Fiduciary Obligations: 40th Anniversary Republication with Additional Essays. By P.D. Finn [Sydney: Federation Press, 2016. xlix + 397 pp. Hardback £75.99. ISBN 978-1-76002-077-4.]

Finn's Law: An Australian Justice. By Tim Bonyhady (ed.) [Sydney: Federation Press, 2016. xvii + 244 pp. Hardback £84.99. ISBN 978-1-76002-080-4.]

Contract, Status, and Fiduciary Law. By Paul B. Miller and Andrew S. Gold (eds.) [Oxford University Press, 2016. xi + 331 pp. Hardback £75. ISBN 978-0-19877-919-3.]

Paul Finn's *Fiduciary Obligations*, first published in 1977, marks the whole field of fiduciary law today and, as such, the second and third books under review: one a *Festschrift* for Finn, the other a book of new essays. Finn's 1977 book has become a classic text for students, academics and practitioners. But what is the significance of its republication for the law and literature of fiduciaries today?

The main body of *Fiduciary Obligations* is in two parts, entitled "Fiduciary Offices and the Fiduciary's Duty to Act Honestly in What he Alone Considers to be the Interests of his Beneficiaries" and "The Duties of Good Faith". To its 24 chapters have been added two published articles: "The Fiduciary Principle" (1989) as chapter 25 and "Fiduciary Reflections" (2014) as chapter 26. Two *fils rouges* appear at the present day. The first is a cluster of conceptual questions. Are "relationships" or "obligations" the primary focus of enquiry? How are loyalty, good faith and unconscionability related? Are fiduciary duties limited to the no-conflict and no-profit rules, or do they include prescriptive standards of conduct? What is the significance of status, role, office and personality to the fiduciary principle? Are fiduciary obligations imposed by law or assumed voluntarily? The second is whether the fiduciary principle plays any role in controlling those in whom "public law" reposes powers along similar lines as those in whom "private law" reposes powers. These themes are related. Further, taking the second seriously may lead to answers to some of the questions in the first.

Over 30 years ago, Sir Anthony Mason quipped that the fiduciary relationship was a "concept in search of a principle". In "Fiduciary Reflections" Finn doubts that things have improved: "For all the construction and demolition that has gone on across the common law world, I question whether we are any closer to agreeing upon a simple, intelligible and coherent account of the law [of fiduciaries] and its rationale. My own impression is that we are heading, unnecessarily, in exactly the opposite direction". As Sir Anthony says in the foreword to the republication, Finn has been the "principal architect in our time" of the structure of the fiduciary relationship and its limits. Finn's unflattering assessment of contemporary scholarship is therefore sobering.

Finn's thought has itself evolved. As Sarah Worthington records in *Finn's Law*, Finn's 1977 expansive qualification of "fiduciaries" contrasts with his narrower view of 1989. Originally, Finn listed eight duties under the rubric of Part II. By 1989, Finn had decided that not all of these duties were properly "fiduciary". He presented instead a graduated range of equitable doctrines from unconscionability to good faith and, finally, to fiduciary obligation. The defining quality of *fiduciary* obligations was the fiduciary's duty to act in his beneficiary's interests to the exclusion of his own – not merely to pursue his own interests in an equitable manner. It is now more or less conventional that fiduciary duties are limited to duties of loyalty, and that prescriptive standards of conduct are a separate matter. However, by 2014 Finn again adjusted his view, renouncing the revised scheme and characterising the

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eight duties treated in his 1977 book as particular instances of a "single fiduciary principle". This later view has not met with enthusiasm. Many, including Worthington (but not Dyson Heydon (2014) 20 T. & T. 1006), see it as a retrograde step.

