Reconceptualising Homelessness Legislation in England

Keywords: *homelessness; need; risk; social control*

ABSTRACT

This article has two central aims. First, it problematises the long-held consensus that homelessness legislation in England operates according to the concept of *need* and, secondly, it advances an alternative reading and reconceptualisation of homelessness legislation according to the notion of *risk*. Through examination of the two major sources of current homelessness law, the Housing Act 1996 and the recently-enacted Homelessness Reduction Act 2017, this article locates and explores how risk is operationalised, the precise conceptions of risk engaged and the implications and potentiality of this risk reconceptualisation. In so doing, it is argued that risk exhibits a stronger explanatory power of the current homelessness legislation than need and presents opportunities for how we understand local authority decision-making and the shape of future reform.

INTRODUCTION

'Society has come to understand itself and its problems in terms of the principles of the technologies of risk.'[1]

There is a pervasive and long-standing consensus in government, amongst politicians and policy-makers that housing in England[2] is allocated to the homeless according to an ideology of need; in other words, that those most 'in need' of housing are those who receive it. Yet, as Cowan et al have observed, this widely-acknowledged rationale of need, whilst almost universally promulgated,[3] is conceptually empty and has largely gone unchallenged.[4] This

[1] F. Ewald 'Norms, Discipline, and the Law' 30 *Law and the Order of Culture*, 138, 147.

[2] Homelessness is a devolved issue in the UK. This article is limited to coverage of the issue of need and risk as they operate in homelessness legislation in England.

[3] Chiefly in political and academic circles: see D. Cowan., R. Gilroy., C. Pantazis, 'Risking Housing Need' (1999) 26(4) *Journal of Law & Society* 403. As to the *need* consensus across political divides, see: M. Carter and N. Ginsburg, 'New government housing policies' (1994) 41 *Critical Social Policy* 100; I. Loveland, 'Cathy sod off! The end of the homelessness legislation' (1994) 16 *Journal of Social Welfare and Family Law* 367.

[4] There are two principal exceptions to this: Cowan et al have called for rethinking of housing law according to a concept of risk, n 2 above. Fitzpatrick & Stephens have, separately, sought to apply a utility maximising framework to housing allocations, recommending housing be

article takes up that task in critiquing and challenging the status of need as the central ordering principle in homeless provision and advances a reconceptualisation, a re-reading of homelessness legislation according to the ordering theme of risk. It does so, not through an examination of housing policy, but through an exposition of the two major pieces of legislation governing homelessness law in England today: the Housing Act 1996 and the recently-enacted Homelessness Reduction Act 2017. The article proceeds in four parts. A first part briefly problematises the concept of housing need and, in so doing, exposes the concept of need as contested, indeterminate and flawed. A second part introduces the alternative, ordering theme of risk by unpacking our understanding and definition of the word risk and highlighting the prevalence of risk analyses across social sciences literature. A third part explores how the Housing Act 1996 and the Homelessness Reduction Act 2017 can be reconceptualised as risk-based systems and how risk provides a framework for understanding our homelessness law. This involves locating the operationalization of risk within the legislation, the precise conceptions of risk engaged and reflecting on how risk exhibits a stronger and more productive explanatory power of how homelessness legislation functions in practice than the concept of need.

In a final section, this article examines the implications of the risk-based framework advocated and reflects on the wider ramifications of a risk reconceptualisation. The argument advanced is not that need has no role or value whatsoever in homelessness provision but

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allocated according to those in 'greatest long-term housing deprivation,' on which see: S. Fitzpatrick., M. Stephens, 'Homelessness, Need and Desert in the Allocation of Council Housing' 14(4) *Housing Studies* 413.

rather that a reconceptualisation according to risk as an alternative (but not substitutive) rationale offers novel insights into the workings of the legislation and unlocks possibilities for future reform. Risk as an analytical frame is therefore proposed not in order to eradicate the ideology of need nor to suggest that need is entirely redundant but as a novel way of 'seeing' and reading the legislation. In so doing, this article identifies two contrasting conceptions of risk operating in our law: first, a negative, exclusionary notion of risk employed as a technique of gate-keeping and resource rationing including 'modes of power' which can be understood as situated within the wider social control literature,[5] and, secondly, a positive, inclusionary and more holistic conception of risk which seeks to mitigate the predicted, future harms of homelessness. It is contended that risk in this second, positive and inclusive conception can be a progressive and positive tool to shape future reform. To this end, the case is made for reframing homelessness law according to a 'risk-embracing' rather than a 'risk-averse' conception as a vehicle for delivering more dynamic and person-centred homelessness legislation.

PROBLEMATISING THE CONCEPT OF *NEED* IN HOMELESSNESS LEGISLATION

[5] On social control see generally: J. Chriss, *Social Control: An Introduction* (Cambridge: Polity Press, 2007); H. Dean, *Social Security and Social Control* (London: Routledge, 1991).

The concept of need has long played a significant role in the provision, distribution as well as in the academic theorising and critique of housing entitlement in England[6] yet little searching examination of the concept has been afforded as it operates in homelessness legislation.[7] As Cowan et al have observed:

> '*It has almost been a mantra in housing circles that social housing is allocated according to 'need' … it has been regarded as an absolute given, indeed a necessity, in housing welfare terms and one accepted across political divides.'*[8]

In this section, the concept of need is problematised and exposed as contested, indeterminate and conceptually hollow thus challenging the apparent settled status of the ideology of need as the foundation of current homelessness legislation.[9]

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[6] See J. Bradshaw, 'A taxonomy of social need', in G. Maclachlan (ed.), *Problems and progress in medical care* (Oxford: Oxford University Press, 1972).

[7] There are 3 key exceptions to this: Cowan et al, n 3 above, consider *risk* in housing law context chiefly in relation to duties owed to sex offenders; Fitzpatrick & Stephens, n 3 above; see also Perri 6 'Housing Policy in the Risk Archipelago: Toward Anticipatory and Holistic Government' (1998) 13(3) *Housing Studies* 347.

[8] Cowan et al, n 3 above, at 402.

[9] See consensus on the Housing Act 1996 as critiqued by D. Cowan, 'Reforming the homelessness legislation' (1998) 18 *Critical Social Policy* 435; M. Carter and N. Ginsburg, 'New government housing policies' (1994) 41 *Critical Social Policy* 100; I. Loveland, 'Cathy sod off! The end of the homelessness legislation' (1994) 16 *J. of Social Welfare and Family Law* 367.

As Spicker has explored, to assert a need is to assert a claim to receive a service.[10] In the homelessness context, need thus refers to a claim to be rehoused or to receive housing support. The concept imports a connotation of necessity; and a rhetorically attractive sense that citizens' reasonable (housing) expectations will be met. As Spicker neatly captures, 'the political pressure for equity [in housing allocation] creates a demand for consistency, which in turn creates an emphasis on the notion of apparent objective, measurable need.'[11] Need as the basis for entitlement to housing for the homeless has its origins in the development of the welfare state in Britain and, in particular since the 1970s, has taken centre stage as the uneasy welfare consensus that emerged in the post-war period dissolved and the universalist approach to welfare gave way to a growing safety-net approach to entitlement. This is well-illustrated by the enactment of the Housing (Homeless Persons) Act 1977[12] which heralded the first recognizable, ostensibly needs-based framework for housing. The 1977 Act, for the first time, made local authorities responsible for accommodating particular groups of homeless people and offered the first statutory definition of homelessness in English law. The Act, introduced through a Private Members' Bill and joining the statute book only after

[10] P. Spicker, 'Needs as claims' (1993) 27(1) *Social Policy and Administration* 7.

