Behaviour and Law – Towards Empirical Legal Studies

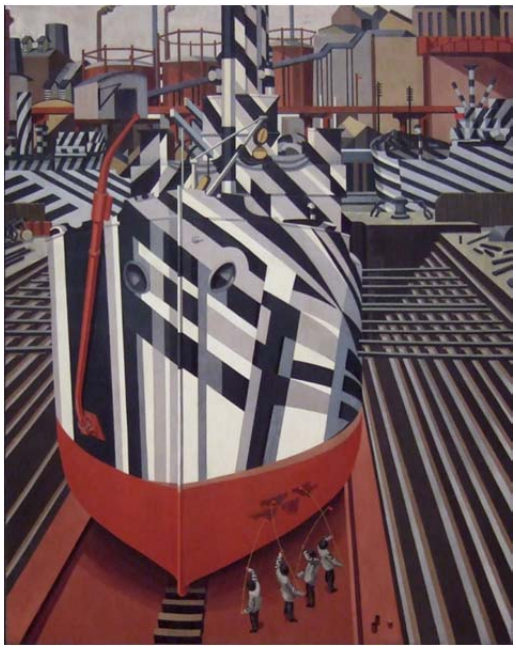
Willem H. van Boom

Speech delivered at the 98th Dies Natalis of the Erasmus University Rotterdam, November 8, 2011.

Ladies and gentlemen,

Where Jeff Rachlinski will be your main course, I consider myself the starter. So as not to ruin your palate, I will be both brief and accessible.

I would like to offer you an introduction to what exactly it is that we at Erasmus School of Law do within the Behavioural Approaches to Contract and Tort research programme. In the process, I'd like to share with you some reflections on the future of research in law schools in Europe, as I believe these two topics are related.



In a moment, I will give you some examples of the research we conduct in our programme. First, however, I would like to show you my personal motivator in legal research. This is a picture entitled '*Dazzle-ships in Drydock at Liverpool*', painted by Edward Wadsworth in 1919. The dazzle painting technique was developed and used extensively in the first World War. It basically consisted of painting war ships in such a way that, when looking at the ship from a distance, the eye would be dazzled. The various shapes, colours, lines and angles were supposed to distort the viewer's sensory perception of where the ship was, the direction it was facing, and where its bow and stern were.

The plausible assumption was that this distortion would cause the enemy ships to misfire, thereby reducing the number of warships hit by enemy fire. So the British navy set out to paint all its warships with dazzle paint – the art of dazzle painting became a true engineering skill. But did it work? In this case, policy-making was based on plausible arguments, not on evidence.

In law, this happens all the time. Sometimes the legislature and courts get it right and sometimes they do not. Therefore, legal research must provide more evidence on what

works, why it works and at what expense. In doing so, we may stumble upon some effect that was not intended but did accidentally occur.

In World War I, the plausible arguments in favour of dazzle painting were not corroborated by evidence. There is no convincing data that dazzle ships were hit less frequently than other ships. There was another effect, however. Dazzle ship crew members seemed to feel safer and more secure than those on other ships. So, more than anything else, the paint may have increased the crew's morale – while it lasted.

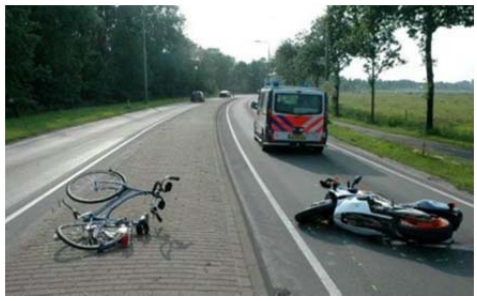
To me, dazzle paint is a metaphor that reminds us to consider legal policy-making as *plausible* argumentation. But does it actually work? One of the aims of our research is to reflect on the "dazzle" questions in law.

Some examples

I will now turn to some examples of the type of research that our research group is conducting. When I refer to 'us' and 'we', I really mean others; namely the many brilliant and creative researchers who make up our research team.

