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## Transatlantic Divisions in Methods of Inquiry About Law: What It Means for International Law

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## Transatlantic Divisions in Methods of Inquiry About Law: What it Means for International Law

John Linarelli\*

In philosophy graduate school, someone – usually the faculty member leading the discussion - offers the counterargument to the young crowd who see disagreement everywhere that we humans agree on a lot we take for granted.<sup>1</sup> The claim is usually offered as a basic one too often ignored because so obviously true though if you read some of the standard corpus in philosophy of language you might discover the claim is not so obvious. Anyone who has taken a seminar on Wittgenstein knows the story. Another possible line of inquiry about what we agree on can be found in meta-ethics but going there will lead us astray.

The basic point of the story is not to puzzle over the peculiarities of philosophical questions but to suggest that humans often misperceive what they share or do not share as common understandings. It is or should certainly be obvious that legal scholars (and people generally) agree on many things. You are reading this chapter because we share a language and are socialized in ways of expressing ideas in an academic context. But we also make mistakes along the way. Language runs out – it can only take us so far. A tribal cognition hard wired into our brains probably triggers when we speak the same language, characterize our legal systems in a common history or culture, or rely on similar kinds of sources

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<sup>1</sup> The origins of this discussion probably go back at least to John Locke's *Essay Concerning Human Understanding*, in which Locke argues that ideas are private to persons and that persons use language to convey these ideas to others. Locke's argument sparked a significant debate in analytical philosophy beyond our scope here. See A.P. Martinich, *The Philosophy of Language* (Oxford University Press 2001): 501-508.

for positive law. But if we begin to take a closer look, we will find the differences in methods of inquiry about the law, including about international law, as between the United Kingdom, the wider Europe, and the United States can be significant. And, as we shall see, the differences are not entirely internal to academic inquiry about the law itself but align with approaches to inquiry in the social sciences.

These differences are reflected at the outset even in the language we use to describe what we do. We do not even agree on what it is we call what we do. In Britain it is called “research” but in the United States it is called “scholarship”. This difference may have something to do with the fact that there is a course in the American law school curriculum on legal research, meant to teach aspiring practicing lawyers how to conduct research into the law for practice. Or, it may have to do with a narrower conception of “research” as something scientists and not lawyers do, and law is not a science to an American legal scholar unless you apply some science external to the law to it – such as economics. We may never know the causes of these etymological differences. To avoid confusion, this chapter will use “inquiry” or similar when practical.

In some contexts continental European legal methods are closer to American legal methods of inquiry than British ones, but usually in a minority of approaches connecting the social sciences in which an American neo-positivist approach to social science has tended to dominate, such as in law and economics, which has made inroads in Germany, Italy, the Netherlands, and Spain.<sup>2</sup> Law and economics is an almost non-existent subject in the British legal academy, probably because American scholars who do this line of work took the United Kingdom for granted as “like us,” an unwarranted assumption. It will be

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<sup>2</sup> Thomas S Ulen & Nuno Goroupa, ‘The Market for Legal Innovation: Law and Economics in Europe and the United States’ (2008) 59 *Alabama Law Review* 1555.

difficult in this short chapter to extend too far into Europe because each national system places international law in a national context. For example, the German concept of international law as German public law is a very long and substantial tradition in Germany but not or less so elsewhere. To keep matters tractable, my focus will be on the United Kingdom and the United States.

This chapter places the differences in traditions of inquiry about the law in general and international law more particularly into two frames, one based in the rise of the analytical and empirical sciences in the United States and the other in the rise of the critical tradition in the wake of American Legal Realism. Some have offered other explanations, such as those grounded in different educational systems between various countries<sup>3</sup> but when one begins to dig more deeply into the question one will find these explanations to be superficial or just a description of an effect of some other more coherent account. Of course, the following is an exercise in interpretation, but at least a plausible one.

This chapter proceeds on an assumption that to understand how international legal scholars perceive their methods is to be explored from the perspective of the history of the social sciences and the humanities generally. The chapter does not offer a historical investigation into inquiry about international law as distinct from approaches to inquiry about domestic law. It is an exercise in placing the current work of international legal scholars in the context in which they operate within the broader university and community of scientists and humanists. It does not offer a history of intellectual thought about international law or international jurisprudence and the reader should consult others for such history.<sup>4</sup>

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<sup>3</sup> For a discussion and critique of these issues, see *ibid.*, 1593-1597.

<sup>4</sup> An excellent start would be with Martti Koskenniemi, *The Gentler Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).

## I. SOCIAL SCIENCE AND “PROGRESS”

Methods of inquiry in the social sciences have differed within countries to various degrees throughout the history of the social sciences. Between countries, some differences are generalizable and could be said to reflect something of a national tradition, though these traditions are by no means without exception and they are starting to dissolve. We can reasonably refer to traditions in the social science as more or less influential in various countries but cannot say much more. We cannot account for a substantial history of the social sciences within the bounds of this chapter.

