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# Measuring the Art of International Law

Mary Ellen O'Connell\*

## Abstract

*Social science methodology is a useful adjunct to law, but it cannot replace the humanist ideas that constitute law. Scholars developed social science at the end of the nineteenth century and were soon using it to measure and assess material facts associated with far older intellectual disciplines like law. They have been able to confirm facts about such issues as the origins and impact of law. These studies rely, however, on a humanist definition of the object of the study. Humanist methods reveal that law is the result of transcendent concepts developed through natural law method. By the early twenty-first century, due to interest in social science and other factors, knowledge of humanism, especially around natural law, began to fade. This development has implications for the social science method, which relies on accurate characterization of law. More significantly, without knowledge of humanism, the reasons to respect and comply with law are fading. It is in the interest of social scientists and society in general to revive the humanism on which international law and all law depend. Law is simply more art than science.*

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## I. INTRODUCTION

The social science method offers an important tool in advancing the power and purpose of international law. The argument in favor of social science presented by Abebe, Chilton, and Ginsburg in their Lead Essay is confirmed here, but their points are also placed in a broader context.<sup>1</sup> While social science can play a useful role, that role is ultimately limited and non-essential. The social science method can provide information about the impact of law on human behavior as well as facts about the origins of law.<sup>2</sup> Social science does not explain what law is or what law should exist as a normative matter. The answers to these questions require humanistic and even transcendent approaches. Law is an ideational construct. It is the result of the human reasoning process. It does not exist in the natural, material world open to scientific study.<sup>3</sup> Ideas impact behavior, and behavior can be investigated using the qualitative and quantitative methods of social science. Ideas themselves are formed and changed through non-material processes. The social science approach cannot measure these aspects of law, which are more artistic and humanistic than materialistic or scientific.

This Essay begins by defining law and its humanistic character. It then discusses the problem of declining knowledge of humanism in legal analysis, particularly regarding natural law theory. This decline has left the understanding of law impoverished and correlates with the evident decline in respect for international law and law in general.<sup>4</sup> The Essay then turns to the social science method, confirming its usefulness but adding the important caveat that the approach is only as reliable as the assumptions and data used to reach its conclusions. If the characterization of law is inaccurate, the social scientific results will be flawed. The social science approach depends on the humanistic understanding of law. Humanism does not depend on social science.

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<sup>1</sup> See Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1 (2021).

<sup>2</sup> Abebe, Chilton, and Ginsburg focus on the second of these social science contributions. *See id.* at 4 n.11–12 and accompanying text.

<sup>3</sup> *See id.* at 3 n.4–8 and accompanying text.

<sup>4</sup> Considerable evidence exists of declining respect for law. *See, e.g.*, Christopher Ingraham, *GOP Leaders' Embrace of Trump's Refusal to Concede Fits Pattern of Rising Authoritarianism, Data Shows*, WASH. POST (Nov. 12, 2020), <https://perma.cc/LHY2-2HXY>.

## II. THE CONSTITUTION OF LAW THROUGH HUMANISM

Law is “the concrete expression of transcendent norms.”<sup>5</sup> Law is not science.<sup>6</sup> Law is not even social science.<sup>7</sup> It is a feature of social life and thus open to study by social scientists, but law per se is best categorized with the human pursuits associated with the humanities—art, music, literature, religion, theology, and philosophy. These are all areas of intellectual endeavor invented by people. So is law. The discernment of transcendent norms occurs through the human reasoning process incorporating non-material sources of knowledge. Social scientists and humanists alike tell us that law is a “social phenomenon,” a “complex, intricate aspect of human culture” but, like religion, is also a “normative social practice” for guiding human behavior, giving rise “to reasons for action.”<sup>8</sup> Law is one of the “normative domains,” a field of intellectual endeavor that depends for its intelligibility on other normative domains.<sup>9</sup>

Social science, by contrast, is “any branch of academic study or science that deals with human behavior in its social and cultural aspects. Usually included within the social sciences are cultural (or social) anthropology, sociology, psychology, political science, and economics.”<sup>10</sup> Abebe, Chilton, and Ginsburg focus on a narrower understanding of social science because of their interest in particular methods of data analysis.<sup>11</sup> They recognize that social science methods vary but argue that they have certain features in common, including “defining

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<sup>5</sup> Charles J. Reid, Jr., *Foreword* to JOHN MAXCY ZANE, *THE STORY OF LAW*, at 5 (Charles J. Reid, Jr. ed., Liberty Fund 1998) (1927); *see also* Andrei Marmor & Alexander Sarch, *The Nature of Law*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2019), <https://perma.cc/4UNG-HR45>.

