International Journal of Law in Context (2022), **18**, 373–382
doi:10.1017/S1744552322000374

SPECIAL ISSUE ARTICLE

How to do things with legal theory

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Abstract

Legal theory must not merely describe our world; it must also assist us acting in it. In this paper, I argue that teaching legal theory should show law students how to do things with legal theory. My pedagogical approach is contextual and historical. Students learn how to use theory by seeing how past jurists acted in their particular worlds by changing dominant concepts of law. Most introductory legal theory courses are organised by what I will call the usual story of jurisprudence. In this story, great thinkers in rival schools of legal thought attempt to answer perennial questions about the nature of (the concept of) law. In this story, the thick context of our world recedes beyond the horizon of theory. I argue that critical genealogy can let us critique this usual story and its unspoken assumptions of morality, politics and history. Amia Srinivasan's account of 'worldmaking' is especially compelling in its emphasis on critical genealogies' capacity to transform our representational practices (and thus open up new possibilities for action). Critical genealogy also has certain pedagogical 'uses and advantages' for teaching legal theory in law schools. Here, context is method. The teacher must defend their political choices of context – choices that are naturalised and so beyond critique in the usual story of jurisprudence. By making these choices explicit, students are invited to both challenge the teacher's choices of context and critique their own common law education. This pedagogical approach also encourages students to experiment in 'worldmaking' themselves, and so cultivate a creative capacity to use legal theory to change the world through transforming their representations of it.

Keywords: jurisprudence; legal theory; genealogy; pedagogy; law

1 Introduction

Legal theory must not merely describe our world; it must also assist us acting in it. In this paper, I will argue that legal pedagogy should teach law students how to do things with legal theory. My concern is with action rather than description. Most introductory legal theory courses are organised by what I will call the usual story of jurisprudence. In this story, great thinkers in rival schools of legal thought attempt to answer perennial questions about the nature of law. In this story, the thick context of our world recedes beyond the horizon of theory. I argue that critical genealogy can let us critique this usual story and its unspoken assumptions of morality, politics and history. Amia Srinivasan provides an especially compelling account of critical genealogy as 'worldmaking'. Her reading emphasises its capacity to transform our representational practices (and thus open up new possibilities for action) rather than its potential for epistemic shock.

Critical genealogy also has certain pedagogical uses and advantages for teaching legal theory in law schools. Here, context is method. Teachers must defend their political choices of context – choices that are naturalised and so beyond critique in the usual story of jurisprudence. By making these choices explicit, students are invited to both challenge the teacher's choices of context and critique their own common law education. Since the choices of context are an open-ended multiplicity, this pedagogical approach also encourages students to practise 'worldmaking' themselves through reflective and research essays that start with critical self-reflection on their own particular standpoint and concerns

in the present. Ideally, teaching jurisprudence through critical genealogy is a collaborative experiment in which the politics of context helps cultivate a creative capacity to change the world through transforming our representations of it.

2 The usual story

Open most introductory handbooks or textbooks on jurisprudence and you will invariably find the usual story of great philosophers of the past in conversation with each other on the unchanging question of the nature of law. 'Inquiry into the nature of law as a form of social ordering, including the values it ought to serve', as the opening line of a recent legal philosophy handbook puts it, 'threads a long and complex path through the great classics of Western philosophy' (Tasioulas, 2020, p. 1). Next, turn to the table of contents. You will almost certainly find one (or both) of two possible structures. The first structure is ordered by rival 'schools' of legal theory. The two great schools of natural law and legal positivism dominate the land with lesser schools like legal realism, historical jurisprudence and assorted critical legal movements confined to the outer pale. The second structure is ordered by what Herbert Hart called the 'persistent questions' of general jurisprudence: What is the nature of law? What is the relationship between law and morality? When should we sanction conduct? And so on. Despite their different emphases, these two structures are simply two ways of telling and teaching the usual story of jurisprudence as rival schools debating the perennial questions of the nature of law over time.

