



# *Conceptualising Home*

## *Theories, Laws and Policies*

*Lorna Fox*

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Lorna Fox



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## CONCEPTUALISING HOME

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It is difficult to overstate the everyday importance of home in law. Home provides the backdrop for our lives, and is often the scene or the subject of legal disputes. In addition, in recent decades there has been growing academic interest in the meaning of home, which has prompted empirical studies and theoretical exploration in a wide range of disciplines. Yet, while the authenticity of home as a social, psychological, cultural and emotional phenomenon has been recognised in other disciplines, it has not penetrated the legal domain, where the proposition that home can encapsulate meanings beyond the physical structure of the house, or the capital value it represents, continues to present conceptual difficulties. This book focuses on the competing interests of creditors who lend money against the security of the property and the occupiers who dwell in the property, in the context of possession actions. By mapping the concept of home as it has evolved in other disciplines against existing legal frameworks, *Conceptualising Home* examines the possibilities for developing a coherent concept of home in law.

*To Bernadette*

*In memory of my father, Des Fox*

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## PREFACE

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This book is about the homes in which we live, and, particularly, about how law responds to the occupier's interest in property *as a home*. The decision to write this book was prompted, in part, by my instinctive feeling that home is important and should be recognised as such in law. I remember reading, as an undergraduate, the decision in *Kaur v Gill*,<sup>1</sup> a case concerning the registration of a wife's statutory right of occupation against the matrimonial home, and whether or not the circumstances of the purchaser should be taken into account as part of 'all the circumstances of the case'. Lord Justice Bingham wrote that '[d]uring the argument of this appeal, my mind repeatedly changed direction, like a weather vane in stormy weather.'<sup>2</sup> It struck me then that, when law is brought to bear on something as important as whether people will lose their homes, the outcome should follow well-thought-out, coherent and justifiable principles. As one of the reviewers of the proposal remarked, '[t]his book has an agenda.' The agenda is to establish the case for a more coherent concept of home within legal discourse, and to consider how the concept of home could be worked out within existing legal frameworks.

My vague instinctive idea that it was important to work out what 'the home' meant in law was challenged in the viva for my doctorate, which focused on the role of legislative and judicial policy in disputes between creditors and non-debtor occupiers of domestic property. The thesis focused on the *ad hoc* approach towards creditor/occupier disputes in English law, governed as they are by a collection of principles and statutory provisions, scattered across different legislative schemes. The overarching policy that emerged from these provisions and their judicial application was the persistence of the pro-creditor approach. Indeed, the court was often called upon to exercise its discretion between the competing claims of creditor and occupier, yet without, it seemed, any guidance as to how to go about weighing these competing interests. In fact, in *Re Citro*, the court acknowledged that:

[t]he balancing which one is required to do between the interests of the creditors and the interests of the wives and families—who are of course entirely innocent parties—is by no means an easy thing to do. The two interests are not in any sense commensurable. On the one hand, one has the financial interests of the Crown, some banking institutions and a few traders. On the other, one has the personal and human interests of these two

<sup>1</sup> [1988] 2 All ER 287.

<sup>2</sup> *Ibid*, at 292.



families. It is very hard to see how they can be weighed against each other, except in a way which involves some value judgment [*sic*] on the part of the tribunal.<sup>3</sup>

This book focuses on two central issues relating to this value judgement: *why* and *how* the interests of occupiers can be weighed in the balance of legal decision making.

The issue of *why* the law should take any account of the interests of occupiers in their homes, when faced with a strong competing claim such as the creditor's commercial interest, arose in the course of my doctoral viva. In some respects, I had taken it for granted that there must be *some* merit in recognising the importance of the occupiers' home interest, but I was ill-equipped to articulate the argument in support of such interests. By then, my views were still largely instinctive, and I had barely scratched the surface of the vast body of literature in other disciplines that has explored the meaning and importance of home to occupiers. Indeed, as a (more or less) 'black-letter' land lawyer, I had at my disposal neither the terminology with which to express my instinctive position, nor the evidence with which to support it. In many respects, this book provides an answer to some of the questions I have been turning over in my mind ever since. In addition, I have attempted to make some progress, not only on the *why*, but also on the question *how* we can develop an idea of home that will serve some useful purpose in legal discourse, by considering the idea of home as it has emerged in different legal frameworks.