Why differences persist as between American and European social sciences has been the subject of study by historians of the social sciences.<sup>5</sup> We can summarize their conclusions. In the United States we see the dominance of the analytical and empirical social sciences, in the grip of a robust empiricism, seeking to explain social phenomena, to produce a set of nomothetical theories to predict, and to make the unit of analysis the individual and the science about individual choice. Positivistic approaches to science were influential in Europe and the United States in the late nineteenth century but waned in Europe and persisted in the United States into the 20<sup>th</sup> century even as logical positivism was discredited in philosophy. By the 1920s, many social scientists in the United States saw their task as engaging in ‘rigorous empirical investigation, to quantify wherever possible, usually in

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<sup>5</sup> Roger E Backhouse & Philippe Fontaine eds, *A Historiography of Modern Social Science* (Cambridge University Press 2014); Dorothy Ross, *Origins of American Social Science* (Cambridge University Press 2008); George Steinmetz ed, *The Politics of Method in the Human Sciences: Positivism and Epistemological Others* (Duke University Press 2005); Theodore M. Porter & Dorothy Ross eds, *The Cambridge History of Science, Vol 7: The Modern Social Sciences* (Cambridge University Press 2003); Thomas L Haskell, *The Emergence of Professional Social Science* (Johns Hopkins University 1997); Mary O Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science* (University of Kentucky Press 1975).

the form of statistics, and to build towards a disciplinary framework of universal laws.’<sup>6</sup> Contrast Germany, where positivism became problematic because elites adhered to the humanistic ideal of *bildung*, the self-cultivation of character and high culture, a route for elites to maintain power as they were confronted with the growing power of the natural sciences.<sup>7</sup> Between the wars, European social sciences suffered in the hands of war, the rise of socialism and fascism, extreme nationalism, traditional university structures, and state and academic body restrictions largely absent from the American college and university system. At the time, England (and probably Scotland too) was stuck in the grip of the power of the private corporation – an Oxbridge caste system. In this period, the American project in the social sciences to imitate the natural sciences continued in a growing college and university system. Historians say that the scientism in the American social sciences came from an ethos of American individualism and democracy and the ‘naturalistic bias of American exceptionalism.’<sup>8</sup> The individualistic methodological assumptions of empirical social science worked well with the American liberal individualist conception of society and the aims of American government ideals in a technocratic bureaucracy.<sup>9</sup> European social science in contrast took a more historical and philosophical approach, with Marxism ever present, and with a wider focus on social theory that focused on structure.

After the War, European universities imported the American empirical approaches but still there was some disengagement and resistance. Today diversity exists in both America

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<sup>6</sup> Dorothy Ross, ‘Changing Contours of the Social Science Disciplines’ in Porter & Ross, n 5, at 205, 215-216.

<sup>7</sup> *Ibid*, 216

<sup>8</sup> *Ibid*, 219.

<sup>9</sup> *Ibid*, 222

and Europe, with the differences based in whether one uses ‘analytical’ and empirical approaches aligning with science or hermeneutical and interpretivist approaches focusing on history and the particularities of human experience.<sup>10</sup> But still, it would be difficult to say that there is no majority-minority tradition in social science trajectories. Clearly in the United States, the methods of positive science still predominate in the tier R1 research universities.<sup>11</sup> Funding priorities are in these areas, as are the high impact journals. The US National Science Foundation (NSF) priorities in the social sciences are currently in the ‘social, behavioral and economic sciences’ or SBE for short. The NSF website as of the date of this writing states that ‘SBE scientists develop and employ rigorous methods to discover fundamental principles of human behaviour at levels ranging from cells to society, from neurons to neighbourhoods, and across space and time.’<sup>12</sup> NSF’s early commitment in the 1950s was to fund social science research that met the standards of ‘objectivity, verifiability, and generality’.<sup>13</sup> Research in typical political science department in the typical American first tier research intensive university will be substantially more empirical than in a typical politics department in the United Kingdom. The political theorist tends to be a solitary figure in the American department. American political science journals also tend to be much more empirically focused. Note the difference in the discipline even in its name. In Britain, a longstanding Oxbridge tradition of the philosophical and historical study of politics opposed the import of political science methods, resulting in the creation

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<sup>10</sup> *Ibid*, 236-37.

<sup>11</sup> On the Carnegie classification of institutions of higher education, see [http://carnegieclassifications.iu.edu/classification\\_descriptions/basic.php](http://carnegieclassifications.iu.edu/classification_descriptions/basic.php) (last accessed 8 July 2019).

<sup>12</sup> <https://www.nsf.gov/dir/index.jsp?org=SBE> (last accessed 8 July 2019).