The usual story of jurisprudence is not ancient. It was constructed as a distinct subdiscipline just over a half-century ago with the rapid expansion and professionalisation of law schools in the UK and the wider British Empire after World War II. Hart himself was instrumental in this transformation of jurisprudence from a reflective inquiry to a distinct subdiscipline. His book, *The Concept of Law*, was an introductory text for law students on general jurisprudence. It was structured by the competing answers given to these perennial questions by rival schools of jurisprudence (legal positivism, natural law and legal realism). The book was also an exercise in creating and popularising this new origin story for legal theory. The revival of general jurisprudence as a discrete unit of study in modern law schools is marked by its ubiquity in undergraduate law degrees in the Commonwealth of Nations states. Before considering how context might help us critique this way of learning legal theory, let us start by looking more closely at how the contradiction at the heart of this subdiscipline structures its pedagogical function.

The usual story of jurisprudence is structured by a contradiction: it is both ahistorical and yet driven by a notion of progress. By focusing on apparently timeless schools of thought, the usual story places all (recognised) legal theorists on a common temporal horizon in an eternal competition to give the best answers to the perennial questions of the nature of law. For example, Aristotle, Aquinas and Finnis stand together in the school of natural law to argue that reason lets us understand the nature of law. Similarly, Hobbes, Austin and Hart represent the school of legal positivism, insisting that law is only a human construct. This method of grouping emphasises the similarity of these thinkers' answers to perennial questions. While the natural law school holds that law is ultimately grounded in morality, the legal positivist school holds that law is based in a positive command or rule. In this story, legal theorists are in an eternal dialogue with each other – both within their schools and against their rivals – to give the best answers to the perennial questions that define jurisprudence as a subdiscipline.

Yet this usual story of jurisprudence is also driven by a sense of progress. If the schools are eternal and the questions fixed, the champions of the rival philosophies can still give better or worse answers. This sense of progress assumes there is some knowable truth about the nature of law that transcends time and place. Not only can we compare how, say, Aristotle and Finnis explain the connection between law and morality, but we can also evaluate the progress the modern Australian has made on the answer first given by the ancient Stagirian. In this way, the usual story constructs the subdiscipline of jurisprudence through its canon (who and what counts as legal theory) as well as the

https://doi.org/10.1017/S1744552322000374 Published online by Cambridge University Press

normative criteria developed to evaluate the theories proposed to answer the perennial questions – and assess their progress towards true knowledge.

Teaching jurisprudence from the usual story has pedagogical consequences. First, teachers' assumptions about the dominant form of each school and its best answers to perennial questions are naturalised in the structure of the course. What counts as natural law, for instance, will be the particular theory of the philosophers chosen as the exemplars of that school. Similarly, the questions chosen as perennial and the way in which they are framed will set the normative criteria of what is valuable theoretically. While we must make choices, the usual story embeds that choice in the structure of the course, and so removes it from the pedagogical process itself. This means that any critique will take place within structural constraints whose own contingency is beyond questioning. Moreover, any legal theory that does not accept these naturalised limits will appear peripheral to what a teacher sees as jurisprudence properly understood.

It should be no surprise that the usual story excludes certain kinds of legal thinkers and questions. Consider one example of this silencing popularised by Hart in *The Concept of Law*. In this story, modern jurisprudence begins with Jeremy Bentham and John Austin in the early nineteenth century, and then leaps forward a century to Herbert Hart in the 1950s. There is a century of silence in which nothing appears to have happened in the UK. Yet this passes over two great legal thinkers in the common law world. The first is Henry Sumner Maine, the peerless Victorian lawyer and scholar, professor of law at Oxford and Cambridge, and law member of the Governor-General's Legislative Council in British India. If he is mentioned at all in the usual story, it is only as the founder (and only member along with Paul Vinogradoff) of the ill-starred and short-lived school of historical jurisprudence. Since his school gave no compelling answer to any of the perennial questions, his jurisprudence is usually treated as of antiquarian interest only. The other major figure is Mohandas Karamchand Gandhi, the common law lawyer turned globe-striding anti-imperialist. His account of the nature of law grounded in the village community was foundational to his political and ethical thought. Yet he too is simply absent from the usual story.

