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# Empirical Legal Research: Fad, Feud or Fellowship?

**Peter Mascini & Wibo van Rossum***

*As co-editor, I dedicate this special issue to Wibo van Rossum, who sadly passed away during the making of it. Wibo initiated this special issue and, despite his grave illness, was determined to help accomplish it. The idea of editing this special issue originated from the annual conference of the Dutch Law and Society Association (VSR) that we organised in Rotterdam in 2016 together with Roel Pieterman and Nick Huls. In 2017, with Hilke Grootelaar, we edited a special issue for the journal of the VSR, Recht der Werkelijkheid, entitled Recht als probleemoplossing? (The Law as Troubleshooter?). This indicates that I have collaborated with Wibo on different occasions, also during his illness. Doing so was always a great pleasure and Wibo has been an example to me in the dignified and resilient manner in which he carried on to doing the work he loved so much, with passion until the end.*

At the end of the last century, a movement emerged on the legal scholarship landscape in the United States that is often referred to as Empirical Legal Research (ELR). This breakthrough in the status quo within the research field of law has since aroused debate and raised questions. Some of these questions arise from the need to better understand this new movement. How can the rise of ELR be explained? What are its main characteristics? Who is part of it? Does this movement also spread outside the US? If so, where and how? The rise of ELR also leads to reflection on the existing research field of the law. How does ELR relate to legal scholarship, the Law and Society (L&S) movement and (New) Legal Realism? What does the emergence of the ELR movement imply for the established institutional and power relations within the research field? Since, at least at the beginning, ELR was thought to focus more on quantitative research methods and to take a less critical and more instrumental stance towards the study of the law than already existing empirical research traditions, it also gives cause for reflection on more fundamental questions about the study of the law. The first question is epistemological: how do empirical legal research and legal scholarship compare? Next is the ontological question of how law and empiricism relate to each other. In other words, the rise of ELR elicits reflection in various ways. The answer to these questions, about ELR itself, about the positioning of ELR within the research field and about the relationship between law and empiricism and the investigation thereof, can be sought in various ways, has not yet been found in many respects or is controversial. In the four contributions to this special issue, three of the more fundamental questions are addressed that are prompted by the emergence of ELR.

The first question concerns the relationship between law and empiricism. One way of characterising this relationship is the well-known dictum 'law in books and law in action.' The conception of '*law in action*' is associated with *Legal* Realism, which examines the role of *law*, not just as it exists in the statutes and cases, but as it is actually applied in society. The law may contain ideals to strive for, but research on the social practice of law has made clear that the law is fooling itself, because it contains a lot of mechanisms that make sure those ideals *remain* ideals.[1] Danielle Chevalier shows in her contribution to this special issue that the prevailing distinction between 'law in books and law in action' does not do justice to the relationship between the way in which the law is formalised, perceived and lived. Though the mutual constitution between law and practice is nowadays commonly professed, the reflex remains to use law in books as starting point. It is argued, however, in this article that law has a storyline that commences before its institutional formalisation. Law as 'a continuous process of becoming' encompasses both law in books and law in action, and law in action encompasses timelines both before and after the formal coming about of law. To fully understand law, it is necessary to understand the entire storyline of law. To illustrate this, an ethnographic case study of a local by-law regulating an ethnic diverse public space of everyday life is expanded upon. The case study is used to demonstrate the dynamics in which law comes about and how these dynamics continue for law in action after law has made the books. This particular case study exemplifies how law is one of many truths in the context in which it operates and how formalised law is, above all, reflective of the power constellations that have brought it forth.

There is another manner in which the relationship between law and empiricism can be conceived. On a more abstract level, it can be reformulated as that between law and its environment. This latter relation-

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1. D.E. Ingersoll, 'American Legal Realism and Sociological Jurisprudence: The Methodological Roots of a Science of Law', 17 *Journal of the History of the Behavioral Sciences* (1981), at 491.



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ship is central to the so-called system theory. According to this theory, a process of functional differentiation brings forth specialised subsystems (such as law, politics, science, religion) that fulfil an exclusive function that none of the other subsystems can take over. Moreover, the subsystems are self-regulating: from their own survival strategy they derive which signals from the environment they respond to.[2] According to Luhmann, systems are cognitively open and operationally closed.[3] This means that they are sensitive to and respond to signals from the environment but that they interpret them from their own operational criteria, *i.e.*, the way in which the system is organised. For a new signal, for example an empirical finding, to reach the legal system, it must be recognised as legally relevant by the law. The law itself determines which actions are considered legal acts (norms) and which mere factual actions (facts).Whereas other-reference ensures the system's cognitive openness towards its environment, self-reference ensures its normative closure.

How are empirical observations entered into the operational logic of the law? Case files, for example, play an important role here. '[T]he case file authorizes and authenticates, ascribes actions to actors and thereby enrols them in the legal case, and it references events and persons in such a way as to attribute legal-factual status to them so that they, too, are enrolled in the workings of the legal case.… Approached as such, the legal case file can further understanding of how "law" establishes itself in relation to a world it references as "outside" but that it, by so referencing, can only deal with as a world enrolled in law, that is, as a legally domesticated world.'[4] Van Berkel en Van Lochem's contribution to this special issue illustrates that also the process of drafting regulatory policies can help elucidate how a border between law and empiricism is enacted. Inherent to all regulatory policymaking is that a 'jump' has to be made from empirical facts (*i.e.* other referencing) to normative recommendations of what the law should regulate (*i.e.* self-referencing). For example, the observations that there are too few organ donors in the Netherlands and that the voluntary registration system is not working has to be translated into normative recommendations of what the law should regulate (*e.g.* we need to change the default rule so that everybody in principle becomes an organ donor unless one opts out). The authors analyse how this translation process takes place and whether it makes a difference if the empirical research on which legislative drafts are built concerns predominantly quantitative or qualitative research. By using the lens of the proportionality principle – which requires that proposals for new legislation are suited to accomplish the aims of the legislature, do not require more intrusive measures than strictly necessary to reach these aims, and will not produce excessive burdens for particular addressees of the rules – in a case study of each type, they conclude that the manner in which empirical data and scientific evidence are used by legislative drafters to justify normative choices in the design of new laws fail to meet the proportionality test.

As noted, the rise of ELR with its alleged focus on quantitative research methods and addressing practical policy issues apolitically gives reason to reflect on the way in which law and empiricism relate to each other. The first two articles from this special issue make a valuable contribution to a better understanding of this relationship. Chevalier shows that the mutual influence of 'law in books and law in action' is a dynamic process where the formalisation of legislation is neither the beginning nor the end. Van Berkel and Van Lochem show that the way in which legislative drafters pick up signals from the environment and convert them into legal rationality usually does not meet the terms against which their own operational actions are evaluated.

The second question addressed in this special issue concerns the relationship between a legal and an empirical study of the law. Does empirical legal research gain importance? There are several reasons to assume that it indeed thrives.

First, legal scholarship may contribute to the growth of empirical legal research. It took a long time for legal scholarship to acquire a respectable and self-evident position within the academic community. It was only after it had succeeded in achieving this status that scope for empirical legal research emerged in law faculties. In combination with the emergence of the social sciences as discrete fields of study and the development of related methodologies, the maturation of law as an academic discipline seems to have been a driver for empirical legal research.[5] The fact that leading scholars in legal faculties plead for more empirical research may also have contributed to empirical legal research as status enhancing and therefore rendering law faculties eager to take the lead in international and interdisciplinary research.

Second, legal practice may contribute to the growth of empirical legal research. During their education and on-the-job training, lawyers are confronted with research that teaches them more about their own functioning or provides insight into problems and developments that they face in their daily work. Moreover, they are confronted with litigants and expert witnesses who provide empirical data in court cases that judges must be able to judge. The environment also expects them to have the capacity to properly evaluate these empirical data. These concerns have led to the need and desire for empirical research that judges can draw from when making their decisions.[6] Incidentally, a caveat must be

2. N. Huls, *Actie en reactie: Een inleiding in de rechtssociologie (Action and Reaction: An introduction in the Sociology of Law)*, (2009) Den Haag: Boom Juridische uitgevers, at 70-74.
3. N. Luhmann, *Das recht der gesellschaft (The Law of Society)*, (1993) Verlag: Suhrkamp.
4. I. Van Oorschot and W. Schinkel, 'The Legal Case File as Border Object: On Self-Reference and Other-Reference in Criminal Law', 42 *Journal of Law and Society* 4 (2015), at 501.
5. M. Heise, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism', *University of Illinois Law Review* 4 (2002).
6. *Ibid.*, at 832.

entered in relation to this factor. Although research shows that lawyers occasionally learn about empirical research, consider themselves capable of understanding it and understand its importance, they still make little use of it in practice.[7] Insofar as the legal practice is responsible for the growth of empirical legal research, nonetheless, the increasing availability of data, for example, as a result of the digitisation of the judiciary obviously also contributes to it.[8]

Third, law and economics may have boosted empirical legal research. Since the 1960s, economic theory has been successfully applied to the law. The predominant assumption of law and economics was that individuals make rational choices in response to incentives that emanate from legal instruments. From this assumption theoretical predictions are derived and recommendations made for the optimisation of legal instruments. This assumption of the rational actor has been problematised for some decades now by behavioral scientists who study the law empirically.[9] These behavioral scientists are dominated by lawyer-economists and psychologists who mainly do large-scale quantitative and experimental research. Their research has demonstrated that the assumption of the rational actor is problematic since the will power, rationality and egoism of actors in their responses to legal instruments are bounded. The dissatisfaction about the assumption of the rational actor in law and economics thus seems to have played an independent role in the growth of empirical legal research.[10]

Have these factors actually led to a demonstrable growth of empirical legal research? Several studies to which Van Dijck, Sverdlov and Buck refer in their contribution to this special issue show that there has indeed been an increase in empirical legal research in the US. The question of whether this growth also applies to Europe has not yet been systematically investigated, according to these researchers. They have taken on the task of finding out. They make a distinction between legal and empirical legal research on the basis of the research method and the use of data that are reported in the articles that they rely on in their study. Based on a content analysis of 78 journals, they establish that there has not been an increase in empirical research in Europe between 2008 and 2017. They address the potential reasons for this absence of growth and discuss how its obstacles can be alleviated. Hereby they mention the availability of data, training and the formulation of questions that are relevant to the legal practice. Their findings subsequently raise the question whether the presumed drivers of empirical legal research mentioned earlier may also be limited to the US.

The last question addressed in this special issue concerns the way in which the ELR movement and other research traditions dealing with the empirical study of the law substantively relate to each other. In this discussion it is rightly pointed out that the law was studied empirically long before ELR emerged. That research took place around the beginning of the twentieth century, mainly in the US, under the heading of Legal Realism. Today it is being continued under the heading of New Legal Realism[11] or European New Legal Realism.[12] Subsequently, the L&S movement was established in the early 1960s. In some respects the ELR movement is considered a reaction to the L&S movement. ELR caught the attention of lawyers because the new movement seemed to promise research on legally relevant facts without too much social theory, and without the usual criticism of the deficiencies of law. These last characterisations of 'focus on social theory' and 'critical about the deficiencies of law' are typical for much of the L&S movement.[13] The L&S movement with its broad interest in immigration law, development in crime, gender issues, the North-South divide and global development, social and economic inequality, the functioning of the legal profession and of courts, inclusion and exclusion of citizens through law etc., has conducted empirical research for many decades. But it has done so almost always with an eye on developing theoretical positions in social theory and speaking critically to power with the aim of furthering justice for marginalised and suppressed individuals and minorities. ELR presented itself as freed from the ballast of social theory and critique. It claims to pose more pragmatic questions than L&S research, with more focus on policy and practical relevance and less focus on theory.[14] Moreover, methodologically, ELR appears to be less pluriform than L&S research. Certainly in the US and at the first European Conference on Empirical Legal Research, the emphasis was on quantitative research.[15] Or so it is perceived. These perceptions contain elements that feed tensions in the L&S movement that may feel it is overhauled, in the ELR movement that may feel wrongly shelved as being a-theoretical, and in legal scholarship that may be afraid to miss the train to new legal methodologies and theories about law.



7. N. Elbers, M. Malsch, P. Van Der Laan, A.J. Akkermans & C. Bijleveld, 'Empirisch-juridisch onderzoek in Nederland: Bespiegelingen over de stand van zaken in de rechtswetenschap, het juridisch onderwijs en de rechtspraktijk' ('Empirical-Legal Research in the Netherlands: Reflections about the State of the Art in Jurisprudence, Legal Education, and the Legal Practice'), 39 *Recht Der Werkelijkheid* 1 (2018).
8. C.L. Boyd, 'In Defense of Empirical Legal Studies', 63 *Buffalo Law Review* (2015), at 371-72.
9. P. Mascini, 'Responses of Law and Economics to the Threat of Its Initial Success', *Law and Method* (2018), doi:10.5553/REM/.000032.
10. R. Lempert, 'Growing Up in Law and Society: The Pulls of Policy and Methods', 9 *Annual Review of Law and Social Science* (2013), at 13.
11. H. Dagan and R. Kreitner, 'The New Legal Realism and the Realist View of Law', 43 *Law & Social Inquiry* 2 (2018).
12. J. v. Holtermann and M.R. Madsen, 'What Is Empirical in Empirical Studies of Law? A European New Legal Realist Conception', 39 *Retfærd* 4 (2016).
13. K. Van Aeken, 'Sociology of Law in Search of a Distinct Identity', 36 *Recht Der Werkelijkheid* 1 (2015).
14. G. Van Dijck, 'Naar een succesformule voor empirisch-juridisch onderzoek' ('Towards a Success Formula for Empirical-Legal Research'), 42 *Justitiële Verkenningen* 6 (2016), at 31 and D. Blocq and M Van Der Woude 'Empirisch-juridisch onderzoek' ('Empirical Legal Research'), 38 *Recht Der Werkelijkheid* 3 (2017), at 33-34.
15. T. George, 'An Empirical Study of Empirical Legal Scholarship: The Top Law Schools', 81 *Indiana Law Journal* (2006), at 141.

In reality, the foregoing story is not black and white. In the first place because the two movements do not manifest themselves everywhere in the same way. For instance in Germany unlike in the US, empirical legal scholars may find themselves outsiders in relation to the legal community, as their work is not readily considered relevant for legal scholarship (*Rechtswissenschaft*), which is usually regarded as a normative enterprise.[16] In the Netherlands, the Empirical Legal Scholarship initiative (ELSi) seems to be methodologically inclusive and, above all, opting for a pragmatic approach with a focus on promoting empirical legal research rather than instigating a fundamental reflection on the relationship between legal science and empirical legal research.[17]

Secondly, Van der Woude and Blocq show in their contribution to this issue that empirical research traditions are evolving. Their contribution to this special issue relates to the relationship between the ELR movement and the L&S movement. The article departs from the observation that the ELR movement, understood as an initiative that emerged in American law schools in the early 2000s, has been quite successful in generating more attention to the empirical study of law and legal institutions in law schools, both within and outside the United States. In the early years of its existence, the L&S movement – as mentioned, another important site for the empirical study of law and legal institutions – also had its centre of gravity inside the law schools. But over time, it shifted towards the social sciences. This article discusses how that happened and goes on to explain how the L&S movement became ever more diverse in terms of substance, theory and methods. As such, it deepens scholarly understanding of the L&S movement and thereby strengthens debates about the relationship between the ELR movement and the L&S movement.



Apparently, there are substantive differences and tensions between the ELR movement and the L&S movement, but these cannot be generalised. For this, the relationship between both differs too much between contexts and is too dynamic.

In closing, it can be stated that the first two contributions of this special issue relate to the boundary between law and empiricism and the bridging thereof. The third contribution to this special issue zooms in on the relationship between legal scholarship and the empirical study of the law, while the last contribution addresses the relationship between the ELR movement and other research traditions that empirically study law. As such, this special issue on 'Empirical Legal Research: Fad, Feud or Fellowship?' analyses the differences and tensions between the more recent ELR movement, the L&S movement and traditional legal scholarship. Thereby, it intends to provide a better understanding of the academically debated field of legal scholarship.

16. Y-C Chang and P. Wang, *The Empirical Foundation of Normative Arguments in Legal Reasoning*, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper, no. 745 (2016), at 3.
17. Elbers *et al.*, above n. 7.

# 'A Continuous Process of Becoming': The Relevance of Qualitative Research into the Storylines of Law

**Danielle Antoinette Marguerite Chevalier***

**Abstract**

The maxim 'law in books and law in action' relays an implicit dichotomy, and though the constitutive nature of law is nowadays commonly professed, the reflex remains to use law in books as an autonomous starting point. Law however, it is argued in this article, has a storyline that commences before its institutional formalisation. Law as 'a continuous process of becoming' encompasses both law in books and law in action, and law in action encompasses timelines both before and after the formal coming about of law. To fully understand law, it is necessary to understand the entire storyline of law. Qualitative studies in law and society are well equipped to offer valuable insights on the facets of law outside the books. The insights are not additional to doctrinal understanding, but part and parcel of it. To illustrate this, an ethnographic case study of local bylaws regulating an ethnically diverse public space of everyday life is expanded upon. The case study is used to demonstrate the insights qualitative data yields with regard to the dynamics in which law comes about, and how these dynamics continue for law in action after law has made the books. This particular case study moreover exemplifies how law is one of many truths in the context in which it operates, and how formalised law is reflective of the power constellations that have brought it forth.

## 1 Introduction

What worries me are the arguments that people articulate with less and less hesitation. The economic arguments people first used are more and more traded in for straightforward statements about 'blacks' that should be moved out. I ask for awareness and extra attention for arguments offered to adjust the legal regulations. It cannot be that on the basis of the perception of a limited group another group is driven from the public space. I ask myself on what grounds this should be.

These words come from a chief of police, written in a letter to his mayor to express his deep concern regarding proposed legislation and implementation of certain regulations in his district. The year is 2003, the district is part of a mid-sized provincial city in the south of the Netherlands. The public space referred to is a small neighbourhood shopping square, a vibrant shared space of everyday life that is intensively used by a highly diverse, multi-ethnic community. The legal regulations referred to are measures restricting the use of the square and include a ban on gathering with three or more persons, closed circuit television surveillance (CCTV) and a ban on use of psychoactive substances.

The quote and the particular case are contextualised further on in this article. Here the citation is offered to present the point that legal regulations do not appear out of the blue; regulations have a story that commences prior to their legislative emergence. To truly understand law is to understand its story, and this article propounds that qualitative case studies offer valuable insights into the full story of law. They can offer light on not only how formal law works in a context, but also – and even more importantly – how that context influences the coming about of formal law.

The formula 'law in books and law in action' has ingrained itself in sociolegal scholarship to denominate formal law and the context in which it operates. Roscoe Pound first advanced the phrase as title to an article, published in the *American Law Review*.[1] The distinction between law in books and law in action is, in the words of Pound, that the former are rules that 'purport to govern the relations of man and man' and the latter are the rules 'that in fact govern them'. Pound argued that the two diverge and stated, the time frame being 1910, that 'Today we are manifestly in a period of stability.' Pound found this state worrisome. Contrary to periods of growth, in which law is developed, periods of stability are marked by the summing up of 'the juristic activity of the past' and of working out details and applying minor corrections. In periods of stability, jurists focus on perfecting existing law, instead of addressing 'new problems or of meeting new situations of vital importance to present-day life'.[2] The adherence of legal thought to an idealistic interpretation of legal science induces that 'justice in concrete causes ceases to be (the) aim' of jurists and this in turn leads to, Pound warned, a gulf

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1. R. Pound, 'Law in Books and Law in Action', 44 *American Law Review* 12 (1910).
2. *Ibid.*, at 22.

between legal justice and social justice.[3] In the face of this hazard, Pound argued, 'it is the work of lawyers to make the law in action conform to the law in the books, (…) by making the law in the books such that the law in action can conform to it.'[4]

The dichotomy inherent in Pound's positioning of law in action versus law in books echoes through in many of the studies of law and society that have since built on Pound's 'law in action' adage. These studies first continued with the instrumentalist understanding of law propounded by Pound; later on research in law and society shifted towards a constitutive approach.[5] Rather than considering law autonomous from social life, law became understood to be 'neither distinct from society' nor to 'act on society from without'.[6] This constitutive turn brought forth rich research focusing on the presence of law in society, investigating how people experienced law in their everyday life.[7] Alternatively, attention is also drawn to what people themselves experience as law, the 'social norms and values that dominate life itself, even though they have not been posited in "official" law'.[8]

Both approaches though keep this implicit notion of 'official' law, of law in books, as the baseline; formalised law forms the starting point of the investigations. However, law in books has a storyline that commences before its formal coming about. As Pound asserts in his 1910 essay: 'law has always been and no doubt will always continue to be in a process of becoming'.[9] Pound's worry was that in the period of stability he detected in his time, the juristic activity was limited to refining established principles instead of developing *new* '(emphasis added)' law better suited to respond to the 'new situations of (…) present-day life'.[10] Law is a dynamic process, and Pound argued, the development of law should encompass new law addressing the external challenges raised by present-day life. In other words, present-day life should be conducive to the development of law. It is not only law impacting present-day life; it is also present-day life impacting law. The dynamic is not one-directional, but rather circular: the continuous outcome of the interplay between juristic activity and present-day life.

