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# Legal education and legal theory: the determined province of jurisprudence textbooks

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# Legal education and legal theory: the determined province of jurisprudence textbooks

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**ABSTRACT**

This article looks at the lessons about law, justice and morality conveyed by jurisprudence textbooks published and sold in the UK. Through a detailed statistical analysis of which legal theories appear and the depth in which they are covered, it shows that these textbooks by and large have a standard content. Based on this analysis, the article argues that this canonical content fails to fulfil the full potential legal theory offers in enabling students to gain a comprehensive and critical understanding of the law they study, and to prepare them for the value choices they might need to make in practice. In particular, it argues that the focus of the theories and jurisprudential issues discussed fails to sufficiently challenge the view of law as a valuable protector of individual freedom and as applying more or less in the way portrayed in the book. In fact, a detailed analysis of the way jurisprudential content is structured and presented through various rhetorical techniques suggests that in some cases textbook content stems from subconscious or even conscious political choices about what law students should learn. But whether this is the case or not, it can be concluded that there is a need for jurisprudence textbooks to diversify and rethink their focus and emphasis in the theories and issues they cover if they are going to fulfil their potential as an essential form of legal education.

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## Introduction

If, as legal educators, we want our students to gain more than just a detailed knowledge of a few areas of law and some related legal skills, a good place to start would be a course involving legal theory. Such a course, usually entitled jurisprudence, can *potentially* address the following questions:[1]

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[1]Many of the books analysed below provide discussions of the value of legal theory (see at n 47), but an excellent starting point is William Twining (with Neil MacCormick), "Theory in the Law Curriculum" in William Twining (ed), *Law in Context: Expanding a Discipline* (Clarendon 1997) 131–48.

- What is law – in particular, how do we distinguish it from other forms of social regulation, what are its constituent conceptual elements and does its validity depend on its justice and morality?
- How does law operate in practice – in particular, what is the relationship between the law as portrayed on paper and how it actually operates in practice?
- What is law's social role – how does it shape, and how is it shaped by, its social context?
- Is law a necessary and/or neutral feature of society or does it reflect and reinforce existing power relations?
- How should legal actors (judges, state officials, legal practitioners and citizens) respond to issues of morality and justice?
- How do we justify claims about the above issues – in particular, does factual and moral truth exist and if so, how do we access them?

Of course, the extent to which jurisprudence needs to provide a (possibly dangerous)[2] supplement to the rest of the curriculum by addressing some or all of these questions will obviously vary from law school to law school. Other courses might cover issues such as how judges reason, legal ethics, how problems of access to justice undermine paper rules, and some law schools might even provide a pervasive focus on these and other issues, such as whether the law being studied is just or oppressive. Moreover, students might indirectly pick up some insights into how law operates, its possible functions and social role, whether it is just, etc. But this will depend on how compulsory black letter subjects are taught, what options they take and, crucially, their ability to identify and synthesise common themes about law gained from these courses.

By contrast, jurisprudence is well suited to looking at these issues in a systematic and in-depth manner, as well as helping to foster critical thinking and general reflection on issues of values. It can challenge students to step back from the wilderness of single legal instances to gain a more holistic understanding of law as an institution and directly confront the questions of whether they want to practise law, and, if they do, whether there are moral and political issues which they need to confront in deciding what area of law to practise and how they might negotiate potential conflicts of values once in practice. Indeed, while these issues are particularly acute for prospective lawyers, they are arguably the sort of enquiries that should be part of a liberal legal education designed to help students develop critical thinking and citizenship skills more generally.[3]

In this light, it is important to know what ideas students are being exposed to when studying jurisprudence. Accordingly, UK courses have seen four surveys between 1951 and 1994.[4] These reveal that during this period there was growing attention to socio-logical theories, an explosion of interest in Dworkin, Rawls and Nozick when they burst

[2]Cf Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Law and Social Theory, Pluto Press 1991).

[3]See eg Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-first Century* (Hart Publishing 2003); Jessica Guth and Chris Ashford, "The Legal Education and Training Review: Regulating Socio-legal and Liberal Legal Education?" (2014) 48 The Law Teacher 5.

[4]RH Graveson, "The Teaching of Jurisprudence in England and Wales" (1951–52) 4 Journal of Legal Education 127; RBM Cotterrell and JC Woodliffe, "The Teaching of Jurisprudence in British Universities" (1974) 13 Journal of the Society of Public Teachers of Law 73; Hilaire A Barnett and Dianna M Yach, "The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics" (1985) 5 Legal Studies 151; Hilaire Barnett, "The Province of Jurisprudence Determined – Again!" (1995) 15 Legal Studies 88.

on the scene, and, more recently, but less universally, an inclusion of feminism, critical legal studies (henceforth CLS) and the economic analysis of law. However, apart from the constant presence of Marxist theory, courses were dominated by Hart and other (mostly English) legal positivists and their supposed arch-rival, natural law, and more recently by Dworkin. The earlier focus on the analysis of legal concepts, legal sources, statutory interpretation and precedent receded considerably over this period, as did attention to Scandinavian realism, and historical and anthropological jurisprudence. Surprisingly, there was also a decline in attention to American realism, notwithstanding its relevance to the question of judicial reasoning, which – along with how to define law, how to respond to unjust law and whether to redistribute wealth – were the central issues in jurisprudence courses. Thus, in the last survey, Barnett concluded that there remains "a remarkable coherence in the core of courses, reflecting a consensus on the intellectual foundations of the discipline and that the vast majority of Jurisprudence teachers identify the same schools of thought as comprising the heart of Jurisprudence".[5]

Whether this remains the case 30 years later, or whether as Green has recently argued,[6] there still needs to be a radical rethinking of jurisprudence teaching, awaits a new survey which, in any event, would only provide a snapshot of courses at any one time and also would depend on how respondents interpret categories like "in depth", "outline" and "brief" in relation to theory coverage. Accordingly, this article looks, instead, at another important and less transient source of jurisprudential knowledge, namely the jurisprudence textbooks which students are recommended or, given the dissatisfaction with existing textbooks expressed in the teaching surveys,[7] might independently consult.

This is by no means the first article to interrogate the content of what has come to be called the "textbook tradition"[8] in law nor indeed the content of jurisprudence textbooks. Thus, Sugarman has described how English law textbooks in the "classical period" between around 1850 to 1907 portrayed law as an internally coherent and unified set of rules which are central to protecting individual freedom[9] – what CLS usefully terms "liberal legalism".[10] Moreover, instead of expanding and challenging this "black letter" tradition, Sugarman also shows that jurisprudence books replicated the emphasis on setting out and explaining what, according to the most successful jurisprudence textbook of its time, are "the very few and simple ideas which underlie the infinity variety of law".[11]

While we will see that jurisprudence textbooks have expanded dramatically from this narrow goal, I will seek to ascertain through a uniquely detailed statistical analysis of the

[5]Barnett (n 4) 89.
[6]Alex Green, "Lines to a Don: Why It Isn't Mindless to 'Re-imagine' Jurisprudence" (2023) 57 The Law Teacher 548.
[7]Barnett (n 4) 123; Cotterrell and Woodliffe (n 4) 87.
[8]See eg David Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition" in William Twining (ed), *Legal Theory and the Common Law* (Blackwell 1986); Peter Leyland and Terry Woods, "From Homogeneity to Pluralism: The Textbook Tradition Revisited" (1999) 33 The Law Teacher 18.
[9]Sugarman (n 8) esp 26–27.
[10]See eg Alan Hunt, "The Theory of Critical Legal Studies" (1986) 6 Oxford Journal of Legal Studies 1, 4–8.
[11]Thomas E Holland, *Elements of Jurisprudence* (13th edn, Clarendon Press 1924), discussed by Sugarman (n 8) 44.

content of almost[12] all UK[13] textbooks currently in print whether they can still be said to have a more or less standard content and the extent to which they currently fulfil jurisprudence's potential in enhancing students understanding of law, justice and morality. In addition, influenced by Goodrich's argument that the rhetoric of legal judgments may reveal law's subconscious values,[14] I will conduct a close analysis of the way that the books present the content they discuss in terms of how it is structured and described to see whether they provide similar clues about the author's political values. But whether deliberate or not, I will argue that, by and large, these rhetorical features of the way jurisprudence is communicated combine with the relative depth of coverage of the various jurisprudential inquiries and relevant theories to undermine the extent to which jurisprudence textbooks could provide UK law students with a sufficiently informed and critical understanding of the nature, operation and values of the law they study. First, however, it will be useful to have an overview of the textbooks examined.

## The textbooks surveyed

In all, the following 18 books were analysed:

- Brian Bix, *Jurisprudence: Theory and Context*;[15]
- David Brooke, *Q & A Jurisprudence*;[16]
- Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*;[17]
- Sean Coyle, *Modern Jurisprudence: A Philosophical Guide*;[18]
- Michael Freeman, *Lloyd's Introduction to Jurisprudence*;[19]
- Peter Halstead, *Key Facts: Jurisprudence*;[20]
- JW Harris, *Legal Philosophies*;[21]
- Lawcards, *Jurisprudence*;[22]
- Ian McLeod, *Legal Theory*;[23]
- Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism*;[24]

[12]Markus McDowell, *Jurisprudence and Legal Theory* (Sulis International 2016) was excluded because the brevity of discussion (just over 80 pages of what looks like PowerPoint slides) undermines the statistical significance of its comparative coverage. In any event, it is more focused on a narrow range of mainstream theories than any other textbook. I have also excluded books written by philosophy, as opposed to legal, academics and which seemed to be aimed more at philosophy than law students: cf Mark Tebbit, *Philosophy of Law: An Introduction* (3rd edn, Routledge 2017).

[13]However, a cursory look at other English-language books suggests that the tradition is broadly replicated throughout the Anglo-American legal world.

[14]Peter Goodrich, "*Jani Anglorum*: Signs, Symptoms, Slips and Interpretation in Law" in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (Routledge 1994) 107–45.

[15]9th edn, Sweet & Maxwell 2023.

[16]7th edn, Routledge 2016.

[17]2nd edn, Butterworths LexisNexis 2003.

[18]3rd edn, Hart Publishing 2022.

[19]9th edn, Sweet & Maxwell 2014.

[20]2nd edn, Routledge 2012.

[21]2nd edn, Butterworths 1997.

[22]7th edn, Routledge 2012.

[23]6th edn, Palgrave MacMillan 2012.

[24]Cavendish 2016.

