Homestead and Other Legal Protections of Possession of a Home

Benjamin Barros, Widener University - Harrisburg Campus
“Homestead and Other Legal Protections of Possession of a Home”

In many legal contexts, homes are given more legal protection than other types of property. This additional protection can be divided into three categories. First, possessory rights in a home might be given more protection than possessory rights in another kind of property. For example, a legal system might make it more difficult for a creditor to force the sale a home to satisfy a debt than it would be for the creditor to force the sale of another type of property (say, a commercial office building) to satisfy that same debt. Second, a legal system might economically favor ownership or possession of a home over ownership or possession of another type of property. For example, ownership of a home might be subsidized where ownership of other types of property is not. Third, a home might be given special treatment when issues of privacy, freedom, or security are at stake. For example, a legal system might require the government to have a stronger justification for searching a home than is required for searching a commercial property.

This entry focuses on the first category – those legal protections that give special protection to possessory rights in a home. It first elaborates on the distinction between rules favoring possession and the other two types of special legal protections given to homes. It then discusses various types of legal rules that give additional protection to possession of a home, including homestead rules favoring homeowners over creditors and tenure rules favoring renters over their landlords. Finally, it discusses theoretical issues related to the protection of possessory rights in homes, and considers open questions about whether this special protection is justified.

**Possession, Subsidy, and Security Distinguished**

The rules favoring possession discussed in this entry focus on a person’s entitlement to live in a particular home in a particular place. These rules may assist a resident in resisting efforts by another party to displace the resident from her home. Other types of legal rules may protect homeowners in different ways.

Legal systems may include subsidies for homeownership or home rental that are not available for other types of property. Some subsidies, such as direct payments made to support rent payments, are easy to see. Others are more subtle. Beneficial tax treatment, for example, could be given to landlords who rent to low-income people. In the United States, homeownership is subsidized through the mortgage interest tax deduction, which allows a homeowner to subtract the interest paid on a home purchase loan from her tax liabilities. These subsidies are indirectly related to possession, in that without them a resident may not be financially able to possess their home. They are distinguishable from the possessory category of rules, however, because they do not directly affect the legal right to possession.

Legal systems may also include special rules that protect privacy, liberty, or security interests in the home. Legal rules in some jurisdictions make it harder for the government to conduct a search of a home than of another type of property. Other legal rules might impose a higher penalty in criminal law for an invasion of a home than for an
invasion of another type of building. In many common-law countries, these special protections are encapsulated in the maxim that “a man’s home is his castle.” The spirit of the castle doctrine is followed more extensively in some common law jurisdictions than in others. In the United States, the special role of the home as a source of individual autonomy is reflected in the Fourth Amendment to the United States Constitution (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”) and in a wide range of court decisions. The Singapore legal system, in contrast, tends not to follow the castle doctrine in legal issues surrounding the home. To the extent that they are present in a given legal system, these rules favoring autonomy and security in the home involve the ability of the resident to exclude others from the home, rather than on the legal entitlement to possess a particular home.

**Homestead and Other Rules Protecting Possession**

Rules favoring possessory interests protect a resident’s ability to remain in a particular home in a particular place. The resident’s possessory interest, of course, often comes into conflict with other legitimate legal interests. The nature of these competing interests can shape the form of the legal rules favoring possession. This section considers the operation of rules favoring possession in four specific contexts, each of which presents a different set of competing interests. These contexts are: (1) disputes between creditors and homeowners; (2) disputes between renters and landlords; (3) disputes over possession of a home in family law; and (4) disputes arising out of government expropriation of homes.

**Creditors and Homeowners**

A homeowner’s possessory interest comes into conflict with a creditor’s interests when the creditor seeks to have the home sold and the proceeds used to satisfy a debt. The larger category of creditors can be divided into two subparts, each presenting a different set of issues when in conflict with a homeowner.