<sup>6</sup> Modern science emerged in the eighteenth century and as it did, some legal scholars attempted to characterize law among the subjects of scientific study. They did so by dismissing non-material aspects of law. For an account of this attempt, *see generally* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). By the early twentieth century, some scholars believed the effort had succeeded. William Rainey Harper, the founding dean who opened the University of Chicago Law School in 1902, held that “education in law ‘implies a scientific knowledge of law and of legal and juristic methods.’” *History of the Law School*, U. CHI. L. SCH., <https://perma.cc/4VPV-Q4K5>. In international law, as Abebe, Chilton, and Ginsburg point out, Lassa Oppenheim was an adamant proponent of international law as science. *See generally* L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313 (1908), cited in the Lead Essay. But Oppenheim was already behind the times as legal scholars were abandoning the “hard” sciences for the new “social” sciences by the early twentieth century. *See* MARY ELLEN O’CONNELL, *THE ART OF LAW IN THE INTERNATIONAL COMMUNITY* 20–33 (2019).

<sup>7</sup> Abebe, Chilton, and Ginsburg title Part III of their Lead Essay, “International Law as Social Science.” Abebe et al., *supra* note 1, at 15. *But see infra* notes 7–15 and accompanying text.

<sup>8</sup> Marmor & Sarch, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Social Science*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/5527-ZLWE>.

<sup>11</sup> Carl Landauer, Remarks at the 2021 *CJIL* Symposium (Feb. 26, 2021) (discussing the narrowness of Abebe, Chilton, and Ginsburg’s definition of social science) (recording available on the University of Chicago Law School website).

research questions, developing hypotheses, using data to test those hypotheses, etc.”<sup>12</sup>

Humanistic approaches focus on ideas and non-material sources of knowledge, not data. The social science approach is newer, dating from the early twentieth century. Ancient fields like history and law that long pre-date social science began adding social science methodology to existing humanist approaches in the late nineteenth and early twentieth centuries.<sup>13</sup> Legal historians using social science methods were joined by sociologists and anthropologists in investigating the origins of law in this same period. The early twentieth century scholar of law and sociology, Roscoe Pound, identified law’s origins in humanity’s search for harmonious social order. He found that law offered “a body of rules by which controversies [are] adjusted peaceably.”<sup>14</sup> John Maxcy Zane, a late member of the first generation of legal historians to adopt social science,<sup>15</sup> found evidence of law’s origins with “primordial men” and their “social instinct . . . that every member of the community must not be guilty of conduct . . . that . . . would endanger the social existence.”<sup>16</sup> Zane found violence perpetrated by individual against individual or tribe against tribe as the primary danger to society.<sup>17</sup> It is a danger that law is uniquely suited to counter.

With the development of kinship groups and families, the hierarchical authority commanded by fathers, and later, by priests, allowed them to impose order. From there, Henry Sumner Maine famously saw a development in the law from status to contract—in other words, from hierarchy to equality.<sup>18</sup> Like Maine, Zane wrote of the early adoption of the general legal principle of equality as the

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<sup>12</sup> Abebe et al., *supra* note 1, at 7. The methods listed are “the use of large-N observational data, text analysis, survey experiments, field experiments, and qualitative field research.” *Id.* (footnotes omitted).

<sup>13</sup> See David Landes & Charles Tilly, *History as Social Science*, SSRC (1971), <https://perma.cc/2AM8-37FD>.

<sup>14</sup> Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 199 (1914).

<sup>15</sup> Reid, *supra* note 5.

<sup>16</sup> ZANE, *supra* note 5, at 27–30.

<sup>17</sup> See *id.* Zane found the earliest “raw material” of law as

fundamental physical factors, the raw human animal, the social community, the deep-seated, ingrained social instincts, the gradually expanding factors of civilization, the matriarchal family, the fixed domestic relations, the patriarchal family, the invention of a weapon, the expanding social type of mind, the development of the fighting instinct, the deep-seated acquisitive instinct for gathering and holding property, all modified by the slowly developing moral ideas of right and justice . . . .

*Id.* at 44.