These dimensions can be denominated law in books and law in action, as the phrase has proven its fetching resonance. A caveat must be noted though with regard to the innate connotation of a dichotomy between books and action. As fetching as the phrase is, as ingrained is the instinctive division between the two. This can distract from the possibility of the difference between law in action and law in books to be merely a point in time. The dimension of law in action, as the context in which law in the books comes about and subsequently operates, should be further differentiated into dimensions of past and present. The prelude to the emergence of a regulation is an important storyline in the narrative of law: regulations and rules originate from somewhere. 'Rules', in the words of Howard Becker, 'are the products of someone's initiative'; they are the products of 'moral entrepreneurs'.[11] Understanding law as a process entails understanding its different dimensions, books and action, past and present, as well as the interplay between these dimensions.

In the following a singular case study is discussed to illustrate how the different dimensions and their interplay can be researched, and what such an investigation yields in insights. Taking the 'process of becoming' of law to the concrete level of a regulation, one can discern the prelude to a regulation, the coming about of the regulation, and the regulation subsequently 'in action'. At the centre of the case study presented here are specific bylaws regulating public space. The regulations are of a restrictive nature and are meant to regulate the social life of a public space. The public space is a shared space of everyday life, with a varied spectrum of users who diverge in their ethnic composition, cultural frames of reference and socio-economic standing. In such a context, developing law in the books 'such that law in action can conform to it', means a differentiation in *whose* law makes it to the books. At the micro-level of a local bylaw, the social power dynamics surrounding the coming about of law can be clearly distinguished and explored.

In the following, first the methods that were used to research this case are put forward, second the case study is introduced, and third the analysis of the data retrieved through the qualitative research is expanded upon. In the conclusion, the contribution of the qualitative section of the investigation of this particular case study is reviewed and discussed.



3. *Ibid*., at 30.
4. *Ibid*., at 36.
5. L.B. Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment', 34(4) *Law & Society Review* 1055, at 1058 (2000).
6. C. Geertz, *Local Knowledge. Further Essays in Interpretative Anthropology* (1983), at 232.
7. *See, e.g.*: S.E. Merry, *Getting Justice and Getting Even. Legal Consciousness among Working-Class Americans* (1990) and P. Ewick and S. Silbey, *The Common Place of Law: Stories from the Everyday* (1998).
8. *Cfm* M. Hertogh, 'A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich', 31(4) *Journal of Law and Society* (2004). Hertogh offers a comprehensive overview of the field of legal consciousness studies and distinguishes between an American and a European conception of legal consciousness: the first focusing on perceptions of official law, the second investigating what people perceive as law. One objection Hertogh raises with the American conception, and in affiliation in Pound's work, is the fixed definition of law, with exclusive focus on law as 'rules laid down in a politically constituted society.' (*Ibid*., at 466) Expanding on the more inductive European conception, Hertogh argues to not only look at how people experience official law, but to also investigate *what* people experience as 'law', because 'both views are sides of the same coin'. (*Ibid*., at 480) Again, parallel to the division between law in books and law in action, a dichotomy is imbued. The division alters from books versus action, to the law in books versus the law in action. In other words, it is not just the setting of books and action that is juxtaposed, the content of the entity law in these two settings is also differentiated.
9. Pound, above n. 1, at 22.
10. *Ibid*.
11. H.S. Becker, *Outsiders: Studies in the Sociology of Deviance* (1991[1963]), at 147.

# 2 Methodology

The lion's share of the data presented in this article was acquired through qualitative research using ethnographic methods. The overall argument put forward is that ethnographic methods offer essential insights that do not materialise by confining the investigation to 'the books', and, moreover, inductive qualitative research offers possibilities of theory formation. In this section I expand rather elaborately on the methods I used to investigate the case presented above. I explain the choices I made with regard to methodology, and how I executed the actual research. It is common practice in qualitative research to offer such an overview, and it offers a base to discuss the analysis made with regard to the case study in the next section.

## 2.1 The Larger Research Frame

The case study presented in this article is one of three cases researched as part of a larger project investigating the juridification of social norms in public spaces.[12] The research was carried out by one single researcher,[13] using different methods of investigation, different sources of data and different theoretical perspectives. At the basis of the investigation was a quantitative nationwide survey inquiring after the numbers and characteristics of local bylaws on substance use. From this quantitative inventory three case studies were selected, to investigate how and why these regulations came about in a given context, and what the subsequent effects were. The ethnographic methods employed are expanded upon below. Additionally, written sources of data were researched through document analysis and legal research methods, including the analysis of policy papers, minutes of local and national political debates, municipal statutes plus their explanatory memoranda, the tracing of legal procedures of court cases, and anything else that turned up in the course of the research. One example of the latter is the letter from the head of police quoted in this article; this letter was part of a police archive on issues regarding the square. Another strand of document analysis consisted of reviewing news coverage in local and national media. Furthermore, semi-structured interviews were arranged with professionals and stakeholders linked to the research sites. Professionals are persons with a professional relationship with the space, and who talked to me in their professional capacity. With regard to the case presented here, the interviewed professionals included the municipal safety coordinator of the district, the legal counsellor for the municipality, policy officers assigned to the area and a representative of the dominant housing corporation. Stakeholders included members of the Association of Entrepreneurs, the chairman of a neighbourhood council and a journalist.[14]

## 2.2 The Choice for Qualitative Research

The overall research was jumpstarted out of curiosity for the seemingly sudden appearance and proliferation of local bans on the public use of soft drugs,[15] which occurred in the Netherlands in the 2000s. A quantitative survey was set up to inventory the number and kinds of bans, and the juridical dimension of the regulation was investigated. Both the quantitative survey and the legal exploration threw up more questions than they answered,[16] and the biggest question remained what these bans were about: why had they come about, in the manner that they did, at the moment when they did and in the location where they did? A starting point to answering this query is to decipher *how* they came about. At this point the strategic choice was made to continue with an in-depth qualitative exploration of three case studies. The term 'exploration' used here refers to the inductive nature of the investigation: there was no pre-set hypothesis to be tested. Rather, the research evolved as an iterative process between data and theory, while searching for an explanation of the issue under investigation.[17] Additional to the questions above, I was interested in the effect of the bans 'on the ground'. Subsequently I also set on researching the locations in which the bans figured, among which the shopping square discussed in this article. As I will exemplify in the next section, the ethnographic fieldwork on site also contributed substantially to understanding why the ban materialised as it did in the first place.

12. Culminating in the PhD thesis *Playing It by the Rules. Local Bans on the Public Use of Soft Drugs and the Production of Shared Spaces of Everyday Life.* Defended June 2015, University of Amsterdam.
13. The disciplinary background of the researcher is a combination of law and cultural anthropology.
14. During my fieldwork a journalist from the regional newspaper *Brabants Dagblad* had taken up residence on the shopping square for a period of three months. Twice a week he wrote an article on 'the blackest neighbourhood of Brabant'. Brabant is the province in which the city of the shopping square is located.
15. Soft drugs and its counterpart hard drugs are popular terms used in reference to the formal categories of, respectively, List II and list I of the Opium Act. Whereas hard drugs are deemed to hold unacceptable risks for public health, soft drugs are generally deemed less addictive and less harmful. The legal regimes of the two categories differ accordingly. Though *qat* was not on either list of the Opium Act at the time of the research, local bans on *qat* did turn up in the national survey and were subsequently factored into the overall research design.
16. To start with, there turned out to be many more of such bans than media reports had estimated: the inventory disclosed 81 bans versus 25 the media had counted. Moreover, many of the bans demonstrated formal deficiencies. One example being that of the 81 municipalities which had adopted a said ban, 48 had formulated it to apply for the entire municipal territory. A similar formula on the use of alcohol had however been repeatedly negated by government and the same reasoning can be expected to hold for the case of soft drugs: There needs to be a direct cause for implementing the regulation, founded in the maintaining of public order. If the public order of the entire territory of a municipality is under threat of being subverted, a ban on the public use of alcohol is considered inadequate. If such a threat is not in place, a total ban is considered disproportionate, in accordance with Art. 3:4 of the *Algemene Wet Bestuursrecht*, the General Administrative Law Act. Consult also: Response by the Minister of Justice to Parliamentary Questions (Tweede Kamer, Vergaderjaar 2010-2011, Aanhangsel 1885) and Letter to Parliament by the ministers of Health, Justice, and Home Affairs (Tweede Kamer, Vergaderjaar 2008-2009, 27565, nr. 75).
17. A. Bryman, *Social Research Methods* (2004).

#### 2.2.1 *Ethnographic Fieldwork*

The ethnographic fieldwork consisted of observations, participant observations and street interviews. The timeline of the fieldwork ran from spring 2010 to autumn 2011. Approximately forty visits were carried out to the shopping square, in time slots varying from one to five hours at a stretch.

My observations concerned the social dynamics of the square: when was it used, by whom and in what manner. I focused on the people in the space, how they behaved and with whom they interacted (or not), but also included observations on physical layout of space such as formal and informal signs and notices put up. I did my observations from the space itself, sharing the cold, the heat, the rain, the noise, and the smell with those I observed. At times, I would position myself in the middle of the setting and for example sit on the much used – and much vied-over – public bench on the square. In other instances, I would take a second-row position, by settling down as a customer of one of the enterprises or by locating myself at the edge of the site, out of direct sightlines. In all instances, I could easily accost others and try to strike up a conversation. Moreover, and more importantly, people could accost me and question me. In many cases, they did. I took notes overtly, and in more than one instance my collocutor would take my notepad away from me, check what I had written, comment on my terrible handwriting, and correct and add to my written notes.

During my hours of observation, I conducted numerous street interviews; informal conversations held with whomever was willing to engage themselves with me. The overall intent of these interviews was to discover existing knowledge of and perceptions on the bans in place on the shopping square. Sometimes these conversations were initiated by me, sometimes by my collocutor. Some people I spoke with on multiple occasions, and some of them I came to consider key informants. The majority of these conversations were one-on-one, though at times I would find myself to be conversing with a group.

To structure the informal exchanges I asked everyone the following same three questions: (1) Which three words would you use to describe this space? (2) How often do you come here and why? (3) Is anything forbidden here that is not forbidden elsewhere? The first question allowed to gauge how people perceive a space, and eased a further exchange. Sometimes, but certainly not predominantly, reference would be made to the restrictive measures in place on the square. The second question functioned to get an idea of the importance of the shopping square to a person in the daily flow of life. The third question zoomed in on the reason I was actually there. The question was meant to make clear how many of the people using the square were actually aware of the issue that had drawn me and my research to this particular place: the municipal ban on the public use of psychoactive substances implemented on the square.[18] In combination, the three questions offered a tangible grasp of how the regulations were perceived by my collocutor, and in which context that perception had been formed.

### 2.3 Theoretical Orientations

The qualitative research conducted did not aim to be merely descriptive in investigating the ban, and tracing how it came about and how people experienced and perceived it. The comprehensive endeavour was to develop a 'grounded theory'[19] on why local bans that restrict specific usage of shared public spaces come about. Accordingly, the research tactic was inductive: the case was explored in constant interplay with theory. Data was analysed as it came in, and the ongoing analysis informed the next steps in data collection. Concretely, the iterative process took form through 'memoing': recording the products of analysis while processing incoming data, and refining memo's in multiple rounds of analysis into more abstract ideas and conclusions.[20]

Additionally, the focus on the specific context in which the legal issue under scrutiny functioned, gave influx to a whole body of theory connected to that context of public space. By moving beyond the direct legal body of thought, opportunity arose for interdisciplinary inspiration. One example of such interdisciplinary inspiration revolves on the work of Henri Lefebvre. In the course of the research it became clear that space and law hold many similarities in their coming about. For the spatial realm, Lefebvre has refined the traditional dichotomy between planned and lived into a conceptual triad, arguing that that space comes about, in his words 'is produced', through the interplay of three linked dimensions: planned, perceived and lived.[21] Tilting the analytical lens from a dichotomy to a three-dimensional interplay likewise with regard to law, offered new insights and understanding on how law comes about. Building on the work of Lefebvre, I commenced to investigate the bans as they were 'in the books', and as they were perceived by the people under the regime of these bans, and as the bans actually figured in the daily life of the shopping square. In combination, these dynamics explained why the restrictive regulations had first come about on the shopping square, and why their actuality continued to be reiterated.

18. The ordering of the interview questions from general context to specifically the bans is taken from the work of P. Ewick and S. Silbey, above n. 7
19. This term was first introduced by: B.G. Glaser and A.L. Strauss, *The discovery of grounded theory: Strategies for qualitative research* (1967). My application of the concept however is inspired by the outlines of Corbin, cfm J. Corbin and A. Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2008).
20. Corbin and Strauss, above n. 19, at 117
21. H. Lefebvre, *The Production of Space* (1991 [1974], at 38-39.

# 3 The Case Study

The case under scrutiny here concerns municipal bans on a small neighbourhood shopping square in a provincial town in the Netherlands. In the following I first describe the setting and the people, that is to say the shopping square and the people on it, and then continue with describing the regulations set to regulate this space and the people using it.

## 3.1 The Square

The square in question is a small low-end shopping square on the outskirts of a provincial city situated in the south of the Netherlands. The shopping square is laid out in a U shape, with three sides containing retail space and the opening to the south side. The three sides with shop space all have a covered archway, shielding pedestrians from the rain and sun. The east arch is two-storied, and on the top level four privately owned apartments are situated. Along the open south end runs the main access road into the neighbourhood, which in turn connects to the main thoroughfare to the freeway circumventing the city.

The square supports mainly shops and restaurants. The main attraction is the Aldi, a discount supermarket chain store. In addition, there is an Islamic butcher shop, an Islamic grocery shop, an Islamic bakery, a Dutch bakery, a Pakistani phone house, a Chinese restaurant, an Egyptian-Italian-Greek restaurant, a snack bar, and a lawyer's office. The majority of the shops are not owner-occupied and most of the retail property is owned by a distant real-estate investment company. The range of shops on offer is volatile, and from the early 2000s municipal reports invariably state that 'There are habitually a few shops empty on the square.' In the direct vicinity, the square is surrounded by residential flats that predominantly house ethnic Dutch senior citizens.

The small shopping square is situated in a post-war neighbourhood built in the 1960s and 1970s, according to the dominant urban planning ideas of that era: it is a car-friendly area, with a lot of communal green and high-rise flats. The area was developed for and originally dominated by lower middle-class and middle middle-class ethnic Dutch residents. Approximately 30% of the residences in the neighbourhood are owner-occupied. The remaining 70% consists predominantly of low-income social housing and is almost exclusively owned by a single housing corporation. In the 1990s the composition of the population started to shift. At the time of fieldwork the moving index hovered around 20%, meaning that one in five residents leave the neighbourhood every year. The neighbourhood officially houses a little under 7,000 inhabitants, though the unofficial count is possibly much higher. In the district an estimated 12% of the inhabitants are older than 65, almost 30% are eighteen years old or younger, circa 40% are native Dutch, and around 50% are of non-Western descent. No official figures are available on the background of the population of non-Western descent; a community worker estimated that a quarter has a Moroccan background, a quarter has a Turkish background, 15% is of Antillean descent, and 15% is of Somali descent. One known fact is that the city has one of the largest Somali communities of the Netherlands, and the area surrounding the shopping square houses a high concentration of Somali residents.

## 3.2 The People on the Square

The shopping square is the central social locus to the neighbourhood, a shared space of everyday life. Its daily users can be categorised into immediate residents of and right next to the square, the shopkeepers, and the visitors. The visitors can furthermore be categorised into 'shoppers' and 'socialites'. This classification is not exhaustive, and the denominated categories are not exclusive, but the proposed ordering facilitates in getting a grasp of the dynamics on the square.

### *3.2.1 The Residents*

The residents on and directly adjacent to the shopping square are predominantly native Dutch senior citizens. One of the owner-occupied apartments on the square itself houses a couple that has lived there since the structure was built in the late 1960s. They reminisce about how it used to be:

> The square was much prettier. There were trees in the middle of the square and there was a sandwich restaurant. The entire neighbourhood came there on Sundays to get an ice-cream. The first fifteen years everything was good.

From their perspective, however, things have changed, and for the worse:

> those who could leave have left […], all the nice people have left.

Not all the immediate residents are as negative; others decipher the life of the shopping square in a different manner:

> I like it here. I moved here from a neighbouring village and you have your youth there, mind you. I've been living here since December and there is youth here. Sometimes they bother me, like the other day they were lighting fireworks and I thought the windows would crack [she laughs], but no they don't really bother me. I had heard the stories, about this square, that it was very criminal, with drugs and everything, but well, there are criminals everywhere and I experience no nuisance at all. I live here on the square, in that flat over there. I walk my dogs in the evening and I don't feel unsafe. I have contact with the other people in my flat and on the street, those are people from another culture. They say hi and I say hi. I like people and I don't care whether they are white, black or yellow.

The residents of the flats bordering the square have a prime view over what goes on there, and the atmosphere on the square permeates through their living room windows. Noise nuisance is a much-expressed complaint and is registered often with the police. Especially for those who are not mobile and whose lives play out in the close vicinity of their home, the situation on the square has an important impact on their daily routines.

*3.2.2 The Shopkeepers*

The shopkeepers are a heterogeneous and split group. For most of the smaller entrepreneurs their enterprise is, in the words of the local policeman, 'not making them a fortune'. An Association of Entrepreneurs exists, but mostly in a dormant state. For the shopkeepers, the atmosphere on the square impacts on its attractiveness for potential clientele and thus their revenues. Their ideas on what constitutes an attractive square, however, do not necessarily line up. Some of the shopkeepers experience nuisance and feel that those 'hanging out' on the square give a negative impression. The Islamic butcher shop and the Dutch bakery put up similar notices in their shop windows, requesting people not to loiter in front of their shops. The proprietor of the Dutch bakery owns both the business and its premises, and is an active spokesperson. He regularly speaks out in the media and actively lobbies the municipal authorities for more intervention. For other shopkeepers, the people who are viewed by some to cause nuisance are their clientele:



> Those guys are my customers. The more of them the better for me. They don't cause me any nuisance. They come to the square for something and then they hang about a while. I never called in nuisance to the police. […] Sure, they come into my place as well and try to pay with a five-hundred-euro note. Of course they are dealing, but what can you do? If I ask them where they got the money they tell me to mind my own business. For me it's a good square, I've never had any trouble, never had any violence in my shop. In the beginning, I was worried about the Antilleans, but they are very nice people.

*3.2.3 The Visitors*

The visitors to the square can be categorised into two groups: the shoppers and the socialites. Of course, the activities of shopping and socialising often overlap. The shoppers, however, come to the square with the main purpose of doing their shopping. The socialites come to the square with the main purpose of socialising.

The shoppers can in turn be subcategorised by their mode of transportation. Some of the shoppers choose the shopping square because it is compact, convenient and car-friendly. The square is an easy turn off from the main thoroughfare north out of town and more often than not it is possible to park the car right in front of the shop. In the early mornings, heavy articulated trucks easily find room to park and get some sandwiches or some cans of energy drink from the Aldi supermarket. They use the square out of convenience.

For the second category of shoppers, the square plays a much more crucial role in their daily lives. The square is their nearest shopping point and they lack the mobility to opt for other shopping venues. These shoppers come on foot: young mothers accompanied by three small children, and elderly people wheeling a pushcart. They depend on the square for their daily groceries and the square is important in their perception of their residential environment. It is also important in their daily social interactions. The Dutch baker for example knows many of his older clientele by name, and often also their health status and the recent achievements of their grandchildren. In the other shops as well many customers are recognised and greeted with personal inquiries. Shoppers meet familiar faces on the square and use the opportunity to exchange pleasantries and gossip.