Of course, the usual story of jurisprudence is not the only story. It sits within a larger field of legal theory encompassing legal philosophy, the anthropology and sociology of law, critical legal studies (including critical race theory) and so on. However, among those scholars who specifically target the ahistorical assumptions of the usual story, many still tend to assume an essential antagonism between history and theory. In their compelling critique, Barzun and Priel defend 'historical jurisprudence' (different from Maine's theory) by contrasting what they call the historical 'contingency argument' with ahistorical 'canon reconstruction'. They argue that '[t]he contingency argument assumes that particular philosophical or jurisprudential texts cannot transcend their times or places, whereas efforts in canon reconstruction assume that they can and do' (Barzun and Priel, 2015, p. 859). According to this view, the contingency argument makes us doubt the (eternal) truth of certain concepts by showing how they have changed over time. Yet this seems to undermine the very possibility of critical judgment of the past and present since no normative values escape this radical historicising. Barzun and Priel thus propose canon reconstruction as the antidote to contingency. They argue that legal theorists can build a new canon of jurisprudence that demotes some past figures and questions, and elevates others better suited to our present condition. Barzun and Priel conclude that their historical jurisprudence can achieve these ends since the contradiction between contingency and truth is 'merely apparent' if we accept that showing the contingent origins of a legal concept is a necessary prerequisite for its rational reconstruction in the present.

Despite their acceptance of the historical context of legal thought, Barzun and Priel still insist that jurisprudence needs a canonical narrative. This conclusion comes from their subordination of contingency to reconstruction. In their view, the proper purpose of jurisprudence is the analysis of legal concepts. Contingency can show us the deficiencies of our current concepts, but it cannot construct better ones for us. That is why any historical jurisprudence must ultimately aim at the rational reconstruction of concepts in the present. The problem with this account, however, is its caricature of contingency as a historical method. It assumes that any historian committed to understanding past concepts in their

historical context necessarily severs themselves from the concerns of the present. Barzun and Priel claim that the 'function' of the contingency argument 'is to shrink our horizons by emphasizing the extent to which even our most fundamental assumptions about law are particular to our own time and place' (Barzun and Priel, 2015, pp. 855–856). This misunderstands the radical potential of attending to context. It is also an argument that merely amends the usual story of jurisprudence rather than moving beyond it. To challenge the usual story more robustly, I want to defend critical genealogy as a kind of contextual history that both begins with our present concerns and is committed to making new future worlds.

3 Context as critique

In the usual story, peripheral 'schools' like legal realism and critical race theory all challenge the assumptions of the central schools of natural law and legal positivism. One powerful pedagogical solution is simply to ignore this story and its conventions by centring an alternative canon and its central concerns. Yet I want to show the 'uses and advantages' of critical genealogy for legal pedagogy (Purcell, 2020). Genealogy – at least the version I will advocate for – denies the assumption of Barzun and Priel that critical history and legal theory are in an antagonistic tension with each other. Instead, it provides us with a way to both teach and critique the usual story, and in doing so move beyond it. Genealogy is also open-ended: it allows students to develop their own critical narratives starting from their particular place in the world. These distinct pedagogical advantages deserve greater attention from legal academics wishing to familiarise students with the usual story of jurisprudence without reproducing its orthodoxies.

Genealogy is a term familiar to everyone as the lineage or pedigree of ancestors descending to the present. For Friedrich Nietzsche, however, genealogy was an intellectual tool to overturn our contemporary morality by showing its apparent truths were deeply and disturbingly contingent. In his reading of Nietzsche's genealogy, Michel Foucault says it helps us 'to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accidents' (Foucault, 1977, p. 146). In our investigations of a concept, the use of genealogy is not to uncover its 'truth'. Instead, it shows us the radical contingency of our concepts and values – 'the accidents, the minute deviations-or conversely, the complete reversals – the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us' (Foucault, 1977, p. 146). Here our unearthing of the past can lead us to re-evaluate those things we take for granted or see as natural. Foucault also reminds us that this critical investigation into the past is always guided by our concerns in the present. He describes his own study of hospitals, prisons, etc. as a 'history of the present' since his studies were shaped and guided by contemporary concerns and needs (Foucault, 1995, pp. 30–31). Genealogy connects the present to the past as both 'a *historical* mode of enquiry' that 'looks to the past to explain the conditions of possibility for present circumstances', and 'a form of critique oriented towards the present' (Purcell, 2020, p. 14, emphasis in original).

