

# Encyclopedia of Law & Society: American and Global Perspectives

## Positivism and Legal Science

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There have been various attempts to turn the law into a scientific body of knowledge. In most general terms, one may regard these attempts as extensions of positivism, the nineteenth and twentieth-century philosophical movement devoted to the conversion of theological and metaphysical doctrines to systems of logically organized and empirically verifiable propositions. Although the term *positivism* was coined by Auguste Comte in 1830, the presence of positivism in legal thought is usually traced to Thomas Hobbes (1588–1679), whose *Leviathan* (1651) conceptualized natural law as an application of the laws of nature that are deducible from the fundamental principles of matter in motion.

## Thomas Hobbes and Jeremy Bentham

Hobbes provided the first clear expression of the law as a unitary body of knowledge pertaining to the most general constraints binding on all members of society, typically in spite of their inertial tendencies, often characterized as animal passions. This became the dominant conception of the law in the modern era, even among theorists such as Jürgen Habermas who otherwise share few of Hobbes's substantive assumptions about the nature of society.

Hobbes provided only one (albeit crucial) condition for legal science. He modeled the domain of positive law on the universality of physical law. It remained to be established just how this domain was to be understood and studied, especially the extent to which the methods of science might offer appropriate access.

In this context, the utilitarian philosopher and legal reformer Jeremy Bentham (1748–1832) often appears as a pioneer. However, Bentham's actual contributions to a scientific approach to the law were mostly negative. Rather, in the spirit of the critical-historical approach that was also prominent in early nineteenth-century theology, Bentham succeeded mainly in demystifying the law's metaphysical commitments, or juristic fictions. These included the will of the sovereign and, notoriously, human rights, which Bentham interpreted as symptomatic of undeserved sectarian religious privilege in British politics.

In addition, Bentham aimed to improve legislative practice by requiring that the legislature formulate laws so that their intended consequences would be evident and testable. Utility, understood as an objective [p. 1155 ↓ ] assessment of each individual's balance of pleasure and pain, set the standard for evaluating legislative effectiveness. For Bentham, frequent elections conducted with secret ballots were the best way to access knowledge of utility. While this aspect of his reforms was never completely enacted, it did become the hypothetical starting point of neoclassical economics.

## John Stuart Mill

The political career of utilitarianism in Britain illustrates how scientific approaches to the law specifically and society more generally emerged together. For example, if one were to characterize the research agenda of Bentham's most distinguished follower, John Stuart Mill (1806–1873), it would consist of the following. Privately funded agencies (charities) would collect evidence of some standing social problem that would be put before Parliament, which would then draft legislation designed to solve the problem in terms that could be periodically checked, potentially resulting in a change in policy, if not politicians (pending an election). Thus, progress in what Mill called the moral sciences would coincide with progress in morals itself.

Unlike most social scientists today, Mill presupposed that, courtesy of Hobbes, Bentham, and other modern classics of political philosophy, the fundamental principles of human nature were already known, thereby rendering legislation an applied science. In that sense, he regarded the enlightened legislator as, quite literally, a social engineer. To be sure, Mill recognized—and even emphasized—the reversible character of legislation designed to get people to behave in ways other than those to which they have grown accustomed. Indeed, Mill is the source of Karl Popper's (1902–1994) construal of the “open society” in terms of legislators remaining open to the prospect of failure. Nevertheless, Mill did not envisage that legislative failure might reflect a basic flaw in the utilitarian vision of the world itself. Once again, the analogy with physics is instructive. Putative advances in its cutting edge may turn out to be false without jeopardizing the prior achievements of Isaac Newton, James Maxwell, Max Planck, and Albert Einstein. Hobbes and Bentham were Mill's Newton and Maxwell.

# Scandinavian Realist School of Jurisprudence

However, because a grasp of social reality might be less secure than that of physical reality, the legal and scientific sides of legal science start to pull against each other. Key legal concepts appear *prima facie* scientifically intractable, if not incoherent. The Scandinavian realist school of jurisprudence originally stressed this point, notably Axel Hägerström (1868–1939), Karl Olivecrona (1897–1980), Alf Ross (1899–1979), and Vilhelm Lundstedt (1882–1955)—all of whom applied a broadly positivistic outlook to a conception of the law that granted the judge much more discretion for attending to matters of public welfare than in civil law countries.