- James Penner and Emmanuel Melissaris, *McCoubrey & White's Textbook on Jurisprudence*;[25]
- James Penner, David Schiff and Richard Nobles, *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*;[26]
- JG Riddall, *Jurisprudence*;[27]
- Julia Shaw, *Law Express: Jurisprudence*;[28]
- Nigel Simmonds and Joshua Neoh, *Central Issues in Jurisprudence*;[29]
- Duncan Spiers, *Law Essentials: Jurisprudence*;[30]
- Scott Veitch, Emilios Christodoulidis and Marco Goldoni, *Jurisprudence: Themes and Concepts*;[31]
- Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*.[32]

Admittedly, knowing exactly which of these books (henceforth referred to by author name only) students are buying would require conducting a survey of course recommendations with a response rate sufficient to capture all books being recommended or preferably paying for expensive access to publishing statistics to see which are actually being bought. Neither seems justified, given that my main aim is to ascertain whether there is such a thing as a jurisprudence textbook tradition and, if so, what it involves, rather than to determine exactly which books are being purchased.

Nevertheless, one can be fairly sure that those textbooks which have recently seen new editions (Bix, Coyle, Simmonds and Neoh, Shaw and Wacks) are being bought by at least some students, whereas those with numerous editions – most notably Freeman and Bix (both in their 9th editions), but also Brooke and Lawcards (7th), McLeod (6th), and Penner and Melissaris (5th) – are likely to have been relatively widely purchased in the past. The contrary does not necessarily apply to those books which have not seen recent new editions[33] or indeed, in the case of Morrison, Penner, Schiff and Nobles, and Spiers, gone beyond a first edition, given that this may be due to personal factors like retirement or changed intellectual interests rather than poor sales.[34] In any event, if most textbooks are similar in content and focus as I will show, then it becomes less important which particular ones are being purchased, as long as some are in fact read (or have an impact on course content).

[25]5th edn, OUP 2012.
[26]OUP 2002.
[27]2nd edn, OUP 1999.
[28]3rd edn, Pearson 2019.
[29]6th edn, Sweet & Maxwell 2022.
[30]Dundee University Press 2011.
[31]4th edn, Routledge 2023.
[32]6th edn, OUP 2020.
[33]However, the teaching surveys show that, of these, Harris and Cotterrell were recommended in the past – as were also previous editions of Freeman, Simmonds and Neoh: see Cotterrell and Woodliffe (n 4) 87; Barnett and Yach (n 4) 165; Barnett (n 4) 123.
[34]Thus, reviews of Harris (Chris Poole (1982) 16 The Law Teacher 64) and Penner and Melissaris (James Slater (2009) 21 Denning Law Journal 183, 188) indicate that at least these books were recommended to students.

It also has to be acknowledged that not all the books are described by their authors (or publishers) as textbooks.[35] However, it can be argued that all may operate as textbooks broadly defined in "containing facts about a particular subject that is used by people studying that subject".[36] Moreover, all perform this function by setting out what they regard as the leading jurisprudence theories, as well as to a greater or lesser extent various standard debates within jurisprudence.[37] The latter involve either what can be described as "set piece" debates between the main legal theories on topics such as the relationship of morality to law's status, as exemplified by the Hart–Fuller debate, and how judges and lawyers reason or more self-contained topics such as debates over distributive justice, the justification of punishment, how far law should interfere with personal morality or the meaning of legal concepts like rights. As regards the latter "jurisprudential topics", there is considerable variation between those like Bix and Harris which give them almost as much attention as the independent discussion of jurisprudential theories, as opposed to those like Cotterrell, Coyle, McLeod and Morrison which are almost entirely focused on the theories alone, with most textbooks fitting somewhere in between.

The books also vary considerably in their depth and sophistication, possibly affected by factors like the word length allowed by publishers, a desire to maximise sales through coverage, and the tendency of books to grow as authors incorporate new developments without knowing what to drop and/or are drawn into providing an ever more "sophisticated and dense commentary accompanying a selection of very difficult materials".[38] By contrast, Brooke, Halstead, Lawcards, Shaw and Spiers are shaped by their function as study or revision guides providing briefer and simpler signposts to essential information or suggesting answers to likely examination questions – what will be called, without pejorative intent, "crammers".[39] Nevertheless, they merit analysis here because they provide further evidence of what content is regarded as relevant to jurisprudence students. Indeed, given that it is no secret[40] that many struggle with jurisprudence, students may turn more readily to the crammers which might therefore have an even greater influence on students' understanding of law, society, ethics and justice than more standard textbooks.

At the other end of the spectrum in terms of length are Penner, Schiff and Nobles, and Freeman which are, respectively, around two and three times longer than the next longest textbook (Morrison, which is an unnecessarily long 543 pages due to numerous excursions into poetry and religion, and ruminations on life, death and even erotic love).

[35]Indeed Wacks (n 32) 3 resists the designation. By contrast, see Veitch, Christodoulidis and Goldoni (n 31) xx; Coyle (n 18) vii; the title of Penner and Melissaris (n 25); the preface to the fourth edition of Freeman (Dennis Lloyd, *Introduction to Jurisprudence* (Stevens and Sons Ltd 1979) ix); the back covers of Freeman (n 19) and Simmonds and Neoh (n 29); reviews of Cotterrell (eg Don Carmichael (1991) 29 Alberta Law Review 739), Freeman (eg David M Walker (1960) 23 Modern Law Review 335), Harris (Philip Milton (1981) 44 Modern Law Review 735), Morrison (Howard Davis (1998) 32 The Law Teacher 110), Simmonds and Neoh (eg Hugh Collins (1986) 45 The Cambridge Law Journal 534).

[36]*Collins Dictionary* <www.collinsdictionary.com/dictionary/english/textbook#google_vignette> accessed 16 December 2024.

[37]Accordingly, in being "premised upon the need to identify modernism, in order then to describe the various critical legal theories which have sought to revise an original model", Ian Ward, *Introduction to Critical Legal Theory* (2nd edn, Cavendish Publishing 2004) has been excluded as being more of a jurisprudence book than a book on jurisprudence.

[38]Penner, Schiff and Nobles (n 26) vii.

[39]Cf Sugarman (n 8) 51ff, discussing the historical role of legal crammers.

[40]See eg Bix (n 15) vii; Riddall (n 27) ch 1 (unhelpfully entitled "I Hate Jurisprudence"!); Wacks (n 32) xv, 2.

This is because they include extracts from original writers as well as commentary by the authors. However, it is arguable that this and the fact that Penner, Schiff and Nobles is an edited collection involving leading jurisprudence writers does not detract from their designation[41] as textbooks in being aimed at introducing students to legal theory rather than making an original jurisprudential contribution.

Cotterrell's book, however, seems to have begun life with more of the latter aim in that it focuses only on what he calls normative jurisprudence in order to argue that it arose in response to particular political conditions and in particular those of legal practice.[42] Nevertheless, while we cannot read anything into the exclusion of sociological or ethical theories as they go beyond this theme and in any event are acknowledged to be relevant to jurisprudence,[43] the fact that the book went into a second edition supports Cotterrell's claim that it was being "widely used as a general text"[44] and hence seems to play the role of a textbook.

The same justification for inclusion applies to Simmonds and Neoh, which is even more selective in content, being confined to six chapters on individual theorists (two of whom write on justice and not law), one on utilitarianism and one on rights, and is a more challenging read than one might expect of a textbook. Nevertheless, given that the book is designed to introduce students "to one of most important intellectual traditions of western civilization",[45] it seems appropriate to investigate what content is given to the book's title of *Central Issues in Jurisprudence*.

A final book which also sets out to provide students with an introduction to "some central issues in jurisprudence"[46] but which may appear to be more like a jurisprudence book than a book on jurisprudence is Veitch, Christodoulidis and Goldoni. Instead of presenting the main theories sequentially and interspersing them with chosen jurisprudential topics like most other books, it is far more thematic and more clearly designed to draw on jurisprudence to assist students to understand the law in both its historical and contemporary context, and both locally and globally. In other words, rather than treating jurisprudence purely as a subject in its own right, it takes at face value the avowed goals of many jurisprudence textbooks[47] to provide an understanding of the nature of law in general and, more specifically, not just its meaning, but also its historical development, relation to questions of justice and power, how it operates and its social function. Accordingly, it examines jurisprudential as well as non-jurisprudential theories to directly explore the nature of the law that students study. But, even if this were to be regarded (wrongly) as undermining the book's primary intended use as a "textbook for a basic course on jurisprudence",[48] its inclusion here can be justified at the very least on the grounds that its unique content and focus contrast with what we shall now see is an otherwise relatively standard content of current jurisprudence textbooks.

[41]See Freeman (4th edn, n 35) ix; Penner, Schiff and Nobles (n 26) v–vii.
[42]See Cotterrell (n 17) vii–viii, ch 1.
[43]ibid at 15–16. Indeed, Cotterrell has made extremely valuable contributions to sociological perspectives on law: see eg *The Sociology of Law: An Introduction* (2nd edn, OUP 1992); *Sociological Jurisprudence* (Routledge 2018); *Jurisprudence and Socio-Legal Studies: Intersecting Fields* (Routledge 2024).
[44]Cotterrell (n 17) v.
[45]Simmonds and Neoh (n 29) v.
[46]Veitch, Christodoulidis and Goldoni (n 31) xx.
[47]See eg Coyle (n 18) 1, 3; Freeman (n 19) 2; Harris (n 21) ch 1 passim; Lawcards (n 22) ch 1 passim; Penner and Melissaris (n 25) 1; Penner, Schiff and Nobles (n 26), v–vii; Riddall (n 27) 3–4; Wacks (n 32) 1.
[48]Veitch, Christodoulidis and Goldoni (n 31) xx.

## The province of jurisprudence revealed

Gaining an accurate picture of this content requires analysis, not just of what is and is not included, but also of the level of depth in which the various ideas and issues are covered. This was done by counting the number of pages devoted to each theory and topic, and calculating this as a percentage of each book's overall substantive content. In doing so, I excluded introductory chapters outlining the topic of jurisprudence, the textbooks' aims and overviews of theories and topics, as well as suggested tutorial topics and advice on how to write exams or essays. Also excluded were blank pages and those containing only chapter headings, indexes and overall bibliographies. While bibliographies, suggestions for further reading and questions for discussion at the end of separate chapters were counted, where they had more than one theory or topic and where chapters had introductions and/or conclusions discussing more than one theory or topic, I made approximate calculations as to the proportion to be allocated to each. This involved rounding up to the nearest half page – though counting the last page of each chapter as a full page unless it contained fewer than five lines. Admittedly, adopting different counting "rules" might have resulted in slightly different results, but not to the point of changing the overall picture which, as we shall see, involves clear patterns in the coverage of different theories. More problematic, however, are the subjective decisions I made on how to classify particular theorists, theories or topics. Here, the best that can be done is to explain my reasoning alongside the relevant findings so as to allow readers to assess for themselves the persuasiveness of the analysis.