Worthington identifies eight themes which have both vexed Finn and constitute "continuing battlegrounds" in fiduciary theory, among these being fiduciary powers, proprietary remedies and the "public law agenda". Regarding fiduciary powers, Finn J. was party to the joint judgment in *Grimaldi v Chameleon Mining N.L. (No. 2)* [2012] FCAFC 6; (2012) 200 F.C.R. 296 which discerned two "discrete parts" of fiduciary law: a limb setting the loyalty standard for those in "fiduciary positions", which seemingly corresponds to Part I of *Fiduciary Obligations*, and a limb controlling the exercise of "powers, duties and discretions given to a fiduciary to be exercised in the interests of another", which corresponds loosely to Part II. The first has been over-emphasised, the second neglected: something about the control of "fiduciary discretions" is missed if the whole enquiry is couched in terms of "loyalty". However, the judgment in *Grimaldi* shows that both limbs are concerned with the due exercise of powers held in virtue of some position. The difference is evidently between established categories such as "trustee" and ad hoc positions. But this may be a distinction without a difference. Powers are always limited by reference to the *purpose* for which they were granted, and their prima facie valid exercise should be controlled where it would impinge on that purpose. This suggests a general principle undergirding both "limbs". Indeed, Worthington observes that in both public and private law no power is absolute – not even powers granted in absolute terms.

Though known for his advocacy of "fiduciary public law", Worthington claims that Finn has "vacillated", in 1977 criticising "the imposition of fiduciary obligations on the holders of public offices … on the basis that it distorted fiduciary law, and that [their duties] would be better regulated by public law" while in 2014 "suggesting instead that all public officials ought to be regarded as fiduciaries". Worthington prefers the later view, but her characterisation is inaccurate. As Ross Cranston notes in *Finn's Law*, Finn began his doctoral research under a renowned public lawyer, and drew his first principles from electoral, parliamentary and ecclesiastical law. Finn himself records his original intention to "write on the fiduciary idea not only in private law but also in what I would loosely call public law" and his later view that it was a "mistake" to abandon this project. *Fiduciary Obligations* was not the book he wishes, on reflection, to have written, which suggests why he produced no second edition. Indeed, as John Williams describes in *Finn's Law*, three of Finn's first four publications after *Fiduciary Obligations* in 1977 dealt with public officials. Worthington points to Finn's 1977 criticism of the reasoning in two well-known bribery cases as hampering development of the law relating to public officers by "forcing" it into the fiduciary mould. But the young Finn made clear his view that "fiduciary principles are reflected in public law, the fiduciary's immediate public counterpart being the holder of a public office", and that "[w]hile the principles which regulate the conduct of public officers differ little, if at all, from those governing persons in a fiduciary position, the manner in which they are applied and enforced differ greatly". As Stephen Gageler notes in *Finn's Law*, Finn never fully developed his thoughts on the translation of fiduciary principles into hard-edged doctrines of public law; Finn's public law project will be "one for others to complete". Summary dismissal of the project gives a distorted picture of his thought. The point is central to Finn's legacy. Finn opines that fiduciary scholarship is misdirected: "we have thought and written about fiduciaries

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on an artificially small, fragmented, and distorted canvas". Scholars must ask what "public fiduciary law" might teach about "private fiduciary law".

The key is the notion of fiduciary "office", as used in Part I of *Fiduciary Obligations* in 1977. Finn defined "office" only provisionally as a position (a) held by one for the benefit of another, (b) subject to duties arising other than by agreement with that other, (c) which must be discharged personally. Others, including Worthington, do not write of – or enquire into – fiduciary "offices" at all. But if Finn's account of the fiduciary "office" was incomplete, and if *Grimaldi* suggests the abandonment of element (b) of the definition, Finn did perceive the significance of the concept of a fiduciary "office" to the conceptual scheme of fiduciary obligations. This perhaps explains Finn's consistent view that that fiduciary obligations are imposed by operation of law, even in consensual relationships. Agreements create positions, which the law then impresses with fiduciary obligations in virtue of some (still mysterious) characteristic. Since the office of trustee is the crucible in which fiduciary duties were forged, there is something fundamental about trustees' "performing a function" on behalf of another that should guide the extension of fiduciary obligations across a wider ambit.

