systems and other programs subject to certain processes.</p> | <p>Drivers v other drivers</p> <p>Drivers v non-driver users of downtown space</p> <p>Property owners v city</p> <p>Drivers vs. city</p> | <p>Current road system:</p> <p>All drivers have the privilege to <i>access</i> and <i>utilize</i> downtown roads within existing rules; All other drivers exposed to impacts (pollution, noise, safety, etc.).</p> <p>Downtown residents and business owners, etc., similarly exposed to all impacts of drivers driving (pollution, noise, safety, etc.).</p> <p>Property owners have right to use their property, etc.; all others (including city) have duty not to impede/infringe.</p> <p>City has power to claim right to land needed to modify road systems; property-owner has liability to this potential change.</p> | <p>Road Pricing/Congestion Fee:</p> <p>The City has the right to exclude drivers from the congestion zone. Drivers have the duty to not use zone unless they pay x fee. Once fee is paid (would-be driver using their power to enter into contract with city), the driver now has the right to <i>access</i> and the city the duty to grant it.</p> <p>Paying drivers have privilege to <i>use</i> roads in the congestion zone; other drivers, residents, business owners, etc. are exposed to their choice.</p> <p><i>Are some individuals excluded from this fee? Should there be different fees? Design of fee structure changes structure of rights.</i></p> <p>Expanded Roadway:</p> <p>City exercises power of eminent domain; certain property owners lose right to property in exchange for \$. They have the duty to accept payment as city gains right to the parcel.</p> <p>Other relations remain the same as under “current road system”.</p> | <p>Current Road System:</p> <p>Congestion and all issues associated with it (pollution, noise, safety, etc.) likely to worsen; will continue to lead to decreased satisfaction and other issues such as decreased rents and home values in the impacted area and work commute area, etc., relative to if congestion stayed the same.</p> <p>Road Pricing/Congestion Fee:</p> <p>Higher cost to drive in zone. Behavior likely dependent on fee level. Drivers who can afford fee will continue to drive. Those who cannot afford fee or do not pay for other reasons will have to find other methods. Likely to result in less congestion in downtown center but higher burden for lower-income users and those already living/working in zone. Issues associated with congestion (pollution, noise, safety, etc.) likely to decrease if fee structure leads to reduced traffic in zone.</p> <p>Fees collected could be used for cost of administering system and various other projects depending on rate and revenue generated.</p> <p><i>How fee is structured impacts legal relations and performance outcomes.</i></p> <p>Expanded Roadway:</p> <p>Costly road expansion project. Who pays?</p> <p>Congestion improved. Sustainability of reduced congestion will depend on many factors.</p> <p>Current levels of certain existing issues such as noise and emissions pollution could worsen, especially for those</p> |

| | | | | |
|--|--|--|--|---|
| | | | | closest to project. Property owners impacted by eminent domain could benefit (or not) from sale. Highly situational |
|--|--|--|--|---|

In a real-world scenario like this there would be much more work done up front to figure out the options available to address this situation of interdependence. We assume two simple alternatives here and then use them to raise questions useful for the analysis, but there could easily be many variations of the same alternatives or new structures all together (such as some form of public transit, etc.). In this example, there are three alternatives.

The first is to maintain the current road system, where all qualified drivers have equal privilege to access and utilize the downtown area for driving within existing rules. This system leaves other drivers, residents, and business owners impacted by other drivers' choices, including increased noise and air pollution as well as the impacts on access to first responders and other public services dependent on working road systems. The property owners have all the usual rights to use of their property (and others the duty not to infringe) but remain exposed to the impacts of congestion. They also retain a potential liability to the government, like all property owners, should the property or part of it need to be seized for the public good under the Takings Clause of the US Constitution. Road-adjacent property owners have many legal relations but for brevity, we include this one as it is relevant for the third scenario. Performance outcomes from this choice are likely to be further congestion, exacerbating current issues beyond what is already apparent. This could manifest as decreased property values and rents for those in the area, decreased accessibility to downtown areas, and the like.

The second option is to implement some kind of road pricing or congestion fee, as has been done in numerous traffic-locked cities (World Economic Forum 2021). In this scenario, individuals can only drive through the downtown zone if they pay some fee X. The city now has the right to exclude drivers from accessing the zone by vehicle unless they pay. It is interesting to note that the would-be driver in this case has the power to enter into this agreement (or contract) by paying the fee, at which juncture they gain the right to access the zone and the city gains the duty to grant them access. At this point, they also have the privilege to use the space as they did in the first scenario, with other drivers who made the same decision exposed to the traffic (or other ills), their utilization causes. Other non-drivers in the zone also continue to be exposed to the utilization choices of those who choose to pay the fee. It is important to note the multiple "sticks" in the bundle of rights revealed here by this scenario: there is the "access" stick, which is between the would-be driver and the city, and there is also the "utilization" stick that is between the driver and other drivers/users of the space. It is important to consider the parties involved in the interdependence for each scenario.