<sup>13</sup> Mark Solovey & Jefferson D Pooley, ‘The Price of Success: Sociologist Harry Alpert, the NSF’s First Social Science Policy Architect’ (2010) *Annals of Science* 1.

of the British Political Studies Association.<sup>14</sup> Sociology started in Europe but greatly expanded and became more empirical in the United States. Sociology did not become a major social science in Britain until the 1960s.<sup>15</sup> The cognitive revolution, which has its genesis in the United States, is the study of human cognition in psychology and in a new discipline known as cognitive science in a way that permits researchers to break through the boundaries of what is now discredited behaviorism, in search of mental states and mental representations that can be reliably discovered and predicted as causing humans to behave in particular ways.<sup>16</sup> Biology is now respectfully extended into the social sciences in fields such as neuroscience and socio-biology.<sup>17</sup>

Economics deserves special mention because of its relative importance in American legal inquiry. There was never much of a postmodern resistance in economics. While other social science disciplines were experiencing some foment in the 1960s, James M Buchanan and Gordon Tullock's, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, was first published in 1962.<sup>18</sup> *The Calculus of Consent* sits at the apex of the most strident libertarian institutionalist vision of the study of economics and politics. It is the origins of public choice theory – the economic study of politics – and Buchanan went on to receive the Nobel Prize for his work in the field. *The Atlantic* describes Buchanan as the ‘architect of the radical right’ in the United States.<sup>19</sup> Another key text in the United

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<sup>14</sup> Ross, in Porter & Ross, n 5, at 233.

<sup>15</sup> British Sociological Association, ‘What is Sociology?’, <https://www.britisoc.co.uk/what-is-sociology/origins-of-sociology.aspx> (last accessed 8 July 2019)

<sup>16</sup> See Paul Thagard, *Mind: Introduction to Cognitive Science* (2<sup>nd</sup> ed MIT Press 2005).

<sup>17</sup> See Jonathan Haidt, *The Righteous Mind* (Penguin 2012)(on criticisms and eventual acceptance of work by EO Wilson).

<sup>18</sup> James M Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962).

<sup>19</sup> Sam Tanenhaus, ‘The Architect of the Radical Right’, *The Atlantic* (July/August 2017).



States, for both economics and law and economics, is Milton Friedman's 'The Methodology of Positive Economics,' a locus classicus on how to do empirical social science in the classic Popperian sense of theory building, hypothesis testing, and falsification.<sup>20</sup>

In a text designed for a seminar for Harvard School of Government undergraduates, Ken Shepsle & Mark Bonchek summarize the trajectory of the study of politics in the United States as follows:

[T]he political science that a college student at the end of World War II might have encountered was primarily *descriptive* and *judgmental*. It was much less oriented toward *explanation* and *analysis*. Over the next twenty years, political scientists got even better at description. They learned data-collection skills enabling more precise measurement, and statistical skills enabling more precise inferences about causal relationships. But it was not until the late 1960s that systematic attention began to focus on questions of "why." "Why?" is the principal interrogative of science; answers to it are explanations, and getting to explanations requires analysis.

The transformation of the study of politics from storytelling and anecdote swapping, first to thick descriptions and history writing, then to systematic measurement, and more recently to explanation and analysis, constitutes significant movement along a scientific trajectory.<sup>21</sup>

This quote is interpretation itself of how social science gets done. It is mistaken in portraying progress in the social sciences. The quote reflects the standard logical empiricist account: that social science had no real trajectory until the methods of science took over. This line of thinking, more prevalent in the United States than Europe but still widely adhered globally, has its origins in Auguste Comte, the founder of the discipline of sociology, who argued that progress in the study of social world passed through three stages: theological, philosophical, and scientific.<sup>22</sup> In this view of the history of social science, moving onto

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<sup>20</sup> Milton Friedman, 'The Methodology of Positive Economics' in Milton Friedman, 'Essays In Positive Economics' (Chicago: University of Chicago Press 1966) 3.

<sup>21</sup> Kenneth A Shepsle & Mark S Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* (WW Norton 1997): 7-8.

<sup>22</sup> Auguste Comte, *Course on Positive Philosophy* (1830); see Michel Bourdeau, 'Auguste Comte', *The Stanford Encyclopedia of Philosophy* (Summer 2018 ed), Edward N Zalta (ed), <https://plato.stanford.edu/archives/sum2018/entries/comte/> (last accessed 8 July 2019).

the methods of the natural sciences in the study of persons and society – to make the study more scientific - is progress – a history of increasingly better predictions and explanations of why people behave the way they do, with the older methods being shed as bad science of myth. It is more sensible to understand the practice of science as Thomas Kuhn did, in its historical context as reflecting the consensus of the scientific community of the time.<sup>23</sup> Newtonian physics may have been replaced but it is still reliable science in many respects.

