Book Reviews

LAW AT THE MARGINS: TOWARDS SOCIAL PARTICIPATION? by Terry Carney, Oxford University Press, Melbourne, 1991, pp 199 + xv, ISBN 0195532198

The title of this short book is taken from a passage (quoted at 132) in a 1973 *Wisconsin Law Review* article by Robertson and Teitelbaum: "Law effects change at the margins, being at best part ratification and part change agent". The title of that article was "Organizing Legal Impact: A Case Study in Search of a Theory". Carney is himself searching for a theory to support his view that law can be used to promote what he calls "rights of citizenship", and which he places at the "margins" of the law.

The title provoked two fundamental questions. First, a definitional problem: is any area of social activity at, or beyond, the margins of law? Secondly, a problem about the nature of theory: if the author's purpose is to mobilise the law to promote the achievement of certain moral or political ends, certainly a legitimate purpose, is the search for a theory to underpin this purpose really a theoretical exercise, or might it more properly be called rhetorical?

Before evaluating this book, I needed to think about these problems. I could not be satisfied that any area of human social activity is beyond the "margins" of law, though there are questions about whether or not it should be. As I agree with Carney that law should have an educative and "empowering" dimension, I have few difficulties with his views about what law ought to be. Therefore much of what Carney suggests is "marginal" to law is already within the sphere of legal activity. What he suggests are new applications for law. For this reason I have difficulty with the last few words of his statement (at xiii) "The basic thesis advanced in this work is that the law does have a place in responding to the new social issues previously at the margins of the law." I agree that the law can assist responses to new social issues; but why should they be seen at the "margin" of the law?

The second problem is more difficult. These days lawyers admittedly face difficulties if the way they think about law as limited by traditional jurisprudences. As Julius Stone taught from 1946, we need to look to other "disciplines" for material that assists us to understand what, as lawyers, we are doing. Carney demonstrates a very wide knowledge of literature in the social sciences generally, and especially in areas related to his areas of special interest. Indeed, the first six chapters represent a distillation of relevant ideas of various writers in jurisprudence, but also in sociology, political theory, and public policy/public administration. Somewhere in this bundle of theoretical observations, one feels, the author seeks theories that justify his preferred direction for law.

Like many of us, he probably feels academically insecure as an aware lawyer if he cannot readily locate his views within a "theoretically sound" framework. Yet, provided we are aware of the logical and practical dangers that are often revealed by attempts to place law in a theoretical context, do we really need always to articulate a theory to justify all our views, particularly when those views constitute a moral or political program, as Carney's clearly do? Some social scientists insist that "scientific" rigour be applied to human behaviour,

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of the individual. In the area of welfare law, which he clearly knows well, he sees that individuals who lack capacity cannot be fully autonomous, yet excesses of paternalism may lead to unjustified bureaucracy.

Carney provides an account of the debate about the nature and source of "rights". He finds neither the "liberal/individualist" nor the "welfare/collectivist" accounts entirely satisfactory, though on balance favouring a version of the latter, a "right of citizenship" which carries with it the right to participate in society and in the making of decisions that affect the person concerned. This may involve breaking up some currently existing institutions.

One of the significant benefits which law can provide, especially in the welfare sector, is as part of a system of "checks and balances" which is necessary to restrain excesses possible under a system of administrative discretions. Carney makes a distinction between the kind of "soft/responsive law" he advocates and the wide discretions which are important in modern administrative law. He sees the former as providing a framework in which agents of the State may work with the recipients of care (who are also those being assisted by the law to realise their rights of citizenship) in a joint effort to maximise participation in civic and social affairs. The law creates scope for state activity, rather than imposing limits on it.

In emphasising the "enabling" aspects of law — the "freedom to", rather than the "sphere of autonomy" or "freedom from" which is so important in the liberal tradition — Carney advocates increased flexibility in the law. Possibly the only argument he does not meet is the great, and, outside the commercial area usually understated, importance of predictability in the law. Law can never be entirely predictable, but people, even though disabled or lacking capacity to participate fully in society, may prefer to know where they stand, rather than to know that the law may provide some inchoate possibility of a right. Carney's "Educative Strategies" include the creation of a "culture of expectations"; but it is clear what the political consequences of disappointed expectations will be.

The book is provocative and useful, but one is left with the feeling that much of it could have been presented more effectively as a solid law review article. The first six chapters appear as a series of brief paraphrases of what other social theorists have said about aspects of law and rights, and might more usefully have been presented more briefly, though this may have led to even more weighty charges of superficiality than Carney will inevitably face from legal academics more concerned with theoretical soundness than with using theory to gain real insights into how the law works.

Carney, unmistakeably a lawyer who has been involved in policy formation, is at his best when he discusses the "black-letter" law in the context of its social functions. He is especially lucid on welfare law and the law relating to guardianship of the intellectually disabled, children and the poor. Chapters six-eight are excellent and an important contribution to our understanding of how law works in these areas, even though, like the rest of the book, the style is rather dense. He is equally disdainful of pettifogging literalists and yuppie consultants in policy analysis; neither will assist the development and expansion of the law. His book is important because it represents a new tradition in Australia: an attempt to think about the nature, and potential applications of the law in a way which relates it to thinking in other disciplines without becoming either totally abstract or an impenetrable exercise in academic jargon.

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