First, a consensual, or secured, creditor obtains a security interest in the home that is voluntarily granted by the homeowner. For example, if a financial institution lends the homeowner a sum of money to be used to purchase the home, the homeowner typically grants the financial institution a security interest in the home. The express purpose of the security interest is to secure payment of the debt. If the homeowner fails to pay the debt, the creditor may exercise the security interest, often by invoking a judicial process to have the home sold.

Second, a nonconsensual, or unsecured, creditor initially has no security interest in the home, but may later obtain a lien through a judicial process if the homeowner fails to satisfy the debt. The relevant consent here is to the creditor’s acquisition of the lien, not the debt itself. The homeowner might voluntarily incur consumer debt, or might instead involuntarily incur a debt, for example by incurring liability to another person for causing an automobile accident. In either case, if the homeowner fails to repay the debt, the
creditor may try to obtain an involuntary lien in the home, or otherwise use the value of the home to satisfy the debt.

Legal systems often have rules that safeguard the homeowner’s possessory interest against both consensual and nonconsensual creditors. Of the two, however, consensual creditors typically have a much easier time in using the home to satisfy the unpaid debt. Consensual creditors are favored in this context because the security interest is consensual and because protecting lenders’ interests is important to the maintenance of a fully-functioning housing market. Protections given to homeowners from consensual creditors are often procedural, and aimed at giving the homeowner an opportunity to pay off the debt before the home is sold in an involuntary proceeding. (These protections are often given to owners of other types of property, and are not unique to the homeownership context). In times of widespread housing marked crisis, legal systems may impose rules that temporarily or permanently give homeowners additional protection from consensual creditors.

Legal protections of homeowners from nonconsensual creditors are often more substantial. Many common-law jurisdictions have homestead laws that limit nonconsensual creditors’ ability to gain access to a home to satisfy a debt. In some jurisdictions, homestead laws prevent nonconsensual creditors outright from reaching the home. In other jurisdictions, homestead laws protect a certain portion of a home’s value from the creditor. Similar protections are created in some jurisdictions through legal mechanisms other than homestead legislation. For example, many jurisdictions in the United States of America that do not have express homestead legislation achieve a similar result in many circumstances through the recognition of an ownership status called tenancy by the entirety. Only married spouses may own property in tenancy by the entirety. In some jurisdictions that recognize the tenancy by the entirety, the home cannot be used to satisfy the debts of only one spouse. For example, if one spouse incurs a large credit card debt, or incurs substantial liability through some sort of wrongful conduct, the creditor will not be able to access a home held in tenancy by the entirety to satisfy the debt.

Homestead laws are often justified in terms of protecting the family home. Some homestead laws, like New Zealand’s, are limited to homes owned by married spouses. Others, such as those enacted in Ireland and in various Canadian provinces, are further limited to protecting the marital home from debts unilaterally incurred by one spouse. These statutes operate in the same way as the tenancy by the entirety, and are motivated by a similar concern – the desire to protect the innocent spouse and the family home from the debts incurred by one irresponsible spouse. This protection, of course, comes at the costs of the creditor, who in some circumstances may be the most innocent party involved.

Landlords and Renters

A rented home is a home nonetheless. Like homeowners, renters often have a strong interest in remaining in their homes. The inherently limited duration of the rental relationship, of course, shapes the legal relationship between the renter and the landlord.
It also influences the expectations of both parties. Absent a contractual agreement to the contrary, a renter’s legal right to occupy a rented home will expire at the end of the rental term. A renter, however, may wish to remain in the home when the rental term expires. If the landlord objects, then a conflict arises between the interests of the renter and the landlord.

Some legal systems protect renters’ possessory interest in their homes by requiring landlords, in at least some circumstances, to allow the renter to remain in possession for successive rental terms. These legal protections can have two distinct components. First, tenure rights give renters the power to remain in their homes for successive periods. Second, rent control or stabilization provisions limit landlords’ ability to raise the amount of rental payments when rental arrangements are renewed for a new term. These two components work in concert – tenure rights often will not help a renter if the landlord has the ability to raise rent to a level that the renter cannot afford. This is not to say that tenure rights are valueless to renters if not accompanied by some limitation on the landlord’s ability to raise rent. Tenure rights may protect renters from the loss of their home if the landlord does not want to renew the rental relationship for some reason not related to finances, such as personal animus towards the renter. Depending on their scope, tenure rights may also protect renters when a landlord wishes to convert a building from rented housing to owned housing.