### *Theory coverage*

Representing the coverage of different theories in diagrammatic form would result in an inverted triangle with four main levels. At the top (or first division) are legal positivism, natural law[49] and the sui generis interpretivism of Dworkin. These can be described as the "Big Three" given that they are the only theories to feature in every textbook and, significantly, together contribute 37.26% of the total content of all books, including those chapters which discussed topics to which positivists, natural lawyers or Dworkin did not contribute or did, but not as representatives of their respective school, such as Hart's debate with Devlin.[50]

As the first column in Table 1 shows, coverage of the Big Three ranges from 13.17% of Veitch, Christodoulidis and Goldoni, at one extreme, to 53.84% of Coyle, at the other. Between them, only Bix devoted less than 30% of content to the Big Three and, if one rounds the percentages up to the nearest whole number, all but seven textbooks devoted 40% or more to them. For those interested in the Big Three's internal (and eternal) squabbles, it can be noted that most[51] books devoted most space to legal positivism,[52] with natural law next and Dworkin last (though not always by very much). Given that Dworkin stands alone against a variety of positivists and natural lawyers, he

[49]Which, following the books which discuss them, have been taken to include the early Greeks.
[50]If these chapters are excluded their dominance rises to just over 55% of discussion.
[51]The exceptions were Coyle, McLeod, and Simmonds and Neoh which devoted most space to natural law, and Harris and Penner, Schiff and Nobles which prioritised Dworkin over natural law.
[52]For many books, it was roughly twice as much as each of the other, though in Cotterrell, Lawcards, Morrison and Spiers there was a rough 3:2:1 ratio.

**Table 1.** Coverage of the Big Three.

| Book | Percentage of overall content |
|---|---|
| Veitch, Christodoulidis and Goldoni | 13.17 |
| Bix | 29.10 |
| Penner, Schiff and Nobles | 30.87 |
| Spiers | 34.69 |
| Shaw | 31.81 |
| Freeman | 33.73 |
| Harris | 36.90 |
| Brooke | 39.92 |
| Morrison | 39.63 |
| Lawcards | 41.66 |
| Wacks | 41.68 |
| Penner and Melissaris | 43.03 |
| Riddall | 43.04 |
| Cotterrell | 44.65 |
| Halstead | 44.66 |
| McLeod | 53.84 |
| Simmonds and Neoh | 51.47 |
| Coyle | 53.84 |

unsurprisingly has more individual chapters devoted to him than any other theorist: more than one chapter in two books,[53] and eight single chapters (including the only "crammer" chapter to be devoted to a single author)[54] plus four others which he shares with one other author.[55] But as further evidence of the Big Three's dominance, Hart has nine chapters solely devoted to him,[56] Kelsen seven,[57] Finnis[58] and Fuller[59] three each (as well one shared between them)[60] and Austin two,[61] whereas some of them also share chapters with another Big Three author[62] – as do Bentham (two chapters)[63] and Raz (two).[64] The only other writers who have chapters devoted to them are Marx[65] and Rawls[66] (three each), Hohfeld and Nozick (one each),[67] and, perhaps surprisingly, Foucault (two).[68]

This means that, of all the questions jurisprudence can illuminate, the ones overwhelmingly covered by the textbooks are how to define law in general and whether this involves a test of moral validity more specifically, how to respond to law regarded as

[53]Penner, Schiff and Nobles (n 26) chs 8–10; Riddall (n 27) chs 8–10, though both chapter 10s were shared with one other author.
[54]Halstead (n 20) ch 10; Bix (n 15) ch 7; Coyle (n 18) ch 7; Freeman (n 19) ch 7; Harris (n 21) ch 14; Morrison (n 24) ch 5; Simmonds and Neoh (n 29) ch 8; Wacks (n 32) ch 5.
[55]Cotterrell (n 17) ch 6; Penner and Melissaris (n 25) ch 6; Penner, Schiff and Nobles (n 26) ch 10; Riddall (n 27) ch 10.
[56]Bix (n 15) ch 3; Coyle (n 18) ch 6; Harris (n 21) ch 9; Morrison (n 24) ch 13; Penner and Melissaris (n 25) chs 4 and 5; Penner, Schiff and Nobles (n 26) ch 4; Riddall (n 27) ch 4; Simmonds and Neoh (n 29) ch 8.
[57]Bix (n 15) ch 4; Freeman (n 19) ch 4; Harris (n 21) ch 6; McLeod (n 23) ch 5; Morrison (n 24) ch 12; Penner, Schiff and Nobles (n 26) ch 5; Riddall (n 27) ch 11.
[58]Coyle (n 18) ch 9; Riddall (n 27) ch 12; Simmonds and Neoh (n 29) ch 6.
[59]Bix (n 15) ch 6; Coyle (n 18) ch 10; Simmonds and Neoh (n 29) ch 10.
[60]McLeod (n 23) ch 6.
[61]Morrison (n 24) ch 9; Riddall (n 27) ch 2.
[62]Cotterrell (n 17) ch 4; Riddall (n 27) chs 7 and 10.
[63]Cotterrell (n 17) ch 3; Freeman (n 19) ch 3.
[64]Penner and Melissaris (n 25) ch 6; Penner, Schiff and Nobles (n 26) ch 10.
[65]Freeman (n 19) ch 12; Morrison (n 24) ch 10; Penner and Melissaris (n 25) ch 13.
[66]Coyle (n 18) ch 8; Penner and Melissaris (n 25) ch 12; Simmonds and Neoh (n 29) ch 4.
[67]Penner, Schiff and Nobles (n 26) ch 13 and Simmonds and Neoh (n 29) ch 5, respectively.
[68]Penner, Schiff and Nobles (n 26) ch 19; Veitch, Christodoulidis and Goldoni (n 31) ch 15.

unjust, and how judges and lawyers reason – a fact emphasised by the presence in some books of chapters[69] devoted to these topics in addition to the Big Three theorists who contribute to them. And this is before one takes into account the discussion of these and related topics by American and Scandinavian realism, Pound and sociological jurisprudence, and Hohfeld and other forms of analytical jurisprudence which fit within the positivist camp.[70] If these theories are included, discussion of these and related topics such as adjudication and the analysis of legal concepts constitutes 46.09% of all substantive textbook content. In this light, it seems appropriate to describe the Big Three and their friends as constituting *mainstream* jurisprudence.[71]

It is possible that, at least with the longer textbooks, extensive discussion of a few theories was motivated by the goal of sharpening students' minds and teaching them how to think conceptually and philosophically. Certainly, this is the impression conveyed by the highly esoteric discussion in books like Coyle, Simmonds and Neoh, and, at times, Wacks. However, if so, one could just as plausibly require similar levels of conceptual analysis of issues such as the alleged logical flaws of epistemological and moral relativism, problems with Marx's base/superstructure metaphor, and the distinction between sex and gender in feminist theory.

Beyond the Big Three, the next level of coverage – what can be called jurisprudence's second division – comprises theories which are discussed in some depth (more than a paragraph or two as context or criticism of other theories) in over half the textbooks. These include American realism, Marx or Marxist theories more widely, CLS, and feminism at 15 appearances each.[72] Other critical theories were also relatively well represented. Thus, postmodern writers were discussed (again, not always in much detail) in 13 books[73] and critical race theory in its own right (but in even less detail) in eight.[74]

Also relatively well represented are Scandinavian realism (nine appearances, though some rather brief)[75] and the sociological jurisprudence of Pound and others (discussed in eight books).[76] As regards sociological theories "proper",[77] in addition to the five books which discussed Marx only (usually as a critical legal, rather than a sociological, theorist), 11 books[78] discussed other sociologists, most notably Weber, but also Durkheim and a range of other contemporary sociologists or social theorists like Bourdieu, Foucault and Habermas, whereas autopoiesis was accorded its own chapter in two books.[79] A final theory which received fairly frequent attention, albeit not always in much detail, was utilitarianism. Thus, apart from passing mentions in providing

[69]Freeman (n 19) ch 20; Harris (n 21) ch 15; Penner and Melissaris (n 25) ch 9; Penner, Schiff and Nobles (n 26) ch 14; Riddall (n 27) ch 7.
[70]See references at nn 67, 72, 75–76, 105 and 110 below.
[71]A term also used by Robin Lister in reviewing Bix: (2007) 41 The Law Teacher 126, 127.
[72]American realism was discussed in all books bar Brooke, Coyle, Simmonds and Neoh, though only fleetingly in Morrison (n 24) at 7; Marxism in all bar Coyle, Riddall, Simmonds and Neoh; feminism in all bar Brooke, Halstead and Simmonds and Neoh; CLS in all bar Brooke, Simmonds and Neoh, Shaw.
[73]All bar Brooke, Coyle, Harris, Riddall, Simmonds and Neoh.
[74]Bix (n 15) 220–26; Cotterrell (n 17) 229–33; Coyle (n 18) 264–70; Freeman (n 19) ch 16; Veitch, Christodoulidis and Goldoni (n 31) 227–31; Wacks (n 32) 360–65; Shaw (n 28) 129–30. Cf also Morrison (n 24) 508–11; Penner, Schiff and Nobles (n 26) 834–37, which discuss critical race feminism in chapters on feminism.
[75]Bix (n 15) 249–50; Freeman (n 19) ch 10; Halstead (n 20) 100–01; Harris (n 21) 103–08; Lawcards (n 22) 52; Riddall (n 27) ch 17; Shaw (n 28) 90–94; Spiers (n 30) 78–82; Wacks (n 32) 183–89.
[76]Cotterrell (n 17) ch 6; Freeman (n 19) ch 8; Halstead (n 20) ch 8; Harris (n 21) ch 18; Lawcards (n 22) 116–17; Shaw (n 28) ch 7; Spiers (n 30) ch 6; Wacks (n 32) ch 7.
[77]Cf Cotterrell (n 17) 148 regarding Pound's failure to engage in true sociological analysis.
[78]All bar Bix, Brooke, Cotterrell, Coyle, McLeod, Riddall, and Simmonds and Neoh.
[79]Penner, Schiff and Nobles (n 26) ch 18; Veitch, Christodoulidis and Goldoni (n 31) ch 12.

background detail for early legal positivism,[80] three individual chapters[81] were devoted to it and it shared two with the economic analysis of law,[82] while also featuring in chapters on justice[83] and rights.[84]

Jurisprudence's third division comprises a motley crew of a few theories which feature in some detail in at least three, but no more than half, of the books. The most prominent of these were various early enlightenment, social contract and liberal political theorists such as Grotius, Hume, Kant, Locke, Mill, Rousseau and Smith, discussed on their own terms in nine books, often in considerable detail,[85] though also playing a role in relation to other theorists or jurisprudential topics.[86] Next most prominent is the economic analysis of law, which is discussed in eight books, albeit only at any length in Bix where it accounted for 13% of all content.[87] Also briefly discussed in five books are communitarianism as part of the criticism of various aspects of liberalism[88] and pragmatism, either in its own right or in relation to American realism.[89] Finally, perched precariously in the relegation zone of the third division are historical jurisprudence which is covered on its own in three books,[90] and alongside anthropological jurisprudence in another three.[91]

