Jurisprudence: Ideology or Analysis?

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Introduction

Here is one view on the relation between analytic jurisprudence and the social study of law, a view that has at least the virtue of straightforwardness. Analytic jurisprudence is an abstract conceptual discipline, concerned to display perspicuously the structure of the concept of law in our present ways of thinking. It freezes the institution of law at some moment in time and asks questions about its conceptual framework. The social study of law takes the institution of law as it functions in the contemporary or the historical world, or both, and presents accounts, whether descriptive or normative, of that functioning. These two activities are not in competition with one another; they are not a proper and an improper way (whichever one thinks of as the "proper" one) of conducting the same activity. In fact, in a sense, the latter presupposes the former. Analytic jurisprudence must teach us what the criteria are for the identification of the institution that the social study of law examines. Unless analytic jurisprudence gave us ways of identifying the social institution that is law, the social study of law could not get off the ground. This does not mean analytic jurisprudence is, from some moral or political perspective, the most important enterprise. If law, the institution, is riddled with injustice, the social study of law may be normatively far more

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1. I have been, and still am, tempted by this view. See R. A. Shiner, Norm and Nature: The Movements of Legal Thought (Oxford: Clarendon Press, 1992) at 5, 9, 321 n. 9. The present essay may be regarded as an attempt to investigate the shape, at least, of other possibilities.
important, in order to set the stage for the rectification of such injustice. All the
same, analytic jurisprudence has its project to carry out, and the social study of
law has its project. Each can happily co-exist. It is a personal choice, even if a
choice not without moral significance, which project a person wishes to pursue.

This straightforward view is rejected by many theorists who believe that, in
some way, analytic jurisprudence is morally and politically bankrupt as an
enterprise, and who think that therefore (and I deliberately emphasize that word)
only the social study of law is acceptable as legal theory (again the emphasis is
deliberate). The purpose of this essay is to look at one recent attempt to validate
that inference, from the claimed bankruptcy to unacceptability as legal theory. At
first sight, as the previous paragraph suggests, the inference contains a large gap
in the reasoning. Can the gap be filled?

In an unduly neglected article some years ago, 2 William Twining, in the guise
of reviewing the Festschrift for H. L. A. Hart, 3 made a number of trenchant
comments about how Hart’s achievement of “integrating legal philosophy into the
mainstream of general philosophical thought,” 4 given that this mainstream was
Anglo-American analytic philosophy, was bought at a price—the price of severing
connections between legal theory and social theory. Twining’s own call for re-
establishing the connections with social theory was largely programmatic, but the
call was made. As he said:

If law is to be viewed as a social phenomenon, it would seem to be worthwhile at
least to explore the relationship between legal theory and social theory, in particular
possible connections between theories of law and theories of society. (pp. 566–67)

It is hard in 1993 to realize that 14 years ago, in the world of analytic jurisprudence,
this modest assertion was regarded with some hostility. Twining, no more than I,
wants to replace analytic jurisprudence with social theory of law; rather, he wants
the former discipline not to proceed in blithe ignorance of the latter. His proposal
to this end is the following. He distinguishes 5 between “high theory,” philosophy
of law at a high level of abstraction such as most of analytic jurisprudence, and
“middle-order theorizing.” This latter may be prescriptive or descriptive, and
includes:

in particular, (a) the articulation of general hypotheses about legal or law-related
phenomena capable of being tested by empirical research, and (b) the development

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Hart” (1979) 95 L.Q. Rev. 557.


5. Twining, supra note 2 at 575.
of working theories for various kinds of participants in legal processes, such as prescriptive theories of legislation and adjudication.6

How much further does this latter proposal go beyond the straightforward view with which I began? In the first place, it asserts what the straightforward view would deny, that prescriptive middle-order theorizing really is legal theory, and not some other way of studying law that may be useful but is not legal theory as such. Second, and I am aware that this remark raises far more issues than I can deal with here, Twining forces on us the deep connection between legal positivism and analytic jurisprudence as standardly practised, while retaining the distinction between description and prescription. Legal positivism promotes the study of law as a closed and autonomous institution. It relegates the study of the nonautonomous aspects of law—the social, political, and psychological processes at work in the evolution of the law; the substantive content of the law—to other disciplines that are explicitly not within “the province of jurisprudence.” Thus, it cannot be part of the project of legal positivism to study law in its social context—or, if you prefer, law-in-its-social-context. To the extent that analytic jurisprudence takes the same view of law-in-its-social-context, then analytic jurisprudence is thinking of itself in positivistic terms.

Twining’s taxonomy, however, while opening up legal theory to a place for social theory, leaves open the following question. Can high theory (if we continue to use that expression) retain its self-identity—its distinction from middle-order theorizing—if it discards a belief in the autonomy of law, and embraces firmly the thought that law is law-in-its-social-context? Here, it is important to remember that the straightforward view has two styles of adherents, not one. The first accepts the difference between analytic jurisprudence and social theory of law and votes to pursue only analytic jurisprudence; the second accepts the difference and votes to pursue only social theory of law. The deep question is whether high theory can admit social theory, and if so how.7 Twining’s taxonomy leaves high theory pretty much in the hands of the analysts, admitting the study of law-in-its-social-context only to middle-order theorizing.