[11] P. Spicker, 'Concepts of need in housing allocation,' (1987) 15(1) *Policy and Politics*, 17, at 25.

[12] For a critique of the 1977 Act, see amongst others R. De Friend, 'The Housing (Homeless Persons) Act 1977' (1978) 41(2) *Modern Law Review*, 173-183; J. N. J. Crowson, 'Revisiting the 1977 Housing (Homeless Persons) Act: Westminster, Whitehall and the Homelessness Lobby' (2013) 24 *Twentieth Century British History*, 424-447.

extensive and complex negotiations between government and local authorities, reflected the growing importance and role of the terminology of need as the route to housing entitlement through introduction of the 'priority need' categories. Only those individuals who could demonstrate a 'priority need' would receive housing: need was therefore expressly on the face of the legislation.[13] The passage of the Housing Act 1996 (which remains the key source of our homelessness law today and which retained the basic framework of the 1977 Act) further confirmed the broad political agreement that existed on legislating according to need. A government review in 1989 had underscored that homelessness legislation be targeted at 'people with a genuine urgent requirement for housing, who would expect to receive a high priority in any needs-based system of housing allocation,'[14] and affirmed, in a subsequent review in 1994, that reform was required to ensure accommodation was allocated according to 'genuine need' and 'real housing needs.'[15] Today, reference to and reliance on the language of need as the supposed ideological foundation of our law remains cemented in the policy discourse; demonstrating the continuing rhetorical potency of the rationale of need. The Government's 2018 Green Paper, *A New Deal for Social Housing* stated, for example, that,

[13] The 'priority need' categories might, alternatively, be construed not as need-based but a means of distinguishing the 'deserving' homeless from those 'undeserving.'

[14] Department of the Environment, *The Government's Review of the Homelessness* Legislation (London: Department of the Environment, 1989).

[15] Department of the Environment, *Access to Local Authority and Housing Association Tenancies* (London: Department of the Environment, 1994), at [2.4], [3.1].

'providing homes based on individual's needs,'[16] was the central principle guiding reforms to the sector. This was mirrored in Shelter's 2019 report *A Vision for Social Housing* which draws heavily on notions such as housing for 'people in the most need'[17] and highlighting the 'national picture of housing need.'[18]

Yet despite the development of elaborate theoretical analyses to delimit the concept of need across academic disciplines from medicine to education to adult social care (perhaps most famously in Bradshaw's 'taxonomy of social need' in the 1970s),[19] need has long been a contested and problematic notion; most notably for its indeterminate meaning and the political malleability and manipulability that the language of need provides. Significant criticism has come from varied quarters: as to the inability to classify the concept with any meaningful precision;[20] that the concept is so void of substance as to be impossible to

[16] Ministry of Housing, Communities & Local Government, *A New Deal for Social Housing* (2018) (CM9671), 5.

[17] Shelter, *Building for our future: a vision for social housing* (2019), 15.

[18] ibid at 37.

[19] See in particular: J. Bradshaw, 'A taxonomy of social need.' in McLachlan G (ed.) *Problems and progress in medical care* (NPHT/Open University Press, 1972); G. Smith, *Social need: policy, practice and research* (London: RKP, 1980); S. Baldwin, *Needs assessment and community care: clinical practice and policy making* (Butterworth-Heinemann: Oxford, 1998).L. W. Green & M. W. Kreuter, *Health promotion planning: an educational and environmental approach* (CA: Mayfield, Mountain View, 2nd edition, 1991).

[20] S. Clayton S., 'Social need revisited,' (1983) 12(2) *Journal of Social Policy* 215.

measure and employ;[21] and from feminist writers[22] and 'new-right' theorists[23] who regard need as deeply gendered and paternalistic.[24] One particular difficulty, exemplified in the government reviews in 1989 and 1994 of homelessness legislation and an issue that endures today, is the assumption that need can be understood as a single, agreed, definable, objective 'test.' This assumption is open to serious question. Specifically in the homelessness context, the representation of need as absolutist and coherent belies the complexity and multi-faceted nature of the homeless experience by suggesting erroneously that individuals are readily categorisable as either 'in need' or 'not in need.' Such binaries fail to take account of the diversity of homeless individuals' housing circumstances and chime disconcertingly with echoes of the historical distinction drawn between the 'deserving' and 'undeserving' poor in the old English Poor Laws.[25]

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[21] A. A. Nevitt, 'Demand and need', in H. Heisler (ed.), *Foundations of social* administration (London: Macmillan, 1977)

[22] N. Fraser, 'Women, Welfare and the Politics of Need Interpretation' in P. Lassman (ed.), *Politics and Social Theory* (London: Routledge, 1989).

[23] N. Barry, *Welfare* (Buckingham: Open University Press, 1990).

[24] Feminist activists have long and successfully campaigned for the 'priority need' categories under current homelessness legislation to be expanded to include those who are vulnerable as a result of fleeing violence or threats of violence. This change was ultimately introduced under The Homelessness (Priority Need for Accommodation) (England) Order 2002.

[25] See amongst others S. Hindle, 'Civility, Honesty and the Identification of the Deserving Poor in Seventeenth-century England,' in H. French H., J. Barry (eds) *Identity and Agency in England, 1500–1800* (Palgrave Macmillan, London, 2004).

Beyond definitional indeterminacy, need is routinely engaged (both within and without the legal sphere) as a tool not in fact of meeting or correcting insufficiencies, wants or demands (e.g. for housing), but as a framework for delivering and legitimising financial or resource rationing in times of public finance constriction.[26] As Spicker explains, 'the ideology [of need] is based less in the implementation of common [welfare] principles than the constraints of practice.'[27] Need is deployed to manage scarce resources and to rationalise resource contraction; to develop 'rationing filters' and gatekeeping processes rather than in the satisfaction of genuine housing need as one might commonly understand it. As Fitzpatrick and Stephens highlight, housing the homeless has always been more concerned with gatekeeping and housing stock management rather than alleviating wants or satisfying need.[28]

When housing supply is inadequate to meet the well-documented, increasing demand, it becomes difficult to argue that housing is, in any meaningful sense, allocated according to

[26] As Bramley et al note, the concept of housing need 'ultimately rests on value and policy judgments … weighed against available resources: A. Holmans, *Housing Demand and Need in England 1996-2016* (London: Town and Country Planning Association/National Housing Federation, 2001).

[27] P. Spicker, 'Concepts of need in housing allocation,' (1987) 15(1) *Policy and Politics*, 17

[28] See S. Fitzpatrick., M. Stephens, 'Homelessness, Need and Desert in the Allocation of Council Housing' 14(4) *Housing Studies* 413.

need.[29] It is this disparity between supply and demand that led Loveland to suggest that homelessness legislation, 'could plausibly be portrayed as an exercise in legislative deceit.'[30] Yet need is politically expedient for, as Cowan et al indicate, the 'conveniently indeterminate meaning'[31] it betrays 'has enabled successive governments to pay lip service to welfarist principle whilst … providing the necessary degree of latitude to ignore whenever [governments] deem necessary.'[32] The concept of need, while both politically convenient and definitionally pliable, has never offered a wholly satisfactory account of homelessness entitlement in England: need alone does not and never has provided an exhaustive explanation of the 1977 nor the 1996 homelessness legislation. Need can be seen to stretch and bend to meet various policy and political ends sought to be achieved and might even be said to carry a moralistic tone.[33] In the sections that follow, an alternative reading of homelessness law according to risk is advocated as a more convincing, productive and stable basis for explaining and reconceptualising current homelessness legislation. This is not to

[29] See discussions of need and 'demand' undertaken by economists including A. Williams, (1974), 'Need' as a demand concept,' in A. J. Culyer (ed.), *Economic problems and social goals* (Oxford: Martin Robertson, 1974); A. J. Culyer, *Need and the National Health Service*, (Oxford: Martin Robertson, 1976).