In the bottom textbook division are various *jurisprudential* theories[92] which make only a few appearances. Thus, Cotterrell devotes a chapter to common law theory[93] (which in any event echoes both natural law and Dworkin), while there are rare (and very brief) discussions of queer legal theory,[94] the free law movement[95] and legal process.[96]

## Critical and sociological perspectives

As is implicit in the Introduction, in order to fulfil their potential in introducing readers to an understanding of law which is not confined to idealistic, broadly liberal,

[80]See eg Cotterrell (n 17) 52; Freeman (n 19) ch 3; Coyle (n 18) 98–99; Morrison (n 24) ch 9; Shaw (n 28) ch 5.
[81]Halstead (n 20) ch 6; Riddall (n 27) ch 13; Simmonds and Neoh (n 29) ch 3.
[82]Harris (n 21) ch 4; Lawcards (n 22) ch 5.
[83]McLeod (n 23) ch 10; Veitch, Christodoulidis and Goldoni (n 31) ch 10; Wacks (n 32) ch 9.
[84]Simmonds and Neoh (n 29) ch 8.
[85]Coyle (n 18) chs 4–5 (15.35% of all content); Morrison (n 24) chs 4–8 (27.85%). These theories also feature in Veitch, Christodoulidis and Goldoni (n 31), Part 1 passim esp ch 2, and ch 10; Halstead (n 20) ch 3, Brooke (n 16) ch 6; Freeman (n 19) ch 2; Penner, Schiff and Nobles (n 26) 1038–63; Shaw (n 28) ch 4; Wacks (n 32) ch 2.
[86]Such as Kant's impact on Kelsen (Penner and Melissaris (n 25) 49–50; Wacks (n 32) 125–26) rights based theories (Simmonds and Neoh (n 29) ch 8 passim) and retributive theories of punishment (Wacks (n 32) 335–36); Locke in relation to rights (Spiers (n 30) 126–28); Hume's discussion of the naturalist fallacy (Harris (n 21) 12; McLeod (n 23) 83–84; Penner, Schiff and Nobles (n 26) 36–37; Riddall (n 27) 28.
[87]Bix (n 15) ch 8, and 132–33, 238–41 passim. See also Cotterrell (n 17) 200–02; Halstead (n 20) 117–20; Harris (n 21) 45–50; Lawcards (n 22) 85–89; McLeod (n 23) 167–71; Penner, Schiff and Nobles (n 26) ch 17; Wacks (n 32) 265–71.
[88]Roughly 27 pages in all: Harris (n 21) 289–93; Morrison (n 24) 408–12; Penner and Melissaris (n 25) 187–88; Penner, Schiff and Nobles (n 26) 764–75; Wacks (n 32) 279–83.
[89]Bix (n 15) 252–55; Cotterrell (n 17) 252–54; Coyle (n 18) 140–41; Freeman (n 19) 837–39; Halstead (n 20) 101–02.
[90]Bix (n 15) 247–48; Cotterrell (n 17) 36–48; Halstead (n 20) ch 7.
[91]Freeman (n 19) ch 11; Harris (n 21) ch 17; Wacks (n 32) ch 8.
[92]The books also discussed in passing theories not directly related to law like hermeneutics and a host of non-jurisprudential writers such as JL Austin, Arendt, Benjamin, Derrida, Heidegger, Lacan, Machiavelli and Spinoza.
[93]Cotterrell (n 17) ch 2.
[94]Bix (n 15) 225–26; Veitch, Christodoulidis and Goldoni (n 31) 221.
[95]Bix (n 15) 248–49.
[96]Bix (n 15) 251–52. Also discussed by Freeman (n 19) 839–40 in relation to American realism.

assumptions about law's positive or, at least neutral, role in society, textbooks need to pay due attention to theories of law which challenge rather than support or are neutral about the liberal legal order (what will be loosely called critical theories), as well as those which involve studying law's actual operation and function in society (sociological theories). On the face of it, the above overview does not suggest that such theories are any more marginalised than any theories other than the Big Three. On the other hand, the latter are largely supportive of the liberal status quo, whereas only some mainstream theories like realism call for attention to be given to how law actually operates in society rather than in theory. Moreover, Simmonds and Neoh do not regard any critical or sociological theories as relevant to their "central issues in jurisprudence" and only just over half the books go beyond Marxist theories of law as opposed to society, legal anthropology or sociological jurisprudence to look at other sociological theories.[97] In other words, the authors of seven books do not seem to think it worth engaging with the sociology of law.[98]

Moreover, once one goes beyond the number of appearances of critical and sociological theories, Table 2 reveals that the depth of their coverage is noticeably low in comparison to non-critical and non-sociological theories in all textbooks apart from Veitch, Christodoulidis and Goldoni, which was not included given the difficulty of separating out the theories in its predominantly thematic discussion. Thus, coverage of critical theories can be seen to range from less than 5 % in the case of Brooke and McLeod to almost 30% in the case of Penner, Schiff and Nobles, with six books allocating it less than 10%[99] (seven, if one includes Simmonds and Neoh). Unsurprisingly, given how many books ignored sociological theories altogether or confined discussion to Marx, their coverage at 9.65% of total book content is just over

**Table 2.** Critical and sociological theories.

| Book | Critical theories Percentage coverage | Sociological theories Percentage coverage |
|---|---|---|
| Bix | 10.32 | 0.47 |
| Brooke | 4.74 | 4.74 |
| Coyle | 9.45 | 0 |
| Cotterrell | 23.86 | N/A |
| Freeman | 21.76 | 12.95 |
| Halstead | 9.71 | 7.77 |
| Harris | 7.82 | 5.08 |
| Lawcards | 26.19 | 11.9 |
| McLeod | 4.75 | 0.90 |
| Morrison | 20.83 | 8.94 |
| Penner and Melissaris | 25.61 | 4.92 |
| Penner, Schiff and Nobles | 28.25 | 17.06 |
| Riddall | 11.60 | 0 |
| Shaw | 18.18 | 9.09 |
| Simmonds and Neoh | 0 | 0 |
| Spiers | 5.49 | 16.33 |
| Wacks | 15.80 | 12.53 |

[97]Freeman; Halstead; Harris; Lawcards; Morrison; Penner, Schiff and Nobles; Spiers; Shaw; Veitch; Wacks.
[98]In addition to Simmonds and Neoh, but not Cotterrell who expressly acknowledges that sociological theories are relevant (see at n 43, above): Bix; Brooke; Coyle; McLeod; Penner and Melissaris; Riddall.
[99]Brooke; Coyle; Halstead; Harris; McLeod; Spiers.

half that of the overall coverage of critical theory at 17.72%, which is itself less than half of the coverage of the Big Three (37.32%) and much less than coverage of all mainstream theory (46.09%). In fact, coverage of the Big Three alone is greater than both critical and sociological theories combined.

Admittedly, these figures are indicative only, especially as regards the average overall percentages. Thus, on the one hand, they would have been slightly higher had Veitch, Christodoulidis and Goldoni been included. Coverage of Pound and other proponents of sociological jurisprudence was also excluded because arguably they did not actually engage in a sociological analysis.[100] On the other hand, any resultant undercounting is more than offset[101] by the fact that Marx and Foucault have been included under *both* the critical and sociological rubrics, even where some textbooks only refer to their theories of law or power rather than society,[102] and anthropological jurisprudence was included under the sociological rubric given its shared focus on analysing the shape of law in terms of its social context.[103]

Then again, the low levels of attention ascribed to critical and sociological theories could be said to be misleading in that the percentages of coverage reported above relate to the books as a whole, whereas all but Cotterrell included at least one chapter discussing a specific jurisprudential topic as opposed to jurisprudential theories. Consequently, the proportion of overall theory coverage attributed to critical and sociological theories can be said to be higher (though this, of course, applies equally to the mainstream theories). However, this difference becomes far less significant when one looks at what these topics were and how they were discussed.

Where only one chapter was devoted to a jurisprudential topic, it was always that of justice (or, more specifically, distributive justice), which featured in all but Cotterrell.[104] However, apart from justice, there were no noticeable canonical topics (as opposed to set-piece debates between mainstream theories). Certainly, only a few books devoted whole chapters to discussing legal concepts along Hohfeldian lines,[105] and issues relating to precedent and statutory interpretation[106] – topics which used to loom large in jurisprudence books[107] – and the only book to discuss all was Harris whose latest edition was the oldest. Indeed, it can be said that modern jurisprudence textbooks have moved a long way from the much earlier tradition of what Harris calls "particular jurisprudence" which supplements the study of law within particular legal systems by analysing its concepts, methods and sources to the study of law per se in the form of "general jurisprudence".[108] Admittedly, Cotterrell covers precedent and

[100]See at n 77, above.
[101]Particularly in the case of Marx who constituted 16.7% of all critical legal theory and 31.14% of all sociological theory.
[102]The inclusion of communitarianism as a critical theory can also be regarded as generous in that it only rejects some aspects of liberal society.
[103]Cf Paul Phillips, Review of Dennis Lloyd, *Introduction to Jurisprudence* (1980) 31 Northern Ireland Legal Quarterly 399, 400: "Has there ever been a valid distinction between Sociology and Anthropology at other than the superficial level of the flippant, 'Sociology is the study of white men, Anthropology the study of natives'?".
[104]As noted at n 42, above, the topic was omitted as it did not fit with his chosen theme.
[105]Harris (n 21) ch 7; Penner and Melissaris (n 25) ch 7; Penner, Schiff and Nobles (n 26) ch 13.
[106]Brooke (n 16) ch 8; Harris (n 21) chs 12 and 13.
[107]See Holland (n 11), RWM Dias, *Jurisprudence* (5th edn, Butterworths 1985); George Whitecross Paton, *A Textbook of Jurisprudence* (4th edn, OUP 1972); PJ Fitzgerald, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966).
[108]Harris (n 21) 4.

statutory interpretation in discussing common law theory,[109] whereas Hohfeld also features in all seven chapters on rights,[110] with human rights discussed in a further two.[111] Other relatively popular topics were: those relating to the duty to obey law (six chapters[112] and part of another);[113] the justification for punishment (five chapters);[114] how far law should interfere with private morality, as exemplified by the Hart–Devlin debate (three chapters);[115] and the study of law and literature (one exclusive chapter, one combined with law and language and part of one on critical legal theory).[116] By contrast, the topics of globalisation and authority were accorded only one chapter each,[117] whereas Bix has short chapters entitled "Will and Reason" and "Authority, Finality and Mistake", and one on the philosophical foundations of various areas of private and criminal law[118] – possibly because he wanted to unleash his favoured[119] economic analysis of law theory.