The socialites are also subcategorised here into two groups. One the one hand are the Somalis, congregating on the west side of the square around 'their' metal green bench and in and around cars parked on the parallel road to the south side of the square. They come to the square to meet others, to socialise, and to discuss the state of the world. Many of them do not frequent the shops at all. Their voices are loud and their gestures are embodied. They do not speak Dutch – sometimes not at all and certainly not amongst themselves. The age range of the group is from early twenties to quite elderly and the group consists almost solely of men. They show little interest in persons on the square not belonging to their group. Most notably, while socialising on the square they conspicuously and extensively consume and trade in the psychoactive substance *qat*.[22]

The other category of socialites consists of adolescents, from mid-teens to late twenties. Again, the members are predominantly male. According to the police the youngsters are divided into subgroups, loosely along lines of ethnicity, with Antilleans on the one hand and a predominantly Moroccan group on the other. During my fieldwork I did not discern this division; all the youths frequenting the square knew each other and intermingled. The lingua franca is Dutch. Disruptions between group members occur intermittently and are at times clearly noticeable from outside the group, influencing the general atmosphere on the square. The youths frequent the phone shop and the grill room and their usual position is in front of these two establishments. Their substance use revolves around alcohol and cannabis, next to large quantities of energy drinks. They come to make an appearance and the square is their stage. As the local policeman narrates: 'These boys have no interest in the hangouts created for them near outlying sports fields. They come to the square to see and be seen.' For

22. *Qat* refers to the leaves and twigs of the plant *Catha edulis*. Chewing on the fresh leaves and twigs of this plant produces a mild euphoric effect. The use of *qat* is connected to deep socio-cultural traditions, often equalled to drinking coffee. Up till January 2013, *qat* was not an illegal substance in the Netherlands. *See also*: D.J. Korf, T. Nabben and M. Wouters, *Evaluatie Qatverbod* (2015).

this group in particular the shopping square is a stage, as much as it is a site of leisure and a space for socialising.

For those whose reference is the rhythm of white-collar work, the lolling about of youths during daytime hours equates to unemployment and idleness. In part, this is undoubtedly correct. However, a fair share of those using the space of the shopping square as their living room come there to relax before or after their work; being employed in blue-collar jobs, their work is often cast in shifts, not bound to a nine-to-five regime.

#### *3.2.4 Competing Claims to the Shared Space*

In the shared everyday space of the shopping square different groups stake a claim on the space, most notably the elderly residents who are predominantly native Dutch, young adolescent males of mostly Antillean and Moroccan background, and Somali men of all ages. Each of these groups has their own mode of using the space they share with others, moulding the space to comply with their view and use of it. At some points these modes converge, at other points the modes diverge, and at times the modes are in practice irreconcilable.

The Somali men perceive the public space of the shopping square well suited to congregate and socialise. The accompanying ritual of *qat* links them to their roots and each other. The bans on congregating and substance use are in contrast with how they perceive and use the square. Though they are only intermittently enforced, the possibility of this happening always hovers in the background. The young adolescents, growing up in the neighbourhood, consider the square as their turf. Often coming from large families housed in small units, the square is like their living room. Likewise, the bans and their possible enforcement hover in the background of their perceptions. To many of the elderly residents the appreciation of the shopping square is tied in with how it used to be, when there was still a large enough clientele to support a hairdresser, a Dutch butcher where one could get a good piece of pork, a florist, an ice-cream parlour. It was a place to stroll and meet neighbours, decent white-collar workers like themselves. The place as they encounter it now is one of empty shop-fronts, a low-end supermarket, a phone shop, two Islamic butchers, and congregations of dark-skinned men they find intimidating. The regulations echo their views on how it should be.

The space of the shopping square is a physical locality, but it is more than a mere physical phenomenon, more than an 'empty medium'[23] 'in which life transpires'.[24] In the same way that societies produce space, space in its turn produces societies. The shopping square is used by people to live their daily lives, and they attempt to manipulate the space into accommodating their use of it and their views on the appropriate use of it. As such, the square is the physical expression of the power dynamics convening in that space. The case study under scrutiny here demonstrates how such power dynamics can culminate into the coming about of legal interventions.

### *3.3 The Law*

On the shopping square, closed circuit television surveillance (CCTV) was installed in April 2004. At the same time a ban on gathering was enacted, with gathering being defined as a congregation of more than three people, of whom it can be assumed that their gathering is linked to repeated nuisance. A ban on the public consumption of alcohol had already been in effect on the square from 2002 onwards. The local bylaws were amended in 2005 to offer the possibility of banning psychoactive substances in designated public spaces, and eventually in December 2007 a ban specifically on the use of and trade in *qat* was put into effect on the shopping square.

The restrictive regulations did not appear out of the blue, but were the result of a very strong bottom-up push. The municipal bans were not a top-down initiative, but closely connected to a series of events that give leeway to a certain faction of the users of the shared space of the square to initiate legal back-up to their perceptions and views. This becomes clear when looking at the historical context.

#### *3.3.1 Backdrop to the Regulations*

In the summer of 2003 the shopping square made the national news. On a Monday afternoon in late July a fight broke out on the square. Initial police reports stated that over eighty people were involved in a street fight, using sticks and clubs. The image conjured up through the newspaper articles is one of a large rumble in clear daylight between two opposing gangs of Somalis versus Antilleans, bashing each other in the central public space of the neighbourhood. A collocutor in a street interview, however, downplays the intensity of the event: 'In the newspaper it said we were fighting with steel bars, but that's rubbish. There was this one guy with the rod of a vacuum cleaner he had just bought.' The police as well report that the incident was less serious than initially broadcasted, but this mitigation received little media attention.

The news of the clash caught the national attention and imagination in the backwash of an incident two weeks previously in the same city, when an eighteen-year-old male had been beaten to death in front of his twin brother and a friend, in a street robbery gone awry. The four perpetrators were strangers to the victims, under the influence of alcohol and cannabis at the time of the failed robbery and violent murder. They declared they had been bored and had wanted to acquire some cash to go out that night. In the press coverage of the incident, two of the four perpetrators are specifically identified as Antilleans. Though the two incidents were unconnected, in combination they triggered the public sentiment on ethnic youths in the city. There had already been other incidents relating to public safety in the region, but this episode firmly consolidated the image in the

23. Lefebvre, above n. 21, at 87.
24. H. Molotch, 'The Space of Lefebvre', 22(6) *Theory and Society* 887, at 888 (1993).

collective consciousness that the shopping square was a troubled area. A public outcry for strong action ensued. As a municipal officer reminisces, the societal pressure on the mayor to do something became enormous.
The comprehensive augmentation of regulations to control public order seems a logical, sequential response to the general sentiment on the status of public order and safety. However, within the municipal organisation not everyone applauds the chosen track. As a municipal legal counsellor recalls, in his perception the petitioned regulations were an ill-considered political response cast in a legal mould:

> We – the legal staff I mean – were raised with the idea of minimizing the amount of regulations. The way it went was that we got a whole package of regulations. We managed to ditch a few of them. In general, and certainly with regard to the local bylaws, but also in general it is my view that you can make as many rules as you want, but you always have to test them on their concrete applicability: can you use it? Can you enforce it? It is not enough to say look I found this wonderful regulation in the local bylaws of Rotterdam – really, one can find anything in there – we should get it too. I mean, does it gain us anything? Or is it just playing to the gallery, because it's in fashion?

Likewise, the police head of the district voiced strong objections to the series of restrictive regulations that were being proposed. The events in the summer of 2003 led him to write a pressing letter to the mayor, a short section of this letter was reproduced at the start of this article. The head of police expresses his concerns about legal regulations requested on 'straightforward statements about "blacks" that should be moved out'. He discerns an 'increasing intolerance towards allochtoneous residents' and in his view

> The moment <18-year male> became the victim of a robbery by allochtoneous youths, it seemed the autochtoneous residents saw their chance to start an offensive via the media in which the allochtoneous resident, Somali, Antillean or Moroccan in or around <the square> was pointed at for the feelings of personal insecurity of the residents on and around the square.

The head of police does not want to trivialise the feelings of insecurity that exist, but argues against 'combating nuisance on the basis of irritation, dominance, or intolerance'.[25]
The municipal authorities on the other hand offered no reservations with regard to the process as a whole, and CCTV is installed and a ban on gathering is imposed within a year. Additionally, the municipal ordinance previously concerned only with the public consumption of alcoholic beverages was extended to also regulate other 'psychoactive substances', without any traceable political debate. The provision in the local bylaw on substance use was subsequently employed, and eventually in 2007, a ban on the public consumption of and trade in *qat* in was announced for the entire district. The motive formulated by the municipality was the nuisance experienced on the shopping square. In the official announcement of the ban, the municipality explicitly recognises it as a serious and far-reaching method, and motivates the intervention with the expectation that it will improve the situation on the shopping square.[26]

#### *3.3.2 Reiterating the Ban on Qat*

By the time I entered the shopping square to conduct fieldwork, the restrictive regulations had already been in place for several years, and specifically the ban on psycho-active substances – in practice a ban on using qat – had waned from the collective consciousness on the square. As one resident recounts:

> It would always be busy here with people who weren't shopping for their groceries if you know what I mean. […] If I approached the police on the matter, those guys driving around in their patrol cars, they would give me a glazed look. They wouldn't know about the ban; those things peter out.

This resident undertakes to bring the ban back to the forefront. He eventually manages to get invited to make a presentation during a Town Council Meeting. He recounts how he went about making his point:

> Look, my neighbour says 'no blacks for me'. That's also an opinion, people here are used to giving their opinion without any varnish. But it doesn't help what I was trying to do. (..) You get five minutes of allotted speaking time and not a second more. So, what can you tell in five minutes? What I did is I made a PowerPoint, referred to the ban in the local bylaw and showed them pictures I had made of what was happening in the neighbourhood.

As a result, the enforcement of the ban is picked up.

> After the presentation, we got a whole squad of enforcers, what do you call those people with a blue jacket but without the service gun? It still goes on in the area, but nowhere near as bad as it was.

The municipality also circulates flyers with on the one side a reminder about the ban of *qat* and on the other a reminder about bans on making loud noise, littering and

25. The letter dates from early September 2003. The mayor addressed in this letter stepped down from his post due to health issues two weeks later and died soon thereafter. I have not been able to trace a response. The letter is translated by the author, the formulas between <> replace name-specific references.

26. For a further analysis on the policy process of specifically the ban on psycho-active substances, *see* D.A.M. Chevalier,'Truth or Tale? The Production, Selection and Interpretation of 'Evidence' Informing Municipal Policy on Public Use of Soft Drugs', in A. O'Gorman, G. Potter and J. Fountain (eds.), *Evidence in Social Drug Research and Drug Policy*. Lengerich: Pabst Science Publishers (2017) 85.

defecating in the public space. A clear link was made in this formal broadcast between the use of *qat* and defecating in public space, and the connotation upset multiple recipients of the municipal flyer.

### 3.4 Concluding

The case under scrutiny here concerns restrictive regulations on a small neighbourhood shopping square in a provincial town in the Netherlands. The shopping square is a shared space of everyday life, that figures as the central space in a socio-economic and ethnic diverse neighbourhood. The square is used intensively by a wide variety of publics, and the way each of these publics use the space does not in all instances harmonise with the expectations and desires of other publics. The venue of the shopping square figures prominently in the daily lives of many different users. These users have diverging perspectives, needs, and interests with regard to the shared space of the shopping square. Those causing the proclaimed nuisance are themselves direct contenders for the space. The ban specifically on the public use of psychoactive substances is part of a package of municipal ordinances in place to regulate the behaviour on the square. The regulations have been instigated through public pressure and is a reaction to actual occurrences, the behaviour it targets is part of the social practices of specific publics for whom the shared space of the square figures prominently in their daily routines.

## 4 Understanding Law

At the surface a clear-cut measure to combat nuisance in the public realm, at closer inspection the ban turns out to be a lot less clear-cut. A qualitative analysis shows these bans to be the product of a power play over shared public space. In the following, first the analysis is traced of why the restrictive bans came about as they did. Second, it is traced how the regulations are perceived by the different participants to the public space after it has been effectuated.

### 4.1 Formalisation into Law

In the section on methodology, spatial thinker Henri Lefebvre was already introduced. To reiterate, Lefebvre refined the traditional dichotomy in spatial thinking – of planned versus lived space – into a conceptual triad consisting of the planned, perceived and lived dimensions continuously interacting and producing space. The planned dimension is the designed space, constructed by professionals and technocrats, emanating 'bureaucratic and political authoritarianism', and it is imposed on those who reside in space. The perceived dimension is the mental realm, where space is read and 'decoded' and imagined to be. The perceived dimension both 'propounds and presupposes' space, and mediates between the planned and the lived dimension. The lived dimension is space as it is actually encountered and directly lived through everyday experiences. It is 'the space of the inhabitants and users', 'the dominated (.) space, which the imagination seeks to change and appropriate'.[27]

Lefebvre furthermore posits that the three different realms of perceived, planned and lived must line up for an individual, in order for that individual to move from one realm to the other without confusion.[28] In other words, when the lived dimension of space does not connect with the planned dimension, or when the perceived dimension of space does not concur with the lived dimension, confusion and disorientation ensue. People do not feel comfortable in a space in which the three dimensions do not line up for them, and will subsequently attempt to organise the space thus that the three dimensions get in synch with each other.

And this is precisely what we see happening in the shopping square. To a particular public on the square the lived experience on the square does not correspond with how they perceive the square should be. It used to be a very nice place where people would stroll on a Sunday to the ice-cream parlour, but now all the nice people have left. 'Sometimes it will be black with people here, literally!'. This mismatch between dimensions leads to a degree of unease, and subsequently an attempt is made to get the three dimensions in accordance with each other. By way of changing the planned dimension a change is sought in the lived experience of the square. Regulations are called for to ban certain behaviour from the square, curbing the typical use other participants to the shared space would like to make of that space. To recall, this is precisely what the head of police advocates against in his letter.

As we have seen though, the warning of the chief of police was to no avail: the regulations are legislated and implemented, including a specific ban on *qat*. And this in turn impacts the space for those targeted by the ban. How the Somali *qat* users perceive the square, as a public space set for socialising – and for them this includes the use of *qat* – is no longer congruent with the regulatory regime of the planned dimension of the space. The codification of social norms into legal bans is consequently a strategy employed in the contestation over space and the reality it constitutes. A ban on certain behaviour is an intervention in the planned dimension of space, aimed at bringing the lived dimension into line with the perceived dimension. The coming about of the restrictive regulations reflects the power contestations in that space.

### 4.2 Law in Action

Though the regulation banning the use of psychoactive substances represents the power play of one faction using a shared space, it doesn't by definition bring what its initiators had aspired. In the following the focus is put how the regulation is perceived and lived by the different publics on the square. Previously the publics on the square have been described on the basis of their use

27. Or in spatial terminology: respectively the potential and the effective environment. Cfm. H. Gans, *People, Plans and Policies. Essays on Poverty, Racism and other National Urban Problems* (1991), at 26.
28. Lefebvre, above n. 21, at 40.

of the square, in this section the definition of the different publics is tilted and the distinction made is that between entrepreneurs of the ban and targets of the ban. Moreover, a third group is discussed, that of the enforcers, as mediators between the entrepreneurs and the targets, while at the same time in their own relationship with the ban.

#### *4.2.1 The Entrepreneurs of the Ban*

Though the entrepreneurs of the ban have successfully seen their norms codified into formal regulations, the ban doesn't bring them the changes they had hoped for.

> It's Tuesday morning and I have entered the Dutch bakery on Verdiplein. An employee is in the front helping customers, but the proprietress appears quickly from the back when she hears my voice. She's upset. On Saturday morning there had been a whole gang of youths, congregating at the entrance of the bakery. The entire façade of the bakery is glass, from ceiling to floor, bathing the shop in light and providing a wide overview of the square. And a front-row view of what occurs on the square and even more so in front of the bakery. The youths had been jostling and making loud noises and impolite gestures at them. It had been very aggravating to them and, even worse, intimidating for their customers. They had called the police, more than once. They did not have a direct number and had to go through the national operating system and explain their story every time. Eventually a patrol car showed up on the square early afternoon. It circled the square and came to a halt level to the youths. The police did not come out of their car. The proprietress repeats this several times, with exasperated unbelief. Instead they rolled down their window, called over to the youths and spoke a while, still seated in their car, with the youth who had ambled over to the patrol car. Quickly enough, they finished their conversation, appeared to exchange amicable goodbyes, and drove off again. The youths of course continued for a while in front of their shop, until they apparently got bored with it and moved on. She had been so unbelievably hopping mad. The youths should have been fined for congregating in a group, their behaviour was really off limits. And the police, she had no words for it, not even getting out of the car. She was so completely fed up with it all. That same afternoon they pulled down the municipal poster that had been in their shop front.



The proprietress is seriously disillusioned: the rules are clear and in effect, but they are not complied with and they are not enforced. The entire effort of the restrictive bans was to alter the lived sense of the shopping square. This has not been achieved. Additionally, the aggrieved behaviour has changed in meaning: it is no longer 'mere' misbehaving; it has become an intentional transgression of norms set by the institutional authorities on the square.

#### *4.2.2 Those Targeted by the Ban*

The Somalis have little doubt as to why the regulations have been installed:

> The people from the high flat, they are coming to do their shopping, walking like this (he mimics pushing a walker), and they see the Somalis, all are black, all are noisy and the people they are scared. One day the police come and say we cannot be here anymore.[29]

The adolescents on the shopping square likewise understand the bans as being directed against their presence.

> About those bans, this is our place, we are not leaving. We are fighting back, even if they barricade the square. […] Why is this bench here? To sit on! Exactly, yeah. […] This is our place, the spot where we come every day.

They understand that the presence of the bans reflect that the square is perceived to be unsafe by some of the other users. The adolescents blame this mistaken perception on popular media, steadfastly depicting immigrant youths as petty criminals.

> Those old people, they sit in their homes and look at 'Opsporing Verzocht',[30] and then they come here and they don't see the difference. They think we are all criminals.

The group that explained the impact of media depictions on how they were regarded in public space went into how hurtful this unjustified ascription was:

> We are not like that. We are not like the gypsies who also come here in their big cars. They are really trash. They would rob an old lady for a few euros. We would never do that. If we rob someone, we take a mature guy, you know, one that can fight back.

The discourse in which the regulations came about resounds in the assessment of these regulations after their implementation. The regulations are felt to respond to an incorrect and unjust ascription of those who use the public space of the shopping square as a venue for their social existence. They are not perceived to be about maintaining *the* public order, but rather about attaining *a* public order in which their presence does not figure.

#### *4.2.3 The Enforcers*

From a different point of view, one police officer responsible for the shopping square explains his position:

29. The quote comes from a conversation held in English and is not a translation.
30. *Opsporing Verzocht* roughly translates into 'wanted by the police'. It is a television program that has aired on Dutch TV since 1975. It is a joint venture between the Public Prosecutor, the police and the public broadcasting channel. Its format consists of the general public being asked to assist in solving police cases.

> We use the bans to keep the situation a bit under control. The shopping square is not a good place to control, if you enter the square everyone immediately disappears. You have to avoid getting caught up in a cat and mouse game, you really don't want that kind of situation. I prefer having them on the square and not branching out into the neighbourhood, into the residential areas. There they will really cause nuisance, much more than on the square.

The policemen do not explicitly concur that gathering and using psychoactive substances constitutes nuisance. For the institutional enforcers, the ban represents what it formally is: an instrument to uphold the public order in a literal sense. Whether the ban is enforced is dependent on the situation it is called upon, and the way an enforcer assesses that particular situation. One police officer contemplates:

> Sometimes I get the impression everybody is practicing window dressing. A bylaw like that is installed to show, look, this is what we are doing. And the police are left holding the baby.

For the enforcers as well the context in which the bans came about does resonate in their appreciation of it. They recognise the symbolic signification of the ban, and they explicitly state that they do not enforce it for the mere sake of it. They view their assignment as keeping the square under control, in the service of all who use the square.