The virtue of Valerie Kerruish’s excellent and challenging book Jurisprudence as Ideology is that it confronts this deep question head on, and gives to it an unambiguous answer—high theory cannot accept that law is a social institution and continue the project of abstract analysis. The political concerns, and the political message, of its author are never concealed in the book: there are many references to the need to do legal theory from the standpoint of the disadvantaged and the oppressed, and to the moral bankruptcy of the discourse of rights and of

6. Ibid.

7. It may seem self-serving to say so, but I think that Shiner (1992), despite what I said in note 1 above, can be taken as not only treating this question, but answering it affirmatively. I will return to this issue briefly below.
analytic jurisprudence. Nonetheless, it seems to me it would be a great mistake for a supporter of analytic jurisprudence simply to dismiss the book as another politically motivated attack on the Oxonian ivory tower. The book is that, of course, but its argument, as I understand it, reaches a level of conceptual sophistication that makes it not merely that. And it is the extra element on which I concentrate in this essay.

The Argument

I will try first to lay out the argument of the book without much comment. The Introduction lays out some of the fundamental conceptual machinery and some of the assumptions of the book. Three concepts are fundamental: jurisprudence, ideology, and rights fetishism. The basic view of jurisprudence seems innocent enough: jurisprudence is the most generalized and abstract form of legal discourse; it reveals the categories and concepts in which lawyers and jurists think about law (p. 3). More controversially, perhaps, Kerruish claims jurisprudence is committed to an internalist understanding of law and legal practices. Since these are constituted in terms, broadly speaking, of liberal individualism, jurisprudence is committed to liberal individualism. Jurisprudence also in her view is committed to the legitimacy of law so understood, and thus is normative. These facts about jurisprudence mean that it must contribute to and conceal what Kerruish calls "rights fetishism" by denying the self-referential character of legal justifications and so arguing (erroneously) their independence (p. 6). Rights fetishism is another key concept. Rights fetishism involves the irrational reverencing of a human artifact—the law (p. 3). It is not in the nature of law to be based on individualism and on rights; it is just that our legal system has evolved that way. But jurisprudence thinks law has to be a system of rules and rights, and believes law justified as such a system. Such thoughts constitute rights fetishism. The connection of jurisprudence with rights fetishism is made before a distinction is drawn, and observed in the remainder of the book, between two senses of "jurisprudence." These are: "jurisprudence," small-J jurisprudence, accumulated doctrine and expert knowledge of the legal profession in a given legal system (the jurisprudence of Canadian tort law, for example); and Jurisprudence, large-J jurisprudence, general theory of law, something like Twining's "high theory" (p. 6). In theory, it would be contingent whether the jurisprudence of some particular legal system exhibited rights fetishism, for it would depend on the content of the settled law in that system. But the claim that Jurisprudence is essentially fetishist is more ambitious, just because Jurisprudence is general theory and not the theory of the law of some jurisdiction. The final concept introduced at the beginning is that of ideology, and in particular the distinction between ideology in the neutral sense and ideology in the negative sense. "Ideology in the neutral sense encompasses more or less complete systems of ideas produced in societies whose basic social relations are relations of material inequality ... In its negative sense, ideology is theories which justify these materially
unequal social relations” (pp. 11–12). Kerruish also asserts in the Introduction that all theory is normative. This, too, is a major claim; since the argument for it occurs later on, I will leave explication till then.

Chapter 1 lays out the nature of social theory as Kerruish views it. The first is that social theory as she sees it is realist. That is, theory assumes that social relatedness is at bottom a genuine fact in the world. Society is not a cultural artefact “all the way down”; at some point there are lumps of flesh and blood and social interactions between them. The issue is one of representing these aright, not of constructing them en nihilo. Second, her social theory is relational. That is, it assumes that social relations are basic objects in the world. They are things that occur in human activity (p. 30). The basic social relations are those of class, sex-gender, and race. These basic relations are configured by social practices into more particular social relations. For example, relations between male and female are basic; if they are in some given society configured into relations of dominance and oppression, that is a consequence of the social practices of that society. Social theory, however, which is in the business of picturing social reality, is faced with the fact that there is a distinction between reality and thought/language. Thought/language is not reality itself. Reality appears to us only via the way in which we think about it and picture it to ourselves. So the central problem of social theory is “to trace the way in which reality appears” (p. 39). Kerruish’s social theory, like any other, therefore operates from a standpoint. As a woman, she chooses the standpoint of the oppressed and disadvantaged; her theoretical position is within social relations and within ideology. So her theory is to that degree normative. But any theory will, from a standpoint, be in some way ideological. The important thing is not to be fetishist, but to be open, to “prevent the interpretative scheme of our thought and language closing out other representations of social reality” (p. 39). What makes Jurisprudence fetishist is that it is not so open. Kerruish ends the chapter by acknowledging the validity of liberty, equality, and community as ideals of Jurisprudence. Her claim is that their fetishization in the legal system prevents their realization for those on the downside of existing social relations (p. 42).

Chapter 2 presents summaries of the three exponents of analytic jurisprudence who are the named villains of the book—H. L. A. Hart, John Finnis, and Ronald Dworkin. These summaries are largely fair enough as far as they go. Kerruish in fact makes two valuable points about Hart. First, she shows both how much of his stage-setting for his theory already assumes legal positivism. Second, she shows

8. It is not clear whether, in a society without material inequality, there would be no social reflection at the level of ideology, or whether there would be but it would simply not count as ideology.