Admittedly, many of these topics, most obviously those relating to legal methods and the definition of legal concepts, do not raise critical and sociological theories in an obvious way.[120] But, even though questions relating to justice, rights, obedience to law, state authority and punishment have seen attention from critical theorists and sociologists, the textbooks tended to treat them as a matter of internal debate between adherents to liberal or at least non-critical theories. For instance, discussions of punishment debate its purpose, but not how it is allocated unequally or is designed to protect the powerful. Books discuss whether law should interfere with private morality, but do not question the morality of capitalist exploitation or whether leaving people a private sphere of morality leaves unchallenged power differences in the home. Discussions of obedience to law ignore the argument that this question plays out very differently for those whose oppression is arguably facilitated, legitimated and concealed by law. Few books[121] draw on critical or sociological theories to question the value or the effectiveness of rights or shift the debate about how far one can redistribute wealth under capitalism to the question of whether one should instead replace capitalism (or, as we shall see,[122] if they do so, they swiftly dismiss this possibility).

For some authors, the most critical perspective they could muster was that of communitarianism.[123] However, students were generally left to their own devices in piecing together critical and sociological perspectives on these issues. Only Veitch, Christodoulidis

[109]Cotterrell (n 17) ch 2.
[110]Bix (n 15) ch 10; Lawcards (n 22) ch 6; Riddall (n 27) ch 14; Simmonds and Neoh (n 29) ch 8; Spiers (n 30) ch 8; Shaw (n 28) ch 15; Wacks (n 32) ch 10; and as part of other chapters: Halstead (n 20) 95–97; Freeman (n 19) 337–39 Veitch, Christodoulidis and Goldoni (n 31) 87–88.
[111]Brooke (n 16) ch 7; Freeman (n 19) ch 17.
[112]Bix (n 15) ch 16; Harris (n 21) ch 16; Penner and Melissaris (n 25) ch 8; Penner, Schiff and Nobles (n 26) ch 11; Riddall (n 27) ch 22; Wacks (n 32) ch 1.
[113]Brooke (n 16) ch 6.
[114]Bix (n 15) ch 9; Harris (n 21) ch 5; Penner, Schiff and Nobles (n 26) ch 12; Spiers (n 30) ch 10; Wacks (n 32) ch 12.
[115]Harris (n 21) ch 10; McLeod (n 23) ch 11; Riddall (n 27) ch 21.
[116]Respectively, Bix (n 15) ch 20; Freeman (n 19) ch 19; Shaw (n 28) ch 8.
[117]Respectively, Freeman (n 19) ch 18, Brooke (n 16) ch 6.
[118]Bix (n 15) chs 11, 12 and 21, respectively.
[119]See at n 87, above.
[120]But cf Freeman (n 19) 314, who notes that some critical theorists engage in analytical jurisprudence, but leaves discussion to later chapters.
[121]Eg Freeman (n 19) (chs 6 and 17 on justice and human rights, respectively); Harris (n 21) (ch 11 on the rule of law); Wacks (n 32) (ch 9 on justice).
[122]Text at nn 185 and 189.
[123]See at n 88.

and Goldoni make a sustained attempt to raise such perspectives whenever relevant, even when discussing legal reasoning.[124] Indeed, rather than fully exploring relevant critical and sociological theories on core jurisprudential topics, some authors[125] deemed it more important to include discussion of topics like punishment, the criminalisation of private morality, private law concepts, legal methods and/or the legal protection of human rights, which arguably could be left to subject-specific textbooks.

Moreover, there seems to be a form of received wisdom passed from one book to another about what theories and theorists are relevant to which jurisprudential questions. This is no more noticeable than in discussions of justice. Thus, topics of restitutive and formal or procedural, as opposed to distributive, justice are usually[126] either ignored or only raised indirectly through discussions of Nozick or Fuller. Moreover, no book acknowledges that problems of access to justice undermine the value of law for huge swathes of society.[127] Most noticeably, when discussing distributive justice, the main protagonists are almost always Rawls in the egalitarian corner and Nozick in the libertarian. Yet it is the far more sophisticated libertarian theory of Hayek[128] who has had probably the most influence on modern law and society.[129] Here one wonders whether the preference for Nozick over Hayek is deliberate in that his views are more easily dismissed or just further evidence of conventional practice.

## *Ethics and epistemology*

The conventional wisdom explanation certainly seems more applicable to the relative marginalisation of ethics (as distinct from theories of justice) and almost complete silence on epistemology, given that both disciplines are less obviously[130] political. Even so, it can be argued that all jurisprudential theories "consciously or otherwise, assume, at the least, a metaphysics, an ethics, and a theory of knowledge" and that these ought to be made explicit.[131]

As regards ethics, it might be expected that the common set-piece debate over the relevance of law's morality to its validity, the almost universal attention to theories of distributive justice, as well as the less common discussion of the extent to which law should regulate personal morality, would lead to more general explorations of substantive and meta-ethical theories of morality. However, there are only few chapters or lengthy discussions devoted to one or more ethical theories: usually utilitarianism,[132] but also Hume, Kant, Mill and Smith (albeit usually in the context of their ideas more

[124]Veitch, Christodoulidis and Goldoni (n 31): ch 7 draws on Weber and ch 9 on CLS, feminism and critical race theory.
[125]Namely Bix, Brooke, Harris, McLeod, Riddall and Spiers.
[126]But see Harris (n 21) 277–78; Veitch, Christodoulidis and Goldoni (n 31) 234.
[127]The fact that it used to be taught in some jurisprudence courses (Cotterrell and Woodliffe (n 4) 85) might suggest that this topic has been outsourced to other relevant courses.
[128]Only mentioned in this context and, then only in passing, by Simmonds and Neoh (n 29) 60n, Wacks (n 32) 284 though discussed more fully by Harris (n 21) in his chapters on the rule of law and sociological theories (chs 11 and 19).
[129]See eg Alan Thomson, "Taking the Right Seriously: The Case of FA Hayek" in Fitzpatrick (n 2).
[130]But see eg Donald Nicolson, "Taking Epistemology Seriously: 'Truth, Reason and Justice' Revisited' (2013) 17 Evidence and Proof 1, esp 42–43.
[131]Stanley Rose, Review of Dennis Lloyd, *Introduction to Jurisprudence* (1961-1962) 36 Tulane Law Review 393, 394.
[132]See at nn 80–84, above.

generally),[133] and Gilligan's ethic of care in the course of discussions of feminism.[134] These and other ethical theories and theorists, as well as meta-ethical positions, are also sometimes raised briefly – usually only in passing to refute moral relativism[135] – in the context of specific topics, set-piece debates or in relation to utilitarianism or natural law,[136] but only McLeod[137] and Spiers[138] provide an overview of most relevant theories, and only the latter devotes a chapter to doing so.

The extent to which jurisprudential discussion of ethics is a matter of convention is clearly revealed by the fact that one ethical theory does in fact receive extended discussion. Thus, many authors seem to be seduced by natural law's role in the set-piece debate with legal positivism to go beyond discussing its views on legal validity to provide lengthy discussions of the ethics of Finnis and earlier natural lawyers without necessarily acknowledging[139] their non-legal focus.[140] At the same time, few acknowledge that natural law involves highly controversial absolutist and universalistic ideas about human nature and morality. To the extent that jurisprudence is, as some books recognise,[141] valuable in preparing students for being good human beings, as well as good lawyers,[142] the assistance derived from the textbooks is likely to be very partial in both senses of the word.

If ethical theory is only a rare visitor to jurisprudence textbooks, epistemology appears even more unwelcome. Admittedly it sometimes comes up in detailed discussions of early philosophers like the Greeks, Hume or Kant.[143] Epistemological issues are also briefly touched upon in the course of contrasting Humean empiricism with Kantian conceptualism in relation to Hart and Kelsen,[144] in discussing language and definitions, most notably in relation to Hart[145] or more generally via discussions of poststructuralism and postmodernism.[146] In addition, there are scattered passages raising the question of whether there can be true facts, usually to dismiss ideas about the challenge of deconstruction and the social construction of knowledge as self-defeating if not "false and dangerous".[147] But, while some textbooks imply that people are inherently rational[148] and can draw on objective foundations for true knowledge,[149] none go on to debate how these might be grounded, canvass contrary sceptical arguments or raise the political and moral dangers of foundationalism.[150] In other words, no textbook treats epistemology as a discipline worth adding to the jurisprudential toolkit.

[133]See at n 85, above.
[134]See Cotterrell (n 17) 217–21; Penner, Schiff and Nobles (n 26) ch 13; Riddall (n 27) ch 20.
[135]See eg Coyle (n 18) 4–6, 175–76.
[136]Eg Bix (n 15) 154–55; Coyle (n 18) 21–22, 175–76; Simmonds and Neoh (n 29) 11–15; Harris (n 21) 20–25 Riddall (n 27) 76–78, 151–53; Wacks (n 32) 42–44, 160.
[137]McLeod (n 23) 7–13.
[138]Spiers (n 30) ch 3.
[139]Cf however Penner and Melissaris (n 25) 11.
[140]See the chapters devoted to Finnis cited in n 58 above as well as Bix (n 15) ch 5; Brooke (n 16) ch 4; Coyle (n 18) ch 2; Harris (n 21) ch 2; Halstead (n 20) ch 2; McLeod (n 23) chs 3 and 6; Morrison (n 24) chs 2–3; Freeman (n 19) ch 2; Penner and Melissaris (n 25) ch 2; Penner, Schiff and Nobles (n 26) ch 2; Riddall (n 27) ch 5; Spiers (n 30) ch 2; Shaw (n 28) ch 2; Wacks (n 32) ch 2.
[141]See Bix (n 15) viii, noting that "only the reflective live is worth living".
[142]Cf Julian Webb, "Being a Lawyer/Being a Human Being" (2002) 5 Legal Ethics 130.
[143]See at n 85, above.
[144]See at n 86, above.
[145]See the references at n 56; and. more generally, Freeman (n 19) 8ff.
[146]See references in n 73, above.
[147]Coyle (n 18) 265–66. See also Wacks (n 32) 237.
[148]See eg Penner and Melissaris (n 25) 11, 130.
[149]See eg Coyle (n 18) 8–9, 53.
[150]See Nicolson (n 130).

### *A panoptic view of the jurisprudence province*

Instead, we have seen that, of the 18 books analysed:

- All examine the meaning of law and in particular whether it needs to be moral and just in order to qualify as "law";
- All discuss Dworkin's interpretive theory and most include competing theories of adjudication, albeit in less detail;
- Most canvass theories critical of the Western legal order and many also sociological understandings of the role of law, but only Veitch, Christodoulidis and Goldoni accord them as much attention as mainstream theories;
- Almost all debate the redistribution of wealth, but most do so entirely from within the liberal paradigm;
- A few discuss theories which apply economic, historical or anthropological approaches to law;
- Some discuss in detail early political and economic theories which helped shape the current Western legal order;
- Some discuss utilitarianism, but very few venture further to its main rivals or meta-ethical theory except to the extent of discussing the marginal theory of natural law;
- A smattering raise topics about how we justify and ground epistemological claims, but none engage directly with this issue;
- Some books analyse the justification for punishment, whether law should enforce morality, the social role and conceptual meaning of rights and other legal concepts, but other than these topics and that of distributive justice, globalisation, human rights, law, language and literature, and concepts of private law are only discussed by one or two.