#### *4.2.4 Concluding*

The expectancy could be that the public that has managed to get their norm of appropriate behaviour on the square codified, is the dominant party in that space. The on-ground reality of the shopping square, however, shows a more nuanced situation. The regulation becomes something for the other parties to contend with, but they would seem to do this only at the practical level. For example, the Somalis on the shopping square adhere to the legal regulations forbidding the trade in *qat* and the gathering of more than three people, but only insofar as they foresee a possibility of the rule being enforced. The tactic of the Somalis is to change their lived dimension of the square: they quickly break up congregations when police are spotted to approach the square, the trade in *qat* is moved to dealings in the enclosed realm of a parked car, and when *qat* is still chewed on the square it happens in a covert manner. They do not, however, remove from the space, the legal regulations are not sufficient to establish or maintain dominance in the space for those who entrepreneured them.

### 4.3 The Storyline of Law

This one local regulation vividly demonstrates that law has a life both before and after its legislative delivery. The manner in which the regulation has come about continues on in how the regulation is perceived once it is formalised. The moral entrepreneurs feel that their achieved regulation should be complied with and if need be enforced, regardless. Those targeted by the ban understand the regulation to be of hostile intent, and adjust insofar as necessary to avoid prosecution. The police regard the ban as an instrument in their work to secure public order, thus as a means to an end, rather than a goal in itself. These perceptions in turn loop back to how also the authority that has emanated the formal law is perceived.

## 5 Conclusion and Discussion

Law is a continuous process of becoming. It has a storyline that commences before its actual legislative codification and that continues beyond this moment of institutional formalisation. The case study presented in this article demonstrates how qualitative research figures in exploring the storylines leading to and leading from the legal inception in the books, offering a comprehensive view of the process in which law continuously becomes.

The micro event of a local bylaw on a neighbourhood shopping square of a provincial town shows the power plays connected to law. A seemingly straightforward response to undesirable situations of nuisance, the ban under scrutiny here harbours dynamics that concern the inclusion and exclusion of those falling outside the acceptance of the dominant group. In the case study presented here, the motions of exclusion were directed at ethnic others. In two parallel cases researched under the same umbrella, dynamics of exclusion occurred along fault lines of socio-economic differences and ideological-religious orientations. Though the characteristics on which 'the other' was defined differed, the mechanism through which law was morally entrepreneured bottom-up to determine the accommodating quality of a shared space was equal. Likewise, the perceptions and experiences of publics propounding the ban and the publics targeted by the ban ran parallel. The qualitative investigation demonstrates that the storyline of law, before its formal emergence, is pivotal to understanding why it comes about, and how this figures in the way formal law subsequently operates in everyday reality.

Formalised law is never the truth, but one of many truths. Whose truth makes the books, how this happens and under which conditions in turn impacts how law in books is subsequently perceived and experienced in the context that brought it about. This mechanism increases in relevance as diversity in society increases. The term 'superdiversity' has been conceived to express the rapid augmentation of societal diversity in terms of culture, ethnicity and religion.[31] One of the consequences of an increasingly diversifying society is that common ground is lost on which people communicate and negotiate everyday conviviality. In this setting of superdiversity it

31. S. Vertovec, 'Super-diversity and Its Implications', 30(6) *Ethnic and Racial Studies* 1024 (2007); F. Meissner and S. Vertovec, 'Comparing Super-diversity', 38(4) *Ethnic and Racial Studies* 541 (2015); M. Crul, J. Schneider and F. Lelie, *Superdiversiteit* (2013).

has been proposed that law could well be the most viable bridge across differences and function as facilitating framework. Law could fulfil the function of a minimal, formal and procedural moral in situations in which traditional forms of social bonding lose their effectiveness.[32] In contemplating such propositions there is a danger of unconsciously understanding law to have a measure of neutrality. When such high expectations are placed on the bridging potential of law, it is pivotal to fully understand law and its storylines; the context from which it arises, the power dynamics it incorporates and how – to circle back to Pound – the rules that 'purport to govern the relations of man and man' and the rules 'that in fact govern them' are perceived by 'present-day life'.[33]



32. *See e.g.*: J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory on Law and Democracy* (1996 [1992]) and C.J.M. Schuyt, 'Bronnen van Juridisering en hun Confluentie', 2 *Nederlands Juristenblad. Special: Juridisering* 925 (1997). I discuss this point more elaborately in 'The production of law': Law in action in the everyday and the juridical consequences of juridification, (38) 1 *Recht der Werkelijkheid, 116 (2017).*
33. Pound, above n. 1, at 22.

# Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions

**Gijs van Dijck, Shahar Sverdlov & Gabriela Buck***

**Abstract**

Empirical Legal research (ELR) has become well established in the United States, whereas its popularity in Europe is debatable. This article explores the popularity of ELR in Europe. The authors carried out an empirical analysis of 78 European-based law journals, encompassing issues from 2008-2017. The findings demonstrate that a supposed increase of ELR is questionable (at best).

Moreover, additional findings highlight:

- An increase for a few journals, with a small number of other journals showing a decrease over time;
- A higher percentage of empirical articles for extra-legal journals than for legal journals (average proportion per journal is 4.6 percent for legal journals, 18.9 percent for extra-legal journals);
- Criminal justice journals, environmental journals, and economically oriented journals being more likely to publish empirical articles than other journals;
- More prestigious journals being more likely to publish empirical articles than less-prestigious journals;
- Older journals being more likely to publish empirical work than younger journals, but not at an increasing rate;
- Journals being legal/extra-legal, journals in a specific field, journal ranking, or the age of the journal not making it more (or less) likely that the journal will publish empirical articles at an increasing (or decreasing) rate.

Considering the lack of convincing evidence indicating an increase of ELR, we identify reasons for why ELR is seemingly becoming more popular but not resulting in more empirical research in Europe. Additionally, we explore interventions for overcoming the obstacles ELR currently faces.

## 1 Introduction

Empirical legal research (ELR) has a long-standing tradition, at least in the United States. There, the roots of legal realism may be placed in the early 1900s, with the first publication of ELR placed in 1911.[1] The *Law and Society Association* (LSA) was founded decades later, in 1964, and the first issue of the *Law and Society Review* (LSR) was published in 1966.[2] The rise of the *Empirical Legal Studies* (ELS) movement can be placed around the year 2000.[3] Soon after, the *Journal of Empirical Legal Studies* (JELS), first published in 2004, was established, as was the *Society for Empirical Legal Studies* (SELS), which held its first Annual *Conference on Empirical Legal Studies* (CELS) in 2006.[4] In addition, several centres on ELR have emerged.[5] This article refers to ELR rather than ELS to describe empirical legal research, because of ELS' connotation with quantitative analysis (see below).

The rise of ELR in the US can be further demonstrated by the numerous publications in a variety of fields and journals. The proportion of publications with empirical analysis has risen significantly over time,[6] even though the proportion of empirical articles as opposed to non-empirical articles remains low.[7] Furthermore, a substantial proportion of law review articles have been found to report empirical research conducted by others than the authors of the article.[8] LSA research and ELS can be

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1. H.M. Kritzer, 'Empirical Legal Studies Before 1940: A Bibliographic Essay', 6 *Journal of Empirical Legal Studies* (2009), at 926.
2. www.lawandsociety.org/history.html (last accessed 8 October 2018).
3. M. Heise, 'The Past, Present, And Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism', *University of Illinois Law Review* (2002), at 819; R.H. McAdams and T.S. Ulen, 'Introduction to the Symposium on Empirical and Experimental Methods in Law', *University of Illinois Law Review* (2002).
4. P. Cane and H.M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (2010), at 1026.
5. L.A. Gordon, *The Empiricists: Legal Scholars at the Forefront of Data-Based Research* (2010).
6. M. Heise, 'An Analysis of Empirical Legal Scholarship Production, 1990-2009', 2011 *University of Illinois Law Review* (2011), at 1739. *See also* R.C. Ellickson, 'Trends in Legal Scholarship: a Statistical Study', 81 *Journal of Legal Studies* (2000) 517, at 528-29 (researching the 1982-1996 period and finding that '[t]he indexes for both *empiric!* and *quantitate!* (…) are virtually flat from 1982 to 1996 (…) [but that] the indexes for both statistic! *Significan!* And *Table* 1 almost double over the same time frame', which suggests that 'law professors and students have become more inclined to produce (although not consume) quantitative analysis') and T.E. George, 'An Empirical Study of Empirical Legal Scholarship: The Top Law Schools', 81 *Indiana Law Journal* (2006) 141, at 147 (extending the Ellickson study to the 1994-2004 period), both researching the number of references to empirical legal scholarship.
7. S.S. Diamond and P. Mueller, 'Empirical Legal Scholarship in Law Reviews', 6 *Annual Review of Law and Social Science* (2010) 581, at 581, 587 (reporting that 5.7% of the US law review articles contain original empirical data, with original defined as data collected by the researcher himself or herself).
8. *Ibid.*, 581, 587. *See also* Heise, 'The Past, Present, And Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiri-


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considered extremes on the same spectrum of ELR. LSA research has adopted a 'Big Tent' policy, making it somewhat undefined in terms of topics and the methods and techniques used:

> Although they share a common commitment to developing theoretical and empirical understandings of law, interests of the members range widely. Some colleagues are concerned with the place of law in relation to other social institutions and consider law in the context of broad social theories. Others seek to understand legal decision-making by individuals and groups. Still others systematically study the impact of specific reforms, compliance with tax laws, the criminal justice system, dispute processing, the functioning of juries, globalization of law, and the many roles played by various types of lawyers. Some seek to describe legal systems and identify and explain patterns of behavior. Others use the operations of law as a perspective for understanding ideology, culture, identity, and social life. Whatever the issue, there is an openness in the Association to exploring the contours of law through a variety of research methods and modes of analysis.[9]

In contrast, ELS researchers arguably pose and answer more pragmatic questions than their LSA counterparts, focusing more on questions that have policy and practical relevance and less on theory-driven questions.[10] According to Eisenberg, the founding father of the ELS movement in the US, ELS was intended to deal with matters regarding how the legal system works, ensuring the relevance for policy makers, litigants and judges.[11]

Despite its popularity, ELS has also been criticised.[12] It has been argued that its role remains significantly underdeveloped and incidental, particularly in comparison to other disciplines forming part of the 'social sciences', such as political sciences and sociology, where empirical methods and research designs have become indispensable tools.[13]

Has ELR also become well established in Europe? In Europe, like in various countries, the methodology of law and legal research has become a debated issue. What was once a primarily national discipline has become more European, more international and more multi-interdisciplinary, with the discipline transitioning from (implicit) traditions to a stronger emphasis on methodology.[14] Moreover, in several countries it can be observed that legislators and policy makers are calling for more empirical research, that scholars seem to welcome more ELR, and that a substantial part of Judiciary Councils' research is empirical.[15] Although ELR was slower to catch on in other corners of the world than the US, no longer is the interest in empirical legal research confined to the US (and perhaps to socio-legal studies in the UK); there are nowadays active communities of empirical legal researchers in Australia, Canada, the Netherlands, Belgium, Spain, Germany, Israel and Japan.[16]

The presumed rise of ELR in Europe can be further illustrated by various conferences, workshops and communities that have taken place or have originated. In the Netherlands, for example, there has been a recent explosion of activities. In July 2016, the *Conference on Empirical Legal Studies Europe* (CELSE) was held in Amsterdam. There were conferences on ELR organised at the Dutch Supreme Court (December 2016) and by the Dutch Law and Society Association (VSR) (January 2017). In 2016, the *Empirical Legal Studies initiative* (ELSi), hosted by the *Ius Commune Research School*, was created, which organised a workshop on a starters kit for novices in the field of ELR (September 2017). Additionally, ELR workshops were held in Amsterdam (October 2016), Rotterdam (May 2017) and Leiden University (October 2017). At the European level, *NoLesLaw*, has emerged, a network of scholars 'who seek to increase the quality, scale, and relevance of legal empirical research'.[17] Furthermore, in May 2018 the second edition of the *Conference on Empirical Legal Studies Europe* (CELSE) was held at Leuven University.

Despite these events, the popularity of ELR in Europe is up for debate. Information on the use of empirical research in legal scholarship is lacking, and anecdotal evidence unreliable. Moreover, the fact that events are organised does not mean ELR is conducted more frequently. In this article, we address the knowledge gap about the prevalence of ELR in Europe by measuring the proportion of ELR articles as part of the number of journal articles published in a large number of European-based journals. Considering we do not find convincing support for the supposed rise of ELR, we seek an explanation for this finding, and subsequently provide directions for overcoming (if one desires to do so) the obstacles ELR currently faces.

This article is divided into five sections. In *Section 2* we discuss our hypotheses regarding the journal analysis. In *Section 3* we provide a theoretical framework of what ELR is and how to translate it into an empirical, observable concept in order to measure the popularity of ELR.

cism'; McAdams and Ulen, 'Introduction to the Symposium on Empirical and Experimental Methods in Law'. For examples of ELS research from before 1940, *see* Kritzer, 'Empirical Legal Studies Before 1940: A Bibliographic Essay'.

9. www.lawandsociety.org/history.html (last accessed 8 October 2018).
10. E. Mertz and M.C. Suchman, 'A New Legal Empiricism? Assessing ELS and NLR', 6 *Annual Review of Law and Social Science* (2010), at 555.
11. T. Eisenberg, 'Why Do Empirical Legal Scholarship?', 41 *San Diego Law Review* (2002) 1741, 1741.
12. *See*, for example, L. Epstein and G. King, 'The Rules of Inference', 69 *University of Chicago Law Review* 1 (2002).
13. M. Heise, 'The Importance of Being Empirical', 26 *Pepp L Rev* (1999) 807, 812.
14. R. van Gestel and H.-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', *EUI LAW 2011/05* (2011), at 2.
15. X.E. Kramer, 'Editorial: Empirical Legal Studies in Private International Law', *Nederlands Internationaal Privaatrecht* (2) (2015), at 195.
16. Cane and Kritzer, above n. 4; L. Epstein and A.D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014).
17. http://noleslaw.net (last accessed 8 October 2018).

The design of the empirical study and the results will subsequently be discussed in *Section 4*. Finally, *Section 5* will be dedicated to identifying and understanding the obstacles that explain why ELR is not more popular in Europe (and possibly beyond), and how to overcome these obstacles.

## 2 Hypotheses

In order to test whether ELR has become more prevalent in Europe, an analysis of journal articles published in legal journals was conducted. European-oriented journals were inspected for empirical articles focusing on a 10-year period (2008-2017).

We were also interested in other predictors for the percentage of empirical articles in European-based legal journals. For this, we anticipated that 'extra-legal' journals that indicate the presence of another discipline (*e.g.* criminology, economics) or whose focus go beyond the law (*e.g.* criminal justice as opposed to criminal law) are more inclined to publish empirical articles than 'traditional' legal journals ($H_1$). This relationship is partly tautological, as the reason some journals are 'extra-legal' is likely related to the fact that they include more empirical work than other journals. Nevertheless, 'extra-legal' journals also include non-empirical work, and not all extra-legal journals necessarily have an empirical focus.

Similarly, we expected that some topics would receive more empirical attention than other topics. Given the societal and political attention for crime-related topics, we particularly anticipated that journals focusing on criminal justice would contain a higher proportion of empirical work than journals focusing on other topics or domains ($H_2$). Furthermore, we expected that older journals would contain more empirical work than journals that were more recently established ($H_3$), because (a) older journals are more well established for a reason (*i.e.* to address trends) and (b) our impression was that the number of specialised journals have risen over time, with many of them having an important focus on legal practice as the market for legal practice seems larger than the market for legal academia.. For similar reasons, higher-ranked journals (as in: high-quality journals) were expected to contain a higher percentage of empirical work than lower-ranked journals ($H_4$).

Moreover, the article investigates the relation between the year in which the articles were published and the aforementioned predictors. We were interested in whether differences regarding the increase (or decrease) of the percentage of empirical articles depended on the scores of any of the other factors. More specifically, we hypothesised that:

- The increase in the proportion of empirical articles is lower for criminal justice journals than for other journals ($H_5$), since publishing empirical work has been more common in criminal justice journals than in other journals.
- For the same reason, the increase in the proportion of empirical articles is lower for extra-legal journals than for other legal journals ($H_{6a}$).
- Alternatively, the increase in the proportion of empirical articles is higher for extra-legal journals than for other legal journals ($H_{6b}$), because extra-legal journals may be more susceptible to an increased demand of empirical research than traditional legal journals, which are likely to be more conservative.
- The increase in the proportion of empirical articles is higher for older journals than for other legal journals ($H_7$), as older journals might adapt to the audience's needs and wants better than more recently established journals.
- For the same reason, the increase in the proportion of empirical articles is higher for high-ranked journals than for low-ranked journals ($H_8$).

## 3 What Is ELR?

Delineating ELR presupposes a notion of what is 'empirical' and what is 'legal'. With regard to the term 'legal', ELR presumes the presence of a legal element, a connection to the legal world. What is considered legal, non-legal or extra-legal, can vary substantially. A judge might mostly or exclusively find information relevant that determines the outcome of a case, whereas a policy maker may see more value in obtaining information to measure the impact of the law and whether the law should be changed. Similarly, a scholar with an instrumental view on the law might be less concerned with maintaining the law than a doctrinally oriented scholar who aims to preserve certain legal concepts and the relationships between those concepts. The differing perceptions about what is legally relevant in a given context impacts the view on what is considered 'legal' and can be subject to change over time. Consequently, discerning what is 'legal' and what is 'a legal journal' can be a daunting task. In this article, we avoid the issue of having to define what is 'legal' by sampling journals from a journal ranking that includes a variety of legal journals.

The answer to the question of when ELR can be considered *empirical* legal research is also not straightforward. One possibility is to define ELR in terms of the object of the research. In its most general sense, ELR may then be described as gathering knowledge by means of observing reality. The issue with such a definition, however, is that it leads to a problem of indistinguishability, as 'reality' includes laws, statutes, cases and legislative history. As a result, the analysis of case law, legislation and legislative history as commonly conducted or accepted in the legal domain has to be considered empirical under this definition.[18] Defining ELR in terms of gathering knowledge by means of observing reality would then become counterintuitive, as it contradicts the intu-

18. R. Korobkin, 'Empirical Scholarship in Contract Law: Possibilities and Pitfalls', *University of Illinois Law Review* 1033, (2002) at 1035 (fn 3).

ition that empirical research is different from doctrinal research.

Another attempt at describing ELR is to define it as systematically analysing the effects on the law (what the law 'does') on the basis of observations.[19] The problem of this definition is that it excludes empirical approaches to determine what the law is or what the law should be.[20] Alternatively, ELR can be defined in terms of the way it is conducted, that is, *how* a research problem is researched as opposed to *what* problem is researched. This type of definition is commonly used within the context of ELS. A limitation of ELS, however, is that it seems to mostly rely on statistical or quantitative methods. The quantitative focus was, for example, visible in the first European CELS version (CELSE), which was held June 2016: 'Empirical analysis is understood to encompass computer-based text-mining techniques and, more generally, any systematic approach to quantitative data analysis'.[21] Most of these definitions bear the disadvantage that forms of qualitative research are excluded, such as interviews or participant observation.[22]

In this article, we follow the approach of defining ELR in terms of how the research is conducted, but without limiting ourselves to quantitative methods. We therefore include, what is referred to as, qualitative studies. However, it may be argued that the way in which ELR is conducted is similar to how research is generally conducted. For example, the process of synthesising cases resembles hypothesis testing in the social sciences. Gionfriddo, using the hypothetical problem of deriving general rules from a number of court decisions in order to determine whether a child toy is considered dangerous, illustrates the role of hypothesis testing when synthesising cases to determine the law.[23] She develops and subsequently tests hypothesis about how the liability determination can be explained: is it the weight of the toy (light / heavy), the shape of the toy (round / angled / oval) or a combination of weight and shape?[24]

In specifying how ELR differs from non-ELR, consequently avoiding overlap with doctrinal (non-empirical) research, we distinguish ELR from non-ELR (*i.e.* legal research not being empirical) in terms of the research methods that are used or applied. In this respect, we discern between (1) methods of data collection and (2) methods of analysis. Methods of data collection that are considered ELR in this research include observation (*i.e.* gathering new data by observing behaviour) and questioning (*i.e.* collecting new data by means of asking questions, either through interviews, a questionnaire, or both), as these methods intend to measure reality but are not commonly applied in non-ELR. Regarding the use of already available data, for example data that were collected and available through archives, data that are documented as the outcomes of administrative processes, or data that follow from the technological developments in the form of 'Big Data', we focused on the method of analysis, meaning that we required the research to have made calculations (*e.g.* frequencies, means, coefficients). When qualitative data of others (not collected by the authors), such as interview data and questionnaire data, was re-analysed, we regarded this as empirical if the data itself was analysed and the analysis went beyond merely mentioning results reported by others.