This story about progress and the trajectory of the social sciences has something to do with why American, British, and European legal research diverge in key respects. Of course, American approaches to the social sciences will have influenced the American study of law. A core difference just might be the reconceptualization of ‘legal analysis’ itself. The concept of legal analysis seems so obvious to lawyers that we all think we agree on its meaning. But a group of legal scholars at the Harvard Law School seem to have developed a very specific meaning for the term, deviating from its ordinary usage. Start with Harvard’s *Journal of Legal Analysis*. This journal was started not by legal conceptualists, but by law and economics scholars at Harvard. Its competitor is likely the Chicago’s *The Journal of Legal Studies*, a journal very much in the law and economics tradition. Move on to teaching at Harvard. The casebook, *Analytical Methods for Lawyers*, arose from the authors’ ‘joint realization that the traditional law school curriculum, with its focus on the development of analogical reasoning skills and legal writing and research, left many students inadequately prepared for upper-level courses and, more importantly, for legal

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<sup>23</sup> Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962); Thomas S Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (University of Chicago Press 1977).

practice in the modern world'.<sup>24</sup> The book contains chapters on decision analysis, games and information, contracting in an economic sense, accounting, finance, microeconomics, economic analysis of law, and statistics. Of course, the Harvard Law School is a big tent. Joseph Singer's 'Normative Methods for Lawyers' appears to be a response, arguing for more focus in legal inquiry and in the classroom on issues of rights and justice.<sup>25</sup> Singer's complaint appears to be against the classic Benthamite labelling of justice as 'rhetorical' in law and economics, or a form of unexamined moral relativism or scepticism that is simply false. According to Singer, 'law professors and students are in need of advice about how to think about the nature of morality, fairness, and justice. More importantly, they need vocabulary for talking about normative matters and a set of resources and methodologies for structuring relevant arguments'.<sup>26</sup> To be contrasted with these re-conceptions of legal analysis in the United States along the lines of positive science are the more historical and philosophical approaches one might find at Oxford, where we are more likely to find a closer allegiance to the tools of the traditional doctrinalist, a coverage of law as a discipline on its own, and a focus on rules and the reasoning of judges as a practice internal to the law itself. The ideas in Ward Farnsworth's, *The Legal Analyst: A Toolkit for Thinking About the Law*<sup>27</sup> might be mainstream in the United States but would be an alien invasion at least in some traditional quarters of legal education in Britain.

Socio-legal studies in the United Kingdom might seem to offer a bridge to interdisciplinarity in the United States but that may be more to law and society research in the United

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<sup>24</sup> Howell E Jackson, Louis Kaplow, Steven M Shavell, W Kip Viscusi, & David Cope, *Analytical Methods for Lawyers* (3<sup>rd</sup> ed. Foundation 2017) v.

<sup>25</sup> Joseph William Singer, 'Normative Methods for Lawyers' (2009) 56 *UCLA Law Review* 899.

<sup>26</sup> *Ibid*, 905 (footnotes omitted).

<sup>27</sup> Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (University of Chicago Press 2007).

States and to a newer movement known as New Legal Realism, though New Legal Realism has encountered some European resistance.<sup>28</sup> Socio-legal studies has developed as a distinct field in the United Kingdom, though its boundaries are blurred. It does not exist in the United States under a socio-legal studies designation. The distinctiveness in the United Kingdom might be partly driven by the funding of socio-legal studies by the UK Economic and Social Research Council. If we investigate empirically, we are likely to find the trends in British socio-legal studies tending to be more in the nature of social theory or qualitative if it is empirical with American research trending towards but not exclusively quantitative and engaged in the investigation of narrower questions using the technical competences of econometrically trained scholars. An influential forum in the United States for such work is the Society for Empirical Legal Studies and the globally influential *Journal of Empirical Legal Studies*. The JELS is known to be inclined towards law and economics and quantitative methods.<sup>29</sup> A Law PhD culture does not exist in the United States with few exceptions. An established route into the American legal academy is the JD-PhD route, with the

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<sup>28</sup> In 2015, the *Leiden Journal of International Law* published a symposium issue on new legal realism and international law. Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 *Leiden Journal of International Law* 189; Jakob VH Holtermann & Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211; Andrew Lang, 'New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science' (2015) 28 *Leiden Journal of International Law* 231; Alexandra Hunees, 'Human Rights Between Jurisprudence and Social Science' (2015) 28 *Leiden Journal of International Law* 255; Daniel Bodansky, 'Legal Realism and its Discontents' (2015) 28 *Leiden Journal of International Law* 267. The following issued dealt with some criticisms. Ino Augsberg, 'Some Realism about New Legal Realism: What's New, What's Legal, What's Real?' (2015) 28 *Leiden Journal of International Law* 457; Jan Klabbers, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism' (2015) 28 *Leiden Journal of International Law* 469; Gregory Shaffer, 'New Legal Realism's Rejoinder' (2015) 28 *Leiden Journal of International Law* 479.

<sup>29</sup> See Elizabeth Mertz & Mark Suchman, 'A New Legal Empiricism: Assessing ELS and NLR' (2010) 6 *Annual Review of Law and Social Science* 555.

