opposition of councillors to boundary changes designed to produce more workable local government units. The opposition, he asserts, is based on conservatism, fears of loss of status and fears of loss of seats.[5] He favours complete re-structuring and a process of "systematic and reasonably regular review".[6] To achieve better administration he favours thoroughgoing professional training of administrators and a movement towards the "managerial" or "chief administrator" system. It is obvious that the present system will never produce the flow of considered and correct decisions which are necessary in the public interest. "Responsibility accounting" is another of the reforms advocated in this area.[7] In dealing with local autonomy Mr Purdie shows some misunderstanding of the concept of *ultra vires* in controlling the exercise of local government powers. He favours "flexibility to experiment and innovate" free of *ultra vires* control.[8] Having regard to the behaviour of councils in the past: Heaven Forbid!

Broadly I find myself in agreement with Mr Purdie's central thesis and most of his recommendations. There *is* a need for extension of local government powers. But this must never happen while the present system is retained. And I do not believe that even the present range of powers under an unreformed system should be tolerated without the closest supervision by departments, courts and tribunals. Whether that supervision may be relaxed in the future to secure greater local autonomy is problematical. I am not very optimistic about the prospects for responsible local government in the foreseeable future.

It is heartening to find someone concerned about a system of government which is so important in our daily lives. And it really is time for the "winds of change".

Harry Whitmore*

The Australian Law of Theft, by M. S. WEINBERG, B.A., LL.B. (HONS.) (MONASH), B.C.L. (OXON.); Barrister of the Supreme Court of N.S.W., Barrister-at-Law (Vic.), Senior Lecturer in Law, University of Melbourne, and C. R. WILLIAMS, B.JURIS. LL.B. (HONS.) (MONASH), B.C.L. (OXON.), Barrister and Solicitor of the Supreme Court of Victoria, Senior Lecturer in Law, Monash University. (The Law Book Company Limited, Sydney, 1977), pp. i-xxxiv, 1-374. Cloth recommended retail price $29.50, P/B recommended retail price $23.50. (ISBN 0 455 19586 2, ISBN 0 455 19588 9 P/B).

It is exciting to be able to review a very welcome book on the Australian law of theft. Considering the importance attached to the

---

[5] *Id.*, 91.
[6] *Id.*, 108.
[7] *Id.*, 139 ff.
[8] *Id.*, 151.
* Professor of Law, University of New South Wales.

protection of property in our community it is only surprising that it has taken so long for such a book to appear. Offences against property make up the majority of those dealt with in our criminal courts. It is also perhaps not surprising that the majority of people in our prisons are there for such offences.

Property and its protection by means of the criminal law and punishment is undoubtedly one of the major issues of the day. The task is not an enviable one, the encouragement of honesty, or at least the discouragement of dishonesty. As honesty is a virtue that we prefer to see in others, a study of the law of theft should illuminate some of the central tensions encountered by the criminal law and punishment as a social practice.

Essential to an understanding of the law of theft is its history. A convenient starting point is the eighteenth century. A time of the great reformers, Bentham and Romilly among them. It is also the century recognised as giving birth to the modern law of theft.[1] Here no organised police force to detect and protect. Prosecutions were by and large private ones. The distribution of property was grossly unequal. Accordingly, the gentry and aristocracy, the members of Parliament, as well as the property owners, set about the task of self-protection with characteristic robustness, unalloyed by petty sentimentality. To protect their property from those who had none, or at least less, they used the threat and example of terror. They did not hesitate to equate the loss of their property with the value of the culprit's life. Indeed this was the century that produced what has been described as one of the bloodiest penal codes in Europe.[2] Between the Glorious Revolution of 1688 and 1820, the number of statutes making provision for the death penalty rose from fifty to well over two hundred. Nearly all of these concerned the protection of property.

The social historian Hay comments:

> What is certain is that Parliament did not often enact the new capital statutes as a matter of conscious public policy. Usually there was no debate, and most of the changes were related to specific limited property interests, hitherto unprotected for one reason or another. Often they were the personal interests of a few members, and the Lords and Commons enacted them for the mere asking.[3]

The enforcement of these terrifying provisions was to say the least random and capricious. The thief who was caught was at the whim and mercy of the property owner. If he prosecuted successfully, death would surely follow. If he pardoned, he won the respect and admiration of at least his neighbours, as a merciful and humane man. Here lies the secret of the success of, at least eighteenth century criminal law, as an instrument of terror, without even the police. Terror selectively and ceremonially administered, yet liberally spiced with mercy. Much more

---

[1] Hall, *Theft, Law and Society* (2nd ed. 1952).

[2] Hay, "Property, Authority and the Criminal Law" in Hay, Linebaugh, Rule, Thompson and Winslow (eds), *Albion's Fatal Tree* (1977) 19.