[30] I. Loveland, *Housing Homeless Persons* (London: OUP, 1995), 331

[31] Cowan et al, n 3 above, at 404.

[32] ibid.

[33] Consider media representation of asylum seekers as 'queue jumpers' in housing; also I. Loveland, 'Cathy sod off! The end of the homelessness legislation' (1994) 16 *J. of Social Welfare and Family Law* 367, 340.

argue that need plays no role whatever in the provision of housing to the homeless (quite plainly it does so even if merely rhetorically) but rather that the concept of risk exhibits a stronger explanatory power of our current legislation than need alone. As Nelken has argued, legislation is a 'managed activity'[34] and rarely a univocal statement of a single prevailing ideology. The next part therefore briefly unpacks the concept of risk before the subsequent sections explore how risk is operationalised in current homelessness legislation and the implications of this reconceptualisation.

THE CONCEPT OF *RISK*: DEFINITION, POTENTIALITY AND PREVALENCE IN SOCIAL SCIENCE LITERATURE

The Covid-19 pandemic has increased our collective awareness of societal risks from risks to health to employment precarity. Crucially, the pandemic has also shone a searching spotlight on how the homeless are protected, 'governed' and provided for under existing homelessness law. As the homelessness crisis in England endures and the pandemic stimulates society at large to revisit and reimagine how we might tackle contemporary issues and crises, academics are looking anew at enduring legal dilemmas and, in the homelessness context in particular, considering fresh ways of conceptualising and resolving long-standing questions about how homelessness law is framed. The call for new thinking sounds across disciplines from law to sociology and economics; all of which are increasingly seeking novel ways of seeing, interpreting and conceptualising the housing and homelessness crisis. The

[34] D. Nelken, 'Is There a Crisis in Law and Legal Ideology' (1982) 9(2) *Journal of Law and Society* Vol. 9, No. 2, 177, 184.

results are varied and fascinating from Marcuse and Madden,[35] who urge a Marxist approach and, drawing on the work of Henri LeFebvre into 'a right to the city,' argue that housing should be recognised as a fundamental human right; to Fineman's vulnerability theory.[36] This article contributes to this wider theoretical undertaking by exploring how a framework of risk might be deployed to better inform and enhance our understanding of homelessness law and policy.

The concept of risk is not new. What is new, as Garland has observed, is the growing recognition that, 'modern societies are *risk*-managing societies'[37] and how in recent years, 'the study of risk has burst out from [its] traditional, technical confines and become a major topic in the social sciences and in cultural commentary.'[38] This is unsurprising as, 'risk is a thoroughly social, thoroughly cultural, thoroughly psychological phenomenon.'[39] There is broad agreement that risk is probabilistic: a 'probability statement' importing notions of prudence, of acting today to influence what may happen tomorrow. As Ericson and Doyle observe, risk is 'a calculating concept that brokers between fear and harm and spans fact and

[35] P. Marcuse., D. Madden, *In Defense of Housing: The Politics of Crisis* (London: Verso Books, 2016).

[36] M. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (Princeton: Princeton University Press, 2013).

[37] D. Garland 'The Rise of Risk' in R. V. Ericson, A. Doyle (eds.) *Risk and* Morality (2003, University of Toronto Press: Toronto), Chapter 3, 73).

[38] Ibid at 69.

[39] ibid.

value.'[40] Landmark risk analyses have been advanced across diverse social science disciplines including prominent work in the 1990s by Ewald,[41] Defert,[42] and Castel[43] in the fields of insurance and psychiatry. For all three, risk was presented as a 'technology of government', a means of analysing how social problems are viewed, 'imagined' and managed. Beck's seminal thesis characterising modern society as an anxious, cataclysmic, dystopian, 'catastrophic risk society,'[44] while open to much academic debate, underscores the potentiality and potency of risk analyses in the wider social science canon.[45] Risk is a technique through which events and individuals can be sorted, ordered and managed based on assessment of future harms. For Giddens, an influential risk scholar, an appreciation of modern risk environments leads to a greater awareness of the limits of expert systems and

[40] R. V. Ericson, A. Doyle (eds) *Risk and* Morality (2003, University of Toronto Press: Toronto), Introduction, 13).

[41] F. Ewald 'Norms, Discipline, and the Law' 30 *Law and the Order of Culture*, 138.

[42] D. Defert, '"Popular Life" and Insurance Technology' in G. Burchell; C. Gordon P. Miller (eds) *The Foucault Effect: Studies in Governmentality* (1991: Chicago: The University of Chicago Press), 211.

[43] R. Castel, 'From Dangerousness to Risk' in G. Burchell; C. Gordon P. Miller (eds) *The Foucault Effect: Studies in Governmentality* (1991: Chicago: The University of Chicago Press), 281.

[44] U. Beck *Risk Society, Towards a New Modernity* (London: Sage Publications, 1992).

[45] Beck's vision of a catastrophic risk society sits in conflict with other risk scholars who see the modern, audit society as monitoring, managing, minimizing risk or as Bernstein has described it 'the mastery of risk:' P. L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996, New York: John Wiley and Sons).

the need to challenge professional competences[46] and despite being an 'apparently simple notion', risk, 'unlocks some of the most basic characteristics of the world in which we now live.'[47] This article seeks to contribute to this growing literature through a re-reading and reconceptualisation of homelessness law according to risk. This involves locating how risk operates within current homelessness legislation and, crucially, pinpointing the precise conception of risk that it is argued is engaged. This is the task of the next section.

THE OPERATIONALISATION OF *RISK* IN CURRENT HOMELESSNESS LEGISLATION

Legal obligations to the homeless in England are, today, contained almost exclusively in the Housing Act 1996 Part VII[48] and in the Homelessness Reduction Act 2017. A full examination and rehearsal of the duties owed by local authorities to the homeless is beyond the scope of this article but, where appropriate, attention will be drawn to the principal obligations owed. Rather, this section does two things: first, it locates and explores how specific provisions of our homelessness law can be read as operating according to risk (and often directly counter to any notion of need), and secondly, it identifies the precise conception of risk engaged. What emerges is that risk is engaged in two contrasting ways: first, in certain statutory measures, according to a negative, 'risk-averse' and exclusionary conception, yet, in other statutory provisions, in what is described here as a positive, inclusionary and 'risk-embracing' conception.

[46] A. Giddens, 'Risk and responsibility' (1999) 62 MLR 1.

[47] A. Giddens, *The BBC Reith Lectures 1999 Lecture 2*: Risk.

[48] As amended by the Homelessness Act 2002 and Localism Act 2011.

(i) The Housing Act 1996

The ground-breaking Housing (Homeless Persons) Act 1977[49] made local authorities responsible for the first time for the long-term housing of particular groups of homeless people and offered the first statutory definition of homelessness in English and Welsh law. The 1977 Act defined certain groups considered as having 'priority need' and therefore owed a statutory duty to be rehoused by local authorities. The homelessness duties of the 1977 Act were later consolidated into the Housing Act 1996 which, in key respects, maintained the essential framework of the 1977 Act including the definition of 'priority need' which the 1996 Act clarified. Today, Part VII of the Housing 1996 Act[50] as amended[51] remains the key source of homelessness law in England and a homeless applicant will be owed the so-called 'main housing duty' if the applicant is: (i) eligible for assistance;[52] (ii) in 'priority need';[53] (iii) not

[49] Accounts of the significance and originality of the 1977 Act are contested: N. J. Crowson, 'Revisiting the 1977 Housing (Homeless Persons) Act: Westminster, Whitehall, and the Homelessness Lobby' (2012) 24(3) *Twentieth Century British History* 424.

