Legal Realism: a family of theories about the nature of law, usually associated with the United States (American Legal Realism) and Scandanavia (The Scandanavian Realists). Justice Oliver Wendell Holmes, Jr. is sometimes considered the most important precursor of American legal realism. Among the important realists were John Chipman Gray, Jerome Frank, Karl Llewellyn, and Roscoe Pound.

Some of the fundamental questions at the heart of legal realism: Is there really a right or best answer to legal questions, or are there instead only different, subjective opinions? Are past precedents, statutes, and other legal materials sufficient to determine the correct legal outcome in a given case? Or is it instead merely a matter of a particular judge’s political opinions?

The Legal Realists were reacting against legal formalism
Legal Realists reacted against what they saw as formalism’s mechanical and nonpolitical approach to the law which approached it as a logical and consistent system of rules and principles (we’ve already seen this charge in Hart’s critique of formalism). Formalism describes those who think that if properly interpreted, the law speaks with a single voice, so there is in theory always a right legal answer. The formalists assumed that as soon as you have identified a rule of the law, then the interesting legal questions are solved and the remainder is just a question of formal logic.

· All X is prohibited.
· This is X.
· This is prohibited.

This is elementary deduction from a rule to the case. But the realists argued that this view was mistaken. In reality, it is between the rule and the individual case that all the interesting and hard problems are to be found. That is why judges disagree and rely so heavily on precedent and legal argument.

Realists believe that formalism understates judicial lawmaking abilities insofar as it represents legal outcomes as entailed syllogistically by applicable rules and facts. For if legal outcomes are logically implied by propositions that bind judges, it follows that judges lack legal authority to reach conflicting outcomes. Holmes, for instance, ridicules the notion that legal cases are best understood as the application of rules. If this were so, then why do so many cases get litigated and why is it that, in most cases that do get litigated, the outcome could really go either way, something one would not expect for genuinely rule-governed behavior?

Legal realism and positivism
Legal realism is not only consistent with positivism, but also presupposes the truth of all three of positivism's core theses. Indeed, the realist acknowledges that law is essentially the product of official activity, but believes that judicial lawmaking occurs more frequently than is commonly assumed. But the idea that law is essentially the product of official activity presupposes the truth of positivism's Conventionality, Social Fact, and Separability Theses. Though the preoccupations of the realists were empirical (i.e., attempting to identify the psychological and sociological factors influencing judicial decision-making), their implicit conceptual commitments were decidedly positivistic in flavor.
Some of the basic elements of legal realism:

- Belief in the indeterminacy of law: the laws on the books (statutes, cases, etc.) did not determine the results of legal disputes. The available class of legal reasons did not justify a unique decision and the legal reasons did not suffice to explain why judges decided as they did.
- Core Claim: In deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons.
- Emphasis on empirical study of the law: how do practicing judges actually decide cases?
- Judicial lawmaking: Judges make law. The law really exists in the courts and adjudication. The test of law is the decision of the judges.
- Ruler’s/Legislators’ understanding of the law is not authoritative. Law is not purely a product of their commands.
- Jerome Frank: The conventional theory holds that “rule plus facts = decision”, while the realist holds that “the stimuli affecting the judge plus the personality of the judge = decision.”
- Written rules do not determine what is the law. To be a realist is to say, whatever gets enforced is the law.
- Importance of stare decisis: existing legal rules are pitched as a level of generality that bore no relation to the fact-specific ways in which courts actually decide cases. Legal rules didn’t have the value for judges in later cases that precedent did, which make legal rules for fact-specific.
- Commitment to science and empiricism (empirical testing): hypotheses had to be tested against observations of the world; the influence of Behaviorism: dispensing with talk about a person’s beliefs and desires; the creation of a “legal science”: testing legal rules against evidence to see whether they produced the results they were supposed to produce. This is sometimes referred to as a naturalized jurisprudence which eschews armchair conceptual analysis in favor of continuity with a posteriori inquiry in the empirical sciences.
- Realism then is understood to mean a scientific examination of why decisions are in fact reached rather than some academic exercise about how decisions could be constructed as logical consequences of rules.
- Belief in an interdisciplinary approach to the law: legal realists were interested in sociological and anthropological approaches to the study of the law.
- Legal Instrumentalism: the law should be used as a tool to achieve social purposes and to balance competing social interests.
- Emphasis on the effectiveness of law: rather than asking if we approve of the law, the legal realists focused on asking if the law is actually in effect.
- The lawyer’s perspective: Legal realism was popular among lawyers advising clients: giving realistic advice is predicting what courts will ultimately decide. The realists were not so much interested in conceptual analysis of the law as they were interested in how it was useful to think about the law for attorneys who must advise clients what to do. Thus Holmes focused on the perspective of the “bad man.”
- Holmes: the law is not a coherent, complete system of rules and principles, nor can it be understood in terms of orders of a sovereign power. The law is nothing more than past decisions plus predictions of what future judges will do.
• Jerome Frank: rejecting the conventional view. The conventional view suggests that the law is a complete body of rules (immemorial, unchangeable). Legislatures are expressly empowered to change the law but the judges are not to make or change the law but to apply it. The law, ready-made, pre-exists the judicial decisions. Judges’ function is purely passive: speaking law. They are not to make law, otherwise they would be guilty of usurpation of power.