This led, for example, to a replacement of the classical distinction of natural versus positive law (whereby the former would be understood as the implicit, albeit imaginary, standard for evaluating the latter) with a more operational distinction between facts given and decisions taken, as if social reality itself were a marketplace. Consequently, the concept of duty, which appeared to mix normative and empirical considerations indiscriminately, was the judge's authorization to speak in a way that brought about compliance with the law. The Scandinavians openly admitted that such speech acts were instances of “word magic” and were not dissimilar, in principle, to what they imagined happened in primitive societies. The British ordinary language philosopher J. L. Austin (1911–1960) famously dubbed these “performatives.”

The Scandinavian analysis drew attention to an apparently incontrovertible fact: the efficacy of the law always remains somewhat mysterious because the more a society appeared to comply with the law (that is, the infrequency of cases brought to trial), the less opportunity judges had to decide cases that test the extent of the law's validity. A rarely invoked law may exert either much or little normative force. Legal concepts tend to obscure this empirically indeterminate situation. Moreover, the Kantian tradition mystifies this obscurity by postulating two parallel realms of being, most recently reinforced by Habermas, who argued that the law has “facticity” through coercion, but “validity” through the provision of reasons. The prospect of a full-fledged legal science requires the [p. 1156 ↓ ] bridging of these two realms. In the 1960s, Philip Selznick

had already proposed this as a goal for the sociology of legality. It is easy to imagine what this would entail. Legal science would focus on phenomena related to deference to the law's authority, as based on the periodic provision of reasons in cases brought to trial, which one would treat as counterfactual threats of force that judges would apply in relevant future cases.

The Scandinavian realists highlighted both the need for and the difficulty of providing a properly empirical account of the law. They were especially sensitive to the problem of disentangling default modes of behavior whose regularity owed nothing to the law's existence and enforcement from behavior whose regularity is entirely dependent on the presence of the law and the prospect of litigation.

## Free Market and Social Welfare Ideology

This distinction acquired a special vividness in the twentieth century, once the liberal parties of Europe divided in their conceptions of the law as defining, on one hand, the limits on and, on the other, the realization of genuinely free action. These corresponded to what Isaiah Berlin (1909–1997) would call a negative and a positive conception of liberty. The distinction, broadly associated with free market and social welfare ideologies, left an indelible mark on economists and sociologists with a strong grounding in the law. The two law-trained economists who shared the 1974 Nobel Prize, Friedrich von Hayek (1899–1992) and Gunnar Myrdal (1898–1987), epitomized the difference. In sociology, Max Weber (1864–1920) and Émile Durkheim (1858–1917) occupied analogous positions.

When one sees law as a limit on free action, people's interests appear irreducibly subjective and empirical research is restricted to the conditions under which people find it in their respective interests to agree to bind their action collectively. Thus, the making and breaking of contracts provide the model of the law in terms of which empirical research is undertaken. The researcher takes as given that people know their own interests but may be ignorant or dismissive of the conditions under which their freedom to pursue those interests are maintained. On the other hand, when one sees law as the enabler of free action, one conducts empirical research on whether the law improves people's capacity to consider options freely and to make decisions that genuinely foster

their interests, now understood objectively. Under the circumstances, research is not concerned with monitoring the enforcement of laws, presumed to have been freely chosen, but rather with the tendency of the enforced laws to promote free choice, as judged by the consequences of enforcement.

Ideologically, this led to differences in the scope for empirical research into the law: the free-market liberal regards freedom as a natural fact—perhaps definitive of human nature—that the law protects and, where possible, enables those positioned to take advantage of their freedom. In contrast, the social-welfare liberal treats freedom as itself one among many legal constructions that enable humanity to flourish, but just as long as freedom extends to everyone equally. This difference in the status of freedom explains much about the past one hundred years of the history of jurisprudence.

## American Legal Formalism and Its Critics

The American idea of legal science, originally promoted by the earliest recognized school of American jurisprudence, legal formalism, became prominent in the two generations after the Civil War (1861–1865), a period of national expansion and consolidation. Legal science was here a vehicle for maintaining the consistency of judgments over time and place needed to underwrite the rule of law that provided the outer boundary of an active laissez-faire political and economic order. Thus, deductive systematization would enable judges to group relevant precedents together under the relevant statutes that justify them and that they serve to specify.