PhD often in economics of some other social science, while the lack of empirical skills in the British legal academy is well understood.<sup>30</sup>

How have these disciplinary trajectories affected international law? In the United States, it has produced a proliferation of instrumentalist inquiry about international law. The New Haven School of policy science arose in the wake of American Legal Realism, started by Myres McDougal, a Yale law professor, and Harold Lasswell, a Yale political scientist.<sup>31</sup> This is not the place to explore the history of the economics of international law in any depth but it is worth noting the use of logit regression as early as 1997 in an article published in the *American Journal of International Law*.<sup>32</sup> Interdisciplinary moves to connect primarily American approaches to international relations, grounded in positive science, to international law, have come in several waves, starting in 1989, with the latest in 2012.<sup>33</sup> A review of the collection of papers by Jeffrey Dunoff and Mark Pollack on international law and international relations noted the focus of the papers on a narrow grouping of American scholars.<sup>34</sup> Steven Ratner and Anne-Marie Slaughter convened a Symposium

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<sup>30</sup> Methods: Capacity Building Resource in Interdisciplinary Research Methodology for Social Sciences, Methodological Challenges, Socio-Legal Empirical Research, <https://www.create.ac.uk/methods/methodological-challenges/socio-legal-empirical-research/> (last accessed 9 July 2019).

<sup>31</sup> For surveys, see Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559; W Michael Reisman, Siegfried Wiessner, & Andrew R Willard, 'The New Haven School: An Introduction' (2007) 32 *Yale Journal of International Law* 575.

<sup>32</sup> Richard Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development' (1997) 91 *American Journal of International Law* 231.

<sup>33</sup> Kenneth W Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Law Journal of International Law* 335; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205; Jeffrey Dunoff & Mark A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012).

<sup>34</sup> Monika Zalnieriute, 'Book Review, Jeffrey Dunoff & Mark A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012)' (2013) 24 *European Journal of International Law* 987.

on Methods in International Law that was published in the *American Journal of International Law* with a further volume added as a book in 2004.<sup>35</sup> This symposium and the book offered contributions on legal positivism, international relations theory, law and economics, the Yale School, new international legal process, feminism, and third world approaches to international law (TWAAIL). Martti Koskenniemi's 'Letter to the Editors of the Symposium', submitted in lieu of a contribution, should be essential reading in any coverage of method in international law, expressing as it does a frustration with the instrumentalism dominant in American legal scholarship, exposing gaps in coverage such as in overlooking the work of David Kennedy and others, while providing self-reflection by Koskenniemi on his project.<sup>36</sup> The economics of international law is now a mainstream school of thought originating in the United States.<sup>37</sup> The American Society of International Law awarded its 2010 book prize to Beth Simmons's influential empirical study of human rights law.<sup>38</sup> The 2012 publication of Gregory Shaffer and Tom Ginsburg's 'The Empirical Turn in International Legal Scholarship' in the *American Journal of International Law* identifies an important turning point in predominantly American approaches to international law.<sup>39</sup> With the the empirical turn we are beginning to see moves toward a behavioural turn, with a

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<sup>35</sup> Symposium on Method in International Law (1999) 93 *American Journal of International Law* 299; Steven R Ratner & Anne-Marie Slaughter, *The Methods of International Law* (ASIL 2004).

<sup>36</sup> Martti Koskeniemmi, 'Letter to the Editors of the Symposium' (1999) 93 *American Journal of International Law* 351.

<sup>37</sup> A comprehensive survey is impractical here. See, e.g., Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Harvard University Press 2013); Joel Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008); Jeffrey Dunoff & Joel P Trachtman, 'Economic Analysis of International Law' (1999) 24 *Yale Journal of International Law* 1. An extensive set of papers can be found in a symposium issue on International Law and Economics in the *Illinois Law Review* in 2008 issue 1.

<sup>38</sup> Beth A Simmons, *Mobilizing for Human Rights – International Law in Domestic Politics* (Cambridge University Press 2009)

<sup>39</sup> Gregory Shaffer & Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *American Journal of International Law* 1.

focus on the behavioural economics of international law, though one of the main contributors to this specialization, Anne Van Aaken, is on a European law faculty.<sup>40</sup> These moves are not without critiques, of course, and the divisions by territory or nationality are by no means clear-cut.

No empirics or exhaustive survey is offered here but it is fair to conclude that American approaches to inquiry about international law tends to be more instrumental and to rely on methods found in the American versions of the social sciences, while British and European approaches tend to more in the historical, philosophical, critical, and normative traditions. We should not lose focus on the influence of the New Haven School on American approaches to international law, which could be understood as implementing an instrumental vision of international law to globalize American values during the Cold War and in the pursuit of foreign policy aims.<sup>41</sup> If one is not sensitive to these distinctions, one must accept the risk that important international law scholarship will be overlooked, because different questions are being asked in these disparate disciplinary terrains.