When I first embarked on this project, one of my early concerns was whether I could locate enough material to fill a book on the idea of *home* in law. However, the greatest difficulty I have encountered has been finding where to stop. When one is constructing an analysis of 'home' as a subject of legal study, the possibilities in terms of approach are virtually limitless. Indeed, to borrow a phrase from Margaret Jane Radin, to write about this subject is 'like trying to write a systematic treatise on life as we know and live it.'<sup>4</sup> I owe many debts of gratitude, not least to my doctoral examiners, Professor Kevin Gray and Professor David Clarke, for a viva that left me with food for thought for years after. I also owe a long-term debt of thanks to my doctoral supervisor, Dr Alan Dowling, who did his best to teach me how to write.

I am also grateful to many friends and colleagues who have read and commented on parts of the manuscript, in one form or another, including Anne Barlow and Roger Smith; Helen Fenwick was kind enough to read and comment extensively on two chapters; and Dave Cowan made some extremely helpful suggestions, which were of tremendous assistance when I attempted to clarify my thoughts on gender and home for Chapter 8.

Some of the research for this book was conducted while I was visiting at Cornell Law School in the Spring Semester of 2003. I am very thankful to Professor Martha

<sup>3</sup> [1991] Ch 142 at 150.

<sup>4</sup> MJ Radin, *Contested Commodities* (Cambridge, Mass, Harvard University Press, 1996), preface, p. xiv.

Fineman and the Gender, Sexuality and Family project, whose generous funding supported this research visit. I am deeply grateful to Martha for her generosity and kindness, and for encouraging me to persist with the project; I also wish to thank the Faculty Members at Cornell, and other participants in the Gender, Sexuality and Family project, who made early and insightful suggestions on the directions that my research into *Home* could take. I am similarly grateful to the Centre for Socio-Legal Studies at the University of Oxford, where I spent research leave in Michaelmas Term 2004 and where I got much helpful feedback from members of the centre and others who attended and participated in a seminar I delivered there. My gratitude is also extended to the Law Department at the University of Durham for granting this leave, when I had barely walked through their door.

Thanks are also due to my friends and colleagues at the Law Department, University of Durham, and, before that, in the School of Law, Queen's University Belfast, for their practical insights, generous encouragement and all round good humour. I am especially grateful to my teaching team-mates at Durham, on Land Law and Trusts, who have been accommodating and encouraging colleagues. In addition, Neil Cobb asked many insightful and pertinent questions about the overall thesis of the book, never let me get away with fudging on the answers, and provided support and laughter, while Roger Masterman answered several stupid questions about the Human Rights Act and tolerated frequent intrusions and interruptions when he undoubtedly had better things to do. Aaron Baker, David Campbell, Helen Fenwick, Rosa Greaves and Clare McGlynn discussed various issues relating to the book with me, and were also kind and supportive colleagues, for which I am grateful. I am similarly grateful to Hart Publishing for making the life of an author as painless as a publisher possibly could. Richard Hart has been a pleasure to work with from beginning to end.

I would also like to record my appreciation to my parents, Bernadette and Des, and to my sisters, Judith and Claire. The more I learn of legal academics, the more I am convinced that we write about what we care about in life. Much of the impetus for writing this book was rooted in my instinctive feeling—despite, I should say, rather than because of my education in law—that home is important, and should be protected. I am grateful to my family for teaching me everything I know instinctively about the meaning and value of home. They will always reside in the experiential home that I have carried with me into adulthood. Finally, my thanks go to David O'Mahony, who read every chapter, several times, in various renditions, and who was always patient and constructive in his comments. For his tireless support, wise counsel and loving encouragement, I owe him a debt beyond thanks.

