NINE-TENTHS OF THE LAW?

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Review of *An Expressive Theory of Possession* (Michael JR Crawford, Hart Publishing, 2020, ISBN 978-1-50992-992-4)

The doctrine of possession is a critical concept in understanding ownership and the right to title, but it remains under-theorised by property lawyers, and hence some have suggested the concept is so hopelessly vague that it should be abandoned altogether. Crawford's book is an illuminating and elegant exception to this rule: he attempts to unpack what he calls 'the possession puzzle'.[1] His definition of possession is simply 'those relations between people and tangible things which, as a matter of social fact, constitute accepted ways of claiming some form of entitlement to them'.[2] This work will be of interest to property law teachers and scholars, legal theorists specialising in property law, and even to non-legal readers who wish to learn more about the concept of ownership and possession.[3] It is worth noting that, distinctively, Crawford does not focus on possession of land or the concept of seisin in his analysis, but it is suggested that it will also nonetheless be of interest to an adventurous real property lawyer.

Crawford's work departs from the usual common law dichotomy according to which lawyers conceive of possession, namely factual control and *animus possidendi* (intention to possess).[4] Control per se is not, according to Crawford's argument, central to possession: what is important is that the means of claiming possession is legitimate within that society (an *expressive* function).[5] And as to why it exists, Crawford says, '[f]or largely inscrutable psychological reasons, the fact of possession was, and continues to be, prominent to those who must decide which objects belong to whom'.[6] As someone who has become interested in the law of possession when considering the development of the law of ownership of animals from both a historical and modern perspective, this resonated with me.[7]

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1 Michael JR Crawford, *An Expressive Theory of Possession* (Hart Publishing, 2020) 1.

2 Ibid 7.

3 I have recently recommended the book to a friend who has an interest in economic history and notions of ownership.

4 Crawford (n 1) 9.

5 Ibid 7.

6 Ibid 8.

7 Katy Barnett and Jeremy Gans, *Guilty Pigs: The Weird and Wonderful History of Animal Law* (La Trobe University Press, forthcoming) ch 1.

In his introduction, Crawford notes that there is a long-standing methodological division running through private law scholarship.[8] On the one hand, English private law scholars tend to engage in strict doctrinal analysis, whereas American private law scholars tend to favour interdisciplinary analyses.[9] Crawford's work weaves together *both* doctrinal analysis and interdisciplinary analyses. In my view, this is a tremendous strength of Crawford's work. It is notable that this book is derived from Crawford's PhD, undertaken at Melbourne Law School.[10] Australia is culturally in between England and America, and hence Australian private law scholars can have an ability to accommodate both doctrinal analyses and interdisciplinary analyses in a way which is unique and valuable. I commend Crawford's book as an exemplar of this.

In Chapter 1, Crawford outlines the basic theory of property rights which underpin his analysis and advances his beguiling theory that the right to exclude, not the right to possess, is at the core of property rights (the 'exclusion model').[11] Rather, possession is simply a fact which leads to the creation of property rights. He uses a Hohfeldian analysis of property to suggest that there is an asymmetrical but simple explanation for property rights over tangible things.[12] Intangible things are excluded from the analysis simply because they are impossible to possess.[13] Under Crawford's analysis, the holder of a property right has a certain liberty to use property in a myriad of ways, and there is a duty upon others not to physically interfere with that property (enforced by proprietary torts such as trespass, conversion and detinue).[14] Of course, the property must not be used in a way which harms others, which is where the tort of nuisance comes in: it is not predicated upon interference but upon a circumscription of rights to use in a way which harm others. He disclaims the 'bundle of rights' theory, saying instead that property law is 'right light and liberty heavy'.[15] The point is not that an owner has certain specific rights: instead the point is that the owner has certain liberties in regard to the property which other people do not have (and in fact, other people can be excluded from interfering with the property). I have never been comfortable with the 'bundle of rights' theory myself.[16] Crawford's theory is exceptionally elegant. It does not require us to enumerate rights. On the other hand, I wonder about more limited property rights (such as easements) and how they might fit in his scheme.