9. There is one mistake about Hart—the ultimate rule of recognition for Hart is in fact “a complex, but normally concordant, practice of the courts, officials and private persons in identifying the law” (emphasis added), not, as Kerruish avers, of officials alone. See
how his use of the distinction between the external and the internal point of view, and the firm attribution of the former to the theorist, do in fact\textsuperscript{10} bypass debates in social theory about hermeneutics.\textsuperscript{11} Chapter 3 embarks on a more detailed reading of the three texts, in order to bring out the common ground between them, despite the fact that, within analytic jurisprudence, the three would be regarded as defending quite different theories. The theses that form the common ground are these. First, all assume that it is the idea of law embedded in doctrinal legal discourse on which philosophical Jurisprudence must go to work (p. 88). None of the three acknowledge the necessity of “tracing the way in which reality appears.” Second, Kerruish asserts, each text has the purpose of showing that law’s legitimacy can be explained without distortion of the positivist’s position (p. 90). Third, all assume norms and individuals are the objects of knowledge of law and of society, and that the concepts central to law are authority and obligation (p. 92). The second of these claims is slippery. Legal positivism is committed to the autonomy of law, and that is an essential part of positivism’s view of legitimacy. Yet Finnis and Dworkin, as Kerruish acknowledges (p. 104), understand law as non-autonomous. How can they then explain law’s legitimacy “without distortion of the positivist’s position”? The response would have to be that, in Finnis’ case, the account of human law, and in Dworkin’s case, the account of institutional law are both thoroughly positivist. The fact that each thinks there is more to law than just human/institutional law is beside the point. But is it?

The book to this point has been descriptive and interpretative, rather than argumentative. Now in chapter 4 the argument begins. The thrust of the chapter, as I understand it, is this: to show how Jurisprudence must be negatively ideological, because of its commitment to the “legal construction of objectivity.” I reconstruct Kerruish’s dense argument as follows:

1. Jurisprudence is committed to the justification of the legal construction of objectivity (p. 108).
2. This notion of objectivity is problematic.
   (a) Law is a matter of applying general rules to particular cases (p. 3, and many other places).
   (b) The very claim that two particular cases can be “the same” involves abstraction from the particularities of the cases. (cf. p. 127 and elsewhere—the “gap between law and laws”).

H. L. A. Hart, \textit{The Concept of Law} (Oxford: Clarendon Press, 1961) at 107. But the mistake need not matter—the citizens who support the ultimate rule of recognition as understood by Hart can be readily construed as victims of/sufferers from rights fetishism.


\textsuperscript{11} I am sympathetic to these two points, because I make the same claims myself in Shiner, \textit{supra} note 1. See c. 13, sec. 2 for the first, and sec. 2.3, 5 for the latter.
(c) Objectivity under such circumstances requires artificial limitation (cf. p. 112).

(d) As such, objectivity involves unavoidable distortion of the social reality (p. 123). It involves privileging lawyers' ideas about law (p. 131).

Rule-following or intersubjective sharing of principle distorts the kind of connectedness there is between persons.

3. When we see that the objectivity of Jurisprudence is problematic, then we see how, taken as a social theory, the assumption that legal norms are the objects of knowledge of law must make Jurisprudence negatively ideological. Jurisprudence must assume the legitimacy of its own enterprise, and to do that is to make a disreputable normative commitment.

Chapter 5 explores further the idea of rights fetishism as a feature of Jurisprudence. The concept of rights fetishism is seen as crucial for the task of explaining what rights are. The form of explanation deployed is not conceptual or analytical but social-theoretical. The explanation uses the core idea of a fetish—the inappropriate attribution of properties to an artifact. Where does the inappropriateness come in, in Jurisprudence's discourse of rights? Two (connected) places, I think. First, lawyers think their idea of law is complete when it is not; they think that it is universal when it is not. The argument for incompleteness is this: the lawyer's picture of law does not contain the content of the picture of law from the standpoint of the oppressed (pp. 143-49). It does not include the value of law to the oppressed, for whom, for example, paper or technical rights have no practical value because of problems of access. There also is a further premise, about law being the application of general rules to particular cases, and therefore necessarily being incomplete. There is always a gap between the content of the rule and the concrete details of the case to which the rule is applied. So there is a fundamental denial of social reality in the standard Jurisprudential rights-based picture of law. Theory needs a mechanism to explain that denial. That mechanism is rights fetishism. The notion of rights fetishism is further explicated (p. 155ff) through an analogy to commodity fetishism in Marx. In the case of a commodity, it has use value (its worth to someone who has it for use) and exchange value (its market price, crudely speaking). These can be wildly divergent. Commodity fetishism is a matter of thinking the exchange value is the use value, or is a genuine form of value. So, by analogy, rights have concrete value to those that possess them in concrete situations; but these are by no means universal—rights are in different ways quite burdensome. But rights talk/doctrinal legal discourse

12. Is that a reason for or an exemplification of the claim about distortion? It is not clear.

13. In the section entitled “Methodological Issues” below, I discuss issues of theoretical methodology as raised by Kernish's critique of Jurisprudence. The term “explanation” is a contested term in this context. Theories of different kinds give explanations of different kinds. It is more important to look fairly at the achievements of different kinds of theory than to pre-empt the term “explanation” for one kind of theory.
professes rights to be universal standards of value. Rights talk speaks about rights as a universal medium of politico-legal exchange, and legal practice treats them that way. But they are not universal. So rights talk fetishizes rights in the sense that irrational value is attached to an artefact; use value with all its ambivalence is ignored, and universal pseudo-exchange value claimed, and worshipped, instead. Take fetishism, not rights, seriously, Kerruish urges (p. 165)!