Admittedly, pointing to these lacunae and biases undoubtedly reflects my personal view of what theories and themes jurisprudence should cover. It is also true that, as some authors acknowledge[151] (sometimes plaintively),[152] they inevitably had to make choices about what to discuss and in how much detail given the constraints on length imposed by publishers mindful of market sales. Nevertheless, irrespective of vast differences in book length and notwithstanding the wide variety of content that could profitably be included, with the notable exception of Veitch, Christodoulidis and Goldoni, there is a surprisingly similar emphasis on the Big Three and mainstream friends, and a narrow range of specific topics and conception of what theories are relevant to these topics.

In the past, when jurisprudence and indeed academic legal education itself needed to legitimate itself in the newly established law schools, it might have been thought that, as with doctrinal textbooks, a common subject-matter in terms of a textbook tradition would assist this project.[153] However, jurisprudence is now well established (and may indeed have peaked as a perceived compulsory subject)[154] and in any event its content has substantially changed since this early period[155] when the focus was

[151]See Bix (n 15) ix; Morrison (n 24) vii; Penner, Schiff and Nobles (n 26) viii; Wacks (n 32) 3.
[152]Freeman (n 19) xvii.
[153]See Sugarman (n 8); Matyas Bodig, "Legal Theory and Legal Doctrinal Scholarship" (2010) 23 The Canadian Journal of Law and Jurisprudence 483.
[154]See Barnett (n 4) 96.
[155]See n 4 and subsequent text regarding teaching and n 107 regarding textbooks.

more on supporting and supplementing doctrinal study via the discussion of legal sources, concepts and methods. Given this greater freedom, one might have expected greater variety in the topics addressed and the theories covered in contemporary textbooks.

No doubt, choices as to the content of books might well be influenced by the perceived market for students, taking into account what the surveys reveal is a fairly standard teaching syllabus[156] – though only Cotterrell acknowledges this.[157] However, not only do these surveys suggest that the courses and textbooks are mutually reinforcing, but also, as Veitch, Christodoulidis and Goldoni show, books can challenge rather than accede to the received wisdom about jurisprudence content. Accordingly, there is also the possibility that this received wisdom reflects political views about law, power and justice. If so, few authors are likely to admit this – though Coyle does acknowledge that he has opted to state how he thinks "the central questions of jurisprudence should be understood".[158] Nevertheless, it remains possible that behind some of the choices as to content are subconscious or even conscious, but unacknowledged, political values which determine what textbook authors think students should learn. Consequently, I turn now to an analysis of the way that the books present the content they discuss to see whether, like the rhetoric of legal judgments analysed by Goodrich,[159] they provide similar clues about the author's political values or at least to see what message they are likely to convey to readers.

## Rhetoric and politics in jurisprudence's hinterland

### *Questions of rhetoric*

In analysing the rhetorical features of the text in the textbooks, we can distinguish between, on the one hand, those features which are structural in involving the order in which the theories and topics are presented, how they are classified and how they are related to each other, and, on the other hand, those which involve the way language is used in presenting such theories and topics.[160] This focus on rhetoric should not, however, be interpreted as a pejorative criticism that the authors are insufficiently neutral or logical. Instead, even when writers are not consciously using language to persuade, given that all content has to be ordered in some way and presented in words, it will often convey some sort of implicit message. Admittedly, this is likely to be less prominent in the shorter books, especially crammers like Shaw and Halstead, which are extremely concise and hence have less room for rhetorical flourishes. However, like all books, they need to be structured, so it makes sense to begin here.

[156]See at n 4 and subsequent text.
[157]Cotterrell (n 17) v, admitting that he expanded the content of the second edition to better serve its use as a textbook; though see also Raymond Wacks, *Swot: Jurisprudence* (5th edn, Blackstone 1999) ix, regarding what seems to be the precursor to his book analysed here.
[158]Coyle (n 18) vii.
[159]See at n 14.
[160]Cf Donald Nicolson, *Evidence and Proof in Scotland: Context and Critique* (Edinburgh University Press 2019) 325ff.

### *Structure: sequencing, silo-isation and semantics*

In doing so, we start literally at the beginning, with the sequence in which textbook content is presented. According to Riddall, there is no logical or conventional starting point for ordering discussion.[161] In fact, however, textbooks like those of Cotterrell and Morrison which emphasise the historical context of jurisprudential theories do have an obvious (chrono)logical order, whereas all but four[162] started with legal positivism, natural law or a comparison between them, with Dworkin often following immediately or at least shortly afterwards. By contrast, only Veitch, Christodoulidis and Goldoni introduce readers to critical and sociological theories before mainstream ones, with many textbooks leaving them to the very end[163] (if discussed at all).

But whether this order is purely conventional or stems from the fact that (non-Marxist) critical theories are more recent than mainstream theories,[164] it may offer a subtle message about the theories' relative importance. Similarly, one will never know whether jurisprudence textbooks are deliberately structured in order to suggest that debates between positivism and natural law over the nature of law are the obvious starting points for jurisprudence, with what comes later being more peripheral. Nevertheless, this sequencing certainly combines with the relative depth of discussion of the various theories to suggest that those discussed later are more in the nature of afterthoughts – light dessert after the main course. But, as with diners who do not leave room for dessert, some readers might find their intellectual stamina exhausted by the sometimes very challenging task of following the twists and turns of argument and counter-argument between different versions of mainstream theories (soft versus hard positivism, internal versus external perspectives, Humean empiricism versus Kantian conceptualism, etc). Indeed, why order dessert when even the chef has not gone to much trouble with it?

In fact, serving courses *à la russe* is not obligatory. Textbooks could return to the earlier *service à la française* dining style and present all jurisprudence theories at once rather than in temporal order by focusing on common topics and bringing in mainstream, critical, sociological, ethical and epistemological theories where relevant. But only Veitch, Christodoulidis and Goldoni do this. Alternatively, books could refer forwards or backwards to theories which are relevant to topics being discussed. The former is likely to be less effective if readers are simply referred to alternative perspectives discussed later, especially if, when they do arrive, the original discussion is not revisited.[165] But, if perspectives from theories discussed in later chapters are dealt with as and when relevant rather than kicked into the long grass, this might overwhelm readers – particularly if they are already challenged by detailed internal debates and then have to digest lengthy diversions containing enough background information to understand the insights from theories discussed later or, worse still, are not provided with sufficient background information.[166]

[161]Riddall (n 27) 18.
[162]Cotterrell; Shaw; Simmonds and Neoh; Veitch, Christodoulidis and Goldoni.
[163]Indeed, if one excludes books which end with topics as opposed to theories, this applies to all except Bix.
[164]Cf Green (n 6) 551.
[165]As with Freeman in relation to analytical jurisprudence: see above at n 120.
[166]See eg Harris (n 21) 113, quoting Unger in discussing CLS and identifying Dworkin as the object of the quote, but not giving enough information about either writer's theories for jurisprudential neophytes to make sense of the comment.

Indeed, this consideration might explain why most books leave insights from critical and other non-mainstream theories to later. However, it does not explain why discussion is rarely detailed enough to both present these theories in their own right *and* explore their implications for the mainstream theories and topics already discussed. Instead, readers are usually left to work out for themselves the implications of critical (and, if covered, sociological, ethical and epistemological) theories for the topics debated within mainstream jurisprudence and relevant topics like justice, rights and obedience to the law. Unlike mainstream theories which are set out, often in extensive descriptive detail and allowed to speak for themselves before criticisms (predominantly from rival mainstream theories) are canvassed, many books give little detail on critical theories before launching into criticisms of them.

More noticeable is a distinct unwillingness by some authors to draw on non-mainstream theories, even when their relevance was crying out for discussion. Examples include books questioning Dworkin's assumptions about the possibility of coherence in law without referring to the CLS argument[167] that incoherence is endemic in stemming from law's insuperable fundamental contradictions,[168] or allowing Nozick's assertions about self-ownership of the products of one's labour to stand without challenge by Marxist theory.

It is difficult to know whether these omissions stem from ignorance or intellectual decisions about the irrelevance of critical perspectives. Certainly, not all authors seem as prepared to immerse themselves in the details of non-mainstream as compared to mainstream theories. For example, Penner and Melissaris conflate the CLS strategies of trashing, deligitimation and the very specific Derridean method of deconstruction.[169] Keeping to the CLS example, a number of books[170] use this term to describe all critical theories rather than the more accurate denotation of a specifically North American movement,[171] whereas Riddall's reference[172] to its epistemological foundationalism ignores its postmodernist variants.[173] These differences in jurisprudential awareness bring to mind the sort of double standard which characterises discussions around cultural integration or colonialism: subordinate groups are expected to learn about dominant cultures, but dominant groups do not repay this respect by learning about subordinate cultures.[174]

Misclassification of theories may, however, be even more problematic. For example, McLeod makes a point about the dangers of classifying theories[175] and then nicely illustrates this by classifying all theories other than natural law and positivism as critical.[176] In doing so, he conflates some of the internecine disputes within liberal theories as regards legal validity adjudication, justice, etc, with those which reject the essential liberal and modernist nature of Western law, thus undercutting the latter's radical edge.

[167]See eg Hunt (n 10) 16–18.
[168]See Simmonds and Neoh (n 29) 235–36, 314–15; McLeod (n 23) 128–89.
[169]Penner and Melissaris (n 25) 214–15. See also Riddall at n 172 below.
[170]Morrison (n 24) ch 16. Penner and Melissaris (n 25) 210ff.
[171]See eg Hunt (n 10).
[172]Riddall (n 27) 265.
[173]See eg Peter Gabel and Duncan Kennedy, "Roll over Beethoven" (1984) 36 Stanford Law Review 1.
[174]See eg Edward Said, *Culture and Imperialism* (Vintage Books 1993).
[175]McLeod (n 23) 6–7.
[176]ibid 149.

### *Partiality in presentation*

Whereas the signals conveyed by the structuring of discussion are subtle and unlikely to be registered by all readers, some books contained more direct means of conveying views about the different theories through either off-the-cuff, quickfire responses to critical perspectives or more developed, albeit not necessarily conscious, means of undermining their challenge to mainstream theories.

One relatively subtle means of such destabilisation involves damning theories with faint praise. Thus, in response to what is an arguably devastating challenge to conventional discussions of liberal theories of justice, not least in reflecting a masculinist orientation, Bix merely refers to feminist criticisms as "interesting"[177] and then accords them only one page of a 16-page chapter on critical theories.