[50] On which see generally D. Cowan (ed.) *The Housing Act 1996 – A Practical Guide* (Bristol: Jordans, 1996).

[51] The Housing Act 1996 has subsequently been amended by the Homelessness Act 2002, Localism Act 2011, Housing & Planning Act 2016 and the Homelessness Reduction Act 2017.

[52] Eligibility is a question of immigration status: see Housing Act 1996 ss 185, 186.

[53] Housing Act 1996 s189.

intentionally[54] homeless;[55] and (iv) can demonstrate a local connection to the local authority area.[56] 'Priority need' is defined in s189 of the 1996 Act as including a pregnant woman, a person with dependent children, someone vulnerable as a result of old age, mental illness, handicap or physical disability or other special reason; those homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.[57] On one view, the survival of the fundamental framework of the 1977 Act into the provisions of the 1996 Act may provide evidence of the continued potency of need as the ordering theme of homelessness entitlement. However, whilst need continues to occupy an important role both in political and policy rhetoric, it is argued that this fails to engage with a key driving force of the legislation; namely risk. The essential framework of the 1996 Act can, it is argued, be understood and construed as a risk-based, risk management system. This is exemplified by the approach taken: (1) to the notion of intentional homelessness; (2) to how local authorities frame their housing allocation schemes; (3) to the requirement for an applicant to demonstrate a local connection and (4) to notions of 'vulnerability' for the purposes of the priority need categories. Each will be considered in turn.

Risk is perhaps most clearly operationalised in the notion of 'intentional homelessness' in the 1996 legislation. Intentionality was first introduced in the Housing (Homeless Persons) Act 1977 after a protracted yet ultimately successful lobbying effort from the Association of

[54] Housing Act 1996 s191.

[55] Housing Act 1996 s175.

[56] Housing Act 1996 s199.

[57] Housing Act 1996 s189(1).

Councils and Conservative MPs who wished to deter self-induced homelessness and discourage queue jumping for permanent rehousing.[58] Intentionality survived from the 1977 Act into the 1996 legislation and only those applicants that are not intentionally homeless will be owed the main housing duty. Under s191(1) of the 1996 Act, 'a person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.' The determination of intentionality is one to be made by the local authority[59] and, it is argued here, amounts to a risk assessment; a determination which involves a consideration of how the homeless applicant weighed up the risks they faced which ultimately led to their homelessness. Put differently, the question of intentionality is a determination of how the homeless applicant itself assessed, balanced and responded to their own housing risk. Intentional homelessness cannot be explained as operating according to any concept of need.

A wealth of case law examples exists in which applicants who adopt 'riskier' behaviours were deemed intentionally homeless.[60] As the case law demonstrates, the decisive factor is an

[58] See R. De Friend, 'The Housing (Homeless Persons) Act 1977' (1978) 41(2) *Modern Law Review*, 173, at 182.

[59] Confirmed in Ministry of Housing, Communities & Local Government, *Homelessness Code of Guidance for Local Authorities* (2018), at [9.5].

[60] Cowan et al, n 3 above, cite example of a *R v Hounslow LBC ex parte R* (1997) 29 H.L.R. 939 where the court concluded that a convicted sex offender's homelessness was intentional on the basis that the loss of accommodation was the probable result of the commission of

assessment by the authority of the risks and, more pointedly, the 'riskiness' of the actions taken by the applicant which led to their loss of housing. In *Denton v Southwark LBC*,[61] the Court of Appeal upheld the decision of a local authority that a 20 year old applicant was intentionally homeless after he had been excluded from his mother's home as a result of his poor behaviour. The 20 year old had not heeded warnings to cease causing a nuisance and stop his drug use. The Court of Appeal held that the mother's 'house rules' were reasonable and the authority was entitled to find the cause of the applicant's homelessness was his own poor behaviour which amounted to a deliberate act under s191.[62] The central question was how 'risky' the behaviour of the homeless applicant had been. Where the probability of risky behaviour occurring or re-occurring is greater than not, an applicant will be held to be intentionally homeless thereby slipping outside the net of homelessness entitlement and protection. In so doing, local authorities are, at the same time, seeking to avoid the risk to their own housing stock and risk to their housing management resources of housing individuals displaying undesirable behaviour.

Intentionality construed through this framework of risk has strong echoes with historical distinctions of the deserving and undeserving poor. Whilst there are grounds to argue that intentionality was introduced as a means of rationing state resources, it is contended here

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further offences; on which see: J. Fionda and D. Cowan, '"He asked for it": paedophiles and the homelessness legislation' (1998) 10 *Child and Family Law Quarterly* 321.

[61] *Denton v Southwark LBC* [2007] EWCA Civ 623; [2007] 7 WLUK 73.

[62] *Alfonso Da Trindade v Hackney LBC* provides another recent example of risky behaviour leading to a determination of intentionality.

that intentionality is better understood as a risk management tool; a device designed to restrict entitlement to housing for those engaged in risky or objectionable behaviour rather than founded on a needs evaluation exercise. Indeed as De Friend wrote in 1978 of the 1977 Act in this very journal, 'the intentions and behaviour of a homeless person rather than his and his family's 'objective' housing needs are now the crucial determinant of the services which he may receive.'[63]

Risk can also be identified as operationalised in how local authorities frame their allocation schemes: that is, the policies they use to determine who is selected to receive housing. In view of changes introduced by the Localism Act 2011,[64] local authorities when framing their allocations schemes are permitted to specify criteria and categories of applicant who are regarded as non-qualifying for rehousing. Work conducted by Bevan and Cowan[65] has revealed how anti-social behaviour and other 'unacceptable behaviour' (as defined by the authority) including a history of rent arrears are the principal non-qualifying conditions adopted by the majority of local authorities in England.[66] This is another example of how 'risky' individuals – those deemed to engage in 'risky' behaviours – are expressly excluded

[63] R. De Friend, 'The Housing (Homeless Persons) Act 1977' (1978) 41(2) *Modern Law Review*, 173, at 183.

[64] On which, see generally discussion of the Localism Act 2011: C. Bevan, 'The Hollow Housing Law Revolution' (2014) 77(6) MLR 964.

[65] C. Bevan., D. Cowan, 'Uses of macro social theory: a social housing case study' (2016) 79(1) MLR 76.

[66] ibid.

from housing support. Such individuals are designated as 'non-qualifying', joining what Bevan and Cowan have described as a growing population of 'unhouseables'. The design of housing allocation schemes can, therefore, be understood as a housing risk management exercise designed according to broader conceptions of risk.

In a different context, the requirement that a homeless applicant be able to point to a local connection[67] with the authority area to which they are applying before becoming entitled to the main housing duty, offers further support to the thesis that need alone cannot explain the 1996 legislation. The requirement for a local connection has little if anything to do with need but instead is characteristic of the gatekeeping inherent in homelessness law in England. Local connection is no more than a 'rationing filter' employed to reduce and strike out the numbers of applicants seeking housing support in a context of restrained resources and limited housing supply. Moreover, the power of one authority to refer a homeless applicant to another authority area which the applicant does enjoy such a connection can be seen as permitting one authority to shift responsibility for housing that homeless applicant onto another local authority and its housing stock.[68]

Finally, it is argued that the 'priority need' categories under the 1996 Act can be understood as operating according to a rationale of risk. We see this reflected in the most contentious and disputed aspect of 'priority need', namely, the notion of 'vulnerability' that sits at the

[67] Housing Act 1996 s199 as amended by Homelessness Reduction Act 2017 s8.