Chapter 5 offers an explanation in social theory of a particular part of social reality—legal practice, an explanation in terms of rights fetishism. Chapter 6 is more avowedly normative. It is important, Kerruish says, to see that the evil of rights fetishism is not simply that it generates failures to see social reality as it is. The refraction of light causes reality not to be seen as it is, yet it does no political harm. Doctrinal legal discourse silences the voices of the oppressed, by coercive imposition of its norms upon them. Rights fetishism prevents the reality of that political harm being seen—that is why its distortions are evil. Legal practices of determining particular cases by reference to general rules, of coercively enforcing these determinations, and of justifying them in terms of legal and “moral” truths that deny the incompleteness of lawyers’ ideas of law—these constitute rights fetishism. Jurisprudence finds its basis in the social reality of this fetish (p. 174). Jurisprudence, like any other social theory, is inevitably from a standpoint; yet its universalism denies this. It pretends that all benefit from a regime of rights; yet this is false. Rights fetishism demands as a *quid pro quo* from all who want a share of the benefits and protections of law that they adopt a prefabricated identity and alienate their very sociability to professional experts (p. 174). The foundational normative value for social theory and practices is emancipation. Doctrinal legal discourse cannot be emancipatory, and in fact must obstruct emancipation. These facts are embodied in its character as rights fetishist.

Chapter 7 relates the argument of the preceding chapters to the issue of Jurisprudence as ideology. It has been shown how Jurisprudence is not neutrally but negatively ideological. We should consider ideologies—more or less complete systems of thought—as neutral where they are simply standpoint-relative understandings of social reality (p. 195). Jurisprudence and doctrinal legal discourse are more than that. Ideologies become negatively ideological, subsequently, on account of the neglect of standpoint and the standpoint-relativity of thought (p. 196). Jurisprudence’s vain pretensions of universality condemn it as negative ideology. Doctrinal legal discourse does make sense of social reality from the standpoint of empowered white men. But in claiming that standpoint as the legal point of view as such, it omits the contribution of subordinated people to the emergence of legal forms (their experiences of oppression and coercion by such forms) (p. 196). The book ends with these thoughts. All theory is normative, and norms have a necessary generality. They represent the limits of our understanding of self and other, not the foundations. They must be constituted and understood in ways that avoid their turning against us as barriers of negative ideology (p. 201). These remarks show how Kerruish’s methodological realism leads her to accept
the reality of law as a social institution. It is important to stress that her project is emancipatory, not nihilistic. She does, though, in several places suggest that the only truly emancipatory projects will be ones consisting in action, not thought—live struggles against structures of domination, not writing books in legal theory (unless such writing is itself an action).

Discussion

I began this essay by trying to sketch a context for considering the relation between legal theory and social theory. I first discuss two details of Kerruish's own particular social theory, and then concentrate on its contribution to the general question.

Substantative Issues

Rules

Kerruish's analysis relies a lot on a theoretical reading of a plain fact, the under- and over-inclusiveness of rules. Legal theory has made much of this fact in different ways. There is no doubt that the fact runs up against a genuine ideal of legal justice, which Frederick Schauer has well put as the ideal of "getting this case just right." Two points, however, need to be made.

Consider how coherent a project it is to try to eliminate the under- and over-inclusiveness of rules in the name of getting this case just right. One would have to postulate a decision-maker who would by intuition or some other form of direct awareness discern from an investigation of the facts of that particular case the correct decision. The alternative (and in the end these alternatives, I believe, reduce to one another) would be to postulate one who has worked out a completely coherent adjudicative scheme that has a place in it for every possible fact situation. Not for nothing is Dworkin's Hercules J. described as "superhuman." Frustration at the real harms done by the under- and over-inclusiveness of rules diverts attention from practical considerations of the real alternatives. Alternative dispute-resolution and mediation procedures should undoubtedly have their place in a humane legal system, and deserve a far more extensive role than they have now. They are also indeed forums where the "female" virtues of relationship- and consensus-building can triumph over the "male" (pseudo) virtues of adversarial competitiveness. Nonetheless, it is hard to imagine how dispute settlement could

14. Nor, of course, simply analytical and descriptive.
be handled only by such methods in anything other than a fairly simple and already coherent society.

The most sophisticated recent discussion of the nature of rules is by Schauer. While Schauer reveals the limitations of standard ways of explaining away the costs attached to regimes of rules, he argues for one central feature of rule-based decision-making that, in principle, can justify regimes of rules: that rules are devices for the allocation of power. If the resulting allocation of decision-making power is justified by the relevant standards of justification, then the regime of rules is justified. I have argued elsewhere that, contrary to what Schauer himself seems to think, his analysis of rules as applied to law seems to favour rulesceptical accounts of law rather than positivist accounts. One sees how that might be so from an analysis like Kerruish’s, who makes very clear how legal rules are devices of empowerment and disempowerment. This coin, though, has an obverse. Schauer’s account, a piece of genuine conceptual analysis, since it does support Kerruish’s view, shows how dismissals of the project of conceptual analysis as being “fetishist” may be short-sighted.

Critiques of rights

My second task is to make a brief comment relating Kerruish’s remarks about rights fetishism to other critiques of rights. The critical legal studies movement has fired many broadsides at the discourse of rights. Each emphasizes the familiar themes of the indeterminacy of the discourse of rights, and the contrast between the abstractness of the discourse of rights and the concreteness of lived experience. Each underlines the limitations on the concrete value of legal rights to the oppressed in the context of contemporary society, and how, when real political struggle is required, the generalities of the discourse of rights seem of little worth. In the context of the Charter, similar critiques have been advanced, of a general kind by Harry Glasbeek and Michael Mandel, from a feminist perspective by Judy Fudge, from the perspective of aboriginal peoples by Mary Ellen Turpel.