The genealogical inquiries of Nietzsche and Foucault also show how genealogy is creative and not merely destructive. Amia Srinivasan defends this idea of critical genealogy as 'worldmaking', which she contrasts with the idea of it as 'epistemic revelation' emphasised by Raymond Geuss. For the latter, genealogy was not concerned with normative evaluation of the present concept or value in question. Its use was rather revelatory in showing us that our most certain and natural beliefs are false, unreliable or inconsistent. In his reading, Geuss argues that Nietzsche wanted to reveal to his readers the rotten foundations of Christian bourgeois morality in a 'slave mentality' that inverted vices into virtues to shackle the power of their Roman masters (Geuss, 1994). This epistemic revelation was intended to shock his contemporaries, and so undermine their faith in this dominant moral order.

While sympathetic to this reading, Srinivasan holds out a more creative use for genealogy. She starts by stating her assumption that we find ourselves in this particular world, which we act in through our representations of it. Yet how are we justified in holding our particular beliefs in a contingent world? Srinivasan calls the doubt this question provokes 'genealogical anxiety', which is 'the

https://doi.org/10.1017/S1744552322000374 Published online by Cambridge University Press

anxiety that the causal origins of our representations, once revealed, will somehow undermine, destabilize, or cast doubt on the legitimacy or standing of those representations' (Srinivasan, 2019, p. 128). She reminds us that there is a long tradition of genealogical history that people take up for the precise purpose of provoking that feeling in their readers or listeners. The ancient Greek philosopher Xenophanes told his contemporaries that humans think their gods look and act like themselves. If a cow or lion could paint, he asks, wouldn't they paint the gods like themselves: horse-gods for horses, lion-gods for lions? The gods are not external truths, Xenophanes implied, but contingent manifestations of our all too human imagination.

One answer to this sceptical worry is an appeal to our 'good genealogical luck', which Srinivasan describes as 'a power to reveal what we tacitly presume about ourselves in so far as we believe that our genealogically contingent beliefs are in fact knowledge' (Srinivasan, 2019, p. 135). Let me give a personal example. I believe myself genealogically lucky in that I know that greenhouse gas emissions warm the atmosphere, which significantly increases the intensity and frequency of bush fires in Australia. Those who denied or were denied access to the scientific knowledge upon which my beliefs are based would be genealogically unlucky. Contrast this with the case of two people of different religious beliefs. If they try to convince each other of their truths, neither will have a reason to think that they could persuade each other due to their vastly divergent genealogies. Good genealogical luck grounded in some kind of empirical fact is thus a more reasonable ground to hold a belief to be true.

Srinivasan then appeals to the position of the belief holder in historically formed structures of power and domination. Doesn't it matter who has (a claim to) good genealogical luck? An American senator advocating military intervention abroad to impose his values of democracy and the rule of law surely believes himself genealogically lucky to know these are values worth imposing by violence on unwilling others. In contrast, Srinivasan offers a different case of those who are subjected to this violence. 'It seems to me a different matter,' she writes, 'when black women insist that their subjugation as black women allows them to know something about the gendered and racialized structure of society that others are liable to miss' (Srinivasan, 2019, p. 137). She also invokes the Marxist example of the proletarians who see exploitation where their bosses see free exchange. Neither of her examples claims that Black women or the proletarian have special access to truth or the true object state of the world. Rather she is suggesting that we might have good reasons to believe certain people or classes have good genealogically luck regarding their knowledge of historically formed structures of power and domination precisely because they are subjected to that power and domination (which, not coincidentally, have historically excluded them from the institutional space of law schools).

In her account of critical genealogy, Srinivasan wants us to pay attention to 'what our representational systems *do*: which practices they emerge from and sustain, how they are mobilized by power, what (and whom) they bring into existence, and which possibilities they foreclose' (Srinivasan, 2019, p. 140, emphasis in original). In her reading, Nietzsche was not – or at least not mainly – trying to show us the unappealing origins of Christian morality as Geuss suggests. Christianity's true origins were not in human goodness or the divine, but instead 'the *ressentiment* of the slave class against their masters, the paying of debts through the extraction of pain, and the will to power of the priestly caste' (Srinivasan, 2019, p. 140). In the case of Nietzsche, Christian morality limited the possibilities of genius and produced the bourgeois morality that came to dominate in the nineteenth century up to our day. By undermining his readers' faith in the epistemic truth of Christian morality, Nietzsche prepares them for his further claim that its function is to repress the higher genius of humankind. His genealogy is thus designed not merely to shock Christians, but to free Germans to recover earlier their morality of the strong.