Following the definition deployed in this article, the analysis of law, legislative history, jurisprudence and literature can be classified as either empirical or doctrinal research, depending on the way the material is studied. The same applies to scholarship that analysed case law. A textual interpretation of case law and a case law comparison will then be considered doctrinal legal research, whereas making calculations would be considered ELR.

Defining ELR as research that uses certain methods of data collection or analysis does not demarcate ELR from other types of research that have legal and empirical elements in them. ELR, for example, overlaps with various 'Law and …' movements such as Law and Psychology, Law and Economics, Law and Anthropology as well as with criminology, victimology and legal realism. We do not consider this an issue. The existence of such disciplines or movements and their proven success presumably contributed to the acceptance of ELR. We will therefore not discern between ELR and, for example, criminology, victimology, or Law and Economics research.

## 4 The Prevalence of ELR in European Journals

In order to test whether ELR has become more prevalent in Europe, an analysis of journal articles published in legal journals was conducted. To obtain a selection of European Law journals, we turned to the Washington & Lee Ranking (Law Journals: Submissions and Ranking, 2009-2016).[25] It is, to our knowledge, the only ranking that exists that encompasses many law journals across the world and that indicates which journals are US-based, European-based etc. The ranking seems biased

19. Diamond and Mueller, above n. 7; C.E. Schneider and L.E. Teitelbaum, 'Life's Golden Tree: Empirical Scholarship and American Law', *Utah Law Review* (2006), at 53; S.S. Diamond, 'Empirical Marine Life in Legal Waters: Clams, Dolphins, and Plankton', *Univ Ill Law Rev* (2002) at 803, 805.
20. 'Should' according to, for example, certain respondents or interviewees.
21. *See*http://acle.uva.nl/content/events/conferences/2016/06/conference-on-empirical-legal-studies-2016---21-and-22-june-2016.html (last accessed 8 October 2018).
22. For example, Heise, 'The Importance of Being Empirical', 810-11; C.A. Nard, 'Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession', 30 *Wake Forest Law Review* (1995), at 348-61.
23. J.K. Gionfriddo, 'Thinking Like a Laywer: The Heuristics of Case Synthesis', 40 *Texas Tech Law Review* 1 (2007) (defining case synthesis in fn 1).
24. *Ibid*., 31.
25. https://managementtools4.wlu.edu/LawJournals (last accessed 8 October 2018). The original URL as it was used for this article is no longer available.

towards US journals,[26] but by filtering out those journals and by selecting the top-100 journals according to the 2016 ranking ($n = 111$),[27] we expected our sample to include most of the important European-based journals. Indeed, highly respected journals such as *Modern Law Review*, *European Law Review and Oxford Journal of Legal Studies* appeared on the list.

Subsequently, all selected journals that were not EU-based (geographically), and journals whose titles indicated a non-European focus (*e.g. African Journal of International and Comparative Law*) were excluded from the list of journals to be studied, leaving a remainder of 84 journals. Of those journals, five were not accessible full-text to us and were consequently not examined. Additionally, one journal only provided 'key points', but no abstracts. Because it was unclear who produced the 'key points' and what they reflect (conclusions or also other information), this journal was not analysed. We decided to analyse all issues for the remaining 78 journals in the 2008-2017 period. Due to reasons of feasibility, the number of empirical and total articles were counted per issue, and later aggregated so that the data set included the number of empirical articles and the total number of articles per year and per journal per year.

Only research articles were inspected. Editorials, introductions, case notes, book reviews et cetera, were not included in the count. The strategy deployed to determine whether an article qualified as 'empirical', using the aforementioned guidelines, was to first look at the abstract. If there was any indication in the abstract that the article could contain empirical research, the full-text of the article was inspected. Articles that lacked an abstract were not inspected and excluded from the study.

Upon examination of the abstract, the starting point was to ascertain whether we recognised the described methodology as empirical. For example, abstracts that discussed conducting interviews, questionnaires or using statistics were assumed to fall within the definition of ELR and were only marginally checked. In comparison, articles that labelled their work 'empirical' or as a 'case study', were examined more thoroughly by inspecting the full-text version. To illustrate, we take the article by Jennifer Beard and Gregor Noll in the journal Social & Legal Studies on credibility and the sovereign of refugee status determination. The abstract describes that '[e]mpirically, the authors focus on the credibility assessment informing the refugee determination procedure operated by the Office of the UN High Commissioner for Refugees'. Although the authors describe their work as empirical, there is no evidence of data collection in terms of observation, survey or analysis of available data in the way described above. This article was therefore not counted as 'empirical'.

26. For example, the prestigious Modern Law Review is ranked below the Stanford Journal of Animal Law and Policy (source: Washington and Lee Law Journals Ranking, https://managementtools4.wlu.edu/LawJournals, Combined score, Year 2017). Search conducted on 13 August 2018.

27. A number of journals ranked equal at rank 100.

The journals were coded by the authors, with each journal being analysed by one coder. Prior to the research, the coding scheme was constructed and tested by applying it to a number of issues, until the coders were under the impression that the agreement levels were high. The information on journal age (*i.e.* year of first publication) was collected from the websites of the various journals. Journal ranks were obtained from the Washington & Lee Ranking (after filtering out the non-European journals). The ranking is not perfect, yet intuitively correct, at least to an extent, as journals such as the *Common Market Law Review* and the *German Law Journal* are more prestigious than the *International Journal of the Legal Profession and Arbitration* in both the ranking as in the authors' perception.

Each journal was coded independently by two coders in order to determine the area of law that the journals focus on (*e.g.* criminal justice) and to determine the journals being legal or extra-legal. The coding for both aforementioned variables was done based on the journal title (not based on its content or website description). Inter-coder reliability was moderate (legal/extra-legal; 75% agreement; Cohen's $k = .57$, $p < .001$) to good (area of law; 89% agreement; Cohen's $k = .86$, $p < .001$). The analyses controlled for these influences when testing a certain variable in order to rule out 'noise' from one or more of the variables.

A Kolmogorov-Smirnov test indicates that the variable that measures the percentage of empirical articles does not follow a normal distribution [$D(701) = .276$, $p < 0.001$]. We nevertheless proceeded with conducting linear regression analysis, because ordinary least square regression analysis is robust for a violation of the normality assumption in case of a large sample size.

We first examined whether a rise of empirical articles can be observed in the 2008-2017 period. For this, we focused on the percentage of empirical articles per year, compared to the total number of articles. Percentages are preferred over the total number of empirical articles per year, since an increase in the number of empirical articles may have coincided with an increase of the total number of articles.

The percentages are reported in two ways. One method of calculation is to divide the total number of empirical articles per year by the total number of articles in a given year. The downside of this method of calculation is that journals or issues with a high number of articles (empirical and / or total) are overrepresented. To prevent this, one can calculate the percentage of empirical articles per year per journal, and subsequently take the average of journal percentages for each year. Table 1 reports the results of the two calculation methods.

Both calculation methods suggest no increase in the percentage of empirical articles over the years. The percentages fluctuate between 2008 and 2017, with both high and low peaks throughout the years. Focusing on the percentage empirical articles per year, the results reveal peaks (low) in 2012 and (high) in 2010 and 2017. When concentrating on the average of journal percentages,

*Table 1 Empirical Articles per Year, Frequencies and Percentages*

| Year | Number of Articles | Number of Empirical Articles | Percentage Empirical Articles | Average of Percentages Empirical Articles per Journal per Year |
|---|---|---|---|---|
| 2008 | 1460 | 220 | 15.1 | 12.5 |
| 2009 | 1599 | 232 | 14.5 | 12.3 |
| 2010 | 1749 | 305 | 17.4 | 11.9 |
| 2011 | 1760 | 264 | 14.8 | 13.1 |
| 2012 | 1948 | 275 | 14.1 | 11.3 |
| 2013 | 1841 | 289 | 15.7 | 11.9 |
| 2014 | 1956 | 313 | 16.0 | 12.1 |
| 2015 | 2010 | 314 | 15.6 | 10.9 |
| 2016 | 2072 | 333 | 16.1 | 12.3 |
| 2017 | 2066 | 368 | 17.8 | 13.1 |

peaks (low) can be observed in 2015 and (high) 2011 and 2017.

To explore whether the fluctuations are indeed random or coincidental, we conducted a regression analysis where we regressed the percentage empirical articles per journal (*Percentage*) on the year in which the articles were published (*Publication Year*). The results provide further support of no change of the percentage empirical articles over the years [$R^2$ = .00, $F(1, 669)$ = .00, $p$ = .98] (Table 2, Model 1). Similar results are obtained in a model that includes several other variables, including journal rank, the journal being legal or extra-legal, the year in which the journal published its first issue, and several areas of the law [$b$ = .06, $p$ = .79] (Table 2, Model 2).



The overall results show no increase (or decrease), whereas this pattern might be different for individual journals. To test whether an increase (or decrease) could be observed on the journal level, we ran separate analyses for each journal individually.

Focusing on statistically significant effects only, the results suggest that especially the journals *Regulation & Governance*, [$b$ = 4.71, $p$ = .03], the *International Review of Law and Economics* [$b$ = 2.85, $p$ = .03] and *The British Journal of Criminology* [$b$ = 2.20, $p$ < .01] saw an increase in empirical articles in the 2008-2017 period, and to a lesser extent *Crime & Delinquency* [$b$ = .41, $p$ < .02] and the *Journal of International Economic Law* [$b$ = 1.47, $p$ = .04]. In contrast, a decrease was observed for the *Journal of International Criminal Justice* [$b$ = -.45, $p$ = .02] and the *European Company and Financial Law Review* [$b$ = -1.15, $p$ = .03]. The *International Journal of Human Rights* also showed a decrease [$b$ = -1.11, $p$ = . 05], with the effect having a significance score of .05 after rounding (yet higher than .05).

As expected, journal characteristics also matter, as effects were observed for whether the journal was legal/extra-legal, the age of the journal (year of first publication), the area of the law and journal rank. When examining the effect of the journal being extra-legal or not on the percentage of empirical articles, it was found that, while controlling for other variables, the percentage of empirical articles is 12.0% [$b$ = 12.04, $p$ < .001] higher for extra-legal journals than for legal journals (Table 2, Model 2) (H1 confirmed). Descriptive statistics reveal that the average percentage of empirical articles per journal is 4.6% for legal journals, against 18.9% for extra-legal journals.

The area of the law also turned out to be an important predictor of the percentage of empirical articles published in a journal (Table 2, Model 2). Compared to journals ranked in the 'other' category (mostly 'traditional' law journals such as *The Modern Law Review, Oxford Journal of Legal Studies* and *European Law Journal*), journals in the field of criminal justice turn out to be 25% more likely to contain empirical articles than the 'other' journals [$b$ = 26.73, $p$ < .001] (controlling for other variables) (H2 confirmed). Additionally, journals dedicated to environmental issues [$b$ = 6.23, $p$ < .05] or that have a business / economic / industry / intellectual property focus [$b$ = 5.40, $p$ < .01] are more likely to contain empirical work (controlling for other variables).

A negative effect was found for journal age [$b$ = -.08, $p$ < .01] (Table 2, Model 2) (controlling for other variables), indicating that older journals are not more likely to publish empirical articles than journals that were established more recently (H3 confirmed). It should be noted that the coefficient is negative because in our data set more recent journals have a higher value (*e.g.* 2016) than older journals (*e.g.* 1980). Furthermore, higher-

*Table 2 Regression Results of Effects of Predictors on the Percentage of Empirical Articles*

| Variable | (Model 1) Effect on Percentage | (Model 2) Effect on Percentage | (Model 3) Effect on Percentage |
|---|---|---|---|
| Publication Year | -.01 (.27) | .06 (.23) | .20* (.10) |
| Year of First Publication | | -.08** (.03) | |
| Journal Rank | | -.05** (.02) | |
| Extra-Legal (ref. cat. Legal) | | 12.04*** (1.54) | |
| Area: Criminal Justice (ref. cat. Not Criminal Justice) | | 26.73*** (2.10) | |
| Area: International Law / Transnational Law / Fundamental Rights / Humanitarian / Comparative (ref. cat. Not International Law / Transnational Law / Fundamental Rights / Humanitarian / Comparative Law) | | 1.75 (1.94) | |
| Area: Constitutional Law (ref. cat. Not Constitutional Law) | | .43 (4.15) | |
| Area: European Law (ref. cat. Not European Law) | | -.85 (3.48) | |
| Area: Environmental (ref. cat. Not Environmental) | | 6.23* (2.79) | |
| Area: Business / Economic / Industry / IP (ref. cat. Other) | | 5.40** (1.92) | |
| Included Control Variables | | | |
| Journal | NO | NO | YES |
| *N* | 701 | 701 | 701 |
| $R^2$ | .00 | .31 | .89 |
| *F* | .00 | 31.12 | 65.15 |

Notes: Standard errors in parentheses. Missing values are excluded. *$p < .05$; **$p < .01$; ***$p < .001$.

*Table 3 Regression Results of Effects of Year on the Percentage of Empirical Articles, per Journal*

| Variable | (1) International Review of Law and Economics | (2) Regulation & Governance | (3) Crime & Delinquency | (4) Journal of International Criminal Justice | (5) Journal of International Economic Law | (6) European Company and Financial Law Review | (7) The British Journal of Criminology | (8) The International Journal of Human Rights |
|---|---|---|---|---|---|---|---|---|
| Year | 2.85 (1.04)* | 4.71 (1.77)* | .41 (.15)* | -.45 (.15)* | 1.47 (.59)* | -1.15 (.44)* | 2.20 (.46)** | -1.11 (.48)† |
| *N* | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| $R^2$ | .48 | .47 | .50 | .52 | .44 | .46 | .74 | .40 |
| *F* | 7.45 | 7.06 | 7.98 | 8.57 | 6.30 | 6.87 | 22.68 | 5.31 |

Notes: Standard errors in parentheses. Missing values are excluded. *$p$ <.05; **$p$ <.01; ***$p$ <.001; † < .10. The International Journal of Human Rights revealed a significance score .05 after rounding, but higher than .05.

ranked journals (*i.e.* more prestigious journals) are associated with a higher percentage of empirical articles [$b$ = -.05, $p < .01$] (more prestigious journals had lower values in the data set than less-prestigious journals), controlling for other variables (Table 2, Model 2) (H4 confirmed). Also here it should be noted that the coefficient is negative because in our data set a journal with a high value on the rank variable (*e.g.* 84) indicated that the journal was less prestigious than a journal with a lower value on the rank variable (*e.g.* 4).

Similar results were obtained when each variable was tested separately, except for journal rank (significant in the full model, not when tested separately), the variable that captures journals specialising in European Law (not

significant in the full model, significant when tested separately) and the variable that captures whether the journal has a focus on environmental law (significant in the full model, not significant when tested separately). Additional analysis reveals a relationship between journal rank and whether a journal is legal or extra-legal (legal journals are ranked better than extra-legal journals): The effect of journal rank on the percentage of empirical articles depends on whether the journal is legal or extra-legal [$b = .16$, $p < .001$], which explains why journal rank is significant in the model that includes the legal/extra-legal variable, but not in a model without that variable. As to the European Law and environmental journals, the differences may be explained by their profile (legal/extra-legal, rank or year of first publication) or simply be the result of coincidence.

Furthermore, it may be that although the proportion of empirical articles has not increased over the years, the total number of empirical articles has. However, similar results were found when the total number of empirical articles is used as dependent variable instead of the proportion of empirical articles. Similar results were also obtained when excluding the journals that did reveal a statistically significant increase or decrease over time, however with the effect of journal age and journal rank becoming statistically insignificant. Apparently, the journals that were excluded filter out some of the age and rank effects.

Interaction effects between the year in which the articles were published on the one hand and the area of law covered by the journal, whether the journal is legal or extra-legal, the age of the journal and journal rank on the other hand were tested, but no statistically significant effects were found (H5-H8 not confirmed). The lack of interaction effects suggests that the relationship between the percentage of empirical articles and the year in which it was published is not different for legal journals compared to extra-legal journals, for journals that focus on a specific area of the law, for journals that are older compared to more recent journals, and for journals with a different rank. There is simply no increase of the percentage of empirical articles observed, also not for subcategories.

The only instance an increase in the 2008-2017 period is observed, is when the percentage of empirical articles is regressed on the journal (*i.e.* the name of the journal, represented in the data set by a unique number) and the year in which the articles were published. The results reveal a positive effect of the year in which the articles were published on the percentage of empirical articles ($b = .20$, $p = .04$) (Table 2, Model 3), suggesting a slight increase of the percentage of empirical articles over time (holding constant the journals in which the articles were published).

The relationship between the year and the percentage of empirical articles when controlling for the journals, taken together with the finding that older journals are more likely to publish empirical articles than more recent journals, raises the question in what other ways journals may differ, that is in what other ways than the ones already tested. Our data set did not provide us with any clues, nor could we identify other variables that we could collect that would explain this finding. Regardless, the effect sizes are small, meaning that the possible increase of the percentage of empirical articles is not substantial, even if the effect is not merely coincidence.

It is important to recognise the limitations when interpreting the empirical study we conducted. We cannot exclude possible selection bias resulting from the ranking that we used to include and exclude journals in the analysis. Furthermore, we only focus on journal articles in a specific period, not on other publications and / or in different periods. For example, a sample that would include empirical articles in the last 50 years could show a rise. As to publication type, it is not clear why other types of publications would show a different pattern than journal articles. Moreover, the articles were only further inspected for empirical research when an abstract gave rise to that. This means we removed false positives (false alarms, *i.e.* no empirical work after inspecting the full-text version), but not false negatives (empirical work in the articles that is overlooked because the abstract did not provide any cues for empirical work). Additionally, even though we controlled for journal rank in the analyses, the decision to not analyse journals where we had no access to the full-text creates possible selection bias as well, as we might only have full-text access to the 'better' journals (and those journals contain more empirical work). The journals that lacked full-text access had were ranked 21, 47, 58, 62, 79 and 95, respectively.

## 5 Increasing the Use and Popularity of ELR

The results do not suggest an increase of the percentage of ELR articles in the 2008-2017 period that was researched. This begs the question as to why ELR is seemingly becoming more popular but not resulting in more empirical research. In the following, we discuss three important factors that are likely to impact the success of ELR: information, training and topic choice.[28] We concentrate on factors empirical legal researchers and the legal discipline have control over, since it is our belief that these factors are the easiest (or least difficult) to influence.

It should be noted that the popularity and use of ELR is also dependent on other important factors, the availability of research funds being an obvious one. However, the legal community exercises little control over funding, and the demand for more research funding is generally not effective. Furthermore, even though the interventions we discuss below will undoubtedly not have

28. The following is based on the work of G. van Dijck, 'Naar een succesformule voor empirisch-juridisch onderzoek'. 42 *Justitiële Verkenningen* 29 (2016).

the exact same impact in different jurisdictions due to how law and legal research is perceived, organised and funded differently, we believe the interventions proposed below can be applied universally. We therefore mostly refrain from comparing whether or why interventions in Europe might work differently than in the US. Supposing we were to identify possible differences such as the legal academic community in the US being more competitive or the law being perceived as instrumental in the US in contrast to an autonomous system that contains values and experiences in Europe, these inferences would be mostly based on impressions and generalisations that may be unwarranted.

### 5.1 Information

Empirical research presupposes the availability of data. Although data collection is part of the process of conducting empirical legal research, the existence of databases and a proper infrastructure can boost ELR, as the availability of data makes it more attractive (easier) to gather and subsequently analyse information. While data collection may not be an important problem for relatively small data sets, it is currently difficult in legal research to apply, for example, Big Data analytics due to the lack of an infrastructure that allows for such analysis.