20. Cf. Tushnet, ibid at 1363, 1371–75, 1382; Olsen, ibid. at 401, 412.
Glasbeek, for example, in (1989a) aims to show that the actual decisions of the Supreme Court interpreting the Charter do not bear out the optimists’ conception of the court as a bulwark of individual rights against corporate and governmental interests in the capitalist nation state. Fudge argues that the restriction of the Charter to governmental action has lead the court to ignore much oppression of women by consigning it to the so-called private realm of relations between individuals or between individuals and nongovernmental organizations. The first paper focusses primarily on the latter issues—family structures, reproduction, equality in the work place; the second focusses on sexual violence and domination.

So far, the themes of these critiques of rights overlap with those of Kerruish. However, Kerruish focusses most of her account on a feature that Tushnet and Olsen, for example, largely ignore—if rights are so worthless, why do we go on believing in them? For Kerruish, it is not enough merely to answer that question with some version of “We’ve been conned by the system.” An explanatory mechanism is needed, and the mechanism of rights fetishism is presented as just such an explanation. If the powerful rhetoric of rights really does need to be deconstructed, then it is not enough simply to appeal to structures of domination. Kerruish sees this very clearly, as others often do not.

Tushnet, Olsen, and Kerruish all regard rights as the point of pressure for contradictory social categories and forces, paradigmatically those of individual/social and public/private. All emphasize how a given legal right is not properly understood until one sees it as part of a larger systemic whole.

When we try to specify a particular right in some localized area, we discover that we have committed ourselves to a description of an entire social order.

The conditions that make “rights” seem necessary must be changed, and these conditions cannot be changed as long as women are oppressed ... Most criticisms of the critique of rights oversimplify the critique of rights by failing to see it as an attack on the entire system that makes rights seem necessary.


23. Tushnet, supra note 19.

24. Olsen, supra note 19 at 430.
Olsen is especially concerned with “the entire system” as an oppressor of women, while both Tushnet and Kerruish are concerned with the disadvantaged generally.\footnote{25} Olsen quite explicitly rejects “liberal legalism.”\footnote{26} She alludes to the debate about the merits of equality of opportunity versus equality of result, and, plausibly, characterizes it as a debate within rights analysis.\footnote{27} She seems to regard doing away with rights as unproblematic. Tushnet’s view is subtly different. He sees how rights focus social tensions:

The language of rights captures the contradictory predicament of people as at once alone and together, independent and yet necessarily in solidarity with others, individuals whose lives have meaning only in society. Treating these experiences as instances of abstract rights mischaracterizes them; they are concrete confrontations in real circumstances.\footnote{28}

Thus, he acknowledges that the discourse of individual rights reflects the fact of human individuality, something that gets lost in more collectivist accounts. Kerruish’s view is different again:

The trap which too dismissive an attitude to rights falls into is to dismiss ethical individualism for the wrong reasons. The idea of empowering people to do what they want to do with their own lives and insisting that they each take responsibility for their own acts is a single idea and a good one. It is contradicted by forcing people to act in accordance with norms set by an alienated authority. (p. 146)

The discourse of rights, however, is not without its defenders even among those who belong to, or make common cause with, members of “the party of humanity.” For many members of minority groups,\footnote{29} the struggle for fundamental civil rights—to break down segregation, for reparations for wartime imprisonment, for nonexploitive working conditions, for acknowledgment of tribal sovereignty and lands—is at the core of self-definition and empowerment. The struggle itself is

\footnote{25} Tushnet speaks of the “good guys” as “the party of humanity,” \textit{supra} note 19 at 1364.  
\footnote{26} Olsen, \textit{supra} note 19 at 400–1.  
\footnote{27} \textit{Ibid.} at 397.  
\footnote{28} Tushnet, \textit{supra} note 19 at 1382.  
not merely part of an anecdotal past, but of a present and vividly lived narrative. It seems too easy for white persons in a position of power to disparage with abstract arguments from the academy the lived experience of the marginalized. While Kerruish’s arguments in this book are academic and abstract, her aim is to transcend academic argumentation; the arguments are in the service of real political struggle as the goal. Compare Kerruish’s emphasis on “tracing the way in which reality appears” with Crenshaw’s argument that white critical legal studies (CLS) “trashing” of rights, insofar as it denies the reality of black experience, fails to confront the fact of hegemonic racist ideology.30

Kerruish’s view here may be profitably compared with two other recent attempts to provide room for a rehabilitated discourse of rights, by Amy Bartholomew and Alan Hunt, and by Jennifer Nedelsky. Bartholomew and Hunt find in both the CLS attack on rights and the minority critique of that attack an inappropriate “thingification” of rights. Both treat rights instrumentally as tools—the minority critique as neutral tools available for use if use is justified; the mainstream CLS attack as “tools that have been appropriated by the bourgeoisie.”31 Bartholomew and Hunt, in contrast, regard rights as necessarily embedded in the political process. No right can be conceived in the acontextual way that instrumentalist conceptions of rights require. What is important is the political context in which a claim of rights is made; that context, rather than anything intrinsic to the supposed right itself, determines the character of the right. While they recognize that the logical form of “right” is “individualistic,” they believe there is no conceptual barrier to “a viable discourse of group or collective rights” (p. 8), and that the primary task for theory is to develop such a discourse in the face of the situatedness of rights themselves.32 In this sense, Bartholomew and Hunt accept the possibility of a transformed discourse of rights, transformed because collectivized, in a way that Kerruish does not, even though they share her dissatisfactions with that discourse as presently constituted.