These themes are explored at length in the third work under review, *Contract, Status, and Fiduciary Law.* This work might be read as an exegesis of some points raised in Gold and Miller's previous collaboration, *The Philosophical Foundations of Fiduciary Law* (2014). While an important contribution to the literature, Paul Miller (in his introduction) and many of the contributors miss the crucial feature of "status": by and large, they assume "status" to be innate, and contrast it with voluntary "contract". This dichotomy can be traced to H.J.S. Maine, who famously claimed that the movement of all "progressive societies" has been distinguished by the "gradual dissolution of family dependency, and the growth of individual obligation in its place" (*Ancient Law* (1861), p. 168). For example, Hanoch Dagan and Elizabeth Scott present a revision of the traditional dichotomy in "Reinterpreting the Status-Contract Divide". Neither innate status nor open-ended contract, they argue, describes the core cases in liberal legal systems. Instead, "status" and "contract" cut across two intermediate categories: "office-type" and "contract-type". Mandatory rules combine with contractual freedom to produce standard types of legal relations with varying degrees of voluntarism. The status of company director, for example, is an "office" whose content is largely pre-determined, although there is room for private agreement, whereas employee is a "contract-type" largely open to negotiation, subject to labour law. Although superficially attractive, as Lionel Smith explains in "Contract, Consent, and Fiduciary Relationships", this continuum is between ascribed and assumed legal relations, not status and contract. Dagan and Scott misinterpret Maine, who did not propose contract and status as mutually exclusive alternatives. Maine's overstatement is conducive to the error, but he saw status as part of the law of persons: a limb of Roman law oddly neglected by Anglophone lawyers. Status is pivotal in legal systems: it is in virtue of persons' status as equal, autonomous legal subjects that they are capable of contracting in the first place. Georg Jellinek observed that a legal system consists of relations between legal subjects; where two entities bear no such relation, "there too law is excluded": *System der subjektiven öffentlichen Rechte* (1892), p. 44. Subjecthood is inherently a matter of status separate from whether any given status is innate, ascribed or voluntarily assumed in any given legal system.

Smith further argues that there is more to fiduciary relationships than duties; fiduciary relationships also involve powers. Laws state what persons *can* do, and what they *may* do. There is a capacitative aspect as well as a duty-imposing one; ignoring rules that enable actions is, as H.L.A. Hart showed, fatal to a proper

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understanding of particular legal systems and legal systems in general. The office-based theory of fiduciary obligations has receded in significance since Mason J.'s influential dissent in *Hospital Products Ltd. v United States Surgical Corporation* (1984) 156 C.L.R. 41; debates about the nature of fiduciary duties as prescriptive or proscriptive, and their basis in contract, have dominated the field. Scholars including Matthew Conaglen and James Edelman have pursued the voluntaristic turn even further. Most of the debate, however – including the essays in this book – has tacitly assumed that fiduciaries have duties, powers and functions *qua* fiduciary (see *Selangor United Rubber Estates Ltd. v Craddock (No. 3)* [1968] 1 W.L.R. 1555). The relationships in which fiduciary obligations inhere are typically relationships in which one has some special ability to affect another's position. The interesting feature is the conjunction of powers with duties; peering at the power and the duty in isolation will not yield answers, nor will focusing on the parties' intentions or even the policy reasons for imposing fiduciary obligations. Fiduciary theory must encompass the concept of office, which implies an adequate deontic logic and logic of action, a theory of autonomy and the minimum standards of behaviour exacted by the law.