The importance of the availability of data sets can be illustrated by means of network analysis. Network analysis, in a legal context, can be used as a citation analysis that allows testing how authoritative precedents are:[29] decisions that are cited more frequently are presumed to be more important than decisions cited less frequently (qualitative data may also be used to conduct network analysis, but for the sake of the example we focus on citation networks). Network analysis studies have emerged in the legal field.[30] Network analysis, among other things, allows determining relevant sub-topics of a particular area of the law and identifying central precedents within the network or within a sub-topic.[31]

In order to conduct network analysis, the data used to conduct this type of analysis need to be processed and made available in a certain (linked data) format so that computational analysis can be applied. This includes the automatic recognition of citations in order to prevent the researcher to have to manually go through all relevant cases (sometimes more than 10,000) and to have to write down all citations. Although legal information such as legislation and case law is readily available, it is not ready for network analysis or other types of computational analysis. However, data preparation for these types of analysis can be time-consuming for an individual researcher and may require technological knowledge that most legal researchers lack.

The network analysis example signals that without proper information it becomes difficult to conduct ELR. Consequently, the success of ELR will to a large extent depend on the information that is available or will be made available. Access to all case law and the publication of decisions of (dispute) commissions and disciplinary proceedings is a good start, but further action will be required, for example by making data sets accessible, regardless of whether they contain quantitative or qualitative data. Empirical legal researchers may want to go beyond accessibility, and think about reusability when composing a data set, that is composing data sets that may be used beyond the publications of the researcher who collected the data.

Of course, it will not be possible to capture all possibly relevant types of information. For instance, parties often intentionally opt for non-court solutions to ensure secrecy in alternative dispute resolution (ADR). However, even having some legal data sets (*e.g.* a case law database with certain variables) could already give a significant boost to ELR. Empirical legal researchers should therefore strive to not only conduct ELR, but also to build relevant data sets and infrastructures that allow for conducting ELR.

Additionally, researchers need not only to receive information – they also need to provide for it. They need to outline what can be expected of ELR in order to prevent creating false expectations. Empirical research, as any research, is incremental. For example, a single empirical study will most likely not determine whether the newly broadened right of victim's to speak in court will have positive effects on the victim's recovery and their satisfaction with the outcome. It can sometimes take many years of research before a clear answer is provided for a question. An example of this are the empirical studies on doctors and liability that have been conducted for decades, but only now making it apparent that the influence is more limited than feared.[32] Nevertheless, the results may change as society changes and can result in the need for new research and consequently new outcomes. For instance, if doctors were no longer insured for damages claims, such claims might affect their behaviour to a greater extent. Consequently, not only does information need to be produced, the community of empirical legal researchers should provide information about what ELR can and cannot do.

ELR may therefore gain popularity if researchers would educate their peers in how to conduct and interpret empirical results. This particularly applies to ELR that relies on statistical analysis (e.g. regression analysis) of the collected data.[33] This type of empirical research, with its many numbers, coefficients and jargon, can be difficult to follow for legal scholars not trained in empir-

29. J.H. Fowler and others, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court', 15 *Political Analysis* 324 (2007).
30. R. Whalen, 'Legal Networks: The Promises and Challenges of Legal Network Analysis', 2 *Michigan State Law Review* 539 (2016), at 547ff (providing a brief overview of the development of network analysis in the legal domain).
31. For more information on network analysis, *see* van Dijck, *MoneyLaw (and beyond)*.
32. For example, G. van Dijck, 'Should Physicians Fear the Tort Claim? Reviewing Empirical Evidence', 2015 *JETL* 282 (2015) (reviewing the evidence of the existence of defensive medicine).
33. Mertz and Suchman, above n. 10, at 555-79.

ical research, and it may deter those scholars from conducting ELR themselves. The challenge here for empirical legal researchers is to conduct the research without losing sight of the fact that unskilled empiricists may also be interested in the results of the research, but that they may be discouraged by seemingly incomprehensible analyses. Only in this manner can ELR be introduced into the 'mainstream' of legal academics, where the community is composed of lawyers, judges and legislators who more often than not lack any empirical knowledge. This community therefore needs to be informed first of what ELR actually encompasses, and second, how the research results need to be interpreted. This informative element can take place through handbooks, reviews and websites that ideally would also provide for courses to develop and update ELR skills, but it can also be achieved in individual publications that explain the analyses for novices in an understandable way.

### 5.2 Training

Training is evidently important. Without the necessary skills, it is impossible to properly conduct ELR. In practice, two main strategies can be observed for obtaining the necessary knowledge and skills to conduct ELR. One strategy is to rely on researchers from another discipline or on researchers who received training in empirical research methods in addition to legal training. The idea behind this strategy is straightforward: the involvement of empirically trained researchers will lead to more ELR.



That importing empirical knowledge leads to more ELR, is supported by a systematic review conducted in the Netherlands. Elbers investigated how many Ph.D. researchers who defended their thesis at a Dutch law faculty in 2015 have collected empirical data, what topic they investigated, which method they used and what background they have.[34] She found that ELR is mostly conducted by those with a degree in another discipline than the law. The study reported that 33% of the PhD theses could be labelled as ELR, with the majority of the studies conducted by researchers who have a social science degree. Some of the (very few) lawyers collecting empirical data reportedly did not aim to conduct ELS according to themselves, even though their research questions could easily be qualified as empirical.

Following this import strategy, many US law faculties have tried to bridge the gap between the legal world and the empirical world by hiring researchers who have a legal diploma (JD) as well as a social science background (PhD). Even within the law faculties comprising 25% of the lowest ranked quartile of American law faculties, 11% of staff have completed a PhD in a different discipline than law.[35] In 2016, LoPucki predicted that JD-PhD hiring in the US will continue to increase at its historical rate of 2.3% of faculty hired per year, and that by 2028 the proportion with that combined background will reach 50%.

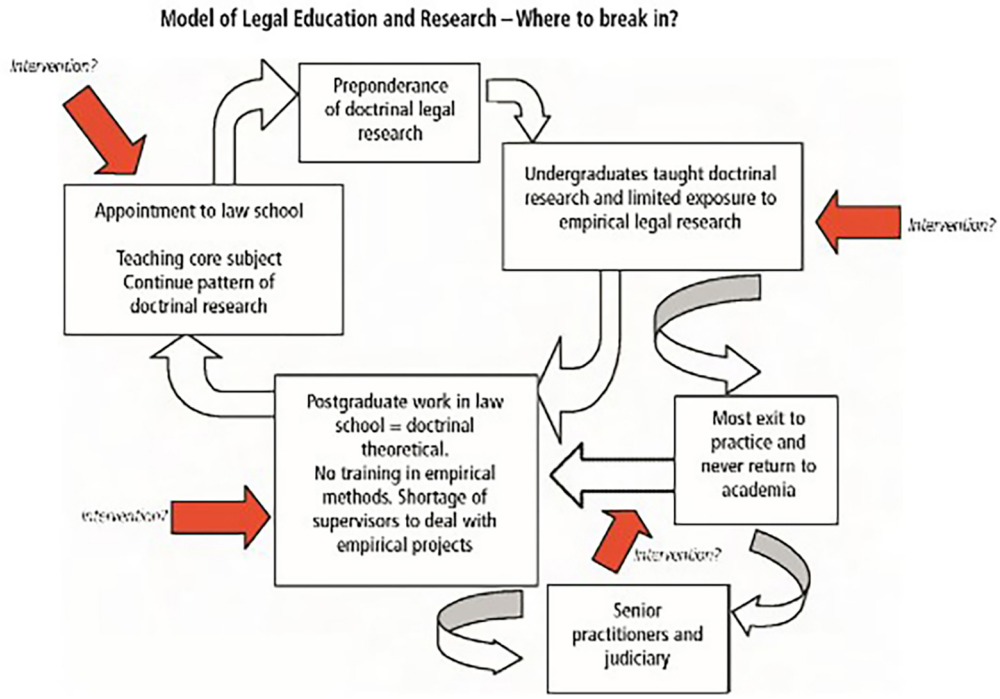
LoPucki argues that the advantage of this development is that researchers will have experience in empirical research. The disadvantage, he claims, will be that they lack experience in the judicial profession, resulting in studies that are less interesting for the legal community. By hiring more researchers with a social sciences background, legally relevant questions may be ignored. This phenomenon is supported by recent research by LoPucki, who compared empirical legal studies conducted by legal scholars without a PhD in another discipline (referred to from here on out as: the Legal), with those with a PhD in another discipline (referred to from here on out as: the Legal+). His research demonstrates that the empirical research of the Legal focused more on judicial questions and judicial sources (such as case law), in comparison with the Legal+.[36] The Legal also more frequently use existing data, whereas the Legal+ create new data sets, which LoPucki considers a sign of the Legal+ being unfamiliar with judicial information and how to use it. Finally, his research concluded that the Legal+, in comparison with the Legal, collaborates more frequently with other researchers who also have a PhD.

The second strategy is to teach empirical legal research skills from within, that is to have legally (doctrinally) trained scholars who enhance their knowledge and skills regarding ELR. This, however, is easier said than done. In 2004, the Nuffield Foundation funded a major inquiry into the UK's capacity to carry out research on how law works in the real world. The central issue it sought to address was how the capacity to undertake empirical research in law could be expanded.[37] Already then, the inquiry was initiated as a result of the widespread concern about a shortage of capacity to undertake empirical research in civil law and justice and that national demand for ELR could not be met within the current capacity. In order to handle the continuing 'crisis in the capacity of UK universities to undertake empirical legal research', the foundation provided recommendations, particularly in the area of legal scholarship culture in education. Recommendations included the funding of post-doctoral and special ELR fellowships, investment in interdisciplinary centres, enhancing the undergraduate curriculum to include more empirical content and the establishment of mid-career cross-disciplinary bursaries to encourage existing academics, from law or social sciences, to re-tool with specialist skills in ELR. Figure 1 demonstrates the difficulties associated with breaking the traditional structure of legal education in order to introduce ELR.

Effective interventions to stimulate ELR are difficult to realise. Bar associations may set requirements that leave

34. N.A. Elbers, 'Empirisch-juridisch onderzoek – toekomstmuziek of werkelijkheid?', 6 *Justitiële Verkenningen* 43 (2016).
35. L.M. LoPucki, 'Dawn of the Discipline-Based Law Faculty', *65 Journal of Legal Education* (2016).
36. L.M. LoPucki, 'Disciplinary Legal Empiricism', 76 *Maryland Law Review* (2017).
37. Nuffield Foundation, Nuffield Inquiry on Empirical Legal Research – Law in the Real World, 2004.

*Figure 1 Interventions to Promote ELR*




law faculties with little flexibility as to how to design their curricula. For example, in order to qualify as a Dutch lawyer, the Dutch Bar Association (*Nederlandse Orde van Advocaten*) has set out mandatory courses deemed to be the most important for a student's legal education. Students are required to take courses in private law, civil procedure, substantive and procedural criminal law, government and administrative law.[38] Most universities supplement these substantive courses with legal skills and method courses, such as academic writing, rather than with courses on ELR methods. In general, the curricula may be fixed and inflexible, leaving little room for courses on ELR. Most legal courses then do not incorporate ELR material into their teaching programmes, resulting in undergraduates having few opportunities to read ELR, much less develop their own skills in empirical data collection.[39] Additionally, law students' perception may become that empirical legal studies is marginal and irrelevant.[40] The same applies to the post-graduate phase.

Furthermore, teachers rightfully teach what they are good at, which is often what they were taught themselves. Because teachers have little incentive to obtain ELR expertise, the self-replicating effect remains in full force. Without empirically trained teachers, ELR cannot be taught properly. The lack of widely accessible and appealing literature also does not help in overcoming the lack of expertise.[41]

38. https://www.advocatenorde.nl/document/20160322-convenant-civiel-effect-1 (last accessed 8 October 2018).
39. Cane and Kritzer, above n. 4.
40. *Ibid.*, 1039.
41. The first law school textbook intended specifically for courses on ELR, R.M. Lawless, J.K. Robbennolt and T.S. Ulen, *Empirical Methods in Law*, Wolters Kluwer, Law and Business 2009, appeared only in late 2009.

Even if the decision was made to include ELR methods as a course in the curriculum, there may still be a problem with the student expectations. Already at the beginning of their study, students have their own expectations of what law school will entail, and those expectations do not necessarily match with what the law school sees as its mission.[42] Given the media and the history of legal education, most students are likely to enter university with the belief that it will be a very dogmatic, text based education focusing on the analysis of words.[43] The farther removed a methods course is from this expectation, the more reluctant and less engaged students may be to participate in it. It is thus harder to justify spending time on a course that students will, in their opinion, seldom use in their future career.

From the above it becomes clear that the embedding of ELR in law schools requires some top-down steering from the administrators to intervene in the self-replicating cycle. One solution is to simply incorporate ELR courses or elements in existing courses, but more creative solutions exist as well. For example, funding schemes may be designed that require applicants to collaborate with other faculties or to provide for training and workshops in addition to research output.

### 5.3 Topic Choice

If ELR is to be recognised as relevant, selecting proper research topics is essential. In order for the legal community – scholars and practitioners – to understand the relevance of conducting empirical studies, ELR needs to somehow relate to what 'the' legal community considers a legal problem.

42. Cane and Kritzer, above n. 4.
43. *Ibid.*

The question of what is considered a legal problem does not have straightforward answer. Convincing evidence on the matter is lacking, and the legal community may simply be too diverse to provide a simple answer to the question. What is perceived to be legally relevant may depend on the community in terms of geography (*i.e.* country, jurisdiction), time and the type of community (*e.g.* practitioners, doctrinal scholars, empirical legal scholars). What is considered 'legal' to one can be seen as 'extra-legal' or 'non-legal' to another. For example, ELR in the US is to an important extent conducted by economists, political scientists and psychologists.[44] The variety of the tools and methods used in the research can vary considerably. To make some generalisations: the economists use financial econometric tools to answer questions of corporate law, the political scientists test game theory models of court decision making, and the psychologists conduct experiments on negotiation, courtroom perception and juries. Researchers from another discipline than the legal discipline may ask questions that are of limited relevance to 'the' legal community, they may be interested in other aspects than legal scholars or legal practitioners, or they may overlook legal nuances, allowing the legal community to dismiss the research as being 'non-legal'.

The discrepancy between the researched topic, and the corresponding legal reality is evidenced by publications in 'flagship journals' such as *JELS* and *LSR*. For some studies, it may be asked what value society, and in particular the legal realm, can obtain from such research. What can a legal practitioner learn from the analysis of kinship and its relationship with the protection of private property in China, or from research on how activists in Myanmar have ensured greater attention to minority groups in the country? The direct relevance of these studies seems minimal, at least to legal practitioners. This does not mean that the research is useless. In fact, many of these studies combined can lead to a better understanding of how fundamental rights can be enforced. However, if these types of studies constitute mainstream ELR studies, the research will only ever be read marginally, as many in the legal community will not relate to the issue that was researched, particularly in legal communities that have a rather doctrinal or normative focus. Consequently, ELR needs, at least in part, to focus on topics that other legal researchers (and perhaps practitioners) are interested in. Regardless of whether the legal discipline is perceived as doctrinal, normative, instrumental et cetera, there will always be a need to know how the law works, what its effects are, and what impact a new or reformed rule may have. It is then that ELR may enhance legal analysis by providing empirical input reasoning, by testing assumptions, or by evaluating reforms.

Nevertheless, it can sometimes be advisable *not* to engage in ELR that is doctrinally relevant. Following a case where a married woman brought her partner to court when she fell out of a hammock placed in their private garden and suffered damage, the doctrinally relevant question may arise if the granting of such claims results in a premium increase of liability insurance.[45] While this is an empirical question that is arguably relevant for evaluating the decision, answering the question is time-consuming and complex in comparison to the knowledge to be gained. Is the answer important enough to spend years of ELR studying it? In selecting the topic, consideration should be given to all of these factors. A balancing act must therefore be done between the expected costs and the expected benefits.

## 6 Conclusion

The empirical results reveal the following:

- An increase was only found for a small number of journals, with a small number of other journals showing a decrease over time. Overall, there is no increase of the proportion of empirical articles over the 2008-2017 period.
- The percentage of empirical articles is higher for extra-legal journals than for legal journals. The average proportion of empirical articles per journal is 4.6% for legal journals, against 18.9% for extra-legal journals, with the former percentage showing resemblance with similar research conducted in the US.[46]
- Criminal justice journals, environmental journals and economically oriented journals are more likely to publish empirical articles than other journals.
- Higher-ranked journals (*i.e.* more prestigious journals) are more likely to publish empirical articles than lower-ranked journals.
- Older journals are more likely to publish empirical work than younger journals, but not at an increasing rate.
- A journal being legal/extra-legal, a journal in a specific field, the rank of the journal, or the age of the journal does not make it more (or less) likely that the journal will publish empirical articles at an increasing (or decreasing) rate.

The claim that the proportion of empirical articles has increased over the years is doubtful at best. In order to increase the proportion of ELR in publication outlets, three factors relevant to the success of ELR were discussed: topic choice, information and training. For interest in empirical legal studies to surge, the research needs to be seen as relevant for the legal community, and needs to be made understandable, for practitioners and scholars alike, including those with a limited background in the area. The acceptance and popularity of ELR is thereby not limited to enlightening and training legal scholars, but also extends to knowing how to select the appropriate topic and to building databases or data sets that legal scholars can use.

44. Mertz and Suchman, above n. 10, at 555.

45. Dutch Supreme Court 8 October 2010, ECLI:NL:HR:2010:BM6095.

46. Diamond and Mueller, above n. 7, at 581, 587 (reporting 5.7% for US law review articles).

# Appendix: Journal List

| Journal | Rank |
|---|---|
| *European Journal of International law* | 2 |
| *Journal of Competition Law and Economics* | 3 |
| *German Law Journal* | 4 |
| *Journal of International Criminal Justice* | 5 |
| *International Journal of Constitutional Law* | 6 |
| *Journal of International Economic Law* | 7 |
| *International and Comparative Law Quarterly* | 11 |
| *Oxford Journal of Legal Studies* | 12 |
| *Human Rights Law Review* | 13 |
| *Leiden Journal of International Law* | 14 |
| *Common Market Law Review* | 15 |
| *Journal of International Dispute Settlement* | 15 |
| *International Review of Law and Economics* | 17 |
| *International Review of the Red Cross* | 17 |
| *Regulation & Governance* | 19 |
| *(Yearbook of International Humanitarian Law)* | 21 |
| *Modern Law Review* | 23 |
| *Journal of Conflict and Security Law* | 26 |
| *Law and Philosophy* | 27 |
| *European Law Review* | 29 |
| *International Criminal Law Review* | 29 |
| *International Journal of Law & Information Technology* | 29 |
| *European Law Journal* | 35 |
| *Journal of Law and Society* | 35 |
| *Climate Law* | 38 |
| *Journal of Environmental Law* | 38 |
| *Law, Probability and Risk* | 38 |
| *Criminal Law and Philosophy* | 42 |
| *British Journal of Criminology* | 43 |
| *Carbon & Climate Law Review* | 43 |
| *International Journal of Law, Policy and the Family* | 43 |
| *Transnational Environmental Law* | 43 |
| *European Business Organization Law Review* | 47 |
| *European Journal of Risk Regulation* | 47 |

| Journal | Rank |
|---|---|
| *Journal of Criminal Justice* | 47 |
| *(Journal of Private International Law)* | 47 |
| *Hague Journal on the Rule of Law* | 51 |
| *International Journal of Refugee Law* | 51 |
| *Crime & Delinquency* | 53 |
| *European Constitutional Law Review* | 53 |
| *Transnational Legal Theory* | 53 |
| *Utrecht Law Review* | 53 |
| *Arbitration International* | 58 |
| *Cambridge Law Journal* | 58 |
| *(Journal of Corporate Law Studies)* | 58 |
| *Business and Human Rights Journal* | 62 |
| *(Capital Markets Law Journal)* | 62 |
| *Erasmus Law Review* | 62 |
| *International Journal of Transitional Justice* | 62 |
| *Journal of Energy & Natural Resources Law (only accessible from 2008-2013)* | 62 |
| *Law Quarterly Review* | 62 |
| *Oxford Journal of Law and Religion* | 62 |
| *Criminal Law Forum* | 70 |
| *International Organizations Law Review* | 70 |
| *Journal of World Intellectual Property* | 70 |
| *Netherlands Yearbook of International Law* | 70 |
| *Nordic Journal of International Law* | 70 |
| *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* | 70 |
| *World Trade Review* | 70 |
| *(Business Law International)* | 79 |
| *Crime, Law and Social Change* | 79 |
| *Current Legal Problems* | 79 |
| *European Competition Journal* | 79 |
| *European Intellectual Property Review* | 79 |
| *Industrial Law Journal* | 79 |
| *International Journal of the Legal Profession* | 79 |
| *International Review of Intellectual Property and Competition Law* | 79 |
| *Law and Practice of International Courts and Tribunals* | 79 |
| *Journal of World Investment & Trade* | 79 |

| Journal | Rank |
|---|---|
| *Legal Ethics* | 79 |
| *SCRIPTed: a Journal of Law, Technology & Society* | 79 |
| *Amsterdam Law Forum* | 95 |
| *Civil Justice Quarterly* | 95 |
| *Computer Law and Security Review* | 95 |
| *European Company and Financial Law Review* | 95 |
| *European Human Rights Law Review* | 95 |
| *European Journal of Law and Economics* | 95 |
| *International Journal of Human Rights* | 95 |
| *(Journal of Comparative Law)* | 95 |
| *Journal of Human Rights* | 95 |
| *Journal of World Energy Law & Business* | 95 |
| *Jurisprudence: An International Journal of Legal and Political Thought* | 95 |
| *Punishment & Society* | 95 |
| *Social & Legal Studies* | 95 |

Note: Titles between brackets indicate journals that were not analysed.