[3] *Id.*, 20.

powerful this than the carefully calculated caricature of terror suggested by Bentham and the like.

Weinberg and Williams break new ground. Not only have they produced the first comprehensive exposition of the law relating to theft in the six State jurisdictions, they discuss policy questions and make suggestions for the reform of the existing law. In their espoused primary task of meeting the need for a detailed exposition of the existing law, they have in my opinion succeeded with gusto. It is difficult to fault the accuracy and detail of their research. I have no doubt that it will take its place alongside Professor Colin Howard's *Criminal Law* as the leading authoritative text on the subject of theft law.

That said, it seems carping to ask for more from this pioneering work of legal scholarship. Yet matters of policy and reform invite response, indeed require it. In their historical introduction the authors make no reference to the vital fact that the legislation that formed the basis of the modern law of theft was characterised by the penalty of death. This would in no small manner account for the rather narrow, not to say at times casuistic, reasoning of the courts. More importantly they miss the point that this very technicality and unpredictability gave the criminal law an "otherworldly" quality. The irrationality of the administration of the law served to remove it from the realm of the terror of men to men, to that of the unknown, the hidden depths or heights of fear. By this technique the law was disembodied, the coercion of the powerful became the rule of Law. Yet Weinberg and Williams strain and struggle to systematise. They assume that the law is some abstract rational system, rather than the instrument for the very real interplay of men.

The value of honesty is to say the least a controversial one. Our authors vigorously take Bray C.J. to task for his narrow construction of the common law of larceny relating to mistake. They urge the adoption of the wider rule that may arguably, by equally narrow reasoning, be teased out of *Middleton's* case.[4] Thus, as a matter of policy they suggest, "so long as that crime is to form the basis of the law of theft in the jurisdictions now under consideration such modifications must be accepted if dishonesty is not in many cases to go unpunished".[5] In relation to the reformed Victorian theft provisions especially the construction of section 81, it allows them to suggest

> [c]ertainly there are many circumstances where the defendant might have deliberately misstated the relevant legal principles in order to advance his bargaining position in an attempt to compromise a suit, and it would be intolerable if such tactics were foreclosed as a result of s. 81(4). To allow the criminal law to impinge in this area of forensic tactics would impede the public interest in settling disputes out of court, and bring the legal profession into the borderland of dishonesty.[6]

---

[4] (1873) L.R. 2 C.C.R. 38.

[5] Weinberg and Williams, *The Australian Law of Theft* (1977) 35-36.

[6] *Id.*, 132.

Reform of the existing law does take second place in the stated aims of the book. It unfortunately receives rather scant and perhaps unimaginative treatment. The suggestion is that with minor modifications, the Theft Act 1968 (U.K.) be adopted as the model for uniform State legislation. I suppose that with one's appetite whetted by the work done in the essential preliminary statement of the existing law, hopes are raised high. However, here fundamental questions are not directly raised. In passing, reference should be made to the rather radical and not uncontroversial proposals of the Canadian Law Reform Commissioners in their working paper on the law of theft.[7]

In sum, a very welcome book. No small measure of credit is due to the authors for venturing on the task that they set for themselves. Here they have succeeded, so well indeed that one is left as one should after reading a pioneering work, asking for more.

Dirk Meure*

Fiduciary Obligations, by P. D. FINN, B.A., LL.B. (QLD), LL.M. (LOND.), PH.D. (CANTAB.); Senior Lecturer in Law, The Australian National University. (The Law Book Company Limited, Sydney, 1977), pp. i-xxxvii, 1-299. Recommended retail price $24.50. (ISBN 0 455 19589 7).

The term "fiduciary" has a large and increasing currency both among equity lawyers and those toiling in adjacent vineyards. Many use it as if it were an expression of fixed and recognised import whereas the truth is to the contrary. The disparity between the views of fundamental issues apparent in the High Court judgments in *Consul Developments Pty Ltd* v. *D.P.C. Estates Pty Ltd*[1] and the uninspired reasons delivered by the Judicial Committee of the Privy Council in *Queensland Mines Ltd* v. *Hudson*[2] are but two recent examples of the necessity for a confident guiding hand to bring order and clarity to this subject.

The appearance of Dr P. D. Finn's work will be welcomed by lawyers with an interest in equity and by all for whom the exigencies of practice necessitate an investigation of the intricate mysteries of fiduciary obligations. Despite a cloudy patch at page 11 (where the author confesses a "felt need") the light of reason shines throughout the balance of the book.

As the author truly observes, the term "fiduciary" is a relative latecomer to our law. It is not much more than a century old, having gained currency as an identification of those relationships to which

[7] Canadian Law Reform Commission, *Working Paper No. 19—Criminal Law of Theft and Fraud* (1977).

* Lecturer in Law, University of New South Wales.

[1] (1975) 5 A.L.R. 231.

[2] (1978) 18 A.L.R. 1.