

A New Legal Science?

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The essay 'New Legal Science in the Dual Penal State: Critical Analysis of Law and the Legitimacy of State Power', attempts an ambitious attack on the current state of Legal Science. It also argues for a more beneficial approach to legal research that I quite agree with. I can, however, not help thinking that the essay is pushing at an open door, and I must say that I also find the way it is done quite provocative. In this brief comment, I will elaborate on what it is with this essay and its arguments that I take issue with. My critique centers on the following three points; a lack of conceptual clarity, a lack of substantiation of empirical claims, and an outdated reliance on ethos in the style of argumentation.

So, considering the apparent aim of the essay, I first and foremost take issue with its lack of conceptual clarity. After having read the essay thoroughly, it remains unclear to me what sort of meaning is attached to the concept of 'legal science'. I doubt the text is meant to convey that in fact no research takes place at all in common-law faculties. Surely it does. It rather seems that what is claimed is that the research that does take place is not an expression of a *proper* 'legal science'. Whether ongoing research is to be deemed proper or not, however, must be dependent on how 'legal science' is understood. As the essay has not provided any clear definition of 'legal science' it remains obscure what the target of its critique really is.

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I myself adhere to the view that ‘legal science’ could be defined as an activity that aims at adding to the knowledge about law (in a wide sense), through a critical and explorative analysis of the law’s (still in a wide sense) contents, that is done in a manner that promotes the scientific ideals of ‘completeness, openness and rationality’.¹ When thinking of ‘legal science’ in this way, different kinds of contributions can be deemed scientific, and one should be cautious about delineating a knowledge-producing activity unscientific, or even not *properly* scientific. At the same time, the scientific ideals entail certain standards that any scientific activity should uphold. Unsubstantiated claims should, from such a perspective, not be given an easy pass. This understanding of ‘legal science’ can explain my second point of critique to which I now will turn.

My second issue is with the essay’s lack of substantiation of what seem to be empirical claims. A concrete example of this may be found already on page two. It is here claimed that

‘[a] common thread running through the various instances of common law jurisprudence scattered across the former lands of the British Empire may be the almost complete lack of interest in methodological speculation.’²

The claim is neither validated by reference to studies by other authors, nor other studies that the author has made. Considering recent methodological contributions, such as professor Byrne and professor Olsens’ article: ‘Doctrinal Legal Science: A Science of Its Own?’, that was published in the *Canadian Journal of Law & Jurisprudence*, I find this claim somewhat surprising.³ The article surely expresses an interest in methodological speculation. *Canadian Journal of Law & Jurisprudence* is also surely an example of a journal that is based in one of the ‘former lands of the British Empire’.⁴ Perhaps an explanation could be that the essay, despite the wide and general formulations in its introduction, was not actually intended to extend critique any further than to the subfield of Penal law. If this is the case, it could have been made clearer. However, added clarity on this point would not change the fact that empirical claims should be backed up by at least some form of empirical data. It *might* be true that ‘[l]egal analysis has tended to fall into one camp or the other: *either* doctrinal *or* “interdisciplinary”’ within the common law context.⁵ I have not done the research, so I do not know. Sadly, I can’t take the essay’s word for it either, something that leads me to my third point of critique.

1 Mindestrømmen (2025), point 2.1, with further reference to Graver (1998) and Mæhle (2005). A similar reflection was also just recently made by Jacobsen (2025), subsection 2.2.1., with further reference to Jacobsen (2021).

2 Dubber (2025) p. 3.

3 Byrne and Olsen (2024).

4 Dubber (2025) p. 3.

5 Dubber (2025) p. 9.

My third issue is with the essay's ethos-based argumentation style. The way an argument is formulated is less important than the actual argument itself. At least it should be. I also *do* think ethos is often warranted — especially when someone has spent many years building and contributing to knowledge that can benefit us all. But sometimes one comes across a text that epitomizes a view of the world, and the legal scholars' place in the world, that it is hard not to take issue with. For me, this is such a text, and it can in my opinion serve as an example of a more general problem of authoritative expression of opinion as a replacement of scientific substantiation in legal scientific argumentation. Although I, admittedly, do not have the empirical data to back up the claim, I *think* that I speak for at least many young *Scandinavian* scholars, when I say that we have had quite enough of ethos-based – *because I said so* – argumentation from established scholars that pretends that something is scientific which, depending on how one defines legal science, perhaps it is not. One's style of argumentation is of course culturally conditioned. The way arguments have been presented in the essay is also rather common. It does however not have to be, and with this being said, I will end this comment with a few reflections on the future of legal science of my own.

In conclusion, I want to express my hope that the future of legal science will be a humbler one. I wish for a future where empirical substantiation, and rationality in argument, will to a larger degree replace ethos as the ultimate test of the validity and usefulness of a contribution to our common knowledge base. It is my impression that this already is a tendency in Scandinavian academia, something that could perhaps be seen in light of a more modest Scandinavian temperament. Maybe Scandinavian legal science here could serve as a source of inspiration to scholars from both civil law and common legal cultures, and serve as a guide in the attempt to bridge the assumed divide between the two. In favor of this, I will argue that what a 'new' legal science actually needs, is a larger degree of epistemic humility, something that both could and should be reflected in the way we argue. It is also my hope that the future of legal science will be a 'contextual enterprise, aware of the contingency of its central concepts' like the essay expresses.⁶ It should in this vein be mentioned that a new wind *already* seems to be blowing in what seems to be the essay's preferred direction within the continental European academia. Professor Sanne Teakema and professor Wibren van der Burgs' recent publication of the book *Contextualising Legal Research – A Methodological Guide*, is an excellent example.⁷ I hope that my own book, *Fare, risiko og farlighet* (Danger, Risk and Dangerousness), may be seen as a contribution in the same vein.⁸

6 Dubber (2025) p. 9.

7 Teakema and van der Burg (2024).

8 Mindestrømmen (2025).

References

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