Minor Children and Allocation of a Home in Divorce

Allocation of the marital home in divorce at a minimum presents a conflict between two residents, at least one of which will lose their home. Decisions about which of the two divorcing spouses will keep a home may or may not involve consideration of fault and assessment of responsibility for the termination of the marriage. Regardless of culpability on the part of the spouses, minor children living at home are typically faultless. Many legal systems protect the possessory interests of innocent minor children by allocating the marital home to the spouse who receives primary custody of the children. The strength of this protection varies between jurisdictions, with some recognizing a categorical rule allocating the marital home to the custodial spouse while others treat the interests of the minor children as one, typically very important, factor to be considered.

In some jurisdictions, however, the possessory interest of minor children play no role the allocation of the marital home. For example, some jurisdictions have mechanical rules that require the equal distribution of marital property. The application of these mechanical rules often leads, as a practical matter, to the sale of the marital home. As a result, mechanical equal division rules have been criticized for failing to protect minor children’s possessory interest in their homes.

Government Expropriation of Homes

Government projects often involve the expropriation of homes. The extension of a roadway may require some homes to be taken and demolished. Blighted homes might be taken as part of a slum-clearance program. An entire neighborhood might be demolished
as part of an urban renewal project. Regardless of the specific context, the expropriation of a home presents a clear conflict between the interests of the government (ideally representing the interests of the larger community) and the homeowner.

The particular protections offered to homeowners vary widely between legal systems. They may also vary widely in particular within legal systems depending on the particular context. In many legal systems, homeowners are not given any more protection from expropriation than any other sort of property owner. Legal systems may, however, provide additional procedural or substantive protections for homeowners facing the expropriation of their homes. For example, a legal system might permit a government entity to take a home only on a showing that there is no other reasonable alternative way to meet the government’s objective. A legal system could also require extra compensation for the expropriation of a home, or require that homeowners be given financial relocation assistance. Strategies that lead to higher compensation rates for homes as compared to other types of property indirectly protect homeowner’s possessory interest by making homes comparatively more expensive to expropriate.

**Theoretical Dimensions: Should Possession of Homes Be Given Special Protection?**

Legal systems tend to give more protection to possessory interests in homes than they do possessory interests in other types of property. This phenomenon seems to reflect a widely-held belief that people have special relationships with their homes, and that these special relationships are worth protecting.

This belief is reflected in the personhood theory of property developed by Margaret Jane Radin, which has been particularly influential on academic commentary on issues related to the home. Radin’s theory is based on the intuition that people become personally connected with certain types of property – for example, family photographs, wedding rings, heirlooms, and homes. Building on this intuition, Radin divided property into two categories, personal and fungible. Personal property in this context is property that has more than market value to its owner. Fungible property, in contrast, has only market value to its owner. Radin’s best illustration of the distinction involves a wedding ring. A jeweler should not care whether she has a particular wedding ring, another ring of the same value, or the cash equivalent. A wedding ring is therefore fungible property for a jeweler. Once a wedding ring has been exchanged with a spouse, however, we would expect that its owner would not be willing to freely exchange the ring for mere market value. A wedding ring is therefore personal property to a recipient spouse. Radin argued that legal systems should favor personal interests over fungible interests. In the housing context, Radin therefore argued that the personal interest of a homeowner should be favored over the fungible interest of a creditor, and that the personal interest of a renter should be favored over the fungible interests of a landlord.