Like the other theorists, Nedelsky rejects the liberal individualist conception of the presocial self, and insists that selfhood implies social relatedness. Yet, she asserts, “the problem is how to combine the claim of the constitutiveness of social relations with the value of self-determination.”33 She emphasizes, using child-rearing as a model, how autonomy in fact can only be developed in social

31. A. Bartholomew & A. Hunt, “What’s Wrong with Rights?” (1990) 9 Law and Inequality 1 at 51; their paper is alluded to by Kerruish on pp. 140–41. Tushnet, supra note 19 is criticized on pp. 8–21, and the “minority critique” on pp. 34–39.
32. Bartholomew & Hunt, ibid. at 50–53.
relationships, not outside of them. Her central thought, seemingly like Kerruish’s
and others, is that the standard dichotomies state–individual, public–private, and
so on are illusory. Yet the twist is quite different. What is illusory is the dichotomous
opposition; what is really the case is an interdependence. For Nedelsky, the
“fetish” (though she does not use the word) is not rights as such, but rather the
identification of coercion with public, state, and so forth, and of freedom with
individual, private, and so forth. Nedelsky therefore seems far less radical a
critic of contemporary social reality than does Kerruish, despite the latter’s
optimism. That the reality of the contemporary individualist state is a problematic
one is not in dispute. But there are different available views on how far the
deconstruction of rights will help solve the problem.

Methodological Issues

Let me begin this section by making some more distinctions, distinctions that
theoretical writing about law of many kinds fails to acknowledge. We need to be
clear about the difference between the following pairs of contrasting terms, as
well as the difference between each member of a pair:

1. law as an autonomous system vs. law in its social context
2. law studied as “momentary” vs. law studied as “continuous”
3. law studied empirically vs. law studied holistically or hermeneutically
4. legal positivism vs. analytic jurisprudence
5. descriptive/analytic theory of law vs. normative theory of law

Take the first pair. One may think that a legal system is essentially a system of
autonomous norms, perhaps united by their dependence on some basic norm, and
that to understand law is to understand that normative structure. Or one may think
that law is essentially a nonautonomous social institution; that is, one thinks that
awareness of the relation of the legal system to the moral, social, and political
context of that system is an essential part of awareness of the nature of law. How
does this distinction map on to distinction (p. 4)? Not exactly. It is quite
characteristic of legal positivism to think of law as autonomous, but it is not
necessary for analytical jurisprudence also so to think of law. There is no reason
why the awareness of law as a socially situated institution should not also be an
analytic awareness, at the level of high theory. Analytical jurisprudence as a

34. Ibid. at 12.
35. Ibid. at 18ff.
36. I borrow this terminology from Joseph Raz, The Authority of Law (Oxford: Clarendon
Press, 1979) at 81.
37. There are also complications with respect to legal positivism. Raz, for example (ibid.,
c. 3), claims that laws have a social source. This is a formal, content-independent
characteristic of law. Does it sufficiently acknowledge the social situatedness of law?
method does not imply any given thesis about either the intension or the extension of the term "law."

Take the second pair. A legal system studied as "momentary" is a legal system studied as frozen in time, to see its structure. A legal system studied as "continuous" is a legal system studied as an institution in process, with a past, a present, and a future diachronically united. Legal positivism typically studies legal systems as "momentary," but high theory certainly does not have to, and I do not believe that analytic jurisprudence has to either; one can analyze processes. Legal positivism has typically studied law as plain empirical fact, but high theory certainly does not have to, and I do not believe that analytic jurisprudence has to either; one can analyze using the hermeneutic method. In short, legal positivism typically opts for the first of each pair of (1) to (3). It would, though, be a mistake to suppose that analytic jurisprudence had to so opt.

The first pair does not map neatly on to the second or third either. Even if one believes that the concept of law is the concept of a socially embedded institution, one can still view legal systems as momentary or as continuous. One can freeze law in its whole social context, or look at law in its whole social context diachronically. If there are reasons to adopt the second strategy, they are independent of any reasons to accept or reject legal positivism, or analytic jurisprudence. Likewise, if one believes that the concept of law is the concept of a socially embedded institution, one can still debate whether empirical methods or hermeneutic methods are most appropriate for studying such an institution. Distinctions (2) and (3) also cut across each other, so that the empirical study of law may be the study of law as momentary or as continuous, and the hermeneutic study of law likewise. Moreover, we have made all of these distinctions while not going beyond the first element of distinction (5)—that is, while remaining within a variety of possibilities for the descriptive or analytic study of law, as opposed to normative legal theory.

In short, suppose we agree with Kerruish and other critics of legal positivism that the latter's understanding of law is impoverished insofar as it fails to take seriously law as a social institution in a social context. It does not follow at all that we must give up high theory, that we must give up analytic jurisprudence, that legal theory must be normative. Much intervening argumentation must be supplied. How successful is Kerruish in supplying it?

I began by distinguishing two views, (a) one that regarded legal theory and social theory as exclusive enterprises (the "straightforward" view), and (b) another (Twining’s) that accepted social theory as part of legal theory, but a different part

Presumably not, for theorists like Kerruish. But it is some attempt to see law as a social institution.

38. A notable exception is MacCormick, supra note 10. He argues that a hermeneutic methodology is quite compatible with legal positivism. I express some scepticism about that claim in Shiner, supra note 1, c. 5.
from high theory or analytic jurisprudence. Let us now distinguish three further possibilities: (c) that high theory can become social theory without ceasing to be abstract and analytic; (d) that high theory properly executed can only be descriptive social theory; and (e) that high theory properly executed can only be normative social theory. Kerruish’s view is clearly a version of (e). The issues we now need to examine are these:

1. What are the arguments for leaving behind (a)/(b) and moving to (c)/(d)/(e), positions that reject the attempt to preserve high theory as an enterprise independent of social theory, whether within legal theory or not?