Together, the three works under review suggest not only the direction of travel in fiduciary law over the past 40 years, but also the problems that lie in prospect and how Finn's thought may be brought to bear on them. Fundamentally, the imposition of a fiduciary character on a relationship occurs, says Finn, by operation of law. The role of party autonomy in the creation of fiduciary obligations opens a set of fundamental normative questions. The contractarian view of fiduciary obligations rests on a particular view of private autonomy, although what passes for theorising on autonomy among doctrinal private lawyers is not always compelling. Even prima facie autonomous transactions can impinge on private autonomy. As Finn remarks, there is more at issue in the imposition of fiduciary obligations than merely facilitating private ordering. In "Fiduciary Reflections", Finn writes that fiduciary obligations inure where "the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his or her interests in and for the purposes of the relationship". Various *indicia* (such as undertaking) assist in making this out, but these are important only in evidencing a relationship suggesting that entitlement: "The critical matter in the end is the role – the function – that the alleged fiduciary has, or should be taken to have, in the relationship". It would seem – despite Finn's long-standing preference for speaking of "fiduciary obligations" – that we are actually concerned with "fiduciary relationships". The most important features are implicit in the concept of office: (a) powers (b) for the benefit of another (c) existing independently from the repository of the power from time to time. According to Finn's working definition, an office "often exists independently of the person who happens to be incumbent for the time being". This element is key. An office is a position which is stable enough to be transferred between persons (e.g. upon death) without thereby changing the office. The office is a separate capacity, tantamount to a separate acting subject, which endures.

While no panacea, a concerted effort to understand and develop the concept of office may hold the key to bringing fiduciary theory back on track. An example is the question of proprietary remedies, which has vexed English equity lawyers for centuries. The conventional wisdom following *Lister & Co. v Stubbs* (1890) 45 Ch. D. 1 was that proprietary remedies for breach of fiduciary duty rest on a pre-existing property right. This causes problems in corruption cases, because the beneficiary has no such right; a strong Privy Council rejected it in *Attorney-General (Hong Kong) v Reid* [1994] 1 A.C. 324. Lord Neuberger M.R. confirmed the English orthodoxy in *Sinclair Investments (U.K.) Ltd. v Versailles*

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Trade Finance Ltd. [2012] EWCA Civ 347; [2012] Ch. 453 while the Full Federal Court (including Finn J.) roundly criticised it in *Grimaldi* in the same year. Lord Neuberger P.S.C. performed a great reversal of the English position in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] A.C. 250. Viewed through the lens of office, the availability of proprietary remedies flows from the proposition that the crooked fiduciary only ever held the bribe for his beneficiary, because he acquired it in his fiduciary capacity. A theory of "fiduciary ownership" may also clarify the bifurcation of "legal" and "equitable" title under express trusts. The Supreme Court had the opportunity to consider the matter in *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 2 W.L.R. 713. Lord Mance approvingly cited such a theory (Clarry, "Fiduciary Ownership and Trusts in a Comparative Perspective" (2014) 63 I.C.L.Q. 901) but declined to decide the question. With respect, doing so might have assisted the Court in deciding that difficult case.

A developed notion of office and its bearing on questions of property law illustrates how the public law aspect of fiduciary theory could advance understanding. In *Finn's Law*, Joshua Getzler traces Finn's work on the Crown in Australian colonial law, sketching its genealogy in the English common law and in canon law. It is trite that individuals act in different capacities in both public and private law; that they hold assets in those different capacities that are legally partitioned from one another; and that assuming a new capacity limits the action which an individual can permissibly undertake in her personal capacity. In this context the deeper significance of the intellectual history of personality appears: Getzler's discussion of the Roman law hints that "ownership", traditionally conceived of as the law of things, rests on a law of persons. This is relevant when looking at trust and corporation as ways of pooling ownership, but also when looking at different kinds of partitioned patrimony. One plausible analysis is that a trustee holds property "in trust" not because the *title* is split, but because the trustee holds it in a capacity distinct from his personal one: the office of trusteeship bi-furcates the *personality of the trustee*, not the title to the trust property. Similarly, a public officer holds powers, rights and duties *virtute officii* and exercises them in a capacity distinct from her personal one.