# Evidence-Based Regulation and the Translation from Empirical Data to Normative Choices: A Proportionality Test

**Peter van Lochem & Rob van Gestel***

**Abstract**

Studies have shown that the effects of scientific research on law and policy making are often fairly limited. Different reasons can be given for this: scientists are better at falsifying hypothesis than at predicting the future, the outcomes of academic research and empirical evidence can be inconclusive or even contradictory, the timing of the legislative cycle and the production of research show mismatches, there can be clashes between the political rationality and the economic or scientific rationality in the law making process et cetera. There is one 'wicked' methodological problem, though, that affects all regulatory policy making, namely: the 'jump' from empirical facts (e.g. there are too few organ donors in the Netherlands and the voluntary registration system is not working) to normative recommendations of what the law should regulate (e.g. we need to change the default rule so that everybody in principle becomes an organ donor unless one opts out). We are interested in how this translation process takes place and whether it could make a difference if the empirical research on which legislative drafts are build is more quantitative type of research or more qualitative. That is why we have selected two cases in which either type of research played a role during the drafting phase. We use the lens of the proportionality principle in order to see how empirical data and scientific evidence are used by legislative drafters to justify normative choices in the design of new laws.



## 1 Introduction

Most legislative drafters in the Netherlands have a predominantly doctrinal perspective on law and legislation and have to learn most of the tricks of the trade of how to transform policy into law in daily practice. This is because law school training is still mainly focused on the role model of the judiciary and (doctrinal) textual interpretation methods of judges and solicitors.[1] In the trainee programme for legislative drafters of the Academy for Legislation (AL) in The Hague, there is a bit more attention for the relationship between law and policy and for sociolegal research.[2] Even in the curriculum of the AL, however, there is little attention of how to interpret and use empirical data in designing new laws and regulations.[3] This is probably no different elsewhere in Europe,[4] even though the ability to translate policy into law is seen as one of the most important talents that drafters should possess. In the United Kingdom, Page interviewed members of the Office of the Parliamentary Council responsible for legislative drafting. One of them formulated it as follows:

> Sometimes you can recruit a wonderful young lawyer. You give them a draft that you have been working on and they rip it all apart brilliantly. But you give them a set of instructions and ask them to write a draft themselves and they sit staring at the wall and won't know where to start. It's an analytical thing, it is actually rather different from being just a good lawyer.[5]

One of the most difficult things for draftsmen to master is the analytical capacity to transform the objectives, logic and structure of what policymakers intend into a legislative language that is comprehensible, executable and enforceable. The importance of designing laws that will actually work is underlined by an increasing emphasis in both theory and practice on ex ante evaluation of legislation and evidence-based lawmaking.[6] Ex ante

* Rob van Gestel is professor of theory and methods of regulation at Tilburg University and dr. Peter van Lochem is jurist and sociologist and former director of the Academy for Legislation. The authors wish to thank Thomas van Golen, PhD at Tilburg University's Law School, for his useful comments. The usual disclaimer applies.

1. J.B.M. Vranken, 'Methodology in Legal Research and Legal Practice. A Comparison of Judge and Legal Academic', in M. Groenhuijsen, E. Hondius & A. Soeteman (eds.), *Recht in geding II* (Boom juridisch: Den Haag; 2016), at 15-25. W.J.M. Voermans, 'Waarom is er zo weinig wetgevingsonderwijs in de universitaire rechtenopleiding?', 30(2) *RegelMaat* (2015), at 68-80.
2. *See*www.academievoorwetgeving.nl. More in-depth: N.A. Florijn, 'De postinitiële masteropleiding tot wetgevingsjurist: opzet, resultaten en toekomst', 30 *RegelMaat* (2015), at 81-94.
3. *See* F. Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training', 11(2) *Utrecht Law Review* (2015), at 19-33.
4. *See* E. Rubin, F. Uhlmann & M. Bouwes, *De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief* (Preadviezen Vereniging voor Wetgeving en Wetgevingsbeleid; 2011).
5. E. Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis', (4) *Public Law* (2009), at 797.
6. M. Antokolskaia, 'Van politiek gestuurde wetgeving naar evidence-based wetgeving: Nog een lange weg te gaan'. in W. van Boom, I. Giesen & A. Verheij (eds.), *Capita Civilogie. Handboek Empirie en Privaatrecht* (Boom Juridische uitgevers 2013), at 174 describes this move

evaluation is a way to investigate whether the assumptions underlying a legislative draft are based on facts and empirical evidence that support the aims of the proposed bill.[7] Unfortunately, many things can go wrong in this process.[8]

Cserne, for example, mentions the following: (1) epistemic concerns related to how empirical research is generated (*e.g.* validity issues but also concerns about what to do with inconclusive or contradictory research outcomes), (2) institutional features regarding how knowledge is channelled into the legislative process (*e.g.* how political opportunism may influence the interpretation of research outcomes) and (3) normative considerations related to counterfactual behaviour (*e.g.* decisions based on emotion or human instinct) and non-instrumental goals (*e.g.* symbolic features of laws and regulations).[9] Moreover, as Rachlinski has rightfully stated, the whole idea of evidence-based law is highly controversial in itself because of the fact that the legislative process is controlled by different, often competing, rationalities.[10]

# 2 Research Questions, Approach and Order of the Argument

Empirical studies of important social phenomena often do not provide clear and unequivocal answers and laws may have conflicting purposes, which makes the relationship between policy problems, causes and remedies highly problematic. Moreover, outcomes of scientific studies sometimes conflict with deeply held moral and political beliefs.

Regarding the latter, one just needs to think about psychological studies showing that people often do not act in their own best interest with regard to financial decisions, matters of healthcare or private safety, which is often seen as a reason for policymakers and legislators to nudge them into doing what is considered best for them.[11] This approach associated with a politics of 'libertarian paternalism' conflicts with liberal views on 'personal autonomy' in which people are seen as responsible for their own actions even if these may sometimes be harmful for themselves (*e.g.* drinking, smoking, dangerous sports etc.).[12] We do not intend to take position in this debate but are interested in how different types of empirical research are used in the text and explanatory memoranda of proposals for new legislation when it comes to making normative choices, such as a duty to inform consumers, the granting of rights or a prohibition to conduct certain behaviour.

## 2.1 Research Questions

An interesting way to study the 'translation' from the empirical to the normative is to view legislative drafts through the lens of the proportionality principle, which is one of the principal standards for assessing the quality of legislation in the Netherlands.[13] Proportionality review is part of the directives on legislative drafting, which require that proposals for new legislation are suited to accomplish the aims of the legislature, do not require more intrusive measures than strictly necessary to reach these aims and will not produce excessive burdens for particular addressees of the rules.[14]

The proportionality principle has two faces. It concerns the relationship between means and ends in law and policymaking (*e.g.* a certain policy measure suitable to accomplish a regulatory goal), but, it also contains normative considerations. Suppose, for example, that a proposed piece of legislation limits the rights and freedoms of certain citizens, which are protected by the Dutch constitution or the European Convention on Human Rights (ECHR), drafters will need to make sure that the intrusion on fundamental rights is both lawful and proportionate. If they do not succeed in doing so, there is a risk that courts will later on strike down this national piece of legislation because it conflicts with supranational law.

towards 'evidence-based legislation' as: 'the legislator in his choices for legislative interventions takes a rational and focused approach and does not let himself be guided by just political and ideological reasoning, but also by relevant results of scientific inquiry assessing the (expected) effectiveness of those interventions.' *See also* R. van Gestel, 'Evidence-Based Lawmaking and the Quality of Legislation: Regulatory Impact Assessments in the European Union and the Netherlands', in H. Schäffer and J. Iliopoulos-Strangas (eds.), *State Modernization in Europe* (Berliner Wissenschaftsverlag 2007) 141, who defines evidence-based legislation as: 'laws and policy initiatives are to be supported by research evidence and policies are preferably introduced on a trial and error basis. Implementation should only be considered on a larger scale after an evaluation of experiments or pilots have taken place.'

7. *See* J. Verschuuren (ed.), *The Impact of Legislation: A Critical Analysis of Ex Ante Evaluation* (Leiden/Boston; Brill; 2009) and more recently: S. Naundorf and C. Radaelli, 'Regulatory Evaluation Ex Ante and Ex Post: Best Practice, Guidance and Methods', in U. Karpen and H. Xanthaki (eds.), *Legislation in Europe*, Oxford: Hart publishing (2017), at 187-213.
8. *See*, *e.g.* N. Huls and N. Jungmann, 'Bedoelde en onbedoelde effecten van de Wsnp, in het bijzonder op crediteurengedrag', in W.H. van Boom, I. Giesen & A.J. Verheij (eds.), *Gedrag en privaatrecht* (BJU: Den Haag 2008), at 487-503.
9. P. Cserne, 'Introduction: Legislation, Legal Episteme, and Empirical Knowledge', 1(3) *The Theory and Practice of Legislation* (December 2013), at 387-93.
10. J. Rachlinski, 'Evidence-Based Law', 96 *Cornell L. Rev.* 901 (2011). Important rationalities, apart from the scientific rationality, are the political, legal and social-economic rationality. *See* I. Snellen, 'Conciliation of Rationalities: The Essence of Public Administration', 24(2) *Administrative Theory & Praxis* (2002), at 323-46.
11. R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).
12. C. Sunstein, *Why Nudge: The Politics of Libertarian Paternalism* (New Haven: Yale University Press 2014). *See* for an early critique: G. Mitchell, 'Libertarian Paternalism Is an Oxymoron'. 99(3) *Northwestern University Law Review* (2005), at 1245-1277, available at: https://ssrn.com/abstract=615562.
13. *See* A view on legislation, Parliamentary Papers II 190-1991, 22008, nr. 2, at 8. Directive 2.11 of the Directives on legislative drafting (digitally available at: http://wetten.overheid.nl/BWBR0005730/2018-01-01). *See also* M.T. Bouwes, 'Het proportionaliteitsbeginsel in het wetgevingsbeleid', 28(3) *RegelMaat* (2013), at 148-65.
14. Criteria for proportionality review can be found throughout the Directives. *See for instance* 2.3, 2.5, 2.10 and 2.11. The directives can be found at: http://wetten.overheid.nl/BWBR0005730/2018-01-01.

Important to know is that proportionality is not only used as a criterion for the ex ante evaluation of legislative drafts.[15] It also functions as a standard for the ex post review of legislation by courts.[16] It is needless to say that the possibility of judicial review of legislative interventions may give ex ante evaluation additional 'bite', especially in case the outcomes of the ex ante evaluation are sufficiently accurate to predict whether there are going to be proportionality issues in the future that will not be accepted by courts.

We have selected two legislative drafts in order to learn whether there might be a difference in how legislative drafters deal with (qualitative and quantitative) empirical research in justifying the proportionality of regulatory interventions. The first draft concerns a more policy-driven technical (traffic) legislation, the second one a dossier concerning a (morally) sensitive topic, namely the protection of children in cases of intimate partner homicide by one of their parents. As we will explain more in-depth later, we realise that only two case studies do not justify bold conclusions, but that is also not our intention. We simply want to explore if the proportionality lens, which we will outline hereafter,[17] could be a useful tool to analyse the way in which quantitative or qualitative empirical research is translated into normative legislative decisions.

Our study is also limited in the sense that we will restrict ourselves to the motivation about the use of empirical research provided in publicly accessible documents that can be found via the Dutch central legislative database.[18] Special attention will be paid to the analysis of the legislative drafts by the Council of State as the principal advisor of the government on legislation, while also being the highest administrative court in the Netherlands. This dual role is interesting because in its judicial capacity, the Administrative Jurisdiction Division (AJD) of the Council of State also has to assess the proportionality of legislation ex post when a piece of legislation is challenged in an individual case against the government.[19] The overarching question we will try to answer is:

> To what extent is available empirical research used in explanatory memoranda of two different legislative drafts, namely the introduction of an alcohol lock programme in traffic law and the protection of children in cases of intimate partner homicide, in order to justify normative legal choices, viewed through the lens of the proportionality principle?

This main question will be divided into three sub-questions: (1) Is there a difference in how the results from qualitative and quantitative studies in the investigated cases play a role in the explanatory memoranda to justify normative choices, judged from a proportionality perspective? (2) Is there relevant empirical evidence missing in the explanatory memoranda or is the evidence not presented in a balanced manner and, if so, is this signalled in the ex ante evaluation of legislation by the Council of State as the organisation primarily responsible for the scrutiny of legislative drafts? (3) How could the possible neglect of (certain types of) empirical evidence be explained?

### 2.2 Selection of Cases

As already mentioned above, we are interested in possible differences between how quantitative empirical studies and qualitative sociolegal studies are used in legislative drafts from a proportionality perspective. In order to do this, we have selected two cases in which empirical studies were used to underpin and justify certain policy decisions by the legislature.

As a first case, we have looked for a problem of drunken driving, especially the legislation of the so-called 'Alcohol lock programme' (hereafter: alcolock). The advantage of a somewhat older case (2008) could be that it provides additional insight into the effectiveness of this legislative measure after enactment because there will probably be articles, reports and court cases available about this piece of legislation. At the same time, this is reason for caution because as researchers we should try to avoid hindsight bias and focus on what legislative drafters could and perhaps should have known at the time they wrote the draft.

The studies in the alcolock case are predominantly accident data and statistics that are predominantly quantitative in nature. Furthermore, this case represents a more classical instrumentalist type of traffic legislation where regulatory decisions are supposed to implement policies with regard to prevention of alcohol abuse by motorists. On the basis of what we know about how legislative drafters are educated and how the legislative process works, one would expect the qualitative research in this policy-driven legislative draft to be less visible and explicitly used to account for the normative choices being made. The main reason would be that draftsmen usually do not have a background in social science research methods, but are trained in law school in conducting doctrinal (textual interpretation) methods.[20] As

15. *See* L.F.M. Verhey, 'Proportionaliteit als toetsingsmaatstaf', *RegelMaat* (2013-3), at 145-47.
16. *See* D. Harvey, 'Towards Process-Oriented Proportionality Review in the European Union', 23(1) *European Public Law*, (2017), at 93-121.
17. There is an enormous body of literature on the proportionality principle and proportionality review that we cannot discuss separately in this paper. *See* for a recent overview: V. Jackson and M. Tushnet (eds.), *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press; 2017).
18. *See*www.overheid.nl.
19. This is called 'exceptieve toetsing', which is a type of judicial review where administrative courts assess the underlying legislation in a procedure against an individual governmental decision (besluit) by way of assessment whether the piece of legislation runs against fundamental rights or legal principles. *See*, *e.g.* ABRvS 13 June 2017, ECLI:NL:RVS:2017:1547.
20. K. Kraan and B. Niemeijer, 'De opleiding tot overheidsjurist', in M. Ahsmann *et al*. (eds.), *Herijking van de juridische opleidingen* (Preadviezen NJV, Deventer: Kluwer 2018), at 93-129. E.L. Rubin, R. Uhlmann & M.T. Bouwes (eds.), *De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief, Preadviezen Vereniging voor Wetgeving en Wetgevingsbeleid* (Nijmegen: Wolf Legal Publishers; 2011).

Vick has argued, it is likely for (traditional) lawyers that information concerning alien disciplines or methods they are not familiar with cannot be transformed into knowledge compatible with the schemata they already possess. Therefore, Vick seems to believe that the closer the alien (empirical) information is to the type of research/data that lawyers are familiar with, the more likely it is going to be that this information will not be ignored.[21] From this perspective, one would expect that quantitative empirical research stands little chance to be taken into account, even if the legislative draft itself concerns a rather policy-driven topic in which the dominant concern for both policymakers, legislative drafters and the wider public is going to be: will the alcolock serve its purpose?

The second case concerns a more recent (2016) niche topic at the intersection of criminal law and family law with a strong ethical and moral dimension, namely, the protection of children in cases of intimate partner homicide by one of their parents. This case is about the right to custody as well as how to deal with conflicts between different sides of the family about the placement of the children and regarding contact with the perpetrating parent in prison. The focus of the research on this problem is mostly qualitative. It concerns mainly sociolegal studies, based on interviews of persons involved in partner homicide as perpetrator, children of perpetrators or caregivers. From a moral perspective, this is a rather sensitive topic. Based on the assumption formulated by Vick that 'methodological closeness' is the determining factor with regard to how decisions made in the legislative draft (*e.g.* the voluntary or involuntary contact with the perpetrating parent) are justified by reference to empirical research, one would expect that the sociolegal research in this dossier will play a more prominent role than the quantitative empirical research in the alcolock case. The fact that the draft concerns a more sensitive topic should not really matter then.

The latter does not mean, though, there can be no alternative explanations for potential differences between the ways in which empirical research is used in the drafting of legislation in both cases. Because of this, and due to the fact that we were able to study no more than two legislative drafts more in-depth, we will also look into the literature on evaluation use after the analysis of our two legislative drafts. This will be done in order to see what possible other explanations might be available to clarify why empirical research has (not) been used in the drafts to support the proportionality of the legislative measures.

### 2.3 Methodology: Looking through the Proportionality Lens

The proportionality principle is a mechanism to scrutinise administrative or legislative measures.[22] It is seen as 'a trade-off device which helps resolve conflicts between different norms, principles and values'.[23] A function of the proportionality principle is to guide the balancing of conflicting rights and interests. Stone Sweet and Mathews have operationalised the principle by identifying three analytical steps to balance facts and normative considerations,[24] namely, (1) is a certain measure *suitable* to achieve the goal(s) set out by the legislature, (2) is it *necessary* in the sense that there are no less intrusive alternatives available to reach the policy goals and (3) are the costs *not excessive* in comparison with the benefits of the selected measure?[25]

We are not going to evaluate the two legislative drafts against the three just mentioned criteria ourselves. Instead we are going to study whether legislative drafters use empirical data to support the different elements of the proportionality review. In doing so, one has to realise that for the study of our two cases, the suitability question could never be answered with complete certainty anyway because as long as a legislative draft is not implemented, the real-life consequences are uncertain. However, what is possible is to study the assumptions underlying a proposed regulatory measure in order to see if these are based on solid data and reliable empirical evidence. If this is not the case, one cannot 'prove' that the measures will be ineffective, but it can be argued that a draft is most likely *not* going to have (all) the intended effects because the assumptions on which the draft is based are flawed.

In our analysis of the legislative files, we have focused on the references to empirical data and scientific research in the explanatory memorandum. Do the data and/or empirical studies actually support the factual assumptions and claims in the text of the draft and in the explanatory memorandum or is the interpretation perhaps one-sided or otherwise clearly inaccurate? We will also study whether the Council of State has looked into this and, if so, how the evidence was assessed. Moreover, via a literature search, we will double-check whether there are relevant studies that have not been mentioned in the explanatory memorandum but could have shed a different light on the topic. We used keywords (*e.g.* alcohol lock, alcolock, alcoholslot and (intimate) partner homicide, partner murder, partner violence etc.) to search databases, such as WorldCat, KluwerNavigator, HeinOnline, Westlaw, Google Scholar) to look for studies that were not mentioned in the drafts. The idea is to find out whether easily accessible and relevant studies may have been (deliberately) overlooked or ignored by the drafters. Such behaviour could be a sign that other, more strategic, considerations impact the use of empirical research.