[68] The authority to which the homeless applicant initially applied retains any interim duty to accommodate until the new authority accepts it owes a duty: Housing Act 1996 s199A.

heart of s189(1)(c) of the 1996 Act. In the absence of a statutory definition of vulnerability, it has been left to the courts to grapple with and make sense of the concept and it is here that risk is engaged. The Supreme Court in *Hotak v Southward LBC*,[69] held that vulnerability involved an exercise in relativity, hence a legal comparator was necessary. The test of vulnerability is not, said the court, as had previously been thought, a comparison with an 'ordinary homeless person'[70] but 'an ordinary homeless person if made homeless.' Lord Neuberger went further noting that 'vulnerable' connoted 'significantly more vulnerable than ordinarily vulnerable'.[71] The Court of Appeal in *Panyiotou v Waltham Forest LBC*[72] confirmed that, 'significantly more vulnerable' was to be interpreted on a qualitative rather than quantitative basis by asking if the applicant would, if made homeless, when compared to an ordinary homeless person, suffer or be at risk of harm or detriment in a significant way taking account of the actuality and qualitative characteristics of the applicant's situation rather than

[69] *Hotak v Southwark LBC* [2015] UKSC 30; [2016] A.C. 811 on which generally see I. Loveland 'Reforming the homelessness legislation? Exploring the constitutional and administrative legitimacy of judicial law-making,' (2018) *Public Law* 299; J. Meers, **'**Murky waters: the ongoing evolution of vulnerability under section 189 of the Housing Act 1996' 21(4) *Journal of Housing Law* 76.

[70] See the long-standing 'test' for vulnerability as laid down by the Court of Appeal in *R v Camden ex parte Pereira* [1998] 5 WLUK 359; (1999) 31 H.L.R. 317.

[71] *Hotak*, n 67 above, at [53] per Lord Neuberger.

[72] *Panyiotou v Waltham Forest LBC* [2017] EWCA Civ 1624; [2018] Q.B. 1232 on which see N. Madge, 'Failing the homeless?' (2018) 21(6) *Journal of Housing Law* 119.

looking quantitatively for 'more harm plus.'[73] A determination of 'vulnerability' and of priority need is, thus, as the Supreme Court has confirmed, a comparative exercise founded on a balancing of risk; a determination as to the comparative, relative risks of the impacts of homelessness on an applicant vis-à-vis an ordinary person if made homeless. To the extent that need plays any role in this exercise, it is relevant only in so far as it feeds into this broader assessment of risks and harms. Put differently, an applicant will be accepted as 'vulnerable' if they are deemed to be exposed to significant risk as a result of their homelessness. This connection between vulnerability and risk is made unambiguous in the Code of Guidance to which local authorities are required to have regard when making housing and homelessness decisions. In particular, as concerns 16 and 17 year olds, the Code notes: 'a young person who is homeless without adequate financial resources to live independently may be at risk of abuse or exploitation [or other harm].'[74] This follows earlier codes of guidance which had equally made express the clear link between vulnerability and risk:

> [A] young person on the streets without adequate financial resources to live independently may be at *risk* of abuse or prostitution. The Secretary of State considers that homeless 16 & 17 year olds who have no back up support are likely to be at *risk*

[73] Approach confirmed by Court of Appeal in *Rother DC v Freeman-Loach* [2018] EWCA Civ 368; [2019] P.T.S.R. 61.

[74] Ministry of Housing, Communities & Local Government, *Homelessness Code of Guidance for Local Authorities* (2018), at [8.41].

> as a result of their age and circumstances and he would normally expect authorities to find that such applicants are vulnerable.[75]

The precise conception of risk engaged in the 1996 Act differs across the distinct statutory measures of the legislation. In relation to intentional homelessness, the ability of authorities to frame allocation schemes by designating 'non-qualifying' groups and the requirement for local connection, risk is engaged as an exclusionary device. These measures are 'risk-averse', by which is meant that risk is engaged as means of resource rationing. According to this conception, the 1996 Act constructs risk groups or 'risk pools' according to defined risk factors. Risk here therefore operates negatively as a technique of 'category exclusion' in that those regarded as risk groups (for example, the intentionally homeless), evincing risky behaviours (and so non-qualifying under an allocation scheme) or lack a local connection find themselves excluded from homelessness entitlement. Risk is thus operationalised as a means of determining (non-)qualification and selection for homelessness provision on the basis of the risks (understood negatively) that particular individuals pose both to the management of social housing and local authority housing stock but also to the safety of the wider community. This resonates with the work conducted on risk and criminal justice by Feeley

[75] Department of the Environment, Transport and the Regions*, Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness (Draft)* (1999) at [12.15].

and Simon[76] and O'Malley[77] who emphasise that the effect of a risk-based system is to treat individuals as members of defined 'risk categories.' Just as in the field of insurance where young age is used as a marker of the increased risk of an accident occurring thereby justifying higher insurance premiums, in the homelessness context, through intentionality and the framing of non-qualifying categories according to 'risky' behaviours we see just such 'risk categories' created which are central to determining who is entitled and who not to receive homelessness support.

However, in relation to the notion of vulnerability for the purposes of 'priority need,' a quite distinct approach to risk can be isolated. Here, the conception of risk engaged is what might usefully be termed 'risk-embracing' rather than 'risk-averse.' A vulnerable person is someone deemed to be at significant risk of future harms, thus behoving assistance and thereby falling within the net of homelessness provision. Determinations of risk here are not premised on rationing resources or excluding certain groups from provision per se but, rather, risk is deployed contrastingly as a technique of 'category inclusion.' Risk therefore operates positively in relation to vulnerability and contrary to the negative operationalisation of risk

[76] See: M. M. Feeley., J. Simon (1992) 'The new penology: Notes on the emerging strategy of corrections and its implications' (1992) 30(4) *Criminology,* 449–74. M. M. Feeley, M.M. and J. Simon, 'Actuarial justice: The emerging new criminal law', in D. Nelkin (ed.) *The future of criminology* (1994, Thousand Oaks, CA: Sage Publications), 172-201.

[77] P. O'Malley, 'Risk, power and crime prevention' 21(3) *Economy and Society*, 252–75.

seen as regards intentionality, non-qualifying categories and local connection. We now turn to examine the operationalisation of risk in the HRA 17.

(ii) The Homelessness Reduction Act 2017

The Homelessness Reduction Act 2017[78] passed into law on the 40th anniversary of the enactment of the Housing (Homeless Persons) Act 1977[79] and promised to herald a culture change[80] in homelessness law. The 2017 Act, which like the 1977 Act began life as a Private Members' Bill,[81] and followed a significant review of existing homelessness law conducted by an independent panel of experts convened by housing charity Crisis in 2015, has been described as 'the most ambitious reform in decades.'[82] The 2017 Act amends Part VII of the Housing Act 1996 by expanding existing duties and 'bolting on' new legal duties on English local authorities so as to provide a sliding scale of assistance to those who are homeless or threatened with homelessness. In short, the 2017 Act requires local authorities to intervene at an earlier stage to prevent and relieve homelessness. There are five major changes at the

[78] On which see generally D. Cowan, 'Reducing homelessness or reordering the deckchairs?' (2019) 82(1) MLR 105; I. Loveland 'Reforming the homelessness legislation? Exploring the constitutional and administrative legitimacy of judicial law-making,' (2018) *Public Law* 299.