Given our concern with the pedagogy of jurisprudence, it is striking how many of Srinivasan's examples of critical genealogy are about law. She takes as one example the dispute between Samuel Moyn and John Tasioulas concerning human rights. Tasioulas argues that Moyn holds human rights responsible for failing to stop Western military interventions or slow the growth of economic inequality. Yet, he asks, how can human rights be singled out for responsibility for these failures any more

https://doi.org/10.1017/S1744552322000374 Published online by Cambridge University Press

than other ideals like justice, equality, mercy, love and so on? Srinivasan responds that Moyn is not denying (or affirming) the truth of human rights or their causal responsibility for any material outcome in the world. Instead, he is showing how human rights have a 'functional' use in legitimising the post-1970s neoliberal order – or at least not threatening its anti-egalitarian drive. Moyn's critical genealogy thus aims to show us how human rights serve as a kind of alibi – even if unwitting or unwilling – in contemporary practices of domination.

Here Srinivasan reads Moyn's intervention as not merely destructive of our cherished belief in human rights. It is also potentially constructive in opening up our imaginations to possibilities beyond our present-day representations of liberal politics. We might, for instance, recover the idea of socio-economic duties that was superseded by a discourse of civil and political rights. In its best form, critical genealogy is thus an exercise in 'worldmaking', which Srinivasan describes as 'the transformation of the world through a transformation of our representational practices' (Srinivasan, 2019, p. 145). The very act of destroying dominant representations also generates new possibilities to construct representations that will transform our world. We need not merely diagnose the oppressive functions of our representations (as important as that task is). We are also agents labouring in the 'workshop where ideals are fabricated' (Nietzsche, 2007, s. I.14). Here we can remake our representations of, and so transform, our world.

4 Workshops in worldmaking

Critical genealogy as worldmaking also has certain 'uses and advantages' for teaching jurisprudence. The most important advantage is to make explicit the politics of pedagogy. The usual story naturalises and so obscures the political choices of the teacher in naturalising these choices through narrative construction. For the critical genealogist, however, there is no escape from or mystification of politics: a history of the jurisprudential present demands that we first confront the question of what matters to us now. This is the necessary starting point for a genealogy of jurisprudence that orients and constrains our inquiry into the past. It is also an inescapably *political* choice: we need to make a judgment about which contemporary concepts, values, institutions, etc. require investigation (and which do not). If we accept Srinivasan's assumption of the particularity and contingency of our world and our representations of it, then we can only make this judgment by first thinking through who can best help us to understand jurisprudence from our own standpoint in this world. This question is itself recursive since we need to be familiar with the usual story, who it gives voice to and who it silences, as well as what forms of power it enables or tolerates. Let me conclude by showing how I have used critical genealogy in my upper-year jurisprudence course, 'The History of Legal Thought'.

What is to be done in a legal theory course? As a teacher, there is no escaping an explicit defence of the choices made in constructing the course: what is your primary present-day concern, and then what historical context, theorists and questions matter? Defending these choices to students is of significant pedagogical value. The context of our pedagogical present matters since our choices of jurisprudential genealogy are oriented by contemporary concerns that include a pedagogical purpose. The usual story of jurisprudence is universal in aspiration at least. It aims to educate students about the nature of law across time and space. Indeed, most modern classics of jurisprudence were all written as pedagogical texts for law students: Blackstone's *Commentaries*, Austin's *Province of Jurisprudence*, Llewellyn's *Bramble Bush* and Hart's *Concept of Law*. My course is also oriented to educating legal students. The major difference is a refusal to mystify the political concerns of my particular present by presenting them as universal and timeless.