In sum, individuals in the zone are exposed to the choice of others, which will heavily influence the level of congestion and negative effects with it. There are numerous ways to consider potential conduct and distributional outcomes of this alternative, all hinging on the specifics of how it is structured. Should the fee be low enough, congestion may continue. A flat fee, even if it reduces congestion, is likely to have greater burden for low-income individuals or those that depend heavily on driving in that zone for various reasons (food delivery, work and school commuters are a few examples). To combat this, the fee might apply to only specific types of vehicles. The City of London, for instance, has experimented with implementing special emission standards for heavy goods vehicles on roads London-wide through a Low Emission Zone (Mayor of London 2021). Depending on how it is designed, some clearly lose privileges and gain exposures. Who should have less privilege here? Those who drive heavily emitting vehicles? Those who drive the most? Should certain groups be grandfathered in (not have to pay)? These are unavoidable questions when conducting impact analysis.

How revenue generated from fees is used also bears heavily on performance. For instance, revenue could be used to cover fees for lower-income drivers via a mobility plan or to subsidize other congestion-decreasing or downtown-enhancing projects. The specifics of these options would also need to be carefully considered and evaluated.

The final scenario involves a road expansion project, adding lanes and updating traffic signals. Under this scenario, congestion may improve, but some of the cited issues creating interdependence, such as high emissions and noise pollution, may or may not worsen. Like in each of the preceding scenarios, it becomes a question of the goals of the project and who or what is deemed to matter. A simple road expansion without consideration of potential environmental impacts or improvements available, for instance, would be choosing to further other goals over environmental priorities. There is also the question of the performance implications for those forced to sell their land in order for the expansion project to go forward. Takings are highly controversial and situational, with outcomes varying case by case.

At this point an alternative could be chosen based on the specific goals of the decision maker. LEP helps make the nature of this normative choice clear. The Hohfeldian language illuminates questions about rights and distribution endemic to this kind of modeling and decision making, such as:

- Who has rights to the existing road and land surrounding the road?
- What issues is congestion causing? For whom?
- In cities without alternative transit options, is it in the social interest to charge flat congestion fees? Who does this impact?
- Should residents be exposed to drivers' pollution (or any cost borne by others)? What level is acceptable?
- Who pays for each system? Who should pay?

Questions like these begin to address what good faith experts and the decision makers responsible for these choices think is most reasonable for the present situation. The answers to each are undeniably different for different individuals. Someone tasked with preventing further damage to the climate might focus on creating a greener solution that values the environmental rights of surrounding citizens more heavily than someone working on behalf of the city to reduce commute time. The approach advocated for here does not provide a definite answer in the form of Pareto optimality, economic efficiency, or optimization. It does help the analyst recognize the inherent interdependence between parties and how that interdependence is structured by formal legal relations and in many cases our cultural and social systems as well.

III. Conclusion

A foundational belief in institutional economics is that decision making is encapsulated or encultured (Mayhew 2018). The question is then raised as to how any model or framework captures the nature or essence of this enculturation structure and evolutionary process over time. The formal legal system, along with the socio-cultural system, are key components of how economic decision making is enclosed and shaped. Economists have sought and identified a number of ways to undertake the task of modeling this type of decision-making. The Legal-Economic Performance framework is a new

approach that provides important advancements in our understanding and processing of the nature of institutional structure and human interdependence.

The LEP framework does not make decisions on behalf of the researcher, nor does it advocate any one set of approaches to decision making. In the field of institutional economics, concepts of decision making range from Marc Tool's social value principle to the Veblenian dichotomy and John R. Commons' reasonable value. In these, social value judgments are necessarily part of inquiry and become a necessary variable in any analysis of social change or impact (Schwiegardt and Sellers 1988). The Legal Economic Performance framework provides a methodology to assist in the critical thinking process supplementing decision making within and across these traditions by making changes in legal relations plain in the process. Institutions, or rights, are not a gift given by God or from nature; they are the exact opposite—gradually and painstakingly formed through individual and collective choices about who or what matters. LEP provides a process and a language that can help facilitate analysis of these complex processes.

In the author's extension work, this model has been very useful in thinking about structural changes and what they might mean for individuals. It prompts us to ask, "What rights are changing?," "What rights are gained or lost?," and finally, "What do these changes mean for these individuals?" It helps us predict when and which outcomes might change, even when the structure may look seemingly unchanged from the outside. It has also enabled us to catch proposals that do not work with existing legal relations, or rules that might need to be changed to assure sustainability of the proposed program. The LEP framework forces us to explicitly state the changes in power, something not always accounted for in short-run cost-benefit analyses and often relegated to the discussion section of scholarly articles. In short, it has aided in our critical thinking process throughout our work and can contribute much across the larger heterodox community more going forward.

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