[79] The 2017 Act came into force on 2nd April 2018.

[80] 2nd Reading of the Bill, HC Deb vol 616 col 544 28 October 2016, Bob Blackman.

[81] Private Members' Bill of Bob Blackman Conservative MP for Harrow East; described as, 'the longest and most expensive Private Member's Bill to successfully become legislation.'

[82] Sajid Javid, then Communities Secretary, March 2018.

heart of the 2017 Act. First, a renewed emphasis on providing advice to anyone threatened with homelessness;[83] secondly, a new duty to assess all eligible applicants and work with them to agree a personalised 'housing plan';[84] thirdly, a new duty on local authorities to intervene to prevent homelessness (the 'prevention duty')[85] accompanied by an extended definition of 'threatened with homelessness' from 28 to 56 days;[86] fourthly, a duty on local authorities to relieve homelessness (the 'relief duty');[87] and fifthly, a new 'referral duty'[88] introducing an obligation on specified public authorities to refer individuals who are homeless or threatened with homelessness to a local authority housing department.

The various moving parts of the 2017 legislation coalesce around three connected impulses: (i) advice and assessment; (ii) prevention; and (iii) early intervention – all of which are targeted at seeking to avoid or mitigate the impacts of homelessness. The consequence of this, it is argued here, is that the 2017 Act can be meaningfully understood as operating according to a rationale of risk. The 2017 legislation operates, it is contended, not according to a concept of need but as a manifestly risk-based system. Risk as connoting a calculation of the probability of specified events taking place, a measure of future likelihood of a circumstance coming to pass, describes precisely the exercise undertaken under the new

[83] Homelessness Reduction Act 2017, s2 substituting Housing Act 1996 s179.

[84] Homelessness Reduction Act 2017, s3 inserting new Housing Act 1996 s189A.

[85] Homelessness Reduction Act 2017, s4 substituting Housing Act 1996 s195.

[86] Homelessness Reduction Act 2017, s1 amending Housing Act 1996 s175.

[87] Homelessness Reduction Act 2017, s5 inserting new Housing Act 1996 s185B.

[88] Homelessness Reduction Act 2017, s10 inserting new Housing Act 1996 s213B.

2017 Act's provisions which are designed to catch and defuse as early as possible the risks of homelessness. This process begins, under the 2017 legislation, with the duty on local authorities to undertake an assessment of all eligible applicants who are homeless or threatened with homelessness and agree a housing plan.[89] This determination is, in essence, a risk assessment or risk audit under which the local authority must identify present and future housing risks and threats including assessing the risk of future housing deprivation potentially leading to an applicant's homelessness. The authority must then, together with the applicant, devise a plan containing 'reasonable steps' that the authority and the applicant must take to secure stable accommodation and commit this to writing.[90] This personalised assessment and planning duty can again be conceptualised as risk-orientated; focused on locating, isolating and eschewing homelessness *risks* rather than meeting an applicant's wider housing *need*.

Equally, the 2017 Act's newly-broadened definition of 'threatened with homelessness' and the prevention duty under which local authorities are required to take, 'reasonable steps to help the applicant secure that accommodation does not cease to be available for the applicant's occupation,'[91] can be construed as operating according to an organising theme of risk. Under s1 of the 2017 Act,[92] an individual is regarded as 'threatened with homelessness'

[89] See S. Fitzpatrick et al, 'Crisis: Homelessness Monitor 2019' (May 2019); available at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf

[90] Homelessness Reduction Act 2017, s3 inserting Housing Act 1996 s189A.

[91] Homelessness Reduction Act 2017, s4 substituting Housing Act 1996 s195.

[92] Which amends the definition in s175 Housing Act 1996.

if they are likely to become homeless with 56 days or a valid eviction notice under s21 of the Housing Act 1988 has been served to bring a private sector tenancy to an end and the expiry of that notice is within 56 days.[93] The significance of this provision is that loss of a private sector tenancy remains the greatest single cause of homelessness in England. This extended definition of 'threatened homelessness' can thus be interpreted as a direct response to the empirical evidence on the causes and deleterious effects of homelessness. As regards the new prevention duty, this applies to those applicants who are eligible and threatened with homelessness irrespective of whether the applicant is intentionally homeless or in 'priority need.' For neither the expanded definition of threatened homelessness nor the new prevention duty can need be located as a central motivation of these provisions. Rather, the driving impulse is to identify at the earliest opportunity those at risk of homelessness, to intervene to assess those risks and to adopt risk-avoidance strategies and wider measures to evade or mitigate the probability of those risks materialising.

A final yet crucial aspect of the 2017 Act that warrants attention are the new sanctions provisions introduced. These sanctions apply where there is evidence of a homeless applicant's 'deliberate and unreasonable refusal to co-operate' with the local authority in its attempts to comply with the prevention and relief duties. Section 7 of the Act[94] provides that if, in the view of the local authority, there has been a deliberate and unreasonable failure to co-operate, including failure to follow any of the agreed 'reasonable steps' contained in a

[93] Homelessness Reduction Act 2017, s1 inserting new Housing Act 1996 s175(5).

[94] Homelessness Reduction Act 2017 s7 inserts new Housing Act 1996 ss193A, 193B and 193C.

personalised housing plan, the housing authority's duties can be brought to an end.[95] These punitive provisions are significant. Evidently, these sanctions do not respond to need and, in fact, will in most conceivable circumstances, actively work against any concept of need. Instead, this disciplinary, 'tough love'[96] provision is premised on notions of responsibilisation of the homeless and of advanced liberal notions of exhorting the homeless to conform to norms of acceptable behaviour which can be seen as set within wider considerations of social control and risk.[97] Homeless applicants who display 'risky' behaviours (in a similar vein to the earlier discussion as to intentional homelessness), will fall foul of the failure to co-operate sanction and thereby will be excluded from the protections of the 2017 Act. Calls from housing charities[98] for the sanction provisions to be circumscribed in the Code of Guidance and designated 'an action of last resort' to be used only in 'an exceptional or extreme situation' such as wilful or sustained refusal to co-operate, went unheeded. Indeed, in an

[95] The housing authority must serve a notice on the applicant explaining its decision and the right of applicants to request a review of the decision under Housing Act 1996 s202(1).

[96] Described as such by Bob Blackman MP who introduced the Private Members' Bill: Public Bill Committee, 6th Sitting col 141 18 January 2017.

[97] For a discussion of the relationship between homelessness, responsibilisation and social control, see amongst others: J. Clarke, 'New Labour's citizens: Activated, empowered, responsibilised, abandoned? 25(4) *Critical Social Policy*, 25(4), 447; S. Johnsen, S. Fitzpatrick., B. Watts, 'Homelessness and social control: a typology,' (2018) 33(7) *Housing Studies*, 1106.

[98] See, for example, Shelter, 'Consultation response: Department for Communities and Local Government consultation on Draft Homelessness Code of Guidance for Local Authorities' Executive Summary 2017, 8.

earlier Draft Code of Guidance it was even suggested that 'prioritis[ing] attending a Jobcentre or medical appointment, or fulfilling a caring responsibility,'[99] would be an example of a homeless applicant's failure of co-operation.[100]

Just as with the 1996 legislation, again under the 2017 Act, the precise conception of risk engaged operates differently across distinct statutory measures of the legislation. In relation to the sanction provisions under s7, risk is deployed as a punitive means for excluding from homelessness entitlement those displaying objectionable or 'risky' behaviours. Risk here is again engaged (as so in the notion of intentional homelessness) negatively as a technique of 'category exclusion' which locates and removes 'risk groups' from homelessness provision according to notions of non-cooperation and un-deservingness.