Any choice of starting point for a course guided by critical genealogy must come from the present. Debolina Dutta reminds us of the 'aptness of anger' (in Srinivasan's words) as one powerful starting point for identifying what matters to us. Anger is indeed an apt emotional response to the poverty of orthodox legal theory dominated by thick yet esoteric debates severed from any obvious interest in the world as it is. Such anger can help us to choose an appropriate context for critique. In my course, the immediate pedagogical context is the law school of an Australian public university. Students have

https://doi.org/10.1017/S1744552322000374 Published online by Cambridge University Press

studied almost exclusively a black-letter law curriculum of transplanted British law with a strong emphasis on statutory interpretation shaped by an implicit legal positivism. With a very few exceptions, this legal education is silent on the Indigenous legal orders of the island continent, and the invasion and colonisation that aimed to eradicate them. The intellectual context for the course responds to this institutional context by starting with present-day political economy since these law students are in training as professionals who will by and large reproduce existing political and economic relations. In Australia, as elsewhere in the common law world, this is presently characterised by a neoliberal political economy of unprecedented social inequality and environmental degradation. I take the material conditions of our contemporary form of life as my starting point for framing the context of the course as the historical antecedent to the present: the contemporaneous expansion of (especially British) imperialism and capitalism from the eighteenth century up to the start of the new neoliberal order in the 1970s. The geographical context encompasses the British Empire and its successor states including the UK, and its settler, African and South Asian states.

Having defined my concern and the relevant historical context, the next step is to define the canon and questions of jurisprudence. My course is constructed by the chronological juxtaposition of the usual suspects (plus two interlopers: Maine and Harold Laski) with an anti-canon of contemporary Indigenous, African and Indian thinkers. These pairings include Blackstone and Sganyodaiyo (Handsome Lake, the Seneca law-giver), Bentham and Rammohan Roy, Laski and Ambedkar, and Hart and Nkrumah. These pairings help to identify the key questions that link the theorists laterally and lineally. For instance, Bentham attacked Blackstone's concept of natural law as inherently conservative in contrast to his utilitarian concept promising radical reform to Britain's commercial society. If Bentham subjected the common law (and indeed everything) to his caustic calculus, so too did his Bengali contemporary and frequent correspondent, Rammohan Roy, interrogate Brahmin *pundits* on their interpretation of Hindu law. Their shared utilitarian concerns were not with the persistent questions of jurisprudence, but rather with the rational reform of their respective societies – especially moribund legal traditions that resisted the rational reform they considered necessary for greater happiness by unleashing progress constrained by custom – by retelling the usual story as a genealogy of legal theory as a series of political interventions in our representations of the (legal) world.

The course's canon and questions shape how I teach these texts. Students are only expected to read primary sources: a short extract from two paired historical texts each week. (I prefer using archive.org since it is open-access and includes digitised first editions.) Let me give two examples. First, Blackstone's 'Introduction' to his *Commentaries* is paired with extracts from the Haudenosaunee *Kayaneren'kowa* (Great Law of Peace; or Iroquois Constitution). Second, Chapter 5 on 'The Union of Primary and Secondary Rules' in Hart's *The Concept of Law* is paired with Nkrumah's speech to open the Ghana Law School and Accra Conference on Legal Education in 1962. Students accustomed to lengthy weekly readings are now asked to read less and slowly. My only expectation is that they come to class having attempted to understand the text for that day on its own terms. This kind of reading also requires a suspension of disbelief, namely of our contemporary condescension to the past. By reading slowly and kindly, students come prepared for a lecture that is not concerned with the logical refutation of classic answers to persistent questions, but seeks to rebuilt a past world to understand each text as an act of worldmaking that marked a moment in the birth of our present.

To teach these historical legal texts as acts of worldmaking, my lectures aim to show what they *do* in response to particular crises of political economy rather than demonstrate their correctness or truth as answers to persistent questions. Let me give an example of how I seek to give context to historical texts with two successive pairings: Maine and Gandhi followed by Laski and Ambedkar. The usual story of legal theory glosses Maine's historical jurisprudence as a failed school or more often simply ignores it altogether. Yet Maine used social evolutionary thought to draw a sharp distinction between 'primitive' and 'modern' law to critique Bentham and Austin's analytical jurisprudence. Maine showed how people accepted the normativity of law for reasons beyond just fear of sanctions (Kirkby, 2018). By historicising the concept of law, Maine was also worldmaking. He created a new representation of India and its laws as stuck in an earlier stage of historical evolution by its codification of custom as religion.