Lorna Fox  
Durham  
1 March 2006



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## Part 1

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### Valuing Home: Theories, Laws and Policies





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## Conceptualising Home in Context

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### Introduction

IT IS DIFFICULT TO overstate the importance of our homes, both in everyday life and, by extension, in law. Our homes provide the backdrop for our lives. As a result, the home is often the scene or the subject of legal disputes. Legal matters concerning ‘home’ may take various forms, and may fall within a range of areas of legal activity from family law<sup>1</sup> to criminal law,<sup>2</sup> from constitutional and human rights law<sup>3</sup> to housing law.<sup>4</sup> This book focuses on the significance of *home* in the context of property law disputes between creditors and occupiers—that is, when a creditor, for example, a mortgagee, seeks to repossess a property which is occupied as a home, following default in repayment by the debtor. The object of the book is to analyse the significance of the occupier’s ‘home interest’ in such cases, and to consider the way in which *home* is conceived in law in this context. In order to correlate the law’s approach to home interests in possession actions with the ‘real world’ consequences of legal decision making in this area, discussion of the laws and policies adopted to regulate possession actions is embedded in an interdisciplinary framework. Drawing on a wide range of empirical and theoretical work on the subject of ‘home’ in other disciplines, the

<sup>1</sup> Eg, when the issue concerns ownership or occupation of a (former) family home.

<sup>2</sup> Criminal law matters involving ‘home’ range from domestic violence to the degree of force permitted to defend one’s home against an intruder; see, eg, the case of Tony Martin, who shot a burglar, leading to his death, and was convicted of murder, later reduced to manslaughter by reason of diminished responsibility: *R v Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1. The criminal law defence of self-defence is currently under scrutiny, particularly in relation to the occupiers’ rights to protect their home: see, eg, Patrick Mercer’s Criminal Law (Amendment) (Householder Protection) Bill (Bill 20 of 2004–05), which was brought before the House of Commons in Feb 2005, and which proposed to allow home owners more latitude to tackle burglars, by providing that they would not be guilty of any offence unless they used grossly disproportionate force.

<sup>3</sup> See, eg, issues concerning the extent to which the state can lawfully impinge upon a citizen’s private dwelling: *Entick v Carrington* (1765) 19 St Tr 1030; *Malone v Commissioner of Police for the Metropolis (No 2)* [1979] Ch 344; Art 8 of the European Convention on Human Rights, as given effect to by the Human Rights Act 1998: *Malone v UK* (1985) 7 EHRR 14.

<sup>4</sup> Housing authorities have a range of responsibilities including the management of rented homes and the provision of shelter for the homeless.

book seeks to develop a more informed understanding of the meaning of home to occupiers, and of the impact of losing that home.

The importance of the home as the site of everyday life for its occupiers, and the centrality of land law in regulating the occupier's access to a home, were highlighted by the observation that:

All of us—even the truly homeless—live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people.<sup>5</sup>

Yet, notwithstanding the centrality of home and the impact of legal regulation on the occupier's experience of home, the legal concept of home has received surprisingly little attention. As laypeople we know that 'there's no place like home', that 'home is where the heart is', and we may even believe that the law recognises that 'an Englishman's home is his castle'.<sup>6</sup> However, while these aphorisms are sometimes reflected in legal discourse, the extent to which the law seeks to recognise and protect the status of home—whether as a refuge or sanctity from the outside world, a place of security, privacy or safety, or even in the most basic sense as a shelter—varies, in a more or less *ad hoc* fashion, depending on the context in which legal issues arise and, particularly, on the weight of the competing interest(s) at stake in any given case. Thus, while 'home' interests may be (implicitly) recognised in some legal contexts (usually where the primary aim of legal policy is to promote the 'home' interest) they are also relatively easily dismissed in others. There is not, as yet, a coherent concept of home in law. Consequently, in the absence of a central organising concept, there is no framework within which to consider the extent to which the law seeks to protect the home or aspects of the home interest in different contexts, nor to achieve cross-fertilisation of legal thinking and discourse in this area.

It is not altogether surprising that the concept of home is underdeveloped in law. In many respects, 'home-type' interests are anathema to legal reasoning. For one thing, 'home' is an essentially subjective phenomenon. It does not appear to be easily quantifiable, and the value of a *home* to its occupiers is not readily susceptible to legal proof. Nevertheless, there are compelling arguments to support further analysis of the idea of home in law. For one thing, while it may be true to say that the nature of *home* attachments presents obvious impediments to the development of a coherent legal concept of home, and that this explains, to a certain extent, the relative neglect of home-oriented analysis in law, the centrality of

<sup>5</sup> K Gray and PD Symes, *Real Property and Real People* (London, Butterworths, 1981) 4.

<sup>6</sup> The expression 'An Englishman's home is his castle' is a misquotation from the decision in *Semayne's Case* (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, when Coke CJ commented that 'the house of everyone is to him as his castle and fortress'.