Outside the sanctions provisions, however, the conception of risk engaged in the 2017 Act is positive in effect, protective and inclusionary; flowing from the essentially preventive motive at the heart of the legislation. Thus, as seen in relation to vulnerability under the 1996 Act, the conception of risk engaged in the 2017's provisions reflects a 'risk-embracing' rather than a 'risk-averse' understanding of risk: from the broadened definition of 'threatened with homelessness', the initial homelessness assessment, the development of personalised housing plans to the prevention and relief duties. An individual assessed and categorised as being at risk of homelessness under the 2017 statute is offered support, the opportunity to

[99] Department of Communities & Local Communities, Draft Code of Guidance, October 2017, at [14.51(d)]; this was subsequently reversed in the final version of the Code.

[100] This form of words was removed from the final version of the Code.

agree reasonable steps to minimise the likelihood of deprivation of housing and is owed housing duties by their local authority. A designation of risk, in this context, leads to greater entitlement, to protection and provision as opposed to exclusion from entitlement as under the sanction provisions or under aspects of the 1996 Act. In the next and final section, the article builds on this new reading of our current homeless legislation according to risk and offers a series of reflections on the implications of this risk reconceptualisation.

IMPLICATIONS OF A RECONCEPTUALISATION ACCORDING TO *RISK*

If the risk reconceptualisation advanced in this article is to be persuasive, the case must be made as to why risk provides a fruitful and novel means of 'seeing' and reading homelessness law. Put simply, what does a re-reading of homelessness legislation according to risk offer? The previous section explored the ways in which risk is operationalised in the Housing Act 1996 and the Homelessness Reduction Act 2017. This section consists of a series of implications that flow from this risk reconceptualisation.

First, a reconceptualisation according to risk exhibits a stronger explanatory power of current homelessness legislation than the concept of need. As this article has shown, risk offers an instructive framework for exploring and explaining how the provisions of the 1996 and 2017 legislation operate *in practice*: both according to a negative and a positive conception. Engaging risk according to a negative conception elucidates, in particular, how the notion of intentional homelessness; the definition by local authorities of excluded, categories of 'non-qualifying' applicants in allocation schemes; and the non-co-operation sanctions of the 2017 Act function. A risk analysis illustrates how risk is routinised in local authority decision-making

on homelessness and, further, demonstrates the trend towards greater exclusions of applicants from housing provision. A risk framework therefore illuminates how local authorities make decisions about who is to receive housing support. These techniques of government cannot be explained by the concept of need. Were housing supply to exceed housing demand, need might be said to feasibly play a larger role, however, in the present context of severe housing under-supply, risk better describes these gatekeeping provisions which serve to exclude and filter out applicants from provision. Equally, locating risk in its positive, risk-embracing conception delivers a more convincing exposition of the test of 'vulnerability' under s189 of the 1996 Act and a more coherent account of the internal motivations of the 2017 Act with its focus on predicting and preventing homelessness than does the concept need. It is here that the inherent probabilistic quality of risk is especially productive. While it may be argued that a vulnerable applicant is, in one sense, 'in need', a re-reading of the law according to risk captures more faithfully the precise legal exercise undertaken by the courts and local authorities when determining vulnerability; namely, the balancing of risks and predicted future harms.

Secondly, and relatedly, it is argued that risk renders visible, in a way that need cannot, the essential logic and contested nature of homeless legislation itself. Risk reveals in sharper focus the difficult balance the law (and local authorities) must strike between the rationing of scarce housing and the management of constrained local authority resources whilst, at the same time, ensuring effective provision to those at greatest risk of harm from housing deprivation. The concept of need, whilst explicit on the face of the legislation and undeniably present in policy discourse, does not render visible this legal contestation as profoundly due to the definitional indeterminacy, political expediency and malleability of *need* which actively

obscure the true conflicts that exist in homelessness provision. Put differently, a risk analysis demonstrates how risk considerations operate both *internally* within local authorities, for example as to decision-making, and *externally* as to the management and husbandry of housing stock and, additionally, in the homelessness legislation itself that serves as the scaffolding of local authorities' organizational structures and delimits the duties they owe to the homeless. This fundamental fracture and disconnect between housing the most vulnerable whilst vindicating local authorities' legitimate desire to protect themselves from risks to their budgets and housing stock are aptly captured by the ordering theme of risk.

Thirdly, an examination of homeless legislation through a risk lens provides insights into how the homeless are represented, governed and how images of the homeless are constructed and promulgated in homelessness law - situated within the broader literature on social control and advanced liberalism.[101] The reconceptualisation advanced in this article is instructive in revealing how programmes and 'technologies' of risk are used as 'modes of power,' as methods of social control and how the homeless are represented in statute and policy discourse. The relationship between social control, advanced liberalism and homelessness is seen most pertinently in the identified negative conception of risk which emphasises the identification of 'risk factors,' the creation of 'risk groups' and, which employs

[101] See Johnsen et al, n 97 above; on social control in social services; generally see H. Dean, *Social Security and Social Control* (London: Routledge, 1991); M. Harrison., T. Sanders, (Eds) *Social Policies and Social Control: New Perspectives on the 'not-so-big Society'* (Bristol: Policy Press, 1996); R. Jones., J. Pykett, J., M. Whitehead, *Changing Behaviours: On the Rise of the Psychological State* (Cheltenham: Edward Elgar Publishing, 2013).

risk as a technique of category exclusion. Johnsen et al have identified the growing incidence of social control mechanisms in housing services where providers are adopting 'softer' forms of social control such as bargaining and influencing in order to mould and otherwise bring about behavioural change. It is here that a risk reconceptualisation can offer unique insights and contribution to the study of such subtler forms of social control. Various 'modes of power' are employed as mechanisms of social control to secure behavioural change ranging from threatening sanction to 'influencing' applicants to secure compliance with behavioural norms via persuasion or bargaining.[102] Clear examples of these modes of power deployed within current homelessness legislation range from more robust and explicit examples of 'coercion' which seek to secure desirable behaviour by employing the threat of 'deprivation'[103] (for example, the threat of removal of support in the event of failure to co-operate under the sanction provisions of the HRA 2017) to subtler forms of 'bargaining'[104] (for example, the development of personalised plans and 'reasonable steps' to which both the authority and homeless applicant must agree and with which they must both comply if the applicant is to receive ongoing support). The notion of unintentional homelessness and allocation schemes' qualification and non-qualification criteria can also be construed as 'coercive' in so far as they signal to applicants the standards and norms of behaviour required if housing support is to be offered.

[102] Johnsen et al, n97 above, at 1109.

[103] For discussion of 'coercion' see generally S. Lukes, *Power: A Radical View* (Basingstoke: Palgrave Macmillan, 2005).

[104] For discussion of 'bargaining' see generally R. Grant, 'Ethics and incentives: A political approach' (2006) 100(1) *American Political Science Review* 29.