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Maine argued that British 'utilitarian' governors in the 1830s to 1940s had provoked the 1857 rebellion by imposing modern laws on a pre-modern people. The solution was to reform British governance by rehabilitating traditional institutions and authorities appropriate to India's historical stage. His ideal was the self-governing villages, the *panchayati raj*, which also provided a self-reproducing pool of labour for plantation capitalists to tap for the seasonal cash crop harvest of tea, indigo, etc. In the following lecture, I tell how Gandhi took up historical jurisprudence and turned it on its head. Gandhi accepted that the organic auto-generation of law out of self-governing and autonomous village communities was an earlier stage of social evolution. But for him the idealised village was India's past *and* future. Reading *Hind Swaraj*, we see how Gandhi saw India's future as a decentralised federation of self-governing village communities with law emerging from each *panchayat* council. For Gandhi, the idealisation of the village community was part of his radical rejection of not only the capitalist state form, but all the 'necessary evil' of 'modern civilization' (Gandhi, 1911, pp. 2–3).

The next week's pairing shows how Laski took up Maine's historical jurisprudence in his 'pluralist' theory of the state only to later reject it in response to the crises of the 1930s. Instead, Laski developed a kind of legal realism fused with a state-centric communist theory of law. In his analysis, a state was only legitimate if it satisfied the citizens' needs (as determined by their own judgment). However, in a capitalist state, the law exclusively or predominantly served the interests of the bourgeois class. While the 'ideal theories' of legal positivists like Austin and Kelsen were 'unanswerable', they were also irrelevant as (echoing Oliver Wendall Holmes Jr) 'an exercise in logic and not in life' (Laski, 1938, p. vi). For Laski, law was a normative order reproducing and legitimising a state's particular political economy. 'In a capitalist society, like Great Britain,' he argued, 'the substance of law will, similarly, be predominantly determined by the owners of capital' (Laski, 1938, p. ix). As a leading Labour Party figure, his analysis would sustain his push for a more radical programme to reconstitute the UK as a socialist state. In the following lecture, I take up B.R. Ambedkar's ambivalent defence of the state in his fierce public debate with Gandhi over the nature of Hindu law – especially the *Manusmriti*, the so-called 'Code of Manu' with which Maine begins his *Ancient Laws*. Ambedkar retold Indian constitutional history as the rise of an ancient and revolutionary Buddhist state that was overthrown in a Brahmin-led counter-revolution codified in the brutal caste hierarchy of the *Manusmriti*. His *Annihilation of Caste* concluded that 'when people come to know that what is called Religion is really Law, old and archaic, they will be ready for a change, for people know and accept that law can be changed' (Ambedkar, 2019, p. 76). This rereading denaturalised the caste system that sustained Gandhi's vision of a harmonious village community. As India's leading constitution-maker, Ambedkar would help create a powerful new democratic state dedicated to deconstructing the caste hierarchy through rights and duties.

My pairings of Maine–Gandhi and Laski–Ambedkar are central to the course's main challenge to the unspoken assumptions of the usual story of jurisprudence. This story passes over not only these legal thinkers, but also the entire century between Hart and Austin from 1860 to 1960 (though it might perhaps mention Kelsen or the American Legal Realists). However, this century of silence coincides with world-historical transformations: the exponential expansion of a capitalist world-system enabled by European imperial rule over nearly the entire globe. It is simply incredible that the usual story implies by omission that there was no one between Austin and Hart asking new questions about how law related to this transformation. Recovering Maine–Gandhi and Laski–Ambedkar is thus one way (and there are others unexplored in my particular course) of challenging the amnesia induced by the usual story. To do so, we need to pay close attention to the historical context of critique – in this case the world-historical birth of global capitalism and imperialism. This is not only an intellectual task. It is also a pressing pedagogical one to show and so teach how theory does not merely describe the nature of law, but has also made and can remake our world. However, as we will see, these choices of context are themselves open to interrogation by students.