Less subtle is the "nothing to see here" response to attacks on apparently favoured jurisprudential positions, which involves raising criticisms and then quickly dismissing or downplaying them by sleight of hand. For instance, Bix responds to some trenchant criticisms of the economic analysis of law, not by refuting them, but by saying that, even if one regards them as "valid and important (and of course not everyone does) there still remains much that is of value" with this approach and then immediately resumes extolling its benefits.[178] Similarly, Harris bats away Smart's warnings about the limits to improving women's lives through law reform as due to typical British gloom,[179] rather than her debt to Foucault,[180] which he ignores altogether.

Another technique is to try to sideline critical perspectives by appealing to contentious and unsupported assumptions about the world, such as Coyle's assertion that redistribution of wealth will have "well-publicised effects on productivity, motivation and common property".[181] Indeed, he is perhaps the most prolific producer of such *ex cathedra* assertions, declaring on one page alone that "[m]arket forces are a much more effective maximiser of material satisfaction than any centralised scheme" and that "[c]ommunism cannot take root without the suppression of dissidents, and the immolation of those considered as being neither 'workers' nor 'comrades'".[182]

Sometimes, these apparent appeals to common sense were combined with presenting critical theories in ways which distract attention away from their full significance. One variant was to focus disproportionate attention on less important and less challenging aspects, such as Bix's devotion of almost half of his short discussion of feminism to pornography[183] or Coyle's preference for defending the institutions of marriage and the family when discussing feminism[184] rather than exploring its arguments about discrimination and oppression. Another illustration involves the apparent eschewing of Marxist

[177]Bix (n 15) 111.
[178]ibid 206.
[179]Harris (n 21) 296.
[180]See Carol Smart, *Feminism and the Power of Law* (Routledge 1989) ch 1.
[181]Coyle (n 18) 258. Simmonds and Neoh (n 29) also refer (at 31 and 74, respectively) to the "widely held" (and hence unsubstantiated) views that people need incentives to work hard and invest and that such incentives are reduced by redistribution.
[182]Coyle (n 18) 150.
[183]Bix (n 15) 218–20, though this and the fact that Bix spends a similar percentage of the discussion of critical race theory on affirmative action (222–24) and is so keen on the economic analysis of law (see at nn 87 and 118) might stem from his US location.
[184]Coyle (n 18) 273ff.

critiques of capitalism because of the unviability and unattractiveness of socialism or communism.[185]

Similar sleights of hand involve setting up straw men or, in some cases, straw women[186] to be knocked down.[187] For instance, Coyle combines this strategy with a *tu quoque* response to criticism of Western legal systems involving the unsubstantiated non-sequitur[188] that "left wing regimes are not less (and sometimes more) corrupt than Western regimes",[189] thus dodging issues of exploitation, oppression and domination in Western societies. Some books do recognise these problems, but Riddall attempts to disarm them by asserting that "liberalism has changed".[190] This variation on the Fukuyama gambit can perhaps be excused in that Riddall's last edition was in 1997 before the worst of neo-liberal austerity hit Western countries, but this does not excuse more recent references to the alleged triumph of capitalism over socialism.[191]

Harris and Coyle provide other examples of "edge of reason" logic, Thus, Harris ends his hatchet job on CLS by noting that there is no evidence that students "who sat at the feet of critical scholars and then accepted posts in firms handling corporation or tax law have taken with them any special attitude towards their clients affairs".[192] Equally facile is Coyle's comment that the deconstructionists' arguments about the indeterminacy of meaning is negated by the fact that they "actually wrote quite lengthy books on the subject"[193] – presumably instead of writing shorter books or expressing themselves through the medium of dance! And if Coyle is going to accuse others of double standards, it is ironic that, after questioning critical race theorists' "narrative style of theory building",[194] he cites[195] the biblical story of Mary and Joseph in support of the institution of marriage – even more ironically, in discussing feminism, which might have something to say about the large age gap between the spouses.

More obvious destabilisation strategies include that of preceding discussion of a particular theory with a health warning about its lack of persuasiveness. This was done most commonly in discussing CLS, which Wacks precedes with Dworkin's dismissal of it as "self-conscious leftist posture . . . which borrows rhetoric from external scepticism".[196] Even more directive and wide-ranging in extending to feminism and critical race theory is Coyle's warning not to be seduced by the "exciting and even glamorous" idea of "disrupting the established Western consensus".[197] In addition he bypasses CLS's

[185]Coyle (n 18) 151–52; Simmonds and Neoh (n 29) 79. Cf also Brooke (n 16) who devotes half of the only (very short) chapter on critical theory (ch 5) to the esoteric differences between communism and anarchism.
[186]Or at least feminists: see at n 202.
[187]Or pantomime villains to be booed off stage: see at n 228.
[188]Coyle (n 18); see also his assertion at 263 that because there has always been poverty its causes are not structural.
[189]ibid 256. See also Spiers (n 30) 2, whose rosy view of law (see text at n 225 below) is only threatened by the possibility that it is made by "greedy, oppressive or megalomaniac rulers"; Simmonds and Neoh (n 29) 69–70, who comment that "the factual assumptions" behind a fictional radical egalitarian position they construct "might strike you as naïve".
[190]Riddall (n 27) 251 – an assertion which contrasts with Wacks' (n 32) citation of various international indicators of deprivation at 251–22.
[191]See at n 185.
[192]Harris (n 21) 113.
[193]Coyle (n 18) 265.
[194]ibid 270.
[195]ibid 273.
[196]Wacks (n 32) 345 quoting from *Law's Empire* (Belknap Press 1973) 272.
[197]Coyle (n 18) 255.

critique of law by focusing solely on Unger's ideas for legal and social reform.[198] A variation on this strategy is Bix's description of, not just critical theories, but also American and Scandinavians realism, law and literature, the economic analysis of law, and even more bizarrely the philosophy of the common law as "concerned primarily with doing justice rather than pure understanding".[199]

However, if there is a prize for hatchet jobs it must go to Riddall's feminism and CLS chapters.[200] Whereas other theories are allowed to speak for themselves in their own words expressed in an academic register, feminism and CLS are conveyed through fictional storylines. Thus, apart from seeming to question whether it counts as jurisprudence,[201] his otherwise fair depiction of feminism is trivialised by a narrative account of a male and female student discussing the quality of toilet provision on buses and by ending the chapter with them leaving for a "tutorial on mortgages", where presumably feminist jurisprudence is not relevant. But at least Riddall does not go as far as Harris who refers to the "depressing spectacle" of male students pressurised into parroting the views of leading feminists in jurisprudence examinations.[202]

Instead, Riddall directs most of his satirical fire at CLS. Thus, rather than setting out its background before exploring its main ideas, two (out of 16) pages are devoted to the biographical history and current situation (watching the chauffeur-driven university provost, the sealed nature of office windows, etc) of Karl and Mark, two fictional legal academics. Then, when we do get details of CLS theory, the narrative is shot through with constant references to Karl's thoughts and feelings including his needing "to turn in" after being introduced to its goals. Admittedly, Riddall provides a rare reference to the implications of critical theory for the Big Three, but the discussion is simplistic and lets Dworkin off the hook by suggesting that problems with his theory stem from not speaking to enough diverse demographic groups.[203] More problematic is ending with a two-page pastiche of the language used by CLS, designed to hammer home criticisms of its impenetrability and a dialogue designed to reveal the naivety of those attempting to change the world by writing academic articles. While the former critique is not without merit, it again raises the double standard about what is expected of academic outsiders,[204] whereas the accusation of naivety is rich coming from a writer who presents without comment Nozick's argument that taxation for wealth distribution is tantamount to slave labour.[205] To be clear, there is nothing wrong with parody as a form of jurisprudential discourse. Indeed, it is used to devastating effect by Douzinas, Warrington and McVeigh[206] – which is perhaps why no book discusses their deconstruction of the heroes of mainstream jurisprudence.

Indeed, by identifying their jurisprudential heroes, some authors provide a more positive means of subtly nudging readers. For example, Bix dedicates his book to Raz

[198]See also ibid 270–77, where feminist jurisprudence is almost entirely confined to MacKinnon and even then is undercut by a lengthy diversion about the value of the family.
[199]Bix (n 15) 171.
[200]Riddall (n 27) chs 19 and 20.
[201]ibid 288–90.
[202]Harris (n 21) 297.
[203]Riddall (n 27) 268.
[204]See at n 174.
[205]Riddall (n 27) 219–20, though at 221 he leaves it to readers to decide whether Nozick's whole theory is a "fairytale", "a "fanciful dream", "jurisprudentially neutral" or "a political manifesto".
[206]Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of the Text and the Text in Law* (Routledge 1993).

and Veitch, Christodoulidis and Goldoni dedicate theirs to MacCormick. Another type of signal comes in laudatory comments, such as Penner and Melissaris' assertion that Hart and Raz "have probably made the most significant contribution to jurisprudence in the past century"[207] and Coyle's description of Finnis' *Natural Law and Natural Rights*[208] as "one of the most significant and intellectually rich" and "sadly too often neglected" books of "modern times".[209] Indeed, so revered is Finnis that Coyle explores in detail[210] how faithful he is to Aristotle and Aquinas, while totally ignoring Durkheim, Marx and Weber.[211]

Less obvious hints are conveyed by the amount of space devoted to textbook authors' favoured writers, as well as the level and tone of criticism (respectful and constructive, on the one hand, versus nitpicking, coruscating and/or dismissive, on the other). Thus, in the same way that the economic analysis of law looms large in Bix[212] and natural law in Coyle,[213] Brooke cites Galligan more than much widely known mainstream titans, Spiers devotes more than 13% of his discussion of jurisprudence theory to MacCormick,[214] and both Penner, Schiff and Nobles, and Riddall devote 11% and 9% of their overall content, respectively to Dworkin,[215] whereas just over 10% of Penner and Melissaris is devoted to Hart.[216]

Here, there may be more than intellectual preferences at play – for instance, writers with a Scottish connection might favour MacCormick out of a sense of jurisprudential nationalism.[217] Prominent attention to a particular author or theory might also stem from intellectual curiosity or a desire to contribute to jurisprudential debate, such as Cotterrell's and Morrison's detailed defence of Austin against criticisms.[218] No doubt, it is neither easy or necessarily desirable for authors to conceal their personal preference. But what is noteworthy is that, with the exception of Penner, Schiff and Nobles, and Veitch, Christodoulidis and Goldoni, whose books both devote a chapter to Foucault,[219] and Shaw, who acknowledges her debt to Douzinas Goodrich and Warrington, such preferences never involve critical – or indeed sociological, ethical or epistemological – theorists. It is also worth noting that, with the exception of Bix and Coyle, most[220] of the obvious rhetoric directed at critical theory comes from books which have not seen new editions for some time – though here it is difficult to know whether this is purely coincidental or because critical theory has recently become more accepted.