<sup>18</sup> HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (Beacon Press 1963) (1861).

very basis of social justice.<sup>19</sup> This type of social science research continues. Anthropologist of law Fernanda Pirie, for example, has shown in her scholarship that law is not dependent on the existence of government.<sup>20</sup> It is dependent on the existence of a society or community and the natural inclination for peace. Pirie concludes on the basis of factual evidence that international law is undoubtedly law.<sup>21</sup>

Anthropologists and other social scientists have plainly contributed to legal knowledge. Their starting place is the concept of law created through the humanist idea of natural law. Natural law theory reveals that law's transcendent norms take concrete expression most often in the form of positive law, formed by consent confirmable with material evidence.<sup>22</sup> The rest of law does not rely on material evidence. It involves the legal theorist, judge, or law-maker observing the natural world, using their reasoning capacity while remaining open to inspiration about the conclusions to draw in the reasoning process.<sup>23</sup> It is well known that Hugo Grotius, considered the father of modern international law, was a natural law scholar in the Scholastic tradition of Thomas Aquinas.<sup>24</sup> Aquinas, Grotius, and other Scholastics looked for inspiration in reasoning about the natural world from scripture, divine revelation, and the beauty of the natural world.<sup>25</sup> Using theology, they identified legal norms. With the suppression of theology in public intellectual discourse in the West by the early twentieth century, knowledge of natural law ideas that constitute law began to fade.<sup>26</sup>

Law is dependent on these ideas, and they continue in the form of tradition.<sup>27</sup> The crisis of law and democracy of the 2020s is traceable, however, to the fading tradition of respect for the rule of law originally built on humanistic thought. Education in these ideas of the selflessness of natural law is increasingly replaced by the economic concept of self-interest. Law is based on the principle of equality, which requires altruism and trust. These are humanist, not economic, principles

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<sup>19</sup> See *id.* at 39.

<sup>20</sup> See generally FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* (2013).

<sup>21</sup> See *id.* at 206–15.

<sup>22</sup> See Mary Ellen O'Connell & Caleb Day, *Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms*, in *THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW* 562, 578 (Samantha Besson & Jean d'Aspremont eds., 2017).

<sup>23</sup> See *id.* at 566–68.

<sup>24</sup> See STEPHEN NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 146–66 (2014).

<sup>25</sup> See THOMAS AQUINAS, *SUMMA THEOLOGICA*, pts. I–II, questions 90–108 (Fathers of the Eng. Dominican Province, trans., Complete Eng. ed. 1948) (1485). On Hugo Grotius's view of natural law, see Jon Miller, *Hugo Grotius*, in *STAN. ENCYCLOPEDIA OF PHIL.*, *supra* note 5, pt. 3, <https://perma.cc/7VDA-AD6A>. See also Marmor & Sarch, *supra* note 5.

<sup>26</sup> O'CONNELL, *supra* note 6, at 4–6, 20–23.

<sup>27</sup> See TOM R. TYLER, *WHY PEOPLE OBEY LAW* 177–78 (revised ed. 2006); see also Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1288 (2014).

for which the humanities are needed. In place of contested theologies, secular fields of philosophy and other arts disciplines are available to update the insights of past centuries to explain the law and its transcendent norms.<sup>28</sup>

### III. THE LIMITS OF SOCIAL SCIENCE WITHOUT HUMANISM

The disappearance of humanist ideas of law in legal scholarship is significant for legal education because these ideas explain what is needed for the rule of law to succeed. Humanist ideas are also significant for the social science approach to law. This Section provides a brief illustration of how the quality of social scientific contributions depends on the social scientist's understanding of the object of their study. *The Internationalists* is a book written by law professors, in which they present social science data on the declining incidence of sovereign state acquisition of territory through the use of military force.<sup>29</sup> The authors claim that the decline is traceable to the 1928 Treaty on the Renunciation of War, also known as the Kellogg-Briand Pact.<sup>30</sup>

The authors assert: "Before 1928, every state accepted . . . [that war] wasn't a departure from civilized politics; it *was* civilized politics."<sup>31</sup> They then hypothesize that the treaty "outlawing" war had a significant impact on behavior and set out to prove this by graphing territorial acquisition through military force around the date 1928. The authors take their facts as to territorial conquest from the Correlates of War (COW) dataset<sup>32</sup> and conclude their graph shows that "[c]onquest, once common, has nearly disappeared. Even more unexpected, the switch point is that now familiar year when the world came together to outlaw war, 1928."<sup>33</sup> In footnotes, the authors point to the need to "correct" errors in the dataset and to adapt data around the issue of what entities qualify, presumably under international law, as sovereign states. They also acknowledge that other social scientists conclude the "switch point" occurred in 1945, not 1928. Nearly all work on the decline of conquest "treats 1945 as the relevant break point in the twentieth century."<sup>34</sup> After the bold pronouncement at the outset of the chapter about 1928, the chapter ends more modestly: The Kellogg-Briand Pact "formed the background of rules and assumptions against which the rest of the new system

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<sup>28</sup> O'CONNELL, *supra* note 6, at 26–33, 42–49.