All three volumes are recommended reading for students, scholars and practitioners, and should find their way into every law school library. In Cambridge lore, *Fiduciary Obligations* is constantly stolen from the Squire Law Library. It is expensive on the secondary market. This republication should balance supply and demand, and will continue to stimulate research. The perspectives opened up by the inclusion of Finn's subsequent essays to the original text should by now be apparent; the republication therefore commends itself. *Finn's Law*, an interesting mixture of legal biography and thematic explorations of particular aspects of Finn's legacy, will be of interest even to those less interested in Finn the man. Many of the contributors to *Finn's Law* close their remarks with personal acknowledgment of Finn's contribution to their own journey in the law. Finn sent me an offprint of "Fiduciary Reflections" in 2014, while I was struggling to convince the Cambridge public lawyers, as he had 40 years previously, that fiduciary principles were relevant to the law of judicial review. His advice to me was: "Keep fighting, the sun will rise". This echoed the closing words of a study in constitutional law by another great Cambridge equity scholar, F.W. Maitland. The task, to which both contributed in their own way, is of staggering breadth and complexity. Like Moses, Finn may have lead us out of Egypt – but, after 40 years in the desert, we are not yet in Canaan. This republication could provide the basis for a reorientation of fiduciary theory, or a footnote in a conversation dominated by defunct

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categories and dichotomies that generate more heat than light. We should all engage in some "fiduciary reflections" – or be content to wander in the dark.

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Privacy Revisited: A Global Perspective on the Right to Be Left Alone. By RONALD J. KROTOSZYNSKI, Jr. [Oxford: Oxford University Press, 2016. xx + 292 pp. Hardback £69.99. ISBN 978-0-19-931521-5.]

Privacy Revisited: A Global Perspective on the Right to Be Left Alone is a curious title for Krotoszynski's engaging comparative analysis of privacy law in five jurisdictions. Whilst this analysis might be considered geographically "global" since it covers privacy laws of countries on three continents, it is an overreach to suggest that the book offers a "global perspective" on privacy law. Four of the five jurisdictions considered (the US, Canada, South Africa and the UK) share common legal genealogies and, in large part, an Anglophone common law tradition. The fifth (the jurisdiction of the European Court of Human Rights) shares broadly similar commitments to human rights and Western liberal democracy as the previous four. The title and book also refer to the right to privacy as the "right to be left alone". As Krotoszynski acknowledges, the concept of privacy is notoriously difficult to define. However, the right to be left alone is one definition that can safely be jettisoned. It is too broad in that it would include assaults, murders and other intrusions, which are not privacy intrusions, but also do not leave the individual alone; and it is too narrow in that it would omit forms of mass surveillance where the individual's personal information is accessed by others, whilst she is being left strictly alone. Whilst pedantic, these quibbles clarify what Krotoszynski's nevertheless impressive thesis does not in truth set out to achieve. Readers seeking to understand significant variations in local understandings of the scope and normative value of privacy can safely be redirected elsewhere, along with readers who seek a philosophically rigorous exploration of what it means to exist in a condition of privacy. For those seeking a lucid analysis of the development (or lack thereof) of constitutional privacy law in the jurisdictions considered, however, Krotoszynski provides a comprehensive and thought-provoking overview.

Through the lens of comparative law, Krotoszynski attempts to articulate the legal meaning of privacy. The focus, according to the author, is on developing a more global perspective of privacy as a legal concept. Stressing the importance of such an endeavour, Krotoszynski suggests that his comparative analysis of democratic polities sharing common constitutional commitments can assist in the creation of a workable system of transnational privacy law, which can identify and describe the distinct yet related interests that fall under the rubric of "privacy". Irrespective of whether a transnational system of privacy protection could be devised, Krotoszynski argues that engagement with transnational sources of law can benefit domestic lawmakers, strengthening the quality of decisions and increasing the consistency with which constitutional privacy protections are interpreted. The importance of this task becomes more pressing as privacy interests are increasingly threatened by technological advances in mass surveillance and "big data", which allow for personal information to be stored and disseminated beyond the borders of the nation state. Finally, and somewhat tangentially, Krotoszynski draws on

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