2. If the reasons (1) alludes to are cogent, what then are the reasons for rejecting (c) and analytic abstractness?

3. If the reasons (2) alludes to are cogent, what are the reasons for rejecting (d) and opting for (e)?

I will proceed by trying to distinguish in Kerruish’s theory those of her arguments that would give reasons of each kind (1)–(3). Once we have done that, we will be able to evaluate whether she has argued successfully for (e) as the only viable option for legal theory.

Let us first, then, consider the reasons for saying legal theory must be a form of social theory, even if done abstractly. The most fundamental claim Kerruish makes to this effect is on p. 103, where she asserts that “the obvious truth that the legal system is part of the social system” is obscured by the assumption in Jurisprudence of the autonomy of law. The thought is that high theory, just by being abstract, treats law and legal practice as abstracted from its social context in the face of its obvious embeddedness in that social context. This thought, though, leaves open the possibility of a legal theory that incorporates the fact of law’s social embeddedness into what is otherwise still an analytical theory. Kerruish also states her own theory to be relational (“social relations are taken as the basic objects of social science” [p. 27]), dialectical (“a theory in which all concepts are considered as products of social practices through which human beings relate themselves to their environment” [p. 27]), and realist (“there is a world with a being and nature independent of human consciousness which is knowable through consciousness” [p. 26]). Such a view implies that the central problematic of social theory is going to be “to trace the way in which reality appears,” which is glossed as “the problem of ideology” (p. 25). Since legal practice is a case of a social practice, it is plausible that a theory that is not relational, dialectical, and realist cannot in the end be an adequate theory of law. Such a theory cannot be abstract in the way that high theory is abstract, but nonetheless may still be abstract. Kerruish also lays down conditions for the objectivity that high theory presupposes—“a well-defined object, universal standards of right and wrong, or an identifiable context (a narrative, a tradition, a way of life) within which normative consistency is possible” (p. 112). She goes on, again plausibly enough, to argue that Jurisprudence/high theory achieves its objectivity by assuming the validity of the lawyer’s picture of law, or the picture of law from the point of view of legal
science. But it is a long way from acknowledging the potential for bias in that pseudo-objectivity to claim that no objectivity is possible.

I am now going to indulge in special pleading and suggest that the theory of law displayed in Shiner\(^39\) may be a candidate for a theory of law that is a social theory but still abstract, of the kind sketched\(^40\). I accept, in the most general terms, the general characterization of law as a social institution given by Duncan Kennedy,\(^41\) that it moves continually between two pairs of poles, certainty/flexibility and procedure or form/substance. Positivism is the theory of those aspects of a legal system in virtue of which it is the repository of certainty and procedure. Antipositivism is the theory of those aspects of a legal system in virtue of which it is the repository of flexibility and substance. Just as a good official of the system is one who keeps the right balance between the claims of each set of values,\(^42\) so also, I claim, a good legal theory will be one that keeps the correct balance between positivism and antipositivism. Since the legal system itself moves dialectically between the opposed values, a good legal theory will also represent the movement between positivism and antipositivism as dialectical. I try to show how the arguments of positivism lead one to antipositivism, and the arguments of antipositivism lead one to positivism, never-endingly. Kerruish claims that “the content of doctrinal legal rules is a fully social product which mounts a constant challenge to their static normative form” (p. 189). She is quite right; I would like to believe that my discussion of legal theory takes her challenge seriously and meets it. I cannot, of course, argue the case convincingly here. Be that as it may, it is still true that the three premises (1) that any adequate legal theory must pay full attention to law’s embeddedness in its social context, (2) that a social theory of law needs to be relational, dialectical, and realist, and (3) that the objectivity of traditional analytic jurisprudence is spurious are not together sufficient to undermine the project of abstract social theory of law as such.

But let us suppose that they are, and so we abandon (c) in our original taxonomy. We will turn to Kerruish’s reasons for adopting a theory based on (d), that high theory properly executed can only be descriptive social theory. If we have accepted

\(^39\) Shiner, \textit{supra} note 1.

\(^40\) Compare P. Fitzpatrick, \textit{The Mythology of Modern Law} (New York: Routledge, Chapman & Hall, 1992), who is concerned with a similar tension between law as autonomous and law as object of social study, and who proposes the mythologization of law as the way to resolve the tension. I cannot address this proposal here.


\(^42\) It seems to me that Kerruish would not deny this. She seems to believe in freedom, equality, and community (cf. p. 42) and empowerment and autonomy (cf. p. 146) as genuine values, and to contemplate the possibility of a normatively acceptable doctrinal legal discourse (p. 175). Her point is that, as basic social relation are presently constituted by material inequality, these ideals cannot be instantiated.
the constraints on theory implied by the move from (b) to (c), then we have, to use Kerruish’s term, accepted that legal theory must be “ideological”—it must look at “the way reality appears” rather than the reality itself. But she draws the important distinction between neutral ideology and negative ideology (pp. 11–12). The distinction is thus: Ideology in the neutral sense encompasses more or less complete systems of ideas produced in societies whose basic social relations are relations of material inequality. In its negative sense ideology is theories that justify these materially unequal social relations. Ideologies that are neutral in that they are nonjustificatory presumably, then, are simply descriptive. They are from a standpoint, but are self-consciously and nonjudgmentally so.