1 How do victims of personal injury experience their damages awards?

In the law of torts – that is, liability for accidents and damage caused to others – the legislature and courts work from the assumption that the ultimate goal of awarding monetary compensation is to bring the victim to a situation that closely resembles his or her situation prior to the accident. But how does this abstract notion of money compare with how victims actually experience having the money at their disposal? We conducted socio-legal research into the experiences of persons who suffered severe personal injury as *children*, and later brought their cases to court and, ultimately, before the Dutch Supreme Court. Their cases resulted in landmark decisions in the area of tort law, which we teach our students. What we usually do *not* teach them, however, is the *narrative* behind the cases after the dust of litigation has settled. Do victims actually experience compensation as the legislature intended? The interviews we conducted as part of this study seem to indicate that they do *not* and that, more than anything, the coping strategies of victims influence how they experience the financial compensation they receive. The first results of this strand of research indicate remarkable discrepancies between the specific human needs of these victims and what tort law actually offers them. We are now considering what the policy implications of these findings are for tort law.



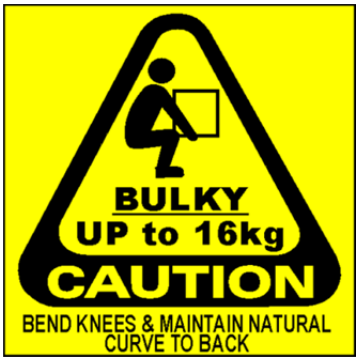
2 How do costs rules in litigation affect settlement behaviour?

One of the most interesting subjects to investigate in private law is the effect that the costs of going to court have on the behaviour of litigants. The decision to go to court is made under inherent uncertainty regarding the outcome and costs. How do cost prospects influence decisions and how can courts influence access to justice by tinkering with these costs? One example of research in this field involves the cosy environment of lab cubicles, shown in the picture. Our researchers have run lab experiments to empirically test the effects and underlying assumptions of the so-called “loser pays” rule in civil procedure. This rule means that the losing party in a civil court case must reimburse part of the litigation costs of the winning party.

The experiment simulated pre-trial settlement negotiations. We varied the amount that the parties had to pay in litigation costs, the chances of winning the case, and the applicable cost-shifting rule. Since we are still in the testing phase, I will not jump to conclusions, but I think we have been able to determine the relative effects of these factors and, in so doing, make a valuable contribution to the empirical legal literature on cost-shifting. This line of research not only tests both economic and psychological assumptions underlying cost-shifting rules in civil procedure, but it also adds a European theory to an otherwise American-dominated field of research.

These are just two examples of the more empirically-oriented research we conduct. In terms of theoretical and doctrinal work, the research programme has a firm basis in the master’s and doctorate programs in law and economics, where dozens of bright PhD students elaborate and refine doctrinal work and theoretical law and economics. We also conduct theoretical research on the implications of social science research for legal policymaking.

For example, consider how *warning psychology* can educate lawmakers on the effectiveness of a warning design. Some warnings seem to be more effective than others; in fact, it is sometimes possible to list the factors that more or less decide effectiveness. What normative implications does this have for product liability? Should courts amend the liability system to reflect these insights? And, if so, how?



Also consider the fact that, in sales of consumer goods, a seller may apply methods that obfuscate the price in

order to boost sales. For instance, by offering items at a “two for one” price without properly displaying the *unit* price, consumers may be tempted to buy more than they would otherwise. If these practices can indeed distort consumer choice, to what extent should the law intervene and prohibit such marketing practices as being unfair to consumers? Obviously, these are normative questions in which policymakers need more than evidence; they need normative guidance, which legal research should provide as well. So, ultimately, our research into behaviour in a legal setting aims to educate legal policymakers and increase our knowledge of informed normative policy design.

The programme

By thinking, deciding, and acting, people and organisations display behaviour. Legislatures sometimes have preconceived ideas about behaviour and how private parties will respond to legislative intervention.

In the research group, we conduct research into the behaviour of individuals and groups, as well as the relationship with private law. We look at legislative and judicial policy-making and ask whether the underlying assumptions about behaviour are correct. Usually, policy-making is implicitly based on powerful concepts such as rational choice theory and on the basic assumption that humans can be influenced.

