

LAW & CULTURE

**ASKING THE LAW QUESTION**

Margaret Davies; Thomson Lawbook Co, 3rd ed, 2008; 428 pp, \$89.95 (softcover)

In *Naturalizing Jurisprudence*, the US philosopher and law professor Brian Leiter grudgingly allows that 20th century critical movements in the study of law (for example, critical race theory and feminist legal theory) reveal 'something of at least moderate interest'. He continues in a similarly magnanimous vein: 'But none of this [i.e. the work of critical legal theory] ... has much direct bearing on jurisprudence, that is, on philosophical thinking about law. None of these theorists shed much light on core jurisprudential questions like: what is law? what is the relationship between legal norms and other norms in society? how do judges decide cases and how ought they to decide them?'.¹ It is one of the many great merits of Margaret Davies's longstanding textbook on legal theory, *Asking the Law Question* (now in its third edition), that it simultaneously provides an introduction both to the kinds of legal theory which Leiter and his ilk would allow within the province of jurisprudence (classical common law theory, positivism, natural law, legal realism) and to those barbarian thinkers upon whom he would no doubt prefer to close the great gates of jurisprudence.

Asking the Law Question is not simply an excellent teaching text which spans (and explains in lucid prose) a great deal of diverse and difficult material — although these are no mean feats in themselves. Rather, on a broader level and as the subtitle to the second edition proclaimed, Davies's coverage of the diverse currents of jurisprudential, political and philosophical inquiries in law actually reflects (and itself works) a 'dissolution of legal theory' itself. That is, after encountering Davies's sensitive treatment not just of the canonically anointed but also of those more marginal endeavours of which Leiter (and many others, to be fair) speaks so disparagingly, it is impossible to definitively encompass what legal theory 'is' with any degree of certitude. As Davies puts it in the preface to the new edition: '[I]t was no longer possible to see legal theory as a single distinct area of academic inquiry. Legal theory had become,

and remains, plural: it cannot be reduced to a core set of questions with a defined number of possible responses' (p v). It may seem an unpropitious (if refreshing) beginning to a legal textbook for it to so readily dissolve its object of inquiry, but Davies's dissolution of legal theory 'properly so called' is an opening onto a much more varied and interesting terrain than the standard tomes routinely permit: here critical whiteness studies jostles with Langdell's case method, and reflections on *Mabo* and terra nullius with Hobbes, Hale and Coke.

The structure of this third edition of *Asking the Law Question* mirrors the structure of the second edition. The first chapter introduces a number of methodological issues which guide the author's approach in the book, whilst the next three chapters deal with what one might call more orthodox or foundational jurisprudential currents of thought: classical common law theory (largely Coke and Hale, with a discussion of the critiques of Bentham and Hobbes); the natural law versus positivism debate (from its ancient formulations to its more contemporary repetitions); and what Davies calls 'legal science' (which encompasses a discussion of the 19th century casebook method, legal formalism, legal realism and law and economics). Davies's elucidation of these different schools of thought is both admirably clear and thought-provoking. In these chapters the usual jurisprudential suspects receive a much more engaging treatment that we are accustomed to expect in legal theory textbooks — classical common law theory is brought into interesting proximity with Jean-François Lyotard (pp 72–4); the hallowed divide between natural law and positivism is constantly submitted to questioning (throughout Chapter 3); HLA Hart's notoriously circular 'rule of recognition' is discussed in terms of Jacques Derrida's critique of legal foundationalism (pp 103–6); and, throughout the discussion Davies's generic eclecticism introduces the reader to *Antigone*, *Gulliver's Travels*, *Rasselas* and *The Merchant of Venice*.

This is the point at which Leiter, had he been writing the textbook, would have stopped. Thankfully Davies progresses beyond page 182 of the present edition to discuss critical legal studies (Chapter 5), feminism/s and

gender in legal theory (Chapter 6), race and colonialism in (and as) legal theory (Chapter 7), and postmodern and deconstructive jurisprudence. These discussions are comprehensive and incredibly clear (not something we are always accustomed to in glosses of Derrida and postcolonial theory, for example). I mentioned earlier in this review that *Asking the Law Question* is an excellent teaching text — indeed, I have been using the second edition of the textbook to teach a subject called 'Law and Society' to American exchange students in London for the past several years. In addition to its comprehensive treatment and clarity, one of the reasons I have found the text particularly useful is that it actively challenges students' assumptions about law and legal theory. These latter chapters do that more than the preceding ones, and they are also the chapters in which the voice (not that it is in any way elided in the preceding discussion) and political engagements of the author become most evidently engaged. In challenging students' assumptions about law and legal theory (through both its form and content) *Asking the Law Question* has frequently provoked heated discussion in my classrooms. This is perhaps rather more than can be said about the average text on legal theory, although it is by now perhaps rather evident that for this reviewer *Asking the Law Question* is no average textbook.

BEN GOLDER is based in the School of Law at Birkbeck College, University of London.

1. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) 83.

UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCCR Commentary
Manfred Nowak; N P Engel,
2nd revised ed, 2005

With the recent enactment of the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*, together with the proposed development of Human Rights Acts in Tasmania and Western Australia, it is both inevitable and important that domestic