We also get some guidance as to the content of such a neutral ideology under our conditions of material inequality. An ideologically neutral legal theory could focus on legal norms as the objects of inquiry, but it would explain their origin in social practices—in our context, an explanation in terms of rights fetishism is an explanation of the proper form, and thus a candidate for selection. The explanation would not distort the character of our being as relational, as the law’s present categories of abstract nonsituated persons do so distort (p. 116). It would leave room for scepticism about rights, as doctrinal legal discourse currently cannot (p. 6). It would incorporate the point of view of those put down by law, as Jurisprudence presently does not (p. 172). We are told, too, that “the limits of law which a realist and relational theory reveals are: its historical finiteness and the actuality of what it can deliver within a society whose social relations are the conditions of existence of the dominant legal form” (p. 173). That is a descriptive claim.

All these are reasons for supposing that descriptive social theory of law is possible. I have, though, been granting Kerruish’s assumption that any such descriptive social theory will be ideological. Must we grant that assumption? The issue is complex. If I understand the notion of (even neutral) ideology aright, one could escape ideology only by adopting a “view from nowhere.” But the availability of such a view is controversial, to say the least. I have sketched reasons for denying the possibility of a viewpoint for legal theory outside positivism and antipositivism. So, in a sense, I am committed to any legal theory’s being “ideological.” The issue then becomes whether there is a difference of any significant theoretical kind between a theory’s self-consciously adopting one particular ideology and its equally self-consciously moving dialectically between ideologies in an attempt thereby to show the nature of human thought. If this is a worthwhile difference, then it seems to me that Kerruish opts for the former rather than the latter; and yet I believe the latter is preferable. One might also think here of the postmodern ironical perspective—the perspective of those who are self-conscious about their stance and exhibit that self-consciousness by displaying it in the very taking of the stance itself. Such irony can be merely descriptive and

43. Shiner, supra note 1 at c. 13.3
attention-getting—"Look at me taking this stance." It does not have to be judgmental—"Am I not clever to take this stance?", "Am I not the victim of social forces in taking this stance?" But these, too, are issues that cannot be explored further here.

So there seem to be enough possibilities for accepting (d). It is, as I have said, clear that Kerruish herself goes further and claims that legal theory can only be normative social theory, because "all theory is normative" (p. 12). Is that claim secured?

Much will turn on whether one can accept that Jurisprudence not merely happens to be but in fact must be negatively ideological. Or rather, that it must be under our social conditions of material inequality.44 To put the issue another way, can one combat a particular picture of law theoretically without at the same time combatting it politically? Can one say a particular picture is a misdescription without also saying it is a politically harmful picture? As Kerruish herself has said, via the comparison with the refraction of light, in theory it is possible. But, she claims, it is not possible in the case of Jurisprudence's picture of law. She claims what might seem contentious, that in justifying the legal maintenance of the existing order of things Jurisprudence justifies that order (p. 194). If in fact Jurisprudence is necessarily engaged in justification by virtue of the picture of law it presents, then any rejection of that picture must be normative and not merely descriptive. But I can hear loud protests from Jurisprudence that it is not trying to justify—"the existence of law is one thing, its merit or demerit another." The counterargument seems to be this. Jurisprudence must believe in the validity of itself as a system of abstract rights held by abstract persons, and in the unquestionable value of such rights to such persons. In reality, actual legal rights differ enormously in their value to persons. Property rights are a spectacular example. Think, too, of the difference in value of academic tenure on this day to myself and to my finishing doctoral student. So to assert the necessary goodness of a system of rights is to judge the experience, and the standpoint, of those who are in reality harmed by such rights as of no, or of lesser, worth. That is a judgment of political morality, and so the rejection of that picture of rights will be a judgment of political morality too.

The crucial premise in the argument is that Jurisprudence is committed to the validity of its own picture of law as a picture of law. It looks as though Kerruish assumes that "validity" here means "validity from the point of view of political morality," and that is where her argument begins. But does "validity" here have to mean that? Suppose Jurisprudence replies: "I am committed to the validity of my picture of law as a system of rights only as a correct descriptive or analytic picture of how the law is actually structured. It may be that, in substance, the law distributes its benefits and burdens unfairly. But how is that the result of it being a

44. It must also be assumed that it is a Bad Thing to be negatively ideological. But that seems not controversial.
system of protected normative positions as such, rather than of the particular normative positions it actually protects?” At this point, I think it becomes clear how wide apart the competing conceptions of legal theory really are. For, if one is fully committed to legal theory as social theory, then the reply to Jurisprudence is thus: “In a society whose basic social relations are relations of material inequality, and ours is such a society, then a system of protected normative positions will protect those very inequalities. That is automatic.” Then the question arises: Why is it incumbent upon Jurisprudence to take into account the sad fact that the basic social relations in our society are relations of material inequality? No answer can be given to that question, it seems to me, which is independent of whether one already accepts the legitimacy of abstract Jurisprudence or high theory as an enterprise.

Conclusion

It is clear from my discussion that I am not persuaded by Kerruish’s challenging argument to give up analytic jurisprudence as an enterprise. As I have indicated, I think that her analysis of Jurisprudence and rights fetishism helps a great deal to show why legal theory is wrong to cut itself off from social theory (but then Twining also argued that), and wrong too to think that some part of Jurisprudence is not social theory at all (which Twining did not argue). Nonetheless, there are still many live issues as to how the acknowledgment of legal theory as a kind of social theory will play itself out in jurisprudential practice. Kerruish herself defends unflinchingly one particular view. But she is far too sensitive, and sensible, a theorist not to show in her defence of that view where the possibilities lie for other views. Unlike (too) many “trashings” of analytic jurisprudence, she does not simply chant slogans. She argues with great theoretical sophistication for her account. Whether one is in the end persuaded by the argument or not, the book will repay an engaged reading. I strongly recommend it.