[207]Penner and Melissaris (n 25) 2; see also at 84 where Raz receives a similar accolade in relation to this century.
[208]2nd edn, Clarendon Press 2011.
[209]Coyle (n 18) 174 and 232.
[210]ibid 203–05.
[211]His ignorance of Marx seems almost wilful as when he asserts at 194 that Plato provides the most famous image of communistic society.
[212]See at nn 87 and 118.
[213]Coyle (n 18) chs 1–5 passim, and 9–11 or more than 50% of the whole book, despite being entitled *Modern Jurisprudence*!
[214]Spiers (n 30) 31–35, 56–66, 134–36. Similarly, Veitch, Christodoulidis and Goldoni (n 31) devote more space to him (74–75, 180–82 and 195–99) than to Hart (139–42, 193–95) and even Dworkin (199–207).
[215]See n 53 above.
[216]Penner and Melissaris (n 25) chs 4 and 5, and 135–37.
[217]Cf Spiers' (n 30) enigmatic reference to MacCormick's "distinctive Scottish contribution" (at 3), though Veitch, Christodoulidis and Goldoni's (n 31) dedication describes him as a mentor and friend.
[218]See Cotterrell (n 17) ch 3 and Morrison (n 24) ch 9.
[219]See Penner, Schiff and Nobles (n 26) chs 19 and Veitch, Christodoulidis and Goldoni (n 31) ch 15.
[220]But cf Wacks (n 32) at nn 147 and 196, above.

Admittedly, some books[221] seemed to recognise the value to be derived from non-mainstream, especially sociological or critical, theories. In fact, reviewing Cotterrell, Bix criticises him for being too deferential to critical theory[222] and only rarely are the implications of non-mainstream theories treated with the same reverence as the contributions of mainstream theories and those regarded as relevant to specific topics discussed. However, even where their details are simply set out without evaluation, leaving readers to decide for themselves whether and how they need to heed their lessons, there remains the fact that all bar Veitch, Christodoulidis and Goldoni devoted less attention to these theories.

## Conclusion

Overall, while there are considerable variations between textbooks – some being far more neutrally presented than others – we have seen that all focus on some parts of the overall jurisprudential picture more than others. As already noted,[223] this form of partial presentation is unavoidable. But what is striking is its uniformity. In essence, most textbooks are aptly covered by one reviewer's description of Wacks as serving a "standard, liberal humanist jurisprudence course with a few alternative, more critical, approaches bolted on".[224]

Also relatively noticeable, but less widespread, is the other, more pejorative form of partial presentation whereby textbooks stack the jurisprudential cards in favour of mainstream theories and support of the liberal legal order. Thus, in addition to the way theories were ordered and discussed in silos, we saw mainstream theories usually treated with respect, if not reverence, and many critical theories either ignored altogether or treated superficially, satirically, superciliously, and/or undermined by various rhetorical devices like the use of non sequiturs, setting up straw men and providing health warnings.

As a result, students reading most UK jurisprudence textbooks are likely to gain the impression that there are no particularly strong reasons to question the essentially liberal nature of the law they study and, indeed, every reason to assume that it represents the natural order of things. Indeed, some authors make no attempt to hide these assumptions. Most notably, without any reference to its contested nature, Spiers opens with the standard liberal, if not Hobbesian, view of human nature, law and the state, in terms of which:

> Law provides mechanisms for achieving our purposes and meeting our needs without unnecessary hostility. Our human nature is not perfect. We are driven by conflicting motives which need to be controlled if we are to live amongst our neighbours. Law can provide that element of control which forces us to consider our social obligations and live in peace. But in addition law can guide our practical day-to-day choices and lead us to live lives justly and virtuously.[225]

[221] Apart from Veitch, Christodoulidis and Goldoni, this seems to apply to Cotterrell, Freeman, Morrison, Penner, Schiff and Nobles, Shaw, and Wacks.
[222] (2005) 1 International Journal of Law in Context 115, 117n.
[223] See nn 151–52 and accompanying text.
[224] Robin Lister (2012) 46 The Law Teacher 322, 323,
[225] Spiers (n 30) 2. See also at 5: "Laws are usually good."

In fact, some books seem to downplay challenges to both dimensions of the liberal legalism orthodoxy. We have already seen this in relation to CLS. However, when not ignored altogether,[226] American realism and other opponents of formalism usually appeared after Hart, Dworkin and other writers who are responding to their ideas,[227] and also received far less coverage[228] and sometimes the sort of complacent dismissal we saw directed at critical theory, such as Harris's suggestion that there is no longer an issue of formalism in legal education and discourse because it now receives a universal boo from American jurisprudence.[229] In addition, the fact that many books omitted sociological theories, and Weber in particular, left unchallenged the formalism and iron cage of rationality associated with modernist law,[230] despite Weber being not nearly as critical of Western law as Marx and his successors. Evidently, it was far more important to spend more time on Dworkin's attempt to provide a more sophisticated version of the common law theory of adjudication[231] than the theoretical attack on formalism which necessitated his rather desperate attempt to avoid its implications for the liberal legal order, even though Dworkin largely ignores all legal activity outside the appeal courts.

While the exact extent to which jurisprudence students are likely to learn that this legal order is natural and neutral or at least preferable to all alternatives and that law operates in a relatively formalistic manner will depend on exactly which textbooks they read, and this in turn may depend on which are recommended to them. It is possible that those books which are more obvious cheerleaders for the liberal legal order are no longer read except by students taught by their authors. But knowing this and what exactly is currently being taught in jurisprudence courses must await the sort of detailed survey referred to in the Introduction.

Until then, however, we can conclude that the jurisprudence textbooks currently available for purchase largely echo the traditional content of jurisprudence courses revealed 30 years ago, albeit with some relatively limited discussion of a few new additions. Consequently, these textbooks, and possibly also those courses they support, only partly fulfil jurisprudence's potential to help students gain a critical understanding of the nature of law. Students may gain some understanding of its technical meaning and how it operates in court, as well as liberal views on redistribution of wealth, some idea of its role in society and the fact that not everyone thinks this role is as positive as most jurisprudence writers and their law courses might suggest. However, they will gain very little idea of what it means to be both an ethical lawyer and citizen, still less how to ground knowledge about facts and values. If we want our students to be not just technically competent, but also reflective and ethically aware, a good place to start would be to rethink the jurisprudence textbook tradition along the lines ventured by Veitch, Christodoulidis and Goldoni, who view jurisprudence as much as a means of understanding law as a subject in its own right and do so in a way which pays due attention to sociological and critical theories.

[226]Most strikingly by Coyle (n 18) at 140–41, who discusses Dworkin's response to "pragmatism" without mentioning that this was a particularly thinly disguised caricature of American realism.
[227]Bix, Freeman, McLeod, Riddall, Wacks, Shaw and even Cotterrell, which otherwise takes a chronological approach.
[228]Eg, overall discussion of American realism was roughly a third of that accorded to Dworkin.
[229]Harris (n 21) 108.
[230]Cf eg the discussion by Veitch, Christodoulidis and Goldoni (n 31) ch 7.
[231]See eg Cotterrell (n 17) 168.

No doubt, this particular offering will not appeal to all teachers and their students. But until other similar jurisprudence textbooks enter the market, it will continue to be dominated by an unduly limited focus. This canonical content is all the more remarkable given the many law schools which teach jurisprudence and the growing research in legal theory and topics like AI, environmental law, queer theory, transgender rights, and race, empire and nationalism[232] which have the potential to challenge orthodox legal theory.

Admittedly, proposals for more innovative jurisprudence textbooks will need to show that the book will fill a gap in the market and is likely to be recommended on at least some courses, but here recent interest in how to rethink jurisprudence teaching suggests conditions might be favourable in this regard.[233] At the same time, new textbooks will need to include all or at least the most common theories and topics currently covered so as not to seriously limit course recommendations and hence sales. This, however, does not necessarily require simplistic "Cook's tours" of all possible content or undue book length – both of which might make new textbooks less sellable. But if book length is a problem – and here there are already very long textbooks and the possibility of more economical e-book versions – there are many ways to make space for new content. For instance, one can omit the sort of esoteric detail seen in some textbooks,[234] traditional topics dealt with elsewhere in the curriculum,[235] and/or some of the less central theories like historical jurisprudence and Scandinavian realism.

However, it also needs to be recognised that the Research Excellence Framework (REF) seems to have had a general chilling effect on textbook authorship,[236] as well as discouraging authors from devoting much time to revising second and subsequent editions.[237] On the other hand, there is no reason why at least the first editions of innovative textbooks[238] cannot score highly in REF terms if, in addition to rigour, they are original in introducing "a new way of thinking about a subject or [are] distinctive or transformative compared with previous work" and significant in being "likely to exert, an influence on an academic field".[239] Indeed, one might think that these criteria, especially that of originality, would reward authors who depart in a coherent and rigorous way from the standard fare of most jurisprudence textbook to provide a

[232]Ref 2021, "Overview Report by Main Panel C and Sub-panels 13 to 24" <https://2021.ref.ac.uk/media/1912/mp-c-overview-report-final-updated-september-2022.pdf> accessed 21 September 2024.

[233]See Green (n 6) and the recent workshop on "bridging the analytical-critical divide" in jurisprudence <www.bristol.ac.uk/law/events/2024/just-jurisprudence-conference.html> accessed 5 December 2024.

[234]Such as Coyle, Simmonds and Neoh, and to a lesser extent, Wacks.

[235]Such as punishment, the criminalisation of private morality, private law concepts, legal methods and the legal protection of human rights.

[236]See Phillip Johnson and Johanna Gibson, "Thirty Years of Legal Research: An Empirical Analysis of Outputs Submitted to RAE and REF (1990-2021)" (2025) 88 Modern Law Review 85, 106 (online version of Record before inclusion in an issue) 32 <https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12913> accessed 3 December 2024.

[237]ibid 116, noting the reduction in submissions of second or subsequent editions over the years.

[238]Such as William Twining and David Miers, *How to Do Things with Rules* (Weidenfeld & Nicolson 1976); Carol Harlow and Richard Rawlings, *Law and Administration* (Weidenfeld & Nicolson 1984); Nicola Lacey, Celia Wells and Dirk Meure, *Reconstructing Criminal Law: Text and Materials* (Weidenfeld & Nicolson 1990); Terence Anderson and William Twining, *Analysis of Evidence: How to Do Things with Facts* (Weidenfeld & Nicolson 1991) to name just a few innovative textbooks in areas I have taught.

[239]"Index of Revisions to the 'Panel Criteria and Working Methods' (2019/02)" (REF2021, October 2020) <https://2021.ref.ac.uk/media/1450/ref-2019_02-panel-criteria-and-working-methods.pdf> [https://perma.cc/9FWA-VXTB] 34-35 accessed 3 December 2024.

richer understanding of the meaning, operation and practice of law, for instance, by placing more emphasis on sociological and critical theories and possibly also ethics and epistemology. Hopefully, this article will go some way to inspire others to take up the mantle of rethinking the existing jurisprudence textbook tradition as well as the courses they serve.

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