## II. A ROLE FOR THE CRITICAL

Another piece in the puzzle in the evolution of legal thought and how it affected inquiry about international law probably can be found in the rise of American Legal Realism in the

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<sup>40</sup> Tomer Broude, 'Behavioral International Law' (2014) 163 *University of Pennsylvania Law Review* 1099; Anne van Aaken, 'Behavioural International Law and Economics' (2014) 55 *Harvard International Law Journal* 421. Broude and Aaken are co-authoring a book on behavioural international law, which Oxford University Press is due to publish in 2019.

<sup>41</sup> See Oscar Schachter, 'Remarks on McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 *American Society of International Law Proceedings* 266; see also Anne Marie Slaughter, *Recueil de Cours, Collected Courses of the Hague Academy of International Law* 285 (Kluwer Law International 2000).

early twentieth century and what happened in its aftermath. Here we can find some rehabilitation of the differences in style or method of inquiry about law as between Britain, the wider Europe, and the United States.

In the eighteenth and nineteenth centuries, American law and legal thought diverged from English law but still was a net borrower of ideas and legislative innovations from Britain. German-influenced historical understandings of the law were also influential.<sup>42</sup> The well accepted notion has been that in the nineteenth and early twentieth centuries, the United States in a ‘classical’ stage of legal thought, which emphasised formal and conceptual reasoning about positive sources of law and supported an individualist approach to the organization of society.<sup>43</sup> But historicism was also influential at the time, which sought to place law within a process of historical development. It could plausibly be argued that competing schools of jurisprudence, as between the historical and the analytical were present in the United States in the nineteenth and early twentieth centuries.<sup>44</sup> Eventually the analytical wing won the battle for the consensus of the epistemological community. But how it won tells us a story about the rise not only of the positive sciences in the United States but also about the rise and eventual fall of the American critical legal studies movement, a movement that may more likely maintain a greater influence outside the United States at the present time, including on international law. The analytical wing did not rise to prominence in any linear chronology of progress in legal science, in which conceptual legal analysis was eventually displaced with a so-called more sophisticated social science

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<sup>42</sup> David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press 2013).

<sup>43</sup> William M Wiecek, *The Lost World of Classical Legal Thought* (Oxford University Press 1998); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard 2006).

<sup>44</sup> Rabban, n 42.



methodology. Rather, what happened was the rise of an eclectic group of scholars known as the American Legal Realists who forced pluralism into American legal thought, giving rise after their demise to a diverse range of modalities from law and economics, aligned with American conservatism and the legal right, to critical legal studies, aligned with American left liberals.<sup>45</sup>

In the United States, American Legal Realism brought an end to the search only for a liberal individualist order in law – to law as an institutional replication of and support for liberal individualism. Legal conceptualism was the traditional means by which to support law in a liberal individualist frame. The trend of legal thought in the United States moved in the early to mid-twentieth century moved towards placing higher importance on understanding the social ends of law and began to place a lower-order emphasis on the logical features of the law and legal concepts. The traditional analysis of legal concepts has never lost significance in the United States. The deployment of legal concepts is essential to solving problems relating to liability forms of legal responsibility, forms of legal responsibility having to do with disputes among persons that have to be resolved in binary forms of opposition of winners and losers of a legal case.<sup>46</sup> But conceptual analysis cannot be the only game in town as a tool for the development of the law, where the aims of social forms of responsibility – beyond the single case – take on more importance.

This move occurred in Britain too but sometime later, with the rise of socio-legal studies. But in the early to mid-twentieth century, legal thought in England, and Britain more generally, took a different course. The period in the history of legal thought when the

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<sup>45</sup> See Roberto Mangabiera Unger, *The Critical Legal Studies Movement* (Harvard University Press 1983).

<sup>46</sup> These concepts of responsibility are borrowed very loosely from Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2013).

American Legal Realists were ascendant in America, from about 1930 to 1955, are approximately in the period before HLA Hart began his appointment as Professor of Jurisprudence at Oxford in 1952. This was the period between John Austin and HLA Hart.

When the history of legal thought is explored, rarely is anything said about the period between Austin and Hart, except perhaps about Maine's historical jurisprudence, which seems to have had little lasting influence but which could be seen in the more general context of a historical move in the nineteenth century that may have been more significant in the United States than in the Britain. Neil Duxbury offers a critique of the period between Austin and Hart: 'It would be wrong to assume that nothing happened in English jurisprudence between Austin's era and Hart's. It is just that nothing much happened that would be remembered' and '[i]t seems fair to say . . . that English jurisprudence after Austin lacked imagination and direction'.<sup>47</sup> English 'jurisprudes' of the day did not write jurisprudence as we know it today, though neither did the Legal Realists.<sup>48</sup> Says Neil Duxbury, 'Americans who travel the neglected path that is English jurisprudence from the 1830s to the 1950s will soon find themselves in a world very different from their own. . . .'<sup>49</sup> English jurisprudence focused on the analysis of legal concepts in this period. Duxbury explains that the English legal scholars of the day wrote papers about stare decisis and the role of precedent, the relationship between law and equity, statutory interpretation, the English

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<sup>47</sup> Neil Duxbury, 'English Jurisprudence Between Austin and Hart', (2005) 91 *Virginia Law Review* 1, 3 and 15.