Radin’s position is expressly based on an intuitive notion about people’s relationship with their homes. Legal rules giving special protection to homes are likely based on similar widely-held intuitions about people’s personal interests in their homes. Intuitions, however, can be wrong or misleading, and therefore form a risky basis for legal policy. There is some support in the literature on the psychology of home that supports, at least
to a degree, the idea that people become personally connected with their homes. Many open questions remain, however, as to strength and nature of this personal connection, and as to the degree to which legal systems should favor this personal connection against legitimate competing interests.

**Is There a Personal Connection to the Home?**

Critics of Radin’s theoretical position, or of particular legal doctrines giving special protection to possession of a home, tend to question the strength and nature of the personal connection to the home. Some legal scholars have expressed doubts about the very existence of a personal connection to the home, and have broadly questioned the justification of special legal protection of the home.

Psychological studies do show that homes can be important sources of psychological feeling of rootedness, belonging, continuity, stability and permanence. All of these feelings would be undermined if a person is dispossessed from a home. There are reasons to think, however, that unexamined intuitions might overstate the strength of the personal connection to the home. As suggested above in the context of the category of legal protections that fall under the umbrella of the castle doctrine, homes are important when issues of freedom, privacy, and security are at stake. Unsurprisingly, the psychological literature suggests that homes are important sources of feelings of freedom, privacy, and safety. These feelings, however, may not be tied to a particular home in a particular place. If a person moves to a new home of roughly equal quality to her old home, the new home should provide feelings of freedom, privacy, and safety similar to those provided by the old home. If a person’s general feelings about her home mix both feelings that are tied to possession and feelings that are movable, then unexamined intuition will tend to overstate the psychological connection to a particular home in a particular place.

On this and other issues, the existing literature on the psychology of home is not sufficiently robust and fine-grained to lend strong support to particular legal positions. Presuming that people do have some personal connection to their home, it is unclear whether this connection is based on a tie between the person and the physical home or is based on other factors such as social networks. A home locates a person physically within a community, and it may be that it is relationships with other people nearby, rather than the physical home itself, that leads to important psychological feelings about the home. It also may be that both the physical home and personal relationships are important. Whatever the answer, resolution of this issue is important in resolving contested legal issues relating to the possession of homes. For example, if social networks are more important than physical space, then displacement of a person from a home in a neighborhood should not have a major negative impact on that person if she can get another home in the same neighborhood, and thereby maintain her social networks. If, on the other hand, the physical home is important, then displacement would have a negative impact on the person even if another nearby home is available to her.

**Should Legal Systems Give Special Protection to Possession of a Home?**
Legal rules that protect the possession of homes are not costless. In any given scenario, legitimate competing interests typically are at stake. These competing interests may be broader than they initially appear. When homeowners face the loss of a home because of loan defaults, the immediate competing interests are those of the lenders. If lenders are unable to reach homes to satisfy the debts, however, the costs of borrowing for the general public are likely to increase. Similarly, if restrictions on the eviction of renters are made too strong, the overall costs of renting are likely to increase. If residents are given too much power to resist the expropriation of their homes by the government, the legitimate goals of the government (presumably acting for the public benefit) will suffer.

The desirability of special legal protections for possession of the home therefore turns on a balance between the strength of the personal possessory interest in the home and the strength of competing interests. Some legal rules protecting home possession come at a relatively modest price. For example, a rule giving a renter tenure rights in a home so long as the renter is willing to pay market value in rent would protect possession while having a minimal impact on the landlord’s interests. Similarly, rules that require governments to take additional procedural steps before they expropriate a home may provide important protection at a minimal cost.

Other rules, however, may impose too high a cost for the benefit they convey. Homestead laws that provide absolute protection of a home from creditors may be an example. Consider a person who has been a victim of fraudulent conduct by a homeowner, and who as a result has obtained a court judgment for money damages against the homeowner. The strongest homestead laws would prevent this creditor from using the value of the home to satisfy the debt. Providing some protection for homeowners against creditors may have merit in many contexts. Giving wrongdoers absolute protection against innocent creditors simply because the asset involved is a home, however, may be excessive, even when the interests of innocent members of the homeowner’s family are taken into account.

**Further Reading and Resources**