What can be observed is the use of a combination of 'modes of power' and social control techniques which oscillate between mechanisms which are coercive, bargaining, 'disciplinary' and therapeutic. As Johnsen et al note, 'the deployment of … modes of social control … raise[s] moral and practical dilemmas, the nuance of which is often unacknowledged in current academic accounts.'[105] These modes of social control within homelessness legislation are exposed through a risk-based analysis and are deeply controversial. Rose,[106] in his work on post-Foucauldian governmentality, traces how government has shifted from rule through 'society' to rule instead through an emphasis on citizens as self-autonomised, active individuals exhorted to self-improvement. This individualised conception of citizenship, centred on individual responsibility has been accompanied by a growing concern and focus on *risk*. Understood as risk-based systems, under the 1996 and 2017 Acts, we see that the homeless must satisfy qualifying criteria to ensure housing allocation; must conform with behavioural norms to avoid 'risky' behaviours and the label of intentional homelessness or non-co-operation; partake in risk assessment; be subjected to continued risk audit and to agree to compliance with mandated steps in personalised housing plans. If not, homeless applicants risk exclusion from local authority protection and support. The homeless are represented, constructed and governed as 'risk populations' that, through the modes of power outlined, are provided with the means, as autonomised, advanced liberal citizens to

[105] Johnsen et al, n97 above, at 1120.

[106] N. Rose, 'Government, authority and expertise in advanced liberalism' 22(3) *Economy and Society*, 283–299.

strive for self-fulfilment, respectability and ethical completion[107] through a process of, what might be termed here, 'de-risking' or risk-removal.

Fourthly, a risk reconceptualisation serves as a powerful catalyst for prompting as well as nourishing wider debates around reform to homelessness law. Set against a backdrop of rising homelessness, the Covid-19 pandemic, increasing public and media attention to the issue of housing deprivation and the well-documented accounts of 'housing crisis,' a risk lens and the distinction that it uncovers between negative, risk-averse provisions and positive, inclusionary, risk-embracing provisions can, meaningfully, incite further academic and policy work on the precise shape and nature of homelessness law and how it can be made more effective at reducing homelessness. The long-standing promulgation by government of need as the ordering theme of our homelessness law (despite being challenged in housing scholarship) has, on one view, concealed and impeded a seizing of the central issues of homelessness; namely, a lack of supply of affordable housing and the necessity to better understand and respond to the complexities of the homeless experience. By casting a new light on how homelessness decisions and entitlement are presently determined, a risk lens allows us to consider how homelessness legislation might be framed differently and more effectively in the future. A risk analysis has the potential to unlock possibilities for legislating according to a positive, risk-embracing conception of risk for more empathetic, preventive and responsive measures to homelessness. Put differently, risk offers a novel means of

[107] See discussion of self-improvement in the human geography context: S. Rutherford, 'Green governmentality: insights and opportunities in the study of nature's rule,' (2007) 31(3) *Progress in Human Geography* 31(3) 291.

reading the law and 'seeing' homeless individuals not as a 'risk' or threat to be excluded or minimised but by embracing and acknowledging the inherent risks that contemporary life presents to all citizens.

It has been argued that risk is deployed as a technique of 'entitlement categorisation' and both the 1996 and 2017 legislation can be re-conceptualised as risk-based, audit and management systems. Castel's work engaging a risk framework in the field of psychiatry demonstrates how a negative risk system can be de-humanising; stripping away subjectivities and identity. However, by locating and exposing the different conceptions of risk engaged in current homelessness law, an opportunity to reshape future homelessness law according to an inclusionary, risk-embracing construction and rejecting the reductionist, exclusionary conception is presented. The prevention and relief duties of the 2017 Act and the 'vulnerability' assessment under the 1996 Act demonstrate that a more person-centred, dynamic homelessness law is possible. Reform that enlarges this inclusionary, non-judgmental balancing of risks and harms could produce better homelessness presentation outcomes and eschew repetition of the homelessness cycle. There is a plethora of literature exploring the so-called homelessness 'revolving door'[108] and cycle of homelessness that current legislation fosters whereby the homeless are supported into housing only to lose that

[108] On which see generally C. Bevan, 'The Hollow Housing Law Revolution' (2014) 77(6) MLR, 964; See E. Orme, 'Localism: keeping it local…again…and again…and again…or not?' (2012) 15 *Journal of Housing Law* 72; V. Busch-Geertsema., S. Fitzpatrick, 'Effective homelessness prevention? Explaining reductions in homelessness in Germany and England' (2008) 2 *European Journal of Homelessness* 69.

accommodation and find themselves once against applying to a local authority for further assistance. A reconceptualisation according to risk will allow more effective prediction of who is likely to be susceptible to this 'revolving door' and channel those most at risk people into more appropriate services suited to their particular vulnerabilities.[109] This also lends weight to the argument to abandon, repeal or reform the punitive provisions around intentional homelessness in the 1996 Act and non-co-operation under the 2017 Act.[110] In addition, adopting a risk analytical framework adds support to those calling for the development of new and radical approaches to housing allocations schemes, such as Fitzpatrick and Stephens,[111] who have advocated for reform to the current, piecemeal allocations approach under which each local authority area adopts its own, bespoke scheme in favour of a unified, 'national allocation framework' under a 'revised principle of allocation according to long-term [housing] deprivation'[112] to take the place of the present system which produces a postcode

[109] See S. Fitzpatrick et al, 'Crisis: Homelessness Monitor 2019' (May 2019); available at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf; see also Shelter Online Press Release, '320,000 people in Britain are now homeless, as numbers keep rising' (November 2018).

[110] In Scotland, the Homelessness etc. (Scotland) Act 2003 abolished the categories of priority need; see W. Wilson., C. Barton, House of Commons Library, Briefing Paper No. 7201, 'Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland' (April 2018)

[111] S. Fitzpatrick., M. Stephens, 'Homelessness, Need and Desert in the Allocation of Council Housing' (2010) 14(4) *Housing Studies* 413.

[112] ibid at 429-30.

lottery of allocation across the country. While risk, as a principle of selection, can be seen to bring about both positive and negative results, in its positive conception, risk can serve a progressive and inclusionary role and a reform agenda built around embracing rather than averting the inherent riskiness of the human experience could meaningfully be pursued.

Fifthly, and finally, adopting a risk reconceptualisation does not involve a denial of the history, role and evident potency of the language of need which has long been promoted as the driving force behind homelessness law. Rather, risk can be deployed, and its useful insights gleaned, without jettisoning need. Risk, in this way, provides an alternative means of analysing homelessness legislation; an additional and productive but not substitutive framework.

CONCLUSION

The concept of need has long been promoted by government as the ordering theme of homelessness law in England. This article has problematised this concept of need and exposed it as definitionally imprecise, inconstant and conceptually empty. Building on existing literature both within and without housing scholarship, this article has argued for a renewed, reconceptualisation of homelessness law according to an alternative, ordering rationale not of need but of risk. This article has located the operationalisation of risk in the provisions of the Housing Act 1996 and the recently-enacted Homelessness Reduction Act 2017. Risk as an analytical frame has been advanced not to obliterate the ideology of need nor to suggest that need is entirely redundant in the theorising of housing law but rather as a novel way of seeing and reading existing homelessness legislation. In so doing, this article has contended that risk

can be observed as operating according to two, distinct conceptions: first, an exclusionary, risk-averse conception which seeks to gate-keep, ration scare resources and bring about behavioural change in homeless applicants and, secondly, an inclusionary, risk-embracing conception which adopts a more predictive, preventive, holistic approach. It has been argued that engaging a risk framework exhibits a stronger explanatory power of existing homelessness legislation local authority decision-making than the concept of need and, moreover, serves as a catalyst for informing and shaping future reform in this area.