<sup>48</sup> 'Jurisprudes' was a term that Llewellyn often used to describe legal realists and others who investigated questions about the role of law and its operation in society. Beyond our scope here are the internecine debates about what constitutes 'jurisprudence'. Most legal scholars today think of American legal realism as some form of proto-social science about the law. Brian Leiter argues that it is a naturalised version of jurisprudence. B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

<sup>49</sup> Duxbury, n 47, 5.

court system, the growth of negligence liability in tort law, the conceptual divisions between legal categories and other conceptual legal projects.<sup>50</sup> In the field of international law, this may have manifested itself in the turn of British international lawyers toward arbitration and legal advocacy and that of American international lawyers toward foreign policy.<sup>51</sup> So what we see here is not a break or even a Kuhnian paradigm shift as in the United States marked by Legal Realism, but a gradualism of cautious common law legal scholarship, more in the nature of normal science.

One of the more influential figures of the time in Britain was Arthur Goodhart, who held the Chair in Jurisprudence that Hart would eventually hold for twenty years before Hart.<sup>52</sup> Though Goodhart was careful to balance competing considerations in his inaugural lecture in 1932,<sup>53</sup> Harold Laski, who chaired the lecture, wrote to Oliver Wendell Holmes Jr that Goodhart ‘thought clearly, that the realists . . . were just wicked’.<sup>54</sup> CK Allen, Goodhart’s colleague at Oxford, described attempts to evaluate law using the social sciences as ‘Megalomaniac Jurisprudence.’<sup>55</sup> Says Duxbury, he considered Pound’s sociological jurisprudence to be ‘inappropriately normative’ and that ‘legal realism filled him with feelings approximating disgust’.<sup>56</sup> Said Allen: ‘It was perhaps appropriate that the age of jazz should produce a Jazz Jurisprudence.’<sup>57</sup> Others at Oxford and particularly at the London universities of the time were more receptive,<sup>58</sup> The inaugural editorial board of the

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<sup>50</sup> *Ibid*, 14.

<sup>51</sup> A special thanks to editors for directing me to this point.

<sup>52</sup> *Ibid*, 58.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid* quoting Letter from Harold J. Laski to Justice Oliver Wendell Holmes Jr. (20 January 1932) in M DeWolfe Howe (ed), 2 *Holmes-Laski Letters* (Harvard University Press 1953) 1358.

<sup>55</sup> CK Allen, *Law in the Making*, (3<sup>rd</sup> ed Oxford University Press 1939) 35, quoted in Duxbury, n 47, 61.

<sup>56</sup> Duxbury, n 47, 61.

<sup>57</sup> Allen, *Law in the Making* 55, quoted in Duxbury, n 47, 62.

<sup>58</sup> Duxbury, n 47, 63-9.

*Modern Law Review* invited the American Legal Realist Felix Cohen to write the very first article for the journal.<sup>59</sup> But few academic law schools existed at the time in Britain and scholarship from the medieval universities such as Oxford carried great weight, not only in England but in the British sphere of influence in what were to become the Commonwealth family of nations.

One could suggest several related reasons for the divergence in the common law tradition. Ultimately the explanation will depend on the discipline in which the person offering it operates. A compelling explanation is sociological.<sup>60</sup> American Legal Realism may have been a response to social and political events in the United States in the early twentieth century, in which classical legal thought was associated with a ‘laissez faire’ ideology of the United States Supreme Court of the time, which used its powers of judicial review to enforce freedom of contract doctrines, obstruct early attempts at regulating the economy, and make difficult the implementation of New Deal policies.<sup>61</sup> It may also have been an attempt to undo so-called Langdellian approaches to the study of law in American law schools.<sup>62</sup> Add to all of this that federalism in a large country that was undergoing significant social change made it impossible to maintain consistency of case law across many jurisdictions and so American versions of the common law necessarily would lead to contradictions in the case law. The US Supreme Court in *Erie Railroad Co. v Tompkins*<sup>63</sup> is

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<sup>59</sup> Felix S Cohen, ‘The Problems of a Functional Jurisprudence’ (1937) 1 *Modern Law Review* 5.

<sup>60</sup> See Duxbury, n 47, 55-6:

It would be a mistake to expect English jurisprudence to take much from the lessons that were being learned in the United States. American legal realism, after all, was a jurisprudential response to the dominance of Langdellianism in the law schools, the initiatives of the American Law Institute, the perceived and some of the legal problems posed by the New Deal. (footnote omitted).

<sup>61</sup> For a summary, see Edwin Chemerinsky, ‘Substantive Dues Process’ (1999) 15 *Touro Law Review* 1501.

<sup>62</sup> Duxbury, n 47, 55-6.