The teacher unilaterally answers the contemporary problem that shapes a course on legal theory – namely, context and canon. However, the very nature of a genealogical approach invites students to challenge those answers through their engagement in class and through their essays. Students are

https://doi.org/10.1017/S1744552322000374 Published online by Cambridge University Press

encouraged to investigate jurisprudence beginning from their own particular standpoint and political presumptions in this world. This can take the form of a reflective essay that asks students to connect a primary reading – like Maine's *Ancient Laws* or Gandhi's *Hind Swaraj* – to their own distinct concerns and experiences. For instance, how might Gandhi's dialogical critique of the British constitutional order unsettle the standard story of the contemporary Australian parliamentary system? Another advantage of critical genealogy is that it makes explicit the politics of pedagogical choices. Students are not constrained by the politics of their teachers, which are naturalised in the structure of the usual story of jurisprudence. Teachers must explain and defend each stage in their genealogy, while students are encouraged to interrogate those choices and suggest alternative possibilities.

Critical genealogy thus differs from the usual law school pedagogy on politically sensitive subjects in two important ways. First, students are sometimes asked to give their moral or political opinions on a controversial legal question like abortion or euthanasia in courses like criminal law. This can create an uncomfortable and sometimes hostile atmosphere in which students must defend their politics against each other. However, in a jurisprudence course structured by a critical genealogy, students direct their political critiques not to fellow students, but to the teacher. Here the teacher is subject to interrogation, not fellow students. By emphasising the contingency and particularity of genealogies, students also have a certain freedom to examine their own standpoints (and interrogate their political presumptions) indirectly through their critique of the genealogical choices of their teacher.

The second pedagogical difference is that denaturalising the usual story of jurisprudence frees students from the implicit limits of politically acceptable perspectives. While many prominent critical genealogists like Foucault and MacKinnon are on the political 'Left', Srinivasan reminds us that like Nietzsche 'the most successful worldmakers of our current moment are on the right' (Srinivasan, 2019, p. 147). While a teacher must make political choices in how to structure their critical genealogy of jurisprudence, their students need not accept these choices as natural and thus closed to challenge. In fact, students can be encouraged to interrogate those choices from their own political standpoint – so long as their own presumptions are also open to scrutiny through critical self-reflection.

As a pedagogical approach, critical genealogy is collaborative and open-ended. It aims not so much to undermine the epistemic standing of the usual story of jurisprudence, but to allow teacher and students to explore the worldmaking powers of past legal thinkers with the aim of challenging and changing our representations of law and legal concepts today. It also begins in the present with our contemporary standpoints and concerns. In my course, the two pressing concerns are the legacies of European imperial rule and the capitalist world-system that drives them. But each course is open to critique and invites different contexts by students starting from their own standpoints and concerns. The hope is to foster an atmosphere of amiable agonism that cultivates a critical understanding of how to do things with legal theory.

By putting legal theory in the historical context of imperialism and capitalism, the course concludes by pointing a way beyond the canon of the usual story or an alternative anti-canon of anti-colonial legal theorists. Instead, students should learn a deeper appreciation and understanding of how past legal theorists were worldmakers who transformed our representations of law through their respective concepts of law. To take two more examples from the course, we can come to see Hart's legal positivism as a defence of the British welfare state that highlighted its potential for managerial tyranny. We can likewise understand Finnis's natural law as a guide for conservative Christians and their secular allies to resist the utopian dangers of communist and liberal states committed above all else to material progress. Reading jurisprudence in context is thus an act of demystification. Our concern is not to uncover a necessary and external 'truth' about the nature of law. The critical genealogist is rather concerned to understand how legal theories transform representations of legal concepts (and thus the world itself). By teaching students how past legal thinkers did things with theory, my ultimate hope is that they will come to see both how legal thought has shaped the world we find ourselves in and how we might remake that world by doing things differently with legal theory.

Acknowledgements. I would like to thank Roxana Banu, Maksymilian Del Mar, Kate Purcell, Ntina Tzouvala and the two anonymous reviewers for their valuable comments.

Conflicts of Interest. None

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Cite this article: Kirkby C (2022). How to do things with legal theory. *International Journal of Law in Context* **18**, 373–382. https://doi.org/10.1017/S1744552322000374