In Chapter 2, Crawford notes that there is a persistent difficulty in conceptualising possession and the arcane terminology sometimes used to describe the rights of parties to a particular thing confuses more than it illuminates.[17] He argues this confusion stems back to medieval times when, even in relation to

8 Crawford (n 1) 4–7.
9 Ibid 4.
10 Ibid vii.
11 Ibid 25–9.
12 Ibid 24–6.
13 Ibid 12–18.
14 The role of torts is discussed at ibid 29–37.
15 Ibid 26.
16 See Katy Barnett, '*Western Australia v Ward*: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24(2) *Melbourne University Law Review* 462.
17 Crawford (n 1) 42–8.

ownership of land, there was not a clear distinction between 'having' a thing and 'having a right to' a thing.[18] I found his discussion of medieval law and policy preventing landowners from violently retaking their land to be fascinating. However, he notes that the modern law has (mostly) broken away from the physical need to 'have' a thing in order to have a right to it. The common law has a concept of relative title (eg, a finder of thing has good title against the world other than the original owner) and Crawford argues that 'possessory title' simply means a hint that someone else might have better title.[19] In order to untether the law of property from the medieval notion that in order to have a right to a thing, it was also necessary to have that thing, Crawford argues that we must jettison the notion of a 'possessory right' and other fictions.[20]

In Chapter 3, Crawford advances his thesis that possession is a fact which gives rise to proprietary rights, and that it plays an *expressive* function beyond simply controlling the thing itself, drawing on the work of Hegel[21] and Rose.[22] In other words, Crawford says:

> The significance of the physical element of possession lies instead in its expressive function. Certain acts qualify as 'possession' because, whether they amount to actual control, they send the recognised signal by which someone communicates his intention to claim a stake in some thing … [T]his account does not argue that physical control is irrelevant. Rather, it argues that its relevance is confined to the clarity of the signal that such acts send to the relevant audience.[23]

This explains why, depending upon the property in question, it is not necessary to physically control something as long as it is *understood* to constitute a 'social fact' signalling possession. Thus, intention to possess is pivotal to Crawford's account because such intention to send a signal is necessary.[24] Crawford uses a variety of examples of possession norms from several cultures, including norms which apply in Australia: we know that if someone drapes their jacket over a seat in the cinema, the intention is to stake a claim over that space regardless of the fact that the person is not present and controlling access to the seat. While that does not create a proprietary right in law, it reflects a societal norm. The significance and value of Crawford's work is that it bridges the gap between the theories of possession as 'behavioural expression' and the orthodox common law concept of property which have been dominated by discussions of possession in the context of real property law.

I found Crawford's discussion of whaling rules fascinating, as this is something I have noted myself will depend upon culture and context.[25] Similarly,

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18 Ibid 51–3.

19 Ibid 54–8.

20 Ibid 58–9.

21 GWF Hegel, *Philosophy of Right* (Batoche Books, 2001).

22 Carol M Rose, 'Possession as the Origin of Property' (1985) 52(1) *University of Chicago Law Review* 73; Carol M Rose, 'The Law Is Nine-Tenths Possession: An Adage Turned on Its Head' in Yun-Chien Chang (ed), *Law and Economics of Possession* (Cambridge University Press, 2015) 40; Carol M Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, 1994).

23 Crawford (n 1) 63.

24 Ibid 67.

25 Interestingly, in *Baldick v Jackson* (1910) 30 NZLR 343, New Zealand adopted whaling norms that were more similar to American norms than the Greenland norms.

his discussion of the famous American fox-hunting case *Pierson v Post* was enlightening:[26] he sees the decision as being explicable on the basis that social norms with regard to possession should be readily understood as such by a wide group, not just a small group of hunters.[27] Hence, the degree of control is relevant insofar as it expresses a clear intention to possess, and in deciding possession cases, judges draw on extra-legal societal norms.

