



## BOOK REVIEWS

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### DELIMITING THE LAW: "POSTMODERNISM" AND THE POLITICS OF LAW

By Margaret Davies

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Anyone who has read Margaret Davies' excellent *Asking the Law Question*<sup>1</sup> will be familiar with her very particular gifts as a legal theorist. Davies has something approaching a genius for recasting complex, abstract ideas so as to simplify and render them accessible to a wide audience. Even more admirably, she generally manages to do so without reducing the object of her analysis to a crude or simplistic caricature of its original form. Furthermore, Davies, like her compatriot Valerie Kerruish, is unusual among "critical" legal theorists in engaging seriously and in some detail with the "orthodox" theorists whose work forms the target of her critique. These gifts are vividly displayed in *Delimiting the Law*, which addresses some of the most difficult ideas in contemporary legal theory and, in particular, explores the implications of Derridean deconstruction and postmodern theory for both our understanding of law and the project of legal philosophy. Along the way, we are treated to brilliantly condensed accounts of some of the key ideas of thinkers as diverse as Finnis and Fitzpatrick; Derrida

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

and Dworkin; Butler and Raz; Irigaray and Kelsen - accounts which often pack more into a stylish paragraph than their original exponents expressed in a lengthy chapter.

In *Delimiting the Law*, Davies offers, from a deconstructionist perspective, an astute critique of the contours and self-conception of traditional legal philosophy. She also provides a positive conceptualisation of law drawn from her critique and, though more schematically, some insights as to how legal theory might move yet further in a progressive or transformative direction. *Delimiting the Law* can therefore fairly claim to be both a useful exposition and elaboration of a Derridean approach to law and an original contribution to legal theory.

As its title suggests, the central problematic around which *Delimiting the Law* is constructed is that of the paradox of the limits of law. Davies shows how traditional legal theories are haunted by the logical conundrum set up by law's inevitable origins in the extra-legal: specifically, in force. Though the problem also affects sociologists of law (who receive little attention) and, in a different way, natural lawyers, Davies' main target is the positivist tradition. She regards the circularity inherent in Austin's account of sovereignty, echoed in Hart's "rule of recognition" and Kelsen's *Grundnorm*, as the most vivid articulation of a problem which cannot be acknowledged without destroying both the image of law's authority and the foundations of modern legal philosophy. In particular, Davies emphasises the way in which the undecidability of law's limits echoes through the system at every level: each judicial decision both assumes and disproves the limited nature, or closure, of law, thus undermining, as it utters, the authoritative nature of legal decision-making. Thus, in a wonderfully bold gesture, she paints Kelsen not only as implicitly recognising this predicament in his late reconceptualisation of the *Grundnorm* as fiction rather than postulate, but also as prefiguring a constructionist notion of "law as performance" in his dynamic theory of norms.

This idea of law as performance, which draws on the work of Judith Butler, is the key to Davies' aspiration to develop a "material" theory of law - a theory which emphasises the centrality of repetition or iteration to law. Law is materialised in the repetitions of its officials and other actors in legal fora. Equally, legal subjects are effects of legal iterations: law has a constructive role in which subjects are both subject *to* and subjects *of* the legal order. This exploration of law as an iterative practice is one in which the modern conception of the pre-legal subject - the "subject before the law" - evaporates, and not only is the past implicated in the present, but the future may also be glimpsed. So while she is generally persuaded of the strong distinction between law, whose mystical foundations lie in the concealed violence of a past which is replayed in every decision, and justice, which is particular and unrepresentable and hence always in the future, Davies is also concerned to recognise, if not thoroughly to explore, the limits, as it were, of deconstruction. Law, on a deconstructionist view, is a limit which invites transgression: but can that transgression escape the binary logic which marks even deconstruction itself? Her argument, which draws on the work of feminist writers such as Irigaray, is that deconstruction remains

preoccupied with the law: whilst it opens up our vision of the repressed underside of law on which the alchemy of legal authority and closure depends - the "other of the same" - it fails to, or perhaps cannot, move beyond that analysis to imagine a different law in which, to paraphrase Seyla Benhabib, "the differend might appear in its midst". Though deconstruction gives us a glimpse of Plato's cavern - the "other of the other" - its logic precludes any hope of realising or even approaching that "other" in terms of reconstructed legal practices. Even Irigaray, in her work on special rights, reinstates a binarism (that of sexual difference) which Davies is keen to question. The fundamentally political, and significantly feminist, motivation of Davies' critique makes her uncomfortable with such a limit to critique, and whilst this is the most underdeveloped part of her book, the reader senses that a utopian horizon is central to her imaginative project.