• The standard picture (not unlike Hart): judges consult a set of rules, the rules that Hart would say are the ones recognized as legally valid by a valid rule of recognition. Having consulted these valid rules, judges then decide the issue before them in the way indicated by the legal rules.

• A basic legal myth or illusion: that law can be entirely predictable. Behind this illusion is the childish desire to have a fixed, father-controlled universe, free of chance and error due to human fallibility. Legal predictability is plainly impossible (Frank endorses the retroactive nature of judicial decisions).

• Frank’s view: judges do make and change law.

• Perspective: what in a rough sense does the law mean to the average man of our times when he consults his lawyer.

• Legal reasoning as rationalization: Begins with the conclusion and works backward. The statements made by judges in their opinions are frequently little more than rationalizations for decisions that they had already arrived at on grounds or for reasons other than that the rules required them to decide in a particular way. Legal reasoning characteristically proceeds backwards beginning with an intuitive judgment or gut feeling that a particular decision is correct or right and proceeding to a rationalization of that decision so fast in legal jargon that it appears to follow from the rules in a logical way.

• Joseph Hutcheson: good judges feel their way to a just decision by waiting for the hunch or flash of insight that will light the way, the intuition that will point in the right direction. The rest of what the judge does (the lengthy opinion) is mere rhetoric. Supporting the hunch with appropriate legal jargon is necessary to disguise its arbitrary nature. The task of the judge is therefore to reason backward from an intuition of the desirable result to a rationalization that will fit it. Judges should be guided by the aim of responding to the real human needs before them, not by the slavish following of inferences from the abstract categories and distinctions embedded in the rules.

• Rule-skepticism: the law consists of decisions, not of rules (Frank); the flux and flexibility of the law. Frank challenged the concept of stare decisis. The realists repeatedly emphasized the indeterminacy or looseness of stare decisis by pointing out that a particular ruling in one case never binds a decision maker in any future case, because the future decision maker can always find some aspect of the later case that can serve as a ground for differentiating or distinguishing it from the prior one.

• General propositions do not decide concrete cases (Holmes). Cases, not rules, were the only source of law.

• As a contingent empirical matter, some legal systems (such as the legal system of the US) there were enough legal rules going in enough different directions that judges could usually find some legal rule to support whatever result they decided, on other grounds, to be the result they wanted to reach. What is law turned out to be able to justify whatever result the judge thought best for his or her own reasons?
• An implication of this: if judges are deciding cases based on their own psychology (Frank) or based on what they think is the best policy decision (Hutcheson), then in an important way the domain of law may not be distinct from other domains. Contra positivism: if judges were actually using everything to reach their decisions, then what is the point of saying that law is defined by a rule of recognition that distinguishes law from non-law.

• Many realists advocated the study of judicial behavior, arguing that to understand the law you must concentrate on the patterns of decisions revealed in actual cases as these are the most reliable guides to, and the most accurate basis for, prediction of what future courts will do.

• From legal realism to critical legal studies: many members of the critical legal studies movement diverge from legal realism in being more inclined to see politics or ideology, where the legal realists saw psychology or social policy, as the empirically dominant motivator of judicial decisions.