In Chapter 4, Crawford discusses the *why* of possession and concludes that it is an unconscious selection intrinsic to human psychology, with reference to game theory (although as he properly notes, the book is not about game theory per se).[28] I wonder if shadows of these concepts are displayed by other mammals: we all know how a dog will growl if you attempt to take their bone, and chimpanzees have displayed complex norms governing entitlement to meat from hunted colobus monkeys.[29] I very much enjoyed Crawford's discussion of spontaneous order, and the role of convention as a solution to coordination problems (using game theory as an illustration).[30]

Chapter 5 contains a fascinating discussion of fairness and possession. It is suggested that possession is *amoral*, but not *immoral*, and that as a basic allocative rule, it works because any given member of society can be in the position of possessor in a contest over scarce resources.[31] Moreover, the law should incorporate basic conventions when they are tolerably fair if those conventions reflect widely held expectations about the law. As Crawford notes, the possibility for people to misuse force and to hoard property is something that has been of concern to theorists from Locke onwards.[32] He acknowledges that in individual cases, possession norms may give rise to unfair results.[33] However, he argues that the rule is fair because it turns on what a person does, not on what a person is (although a person's individual characteristics might make it harder to assert the convention in a given situation).[34] A second advantage is that because it is readily understood, and indeed possibly intrinsic, it is a norm which appeals to laypeople.[35] And even in complex abstract land registration systems, possession still retains a role.[36]

Chapter 6 contains a discussion of losing property and the law of finders (one of my favourite topics when teaching Property Law: lost bracelets, buried canoes, medieval brooches and rings hidden in chimneys). Crawford considers whether these rules are manifestations of the general norms of possession, and concludes

26 3 Cai R 175 (1805). For a detailed description of the history behind *Pierson v Post* I recommend Angela Fernandez, *Pierson v Post: The Hunt for the Fox* (Cambridge University Press, 2018). There was apparently underlying family rivalry between the Piersons and the Posts.
27 Crawford (n 1) 75–7.
28 Ibid 4.
29 Christophe Boesch, 'Cooperative Hunting Roles among Taï Chimpanzees' (2002) 13(1) *Human Nature* 27.
30 Crawford (n 1) 93–113.
31 Ibid 122.
32 Ibid 124–7.
33 Ibid 132–4.
34 Ibid 133.
35 Ibid 135–8.
36 Ibid 138–40.

that the disputes between finders and occupiers of land do not fit into the general norm of possession – ie, it depends upon whether the item is attached or unattached to the land, and a variety of other circumstances.[37]

Chapter 7 grasps the bull by the horns and considers the notoriously difficult problem of property rights in the wake of theft, and the role of the good faith purchaser. Thieves *do* have a relative property right in items they have stolen, but this has been criticised as allowing immoral persons to assert proprietary rights.[38] Crawford suggests that the problem is not with norms of possession themselves, but with the question of whether it is right for a court to enforce a thief's property rights.[39]

The good faith purchaser rule is justified by considering the signalling aspect of possession. If someone reasonably looks like they have a right to own something, then we allow those who purchase from them to assume that there was a right to sell.[40] The difficulty, of course, is if the original owner and the new purchaser both claim property, then the law is presented with an impossible contest between two equally deserving parties, both of whom have equal reasons to assert ownership. The law tends to favour purchasers over owners. Crawford suggests that in some cases, a registration system will be appropriate to deal with issues of unfairness created thereby.[41]

Crawford's use of doctrine, economic theory and psychology is ingenious. He suggests that the main role of possession is signalling through convention, but that it is necessary (and indeed inevitable) that these norms become law. In conclusion, I recommend Crawford's book to all scholars interested in property rights, personal property and the theory of property law and commend him on an excellent scholarly monograph.

37 Ibid 146–71.
38 Ibid 173–84.
39 Ibid 185.
40 Ibid 186–91.
41 Ibid 197.