In attempting an assessment of the book's contribution, it is worth reflecting briefly on its structure. The book falls into two parts. The first develops a critique of "orthodox" legal theory - natural law and positivism - from a deconstructionist point of view. Davies' task here is to show how the method and self-conception of legal philosophy itself has served to obfuscate the politics of law and law's implication in prevailing power relations. As she recognises, her project in this part of the book has much in common with that of "critical legal theory". The distinctive features of her particular approach are the meticulousness with which she approaches "orthodox" theories and the breadth of her conception of law and legal actors, which stretches well beyond the familiar terrain of cases and legislation, judges and legislators to encompass a wide spectrum of norms. In the second part, however, Davies aspires to move beyond a critical approach which nonetheless leaves "law" in place as a relatively unproblematic category understood as social or political institution, and to follow through the logic of the deconstructive arguments (used somewhat unevenly and pragmatically by some critical legal theorists) so as to generate a more thorough "postmodern" vision of law. The two parts of the book are bridged by an "interlude" which sets up the legal decision as the salient figure around which her own analysis will be framed. Curiously, this is almost exclusively understood as the judicial decision and, somewhat ironically, it presages a retreat into a rather more conventional and limited vision of the legal terrain in the second part of the book. The bipartite division of *Delimiting the Law* serves Davies' purposes well in many respects. However, both the dominance of Derridean and postmodernist critical arguments in the first part (Davies draws on writers inspired by continental philosophy, such as Douzinas and Goodrich, rather than on the American school of critical legal studies) and the salience of positivist adversaries in the second, mean that the division is, perhaps appropriately to the project, far from watertight. One slightly unfortunate - again, ironic - implication is a significant degree of repetition in what is a relatively short book.

Davies' project is first and foremost a contribution to legal philosophy. This entails, as she implicitly notes at various points in the text, its own set of paradoxes. Philosophy, like law, is a tradition; it is a tradition whose history is selectively represented and whose contingency is necessarily repressed within its system of meaning and validation. The

pretension of deconstruction to be, as it were, a post-philosophical philosophy is an intriguing one which might usefully have attracted more critical attention in Davies' text. In particular, it is perhaps significant that the relatively broad conception of the legal which Davies affirms early in the book gradually falls from view as her increasingly radical argument focuses on an increasingly traditional terrain: that of judicial decisions, generally considered in the abstract. We are left, as so often in legal theory, wondering about the links between philosophical critique and the more overtly political interpretive projects spawned, for example, by feminist legal analysis. Though Davies' examples spanning this gulf, such as the recurring example of the legal construction of women who kill violent partners, are effective, they are few and far between. The question may therefore be raised as to why, as a complement to her sure-footedness in handling abstract philosophical arguments, Davies did not also explore some more sustained examples.

In this respect, it is interesting to compare Davies' work with that of Drucilla Cornell. As Davies recognises, Cornell has done more than any other feminist legal theorist both to elaborate the implications of Derridean thought for legal philosophy and to emphasise the "utopian moment" in Derridean deconstruction. This moment, which underpins the possibility of what Cornell calls "ethical feminism", consists in the irreducible reference to what has been repressed, and hence a glimpse of the "other", in all legal analysis. This is presumably what Davies would call "the other of the same", and is therefore precisely what she wants to build upon yet go beyond. In assessing the possibility of a more radically utopian approach to law and legal theory, it is instructive to think about Cornell's latest book *The Imaginary Domain*<sup>2</sup> which had presumably not appeared when *Delimiting the Law* went to press. In this book, Cornell holds to her vision of the utopian possibilities of deconstruction. What is distinctive about *The Imaginary Domain* is that analysis of legal constructions of particular practices (abortion, harassment and pornography) have a more central place than in any of her previous work. It is fascinating to see that, as her analysis has become more rooted in concrete issues, her principal theoretical resources are no longer those of deconstruction but those of liberal political philosophy: a philosophy in which law's closure is, by definition, assumed rather than questioned. Rawls and Nagel displace Derrida (who is referred to only once) and at least demote Lacan from their status as symbols of philosophical authority in, for example, *Beyond Accommodation*.<sup>3</sup> It is as if the move from philosophical (de)construction to critical analysis of existing legal discourses gets drawn into the legitimating metaphysics of modern law and legal theory. Is this displacement the (negative) answer to Davies' question about the possibility of a more radically utopian legal philosophy, and indeed the explanation of her own failure to develop the project to which she affirmatively gestures? Answers, on a Derridean postcard, may presumably be expected not to arrive. Happily, the principal messages of

2 Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, New York 1995).

3 Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (Routledge, New York 1991).

Davies' book, eloquently articulated and well directed as they are, are certain not to share the same fate.