That such consistency might result empirically in decisions disadvantageous to large sections of society was not a strict consequence of the legal system but an effect in, as the German neoformalist Niklas Luhmann (1927–1998) would later put it, a different [p. 1157 ↓ ] social subsystem, politics, which involves legislators, not judges. On this view, the main aim of legal science would be to convert the law into an autonomous body of knowledge that would ensure the neutrality of adjudication. Under the circumstances, the only consequences worth considering in a judicial decision are ones that pertain to the law itself, especially the maintenance of its overall consistency.

The revolt against formalism in American jurisprudence marks a shift in emphasis from the logical to the empirical aspects of the positivistic conception of legal science. Accordingly, formerly sharp distinctions between the legal and the nonlegal consequences of judicial decision making and, more generally, the role of judges and legislators, came to be blurred. Schools associated with the promises and pitfalls of the welfare state—especially sociological jurisprudence, legal realism, and critical legal studies—have led this revolt, though its first champion, Oliver Wendell Holmes (1841–1935), was largely concerned with the illusoriness of the very idea of a coherent legal science in the partly devolved (federal) American system.

Still in the spirit of Mill and the utilitarians, Holmes focused empirical attention on the consequences of judicial decisions on target populations (for example, whether a punishment will deter future crime). Roscoe Pound (1870–1964) explicitly developed this view, though with minimum recourse to social science. If anything, Pound saw the law more as a technology for solving social problems than a science in its own right. Indeed, the only evidence of social interests he took as relevant to jurisprudence came from whatever the parties to a dispute themselves volunteered, which the judge would then weigh in relation to a presumptive understanding of the society's overall ideals. The political scientist Harold Lasswell (1902–1978) subsequently tried to develop indicators to measure the extent to which particular interests promoted such ideals, but Pound himself was always more interested in the law's impact on society than vice versa.

In contrast, advocates of legal realism and critical legal studies have been generally more receptive to the social scientific study of the law. At the same time, those advocates tended to restrict its relevance to the mechanics of judicial behavior, regardless of its actual impact on society, knowledge of which these advocates increasingly treated with skepticism. Thus, the empirical grounding for legal science shifted from wider sociological and economic considerations to more specifically psychological and cultural ones, eventually subjecting not only court proceedings but also even law classes to intense empirical scrutiny, using methods ranging from quasi-experimental studies of jurimetrics to ethnographic accounts of the sites of legal discourse.

In recent years, some researchers in the spirit of Pierre Bourdieu (1930–2002) have forged lines of inquiry that mediate the macro concerns of sociological jurisprudence



and the more micro emphasis of legal realism and critical legal studies. For them, legal science captures the process by which court clerks and other intermediaries reproduce larger social distinctions in legal practice, and so end up framing the conduct of trials, even unwittingly influencing the verdict. While it may not be possible to assess the long-term consequences of a judicial decision for the issue it purports to address, this post-Bourdieu development promises to assess the role of the decision itself in the reproduction of established social categories.

Finally, the legal realist Karl Llewellyn (1893–1962) raised the problem of the independence of judicial opinion if legal science were successful even in its narrow construal, that is, as simply predictive of the judge's behavior. In response, he proposed the valuable concept of the Grand Style in adjudication. Llewellyn observed that some, typically high prestige, judges are predictably unpredictable. They earned their reputations by relating cases to unusual but no less relevant statutes and precedents. On that basis, their judgment is trusted when they make rulings that preempt disastrous consequences that would otherwise follow from more formalist applications of the law. Thus, they become harbingers of new legislation. At the same time, their pedigree suggests that they are the ones likely to function in that innovative capacity.

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*See also*

- [Bentham, Jeremy](#)
- [Bourdieu, Pierre](#)
- [Comte, Auguste](#)
- [Durkheim, Émile](#)
- [Hägerström, Axel](#)
- [Hayek, August Friedrich von](#)
- [Hobbes, Thomas](#)
- [Holmes, Oliver Wendell Jr.](#)
- [Judicial Decision Making](#)
- [Lasswell, Harold D.](#)
- [Llewellyn, Karl](#)

- [Luhmann, Niklas](#)
- [Olivecrona, Karl](#)
- [Positive Law](#)
- [Realism, American Legal](#)
- [Ross, Alf](#)
- [Rule of Law](#)
- [Scandinavia](#)
- [Sociological Jurisprudence](#)
- [Utility Maximization](#)
- [Weber, Max](#)

#### Further Readings

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