When we take a closer look, we often see that the theoretical assumptions that underlie policy instruments prove incorrect or remain implicit or uncorroborated. Consequently, policy measures may have unintended consequences because users or target groups attach different meanings to policy instruments than policy-makers had hoped for or assumed. The overarching aim of this research is to increase our understanding of how behaviour interacts with private law; this ranges from contracts to corporate governance, and from personal injury to property law issues.

Obviously, the methodology of our research efforts is multidisciplinary by nature. Our research team includes legal scholars specialising in contracts, torts, property, corporate law, and civil procedure, as well as scholars specialised in law and economics, socio-legal studies, empirical legal studies, and psychology. Such a distribution combines what I like to call the two pillars of modern legal research: the pillars of arts and language on the one hand, and the pillar of social sciences on the other.

Towards empirical legal studies?

Now that I have explained what the research programme entails, the next question is: how does it compare with other legal research?

What is legal research? Is it part of *the arts and languages* or the *social sciences*? I submit that *modern* legal research actually *synthesises* arts and language with the social sciences.

Traditional European legal scholarship is, at best, a mixed bag of methods. Legislatures and courts make law and scholars try to make sense of it – by applying linguistic methods, by interpreting sources, by building a self-referent system and by applying common sense argumentation to deal with society's problems. In terms of methodology, legal scholarship originally contained traits of linguistics and theology, with a dash of political and economic argumentation. It was predominantly an art, not a science. You will still find a lot of such scholarship in European law schools, and rightly so: law schools train tomorrow's practitioners by giving students a taste of all legal aspects of society. However, my impression is that legal research is increasingly moving away from the arts and languages and into the social sciences arena. Scholars like Jeff Rachlinski have shown the way forward in this regard.

The two pillars of modern legal research should be reflected in legal education. I believe that law schools could improve their curricula by imbuing students with critical thinking, both with regard to their own expertise and methodology and to the role of law in the arts and social sciences. Law students could benefit from a firmer understanding of what other disciplines have to offer to the lawyer's methodological portfolio. This could refer to issues of deciding under uncertainty, to what it is that rules aim to achieve, to what extent these aims are actually achieved, or to what we know and can learn about the effects of law in the real world. Training students in empirical legal studies could be a good way of ensuring all this.

Ultimately, what behavioural legal research aims to do for private law is what criminology has been doing for criminal law for decades; that is, to reflect on its function on the basis of facts rather than plausible arguments. What we will not do, however, is neglect, ignore or substitute the arts and languages side of legal teaching and research. Legal research has direct relevance for society and lawyers may only continue to play their societal roles when they *combine* the strengths of the arts and languages with the social sciences. Lawyers should be able to construe, interpret and analyse legislation and case law, but they should also be able to appreciate both empirical and normative questions, such as: does the law actually work in accordance with its design? At what cost? Can it do better? How can it do better?

Outlook

Given the title of my address, you will not be surprised to learn that I personally advocate a more streamlined configuration of legal research. There is already a lot of 'empirical legal studies' research conducted in our law school and elsewhere. The challenge for European

law schools is to concentrate our efforts in a more comprehensive and methodologically rigorous way in order to fully harvest the benefits associated with this two-pillar type of research. In my ideal world, legal policymaking would be evidence-based and the role of legal scholarship would be to provide the evidence. Although this will not happen overnight, at Erasmus School of Law we have both the pedigree and capabilities to make it happen in the coming decade if we put our hearts and minds to it.[1]

The continued support of the Erasmus School of Law and the Board of this University has enabled us to survey uncharted territory for European legal scholarship. My personal ambition is to ensure that ESL will also chart the map for European empirical legal studies. It should, because ESL (the acronym for Erasmus School of Law) is actually an anagram of ELS.

And now for the main course.

[1] Concerning pedigree, I merely refer to: the Institute for legal decision-making (1980s Jan van Dunné). One example of the output: P.J. van Koppen en J. ten Kate, Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making, 18 Law & Soc. Rev. 2 (1984) 225 ff.