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ASKING THE LAW QUESTION

by Margaret Davies

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THERE is a great temptation to spend time unravelling the tensions and savouring the ambiguities of the title. It always seems to require explanation to legal minds.

- "What?" they say, "asking the law *a* question?"

"No", I reply, "asking the law question".

- "Oh", they reply, yearning for comprehension, "Asking the law questions, some kind of critical stuff eh?"

- "No", I patiently respond, "asking the law question".

- "*What* is the law question" they say, a deep psychological need for meaning unsatisfied, "I don't understand".

- "You don't need to", I say, referring them to the chapter on post-modernism.

This book can be inadequately described as an introduction to legal theory. Even at this prosaic level the book is invaluable as a summary of developments in jurisprudence. At 278 pages most jurists are still defining their terms but Margaret Davies manages to encompass a broad sweep of legal thought from classical common law theory to deconstruction.

The chapters on Common Law Theory and Natural Law and Positivism are necessary evils. After all, it seems to be these things which still form the basic theoretical training of the (not so) thoroughly modern lawyer. The

association of law with science and scientific method through formalism, realism, and the law and economics school is the subject of the next chapter. Law and Economics deserves to be taken about as seriously as any spurious form of positivism. They need their foreheads measured. The imperialist tendencies of economics are well presented in the section, "Law's *terra nullius* - settled or conquered?". The author rightly condemns economic notions which alter the standard of care in torts from reasonableness to rationality, replacing soft flexibility with cold calculation.

After repelling the invasion of the discipline snatchers Dr Davies moves on to arch an eyebrow at the Critical Legal Studies movement. Defined around a loose left orientation they "can be infuriatingly obscure and jargonistic, passionate, funny, insightfully critical of legal ideology, intimate, provocative, or vague".¹ This chapter brings up acutely one of the themes of the book which is the utility (*lawandeconomicsspeak*) of theory.

In "Feminisms" the author defends the idea of transformative theory as inseparable from political practice. Transformation is both a theoretical and a political process so any cleavage between them is artificial. Davies does, however, recognise some distinction between the single political agenda of feminism and the multiplicity of different theoretical feminisms. This is an accessible account of feminist theories steering a difficult path between simplification and obfuscation. Her plan is to consider liberal feminism, radical feminism, and the problem of intersections between patriarchy and other systems of oppression. Women are not just women. Race and class are two (of many) variables.

The chapter on post-modernism is a revelation. It is quite an achievement to explain such difficult concepts in such an accessible way. I have never seen a better treatment of modernism and post-modernism, structuralism and post-structuralism and deconstruction. Those big words can terrify the uninitiated; jargon is perhaps the most demoralising form of exclusion ever invented and post-modernists are gifted exponents. Margaret Davies' text is consciously inclusive. A footnote is revealing:

There comes a point in every writer's life where it is simply not possible to avoid trendy words. Having over-used "analysis", and "thought", being not entirely in agreement

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 1 Davies, *Asking the Law Question* (Law Book Company, Sydney 1994) p143.

with "critique", and not wishing to go as far here as "gesture" I thought it was time to introduce "intervention".²

The author's explanation of the metaphysics of presence is brilliantly lucid. Trying to make present our objects of thought is a basic trait of western philosophy. It is hard to avoid linguistic metaphors which attempt to embody the concept in a physical form. 'Embody' is an example. 'I see' is synonymous with 'I understand' in our language. You 'grasp' a 'point'. You get an 'impression' of something. Metaphor has a tendency to be unconsciously sensuous.³

In the final short chapter deconstruction is linked specifically to law. The temptation to identify deconstruction with nihilism is roundly rejected. It is instead the tool which allows us "to think about our previously unstated assumptions differently".⁴ The author teases out some major strands of deconstructive practice and its application to law. The problem of the legitimation of knowledge, the relational nature of subjectivity, and the complexity of the notion of 'text' are crucial aspects of the post modern approach to law.

Kafka's famous parable about the gatekeeper from *The Trial* is the most poetic and baffling account of the dichotomy between the inside and the outside. Davies has written one of the most theoretically satisfying and accessible accounts in her book. She argues, "law is a boundary which says that everything inside is legal or legitimate and everything outside is illegal or illegitimate."⁵ This book is about acknowledging the existence and nature of that boundary. Law is too often only a study of where the boundaries are. Instead we must be vigilant as to who built them, what they are made of, who guards them and why. Book review lore has always recognised the adage that you *can* judge a book by the cover (and the footnotes). The cover of this book features a painting by Debra Dawes, entitled *Starlite*. It is not really outside the book; and it is certainly part of the text:

[J]ust as *Starlite* on one of its many levels refers outside itself (and inside my book) to something as familiar as a Besser-block wall, so what is inside the book (apart from

2 Davies, *Asking the Law Question* p262.

3 Spotting the metaphysics of presence has become something of a party trick. 'Spotting', for that matter, is another one.

4 Davies, *Asking The Law Question* p261.

5 As above p12.

referring in its turn to *Starlite*) is only an opening on to the world of ideas.⁶

I recently attended a seminar given by the author for English Honours students about the applications of deconstructive theory to literary criticism. On reflection it is a little strange to be told about these things by the author of the book you are about to review. However, it did reinforce my impression that the book is written by a *teacher* as well as a jurispude. She has a way of attacking a point from different angles in order to make it comprehensible. This is very much the talent of a teacher. New law students react especially well to the extended use of literary and philosophical excerpts. At first Jeanette Winterson, Hans Kelsen, Umberto Eco, St Thomas Aquinas and Catherine MacKinnon seem strange bedfellows. But their voices reinforce and clarify the text as they are in turn amplified by their position in the text.

On a less tangible level it is not so much the content or the lucidity of the presentation which is the key to this book. Instead, the important thing for me is the way it made me think. Ideas resonate. No doubt many of them are my *misunderstandings* but that is all right:

In fact, treating a text with respect may involve interpreting it in a way, or seeing things in it, which the author herself did not see or intend ... a respectful reading of someone else's work may involve translating it into a context where new meanings arise.⁷

This process of translation is what keeps a text alive. As the author recommends, "I would say that we can and should relax about finding an absolute 'meaning', and try to imagine or construct connections for ourselves".⁸ Relaxing into reading is a habit which law schools can easily crush.

The author stresses that topics or chapters are not really separate or mutually exclusive. It is just that the material "seems to have organised itself into a jurisprudential narrative".⁹ There are also problems of coverage in a book this ambitiously brief. This is "an unfortunate side effect of not being

6 Davies, *Asking the Law Question* p18.

7 As above p246.

8 As above p219.

9 As above p9.

omniscient".¹⁰ As the author recognises, "there is no end to a book on legal theory, though there is an end to the time I can spend writing it". This seems like a pity. I'm still not exactly sure what the law question is.

10 Davies, *Asking the Law Question* p213.