<sup>29</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

<sup>30</sup> *See generally id.*

<sup>31</sup> *Id.* at xiv.

<sup>32</sup> *Id.* at 530 n.8.

<sup>33</sup> *Id.* at 313.

<sup>34</sup> *Id.* at 530 n.9.

[of 1945] operated.”<sup>35</sup> This is undoubtedly true, but it is also true of the ancient peremptory norm prohibiting force, which pre-dates 1928 by centuries.

The new development in 1928 was not the outlawing of war. It was the policy, being developed at the League of Nations, of refusing to recognize legal title to territory taken using unlawful force.<sup>36</sup> *The Internationalists* describes how the United States, a non-member of the League, promoted the policy of non-recognition as a way to enforce Kellogg-Briand.<sup>37</sup> The treaty itself does not require non-recognition. The 1945 United Nations Charter, the next important codified version of the prohibition on the use of force, does not do so either. The experience of World War II, however, and the rampant conquest by Japan, Germany, and Italy—after 1928—left the international community convinced of the need for a Security Council to enforce the prohibition. The Council continued the practice of calling for non-recognition, so that it crystallized as a corollary duty to the prohibition on force. U.N. members codified the corollary in the 1970 Declaration on Friendly Relations. The Declaration mandates that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.”<sup>38</sup> Non-recognition is also required respecting territory held in violation of the principle of self-determination.

The prohibition on force, in contrast to the duty of non-recognition, has been a principle of international law since the modern system emerged in 1648.<sup>39</sup> The peace treaties of Westphalia, which brought a formal end to Europe’s Thirty Years’ War, incorporated the Just War Doctrine’s prohibition on force, along with an enforcement mechanism requiring all treaty signatories to join in military action against a transgressing party.<sup>40</sup> The Doctrine holds that war is prohibited except for a few just causes and, even then, only when it is necessary and can be waged

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<sup>35</sup> *Id.* at 335.

<sup>36</sup> See Anna Spain Bradley, Book Review, *The Internationalists: How A Radical Plan to Outlaw War Remade the World*, 112 AM. J. INT’L L. 330 (2018) (citing GARY GOERTZ, PAUL F. DIEHL & ALEXANDRU BALAS, *THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM* 108, 109 (2016)).

<sup>37</sup> See HATHAWAY & SHAPIRO, *supra* note 29, at 173–74.

<sup>38</sup> G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

<sup>39</sup> See generally Mary Ellen O’Connell, *Peace and War*, in *THE HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 272 (B. Fassbender & A. Peters eds., 2012). For additional evidence that the prohibition on the use of force was certainly in existence in the nineteenth century, see Agatha Verdebout, *The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis*, 1 J. ON USE FORCE & INT’L L. 223 (2014).

<sup>40</sup> Leo Gross, *The Peace of Westphalia, 1648–1948*, in 1 *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 3, 7 (1984) (citing 2 DAVID JAYNE HILL, *A HISTORY OF DIPLOMACY IN THE INTERNATIONAL DEVELOPMENT OF EUROPE* 602 (1925)).

proportionately to the injury received.<sup>41</sup> The only theory of law in existence in 1648 to explain the prohibition on war or any other aspect of international law was natural law. Natural law theory recognizes that most legal rules and principles fall within the category of positive law, which requires express or implicit consent and includes two of the three primary sources of international law, treaties, and customary international law.<sup>42</sup> Legal principles and norms not based on consent are discerned through natural law methodology. These include most of the general principles of law, such as equality, fairness, good faith, necessity, and proportionality, as well as the peremptory norms or *jus cogens*, including, the prohibitions on the use of force, torture, slavery, apartheid, genocide, and widespread extra-judicial killing.<sup>43</sup>