<sup>63</sup> 304 U.S. 64 (1938)

widely understood to have settled the point that the common law resided in the states, leading eventually to the common law comprising essentially only private law in the United States and an ideological stance that the common law was unsuitable for public law, with its values hewing more closely to liability than social forms of legal responsibility. Duxbury concludes: ‘North American commentators were concluding by the 1960s that English jurisprudence and American jurisprudence were each motivated by different concerns, and that the English had but the flimsiest understanding of realist legal thought. It is difficult to argue that this conclusion is wrong.’<sup>64</sup>

The result has been a pluralism in legal thought and method that is now accepted without controversy and even expected in the American legal academy, and which has had a hand in promoting a global epistemological pluralism in inquiry about the law. The American Legal Realists pushed open the doors to both the analytical wing of legal thought, with a focus on positive science, and critical wing, the critical legal studies movement of the 1960s. The result is that American legal inquiry has had plenty of opportunity to be interdisciplinary in diverse ways for quite some time. In Britain, American Legal Realism was a transplant. In the United States it was indigenous. This is not a story about ‘progress’ but a push away from a universalism about how to think about the law that tended to rigidly support a *status quo* and elite status for some.

Philosophers of social science divide the study of the social world into the projects of meaning versus causal adequacy. A legal conceptualist sees her work from the standpoint of the meanings of legal concepts. A social scientist sees her work in explaining why, in determining cause and effect. So, while a conceptualist argues that a legal text should be

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<sup>64</sup> Duxbury, n 47.

interpreted to mean *x*, she has no tools to assess whether that interpretation will cause legal agents to act in a particular way in response to the law. The social scientist does have these tools to predict behaviour but lacks the tools to advise on the meaning of the legal text as *x*. These sorts of exercises are where the narrow technical competence of modern science leads us. American Legal Realism is an ancestral movement that allows us to accept what might seem as oppositional epistemologies without confusion. Critique, or critical legal studies, provides us with the means by which to expose the limits of approaches to the study of law based in meaning or causal adequacy and to expose where the confusions just might be. Meaning adequacy has been a central target of critical legal studies from its very beginnings. Causal adequacy is defeated once its foundations in reductionism are exposed. For a critical theorist, social science arguments are tautological.

For domestic law, critical legal studies is currently at best a minority position. It has been proclaimed to be dead in the United States, but it is not, for reasons that go beyond this chapter.<sup>65</sup> It has more vibrancy in Britain and Europe but on the domestic law front remains a minority position. For international law, critical legal studies seems to have a natural home, at least in the European tradition. Of course, critical studies is not unique to the United States. The influences on the American critical legal studies are in Marx, the Frankfurt School, Gramsci, and Foucault, among others. American Legal Realism opened up a particular approach to the critical study of the law and make it internal to the practices of contemporary legal scholars.

Critique works as a practice to study international law because it provides a degree of detachment other approaches cannot. It is not really a method but the articulation of a

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<sup>65</sup> Mark Tushnet, 'Survey Article: Critical Legal Theory (without Modifiers) in the United States' (2005) *The Journal of Political Philosophy* 99

standpoint. It does not entirely free us of our human psychology and social context. There is no view from nowhere and we are not perfectly rational beings. But it takes us an additional step removed from somewhere. This seems an important technique or facility when dealing with international law, which does not connect to a particular political constitution. Critique provides the means by which to disentangle national ideologies. It permits us to question liberalism as well as authoritarianism. But critique does not provide us with a value theory.<sup>66</sup> The end of critique is critique.

#### CONCLUSION

The notion of a comparative international law applies not only to the law itself and its practice by states and other legal actors but also to the methods used to study it. This chapter lays some of the groundwork by which to study differences as primarily between American, British and European approaches to inquiry about international law. The differences tend to center on the use of methods of the analytical and empirical sciences to study the law. These approaches currently enjoy the label of interdisciplinary studies of the law but what is coming or may already be here is an organic legal studies or legal analysis distinct from the conceptual analysis of legal doctrine.

I will concede my own scientific allegiances and suggest that a cognitive or psychological account may help to explain what is happening, but research is necessary to so find. As a matter of anecdotal observation, a distinctive form of nationalism in inquiry about the law seems to be occurring. This nationalism seems more pervasive in law than in other disciplines, though some other disciplines have national schools of thought, usually with blurred lines. Explanations as to why law and its study might be nationalistic in orientation

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<sup>66</sup> See Koskenniemi, n 4 and n 36 at 356.

cannot be undertaken without empirical work in the psychology of legal judgment. At first blush it seems a form of identity-protective cognition about the most important tribal norms for societies.<sup>67</sup> No other area of academic inquiry appears as resistant to penetration of ideas across borders than inquiry about the law. There just might be a corrosive ideological character to the law and its study. To some extent we expect different evolutions in the law, based on historical and social contingencies. But we must have adequate information and workable theories to know when enough is enough.

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<sup>67</sup> See Dan M Kahan, 'Laws of Cognition and Cognition of Law' (2015) 135 *Cognition* 56.