*The Internationalists* leaves out the natural law and peremptory status of the prohibition on force. The book includes a lengthy treatment of Grotius, who used natural law methodology, but emphasizes his paid work, never completed, as a young jurist on behalf of the Dutch East India Company over his seminal published work as a mature scholar, *The Law of War and Peace*.<sup>44</sup> In *The Law of War and Peace*, Grotius makes clear that war is prohibited under the Just War Doctrine. It is not only unlawful; it is immoral.<sup>45</sup> As such, war is prohibited as *jus cogens*. Grotius was not only a jurist and diplomat, he was also a Christian theologian. He drew upon and valued the insights of other faith traditions in addition to his own. Like Aquinas before him, Grotius accepted that norms found in multiple cultures are more reliable principles of natural law discernment than those found only in one or two. The prohibition on war is such a norm. Omitting the humanist aspects of Grotian thought, *The Internationalists* depicts Grotius as a materialist proponent of “might is right.”<sup>46</sup> The authors prove this by pointing to evidence that Grotius failed to demand the return of conquered territory or property as the necessary remedy for unlawful war. Their position, however, conflates the prohibition on force with the legal consequences of violating the prohibition, such as the requirement of non-recognition.

Grotius clearly understood resorting to war to be prohibited under natural law. In an article published in 1946, Hersch Lauterpacht, who is extolled in *The Internationalists*, writes of Grotius as the quintessential proponent of right over

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<sup>41</sup> Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 669 (1939).

<sup>42</sup> O’Connell & Day, *supra* note 22.

<sup>43</sup> *Id.*

<sup>44</sup> *See generally* HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., James Brown Scott ed., Oxford U. Press 1925) (1625).

<sup>45</sup> *See id.* at 21–23.

<sup>46</sup> HATHAWAY & SHAPIRO, *supra* note 29, at 24–25.

might.<sup>47</sup> Lauterpacht also explains the importance of natural law to all law, but emphasizes that for international law, with its lack of governmental institutions, knowledge of natural law is critical.<sup>48</sup> Another hero in *The Internationalists* is the legal philosopher Hans Kelsen, who wrote that the Just War Doctrine of Aquinas and Grotius was codified in the Kellogg-Briand Pact.<sup>49</sup> As *jus cogens*, the prohibition on the use of force endures with or without the doctrine of non-recognition.

The American non-recognition policy that followed the adoption of Kellogg-Briand may or may not account for the decrease in territorial conquest found in the COW dataset. That study has not been undertaken. The study that was done assumes war was first outlawed by Kellogg-Briand. Humanist knowledge of the prohibition indicates otherwise and draws into question the study's results. Designing a social science study of law requires humanistic knowledge of law as a preliminary matter. This is true whether the phenomenon is the sanctity of a common law contract promise or the imperative duty to forego war. Law is constituted through ideas. It is oriented toward social peace for the common good. It balances the seeking of self-interest with the need for selflessness. Social science can provide factual information about the origins and impacts of these ideas but not law's constitution or its normative purpose.

What this observer says about the dual approaches of the arts and social sciences to understanding humanity's past also applies to humanity's law:

[S]tudents of history as social science will always need training in all aspects of the discipline. If anything, the growing sophistication of social scientific techniques makes it all the more important for practitioners of these techniques to know and appreciate the humanistic approach to historical knowledge. We cannot afford to gain a world of numbers and models, only to lose our historical souls in the process.<sup>50</sup>

#### IV. CONCLUSION

Abebe, Chilton, and Ginsburg confirm in their Essay high levels of interest in social science approaches to law. While this bodes well for gaining information about law and society, if the trend excludes knowledge from the humanities, social scientists may produce results of questionable value. Law, the practice of law, and the study of law are more art than science. In this respect, law is closer to the study of history than economics: "If historiography is art, it cannot and must not be reduced to some kind of routine."<sup>51</sup> The reference to "routine" is to a numbers-based repeated use of the social science methods, such as survey and regression

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<sup>47</sup> See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 51 (1946).

<sup>48</sup> See generally *id.*

<sup>49</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 330 (Anders Wedberg trans., 1945).

<sup>50</sup> Landes & Tilly, *supra* note 13.

<sup>51</sup> *Id.*

analysis. Assessing numerical data related to law is useful; understanding the object of study is essential. There is another trend in international legal scholarship, one toward rediscovering humanistic knowledge. It is a trend toward scholarship with transcendent potential.<sup>52</sup>

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<sup>52</sup> See O'CONNELL, *supra* note 6, at 5 n.23.