21. D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31(2) *Journal of Law & Society* (2004), at 189-90.
22. R. Gestel and J. de Poorter, 'Putting Evidence-Based Law Making to the Test: Judicial Review of Legislative Rationality', 4(2) *The Theory and Practice of Legislation* (2016), at 155-85, doi:10.1080/20508840.2016.1259899.
23. T. Harbo, 'The Function of the Proportionality Principle in EU Law', 16(2) *European Law Journal* (2010), 158-85, at 165.
24. *See for instance* A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008), at 73-164.
25. *See for instance* J. Jans, 'Proportionality Revisited', 27(3) *Legal Issues of Economic Integration* (2000), at 239-65.

Next, we will move to the necessity of the regulatory measures and how these are accounted for. Assessing the necessity of proposed regulatory instruments always requires some kind of study of possible alternative measures that could be used to reach the same goals. If there is a choice between several in principle equally suitable and effective measures, the proportionality principle requires that the least onerous one should be selected.[26] This presupposes a regulatory impact assessment in which alternative measures have been studied. Does the explanatory memorandum explicitly refer to an impact assessment or to any other (empirical) method of ex ante evaluation in which alternatives have been studied? If not, does the Council of State signal this? In case the Council does not, is that even noticed by the House of Representatives?

The last step is to analyse whether effects of a draft are not excessive in relation to the interests affected. As Andenas and Zleptnig have argued, it is here where a true weighing of competing objectives takes place. The more intense the restrictions or the higher the costs for a particular interest, the more important the justification for the countervailing interest and benefits needs to be.[27] This last test is undoubtedly the most controversial one.[28] The objective is to examine whether the severity of the harm to the individual, and the reasons of general interest justifying it, are reasonably proportional to each other.[29] There is no objective yardstick to weigh these different interests, which is why this test is so often criticised. We are not going into that here, though, because our intention is merely to study whether and how empirical research has played a role in the balancing of costs and benefits as accounted for in the explanatory memorandum. Is there, in other words, an explicit reference to how costs and benefits are weighed and is there a reference to empirical data of scientific (*e.g.* economic) research here? It is not up to us to decide whether a fair balance has actually been struck between costs and benefits. What we like to learn is if legislative drafters support cost–benefit analysis with empirical data.



26. This requirement can also be found in Art. 7 of the Dutch guidelines for legislative drafting, which states: 'Before deciding to introduce a regulation, the following steps shall be taken: a. knowledge of the relevant facts and circumstances shall be acquired; b. the objectives being aimed at shall be defined in the most specific, accurate terms possible; c. it shall be investigated whether the objectives selected can be achieved using the capacity for self-regulation in the sector or sectors concerned or whether government intervention is required; d. if government intervention is necessary, it shall be investigated whether the objectives in view could be achieved by amending or making better use of existing instruments, or, if this proves impossible, what other options are available; e. the various options shall be compared and considered with care.'
27. M. Andenas and S. Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective', 20(1) *Cambridge Review of International Affairs* (2007), 71-92, at 76.
28. L. Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing', 12 (4) International Journal of Constitutional Law (2014), 864-90 at 865.
29. A. Barak, 'Proportional Effect: The Israeli Experience', 57(2) *University of Toronto Law Review* (Spring 2007), 369-82, at 374.

The interesting thing about the proportionality test is that it requires rational legal arguments in the decision-making process. As Craig has rightfully claimed, those arguments need to be justified in a public deliberative process.[30] Our intention is to show to what extent this actually happens during the preparation of our legislative drafts.

# 3 Analysis of the Cases

Regarding both cases, we will start with an introduction of the legislative proposal and a short overview of the relevant studies. After that, we investigate to what extent the studies played a role with regard to the different elements of the proportionality test. We conclude each case study with a brief conclusion of our findings.

## 3.1 The Alcohol Lock Case

In 2008, the Dutch government presented a legislative draft to amend the Road Traffic Act (RTA) 1994 in order to introduce a so-called 'alcohol lock programme'.[31] This was meant to reduce the number of victims of road accidents due to drunken driving. The annual number of road deaths in this period was 800 and a case-control study in the police district of Tilburg concluded that at least 25% of these fatalities were caused by alcohol use.[32] This would result in at least 200 casualties a year. Seventy-five per cent of the victims are the result of drunken drivers with a blood alcohol content (BAC) of 1.3 g/l or more. Studies by the Ministry of Transport, Public Works and Water Management revealed that, although the number of offences is slowly decreasing, this is not the case for the category of heavy drinkers who are caught with a BAC of 1.3 g/l or more.[33] Moreover, the minister concludes from accident statistics that existing measures to reduce the use of alcohol in traffic, such as media campaigns and education programmes, have had limited effect on this category of drivers.[34]

The draft to amend the RTA 1994 argues that new measures to prevent alcohol abuse are necessary and that the introduction of an 'alcolock' (breath alcohol ignition interlock) would be an appropriate tool to make heavy drinkers learn how to separate the use of alcohol from driving a motor vehicle.[35] The idea is to amend the existing procedure for driving license suspension and mandatory educational measures for offenders focused

30. P. Craig, 'Unreasonableness and Proportionality in UK Law', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart 1999), 85-106, at 99-100. *See also* P. Craig, 'The Nature of Unreasonableness Review', 66 *Current Legal Problems* (2013), at 131-67.
31. Parliamentary Papers II 2008-2009 31 896 nr. 2.
32. M. Mathijssen and S. Houwing, *The Prevalence and Relative Risk of Drink and Drug Driving in the Netherlands: A Case-Control Study in the Tilburg Police District* (Leidschendam: SWOV Institute for Road Safety Research, R-2005-9).
33. Parliamentary Papers II 2008-2009, 31 896, nr. 3, at 7.
34. *Ibid.*, at 8.
35. *Ibid.*, at 8.

on the use of alcohol in traffic with the possibility to participate in the alcolock programme at one's own expense. When people are selected to participate in the programme, their car will be equipped with the alcolock, which prevents ignition of the engine. Every time the driver wants to start the car, he is submitted to a breath test. In case the BAC is too high, the engine will not start. Even while driving, the alcolock requires random retests. This is to prevent the person from being drunk while driving and to avoid that another person takes the breath test before starting the car. The period of being sentenced to have your car equipped with a lock is in principle two years. In case someone sabotages the alcohol lock or gets round it by driving in another car, this period will be lengthened, the driving license will be declared invalid or in the worst case, someone must go to jail. The alcolock is used to enable drivers to prove they are no longer alcohol-dependent when participating in traffic.

Technically, the alcolock is equipped with a recorder. Every breath test is recorded and can be read out by a counsellor attributed to the programme. On a regular basis, the counsellor and the convicted person meet each other to discuss the results of the breathalyser in order to see if additional measures are necessary.

#### *3.1.1 Empirical Research*

The explanatory memorandum of the legislative draft enabling the introduction of the alcolock programme refers to various empirical studies in the United States, Canada and Sweden since 1997.[36] These would show that drivers who participate in the programme on average reoffend 80% less often than drivers with temporary suspensions of their license. The drafters in particular refer to a study by Beirness and Robertson,[37] concluding that a number of conditions must be fulfilled to make the programme effective. There should be: an obligation in the sense that drivers may only use their vehicles if an alcolock is installed; a code on the driving license is necessary to inform the police about participation in the programme during routine inspections; the obligation to take part in the programme should be based on administrative law instead of criminal law; there needs to be compliance-monitoring by reading out the data from the breathalyser registration unit and a regular inspection of the alcolock to detect attempts of fraud; the programme needs to be flexible in the sense that the duration can be adjusted to the individual behaviour of the participants in the programme on the basis of the data from the registration unit.

Based on a study by SWOV,[38] counting on an annual participation rate of between 2,000 and 6,750 persons and a maximum number of participants of 13,500 after two years, it was estimated that introduction of the alcolock should lead to an annual reduction of between twenty-five and thirty road deaths and a decrease in the number of people who have to be hospitalised of between 250 and 300. This estimation was based on the following assumptions: a two-year programme; participation in the programme as soon as possible after the offence; regular monitoring of the data from the registration unit; extension of the alcolock programme (each time for six months) in case offenders have shown to be unable to separate the use of alcohol while driving; no direct participation in the programme for offenders with a BAC above 2.1 g/l (experienced drivers) and 1.8 g/l (starting drivers).

Regarding the latter, the explanatory memorandum points to several studies showing that an alcolock programme could also be successful for the latter group of heavy drinkers,[39] but the people in this category should first undergo a test whether they are fit to follow the programme. As far as the practical functioning of the alcolock is concerned (*e.g.* can it be installed in all cars, does the retest not pose dangers when conducted during driving? etc.), the drafters point to a pilot project in which eighty persons tested two different alcolocks during a period of eleven weeks.[40] This pilot showed no practical difficulties in the daily use of the alcolock. The draft also point to studies showing that once the alcolock is removed from a car, there are hardly any positive effects anymore on the alcohol use. That is why a period of at least two years is recommended for participation in the programme.[41] A longer period is believed to have more durable results on the driving behaviour of offenders. Moreover, reference is made to foreign studies showing that the introduction of an alcolock works better in case it is accompanied by a counselling and guidance programme.[42] This is why the draft introduces a



36. M. Weinrath, 'The Ignition Interlock Program for Drunk Drivers: A Multivariate Test, 43(1) *Crime Delinq*. (1997), at 42-59. R. Voas and A.S. Tippetts, 'Requiring Interlocks for Reinstatement: The Florida Example'. *Paper Presented at the 7th Annual International Ignition Interlock Symposium*, Bachelor Gulch, Colorado, October 22-24 (1997). K. Beck, W. Rauch, E. Baker & A. Williams, 'Effects of Ignition Interlock License Restrictions on Driver on Multiple Alcohol Offences: A Random Trial in Maryland', 89 *American Journal of Public Health* (1999), at 1696-1700. R. Voas, P. Marques, A. Tippetts & D. Beirness, 'The Alberta Interlock Program: The Evaluation of a Province-Wide Program on DUI Recidivism', 94(12) *Addiction* (1999), at 1849-1859, L. Venzina, 'The Quebec Alcohol Interlock Program: Impact on Recidivism and Crashes', in D.R. Mayhew and C. Dussault (eds.), *Alcohol, Drugs and Traffic Safety 0 T2002. Proceedings of the 16th International Conference on Alcohol, Drugs and Traffic Safety*. Montreal, August 4-9, 2002 (Quebec City: Societé de l'assurance automobile du Quebec; 2002), 97-104. B. Bjerre, 'Primary and Secondary Prevention of Drinking and Driving by the Use of Alcolock Device and Program: The Swedish Experience', in P. Marques (ed.), *Alcohol Ignition Interlock Devices. Volume II 2005: Research, Policy, and Program Status* (Oosterhout, the Netherlands: International Council on Alcohol, Drugs, and Traffic Safety (ICADTS), 2005). J. Frank, R. Raub, R. Lucke & W. Wark, 'Illinois Ignition Interlock Evaluation', in *Proceedings of the 16th International Conference on Alcohol, Drugs and Traffic Safety* (2002), at 105-9.

37. Parliamentary Papers II 2008-2009, 31 896, nr. 3, at 9.

38. SWOV institute for road safety research, Geschat effect op de verkeersveiligheid van een alcoholslotprogramma (ASP) en de kosten-batenverhouding ervan, Leidschendam, 2009.

39. Parliamentary Papers II 2008-2009, 31 896, nr. 3, at 13.

40. *See*https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2008/10/01/demo-alcoholslot-onderzoeksresultaten/demo-alcoholslot-onderzoeksresultaten.pdf.

41. Parliamentary Papers II, 2008-2009, 31 896, nr. 3, at 54.

42. P. Marques, A. Tippets, R. Voas, E. Danseco & D. Beirness, 'Predicting DUI Offenses with the Alcohol Interlock Recorder', 33 *Accident Analysis and Prevention* (2001), at 609-19; P. Marques, R. Voas &

parallel programme focused on the motivation and learning of participants, which should not be seen as an addiction treatment and rehabilitation programme though, because the programme is not set up to 'cure' alcoholics but to teach regular (non-addicted) drivers to separate the use of alcohol from participating in traffic.[43]

*3.1.2 Aims of the Draft*

The first thing to be noticed in the draft is that the text of the explanatory memorandum is rather vague on what are the exact goals of the alcolock programme. The proposal presents specific targets in terms of an estimated decrease in the number of (fatal) casualties, but the empirical evidence on how these targets are going to be accomplished is rather weak. Problematic is also the lack of clarity on the relationship between the introduction of alcolock programmes in other legal systems and the estimated drop in (fatal) accidents in the Netherlands. Of course one could argue that the best possible 'proof' of the real-life effects of alcolock programmes can be found by looking at countries where there is experience with these systems. However, the problem is that very little information is provided with regard to the context in which these programmes functioned abroad and there is also no information about the longitudinal effects. This makes it highly problematic to extrapolate the findings abroad to the Dutch situation.

*3.1.3 Suitability*

Striking is that the explanatory memorandum leans heavily on evaluation studies and pilot projects in other countries; most notably the United States, Canada, Australia and Sweden, but the regulatory context in these countries might very well be quite different from the one in the Netherlands. Remarkable is, therefore, that a 1994 SWOV study, which is not mentioned in the explanatory memorandum, concluded that

> it would be of benefit to conduct an experiment with alcohol locks in the Netherlands. Sufficient knowledge is available to set up a sound experiment, linked to an effectivity study. Such an experiment would only be useful, however, if the user is also subjected to intensive supervision.[44]

Such a study has never been undertaken, though. The aforementioned pilot project was not set up as a study to measure the effectiveness of the programme, but merely served to detect potential practical and technical problems in the implementation of alcolocks. From a methodological perspective, only a well-designed experiment could deliver solid evidence about the effectiveness of such a programme in the Netherlands.

The Council of State also pointed to weaknesses in the programme due to (1) the lack of a parallel mandatory addiction treatment programme aimed to take away the root cause of the problems of the group of heavy drinkers on which the alcolock programme is focused; (2) the susceptibility to fraud of the programme, shown for example by the refusal to introduce additional sobriety inspections (*e.g.* think of people with an alcolock notification on their driving license who might keep driving with borrowed cars); (3) potential overlap with criminal law measures, which can make that offenders cannot be submitted to the alcolock programme due to, among other things, the need to avoid ne bis in idem problems. This not only delays the implementation of the programme, but could also increase the uncertainty among drunken drivers about what lies in wait for them and affect the willingness to participate.[45] The government does not respond by referring to other research in the follow-up to the advice by the Council of State.

The debate of the draft in parliament did not really raise new issues with regard to the suitability of the programme and the research conducted in that respect with one important exception. Serious worries were cast concerning the advice by the Dutch Association of Psychiatrists with respect to the dangers of allowing alcoholics (addicts) to enter into the programme without a mandatory rehab programme. Initially, the government had ignored this advice, but in reaction to questions in parliament about this, an elaborate response was given referring to a wide list of foreign studies with respect to the consequences of allowing alcoholics into alcolock programmes. The government concludes on the basis of evaluation of foreign programmes and studies that these programmes would not be less effective for people with an alcohol addiction.[46]

*3.1.4 Necessity*

Although the draft underlines the fact that alternative policy measures, such as information campaigns (*e.g.* the 'Bob campaign' focusing on the responsibility of sober drivers taking friends for a night out), education programmes and regular sobriety inspections have not delivered the desired results,[47] no impact assessment seems to have been conducted. This means that a systematic comparison between potential alternative policy measures, such as mandatory medical treatment and targeted rehab programmes, is lacking.[48]

As far as comparative studies are concerned, these concentrate on experiences with alcolocks in other countries and do not include other policy alternatives. Hence, it is



D. Timken, 'Preliminary Outcomes from a Texas Manual-Based Group Motivational Intervention Supplement for Court-Stipulated Interlock DUI Offenders', in *Proceedings of the 17th International Conference on Alcohol, Drugs and Traffic Safety* (2004). G.P. Marques, R. Voas, S. Tippetts, K. Blackman, D. Timken & C. Field, 'Motivational Intervention Keyed to Interlock Use Reduces the Rate of Positive BAC Tests', in B. Logan, D. Isenschmid, J. Walsh, D. Beirness & J. Morland (eds.), *Proceedings of the T2007 Joint International Meeting of TIAFT/ICADTS/IIS*, August 26-30, Seattle (WA: ICADTS; 2007).

43. Parliamentary Papers II, 2008-2009, 31 896, nr. 3, at 27-30.
44. J. van der Sluis, 'Alcoholslot Onderzoek naar de ervaringen in het buitenland en de mogelijkheden in Nederland Leidschendam' (Stichting Wetenschappelijk Onderzoek Verkeersveiligheid SWOV, 1994), at 4.
45. Parliamentary Papers II 2008-2009, 31 896, nr. 4, at 4-7.
46. Parliamentary Papers II 2009-2010, 31 896, nr. 7, at 4.
47. *Ibid*., at 8.
48. According to § 4.43 (b) of the directive on legislative drafting, the explanatory memorandum should provide an overview of how alternatives to legislation have been taken into account.

no wonder that alcolock programmes come out on top. The statement in the explanatory memorandum that no other measures abroad can be found with a similar effect to the alcolock, therefore, sounds rather pretentious.[49] After all, one cannot know whether less intrusive and equally effective measures are available, unless a systematic study of potential alternatives is undertaken.

Additionally, there is hardly any mentioning in the draft about the methodological strengths and weaknesses of the existing studies in this field.[50] This makes it difficult to rate the outcomes of the available foreign studies concerning the effectiveness of alcolock programmes.

The Council of State does not really discuss the lack of serious attention for alternatives to the alcolock programme and/or the strengths and weaknesses of the studies mentioned in the explanatory memorandum. In parliament, this is also not a serious issue. Both State Councillors and Members of Parliament (MPs) seem to depend quite heavily on the information provided by the government in the draft and did not carry out independent research on their own nor do they point to the lack of attention for potential alternatives to the alcolock instrument because they seem focused on the single policy instrument the draft presents. This is also the only instrument supported by (empirical) data and research.

#### *3.1.5 Proportionality stricto sensu*

In terms of 'costs and benefits', the draft mentions an estimated decrease in the number of road deaths and serious injuries, depending on the number of participants and the time between driving license suspension or revocation and active participation in the programme. It also predicts the costs for individual participants in the programme to get the alcolock installed. These costs would lie somewhere between 1,300 and 2,000. The draft also mentions that the exact costs are hard to predict because of the fact that the alcolock programme represents 'work in progress'. Costs would depend on competition between the suppliers of alcolock devices, the number of alcolocks that are going to receive a certificate from the Central Bureau for Driving Licenses and the number of participants in the programme. What the draft makes clear, though, is that all costs for the certification and installation of the alcolock, the maintenance of the registration system, the monitoring of the results from alcolock registration unit and the cost for a driving license with an alcolock notification need to be covered by the participants.[51]

The Council of State warned that the participation in the programme might prove to be disappointingly low because of the costs involved in participating. After the introduction of the alcolock in 2011, however, the costs for participating appeared to be much higher than the estimated maximum of 2,000. On average, the costs turned out to be around 5,000. This meant that many offenders were not financially capable of participating because of the costs. Consequently, their driving license was suspended for five years because the 'voluntary' alternative of participation in the alcolock programme was de facto unfeasible. In 2015, the AJD of the Council of State declared the regulation on which the 'educational measure' of the alcolock was based unlawful because it violates the proportionality principle enshrined in Article 3:4 of the General Administrative Law Act.[52]

The AJD argued that the regulation did not take the personal situation of different drivers and their dependence on a driving license sufficiently into account. The possibility for people to continue driving under the realm of a special license linked to an alcolock programme with reasonable costs had been a cornerstone of the amendments to the Road Traffic Act 1994, but there was no serious alternative to maintain a limited driving license without partaking in the alcolock programme. Apart from that, the AJD revealed that in the meantime, numerous cases had been brought before it in which the defendants claimed that participation in the programme was financially impossible. Some offenders did not own a car and were caught driving a borrowed or rental car. In case offenders cannot participate purely because of the height of the costs, the AJD found that the educational measure on which the alcolock rests fails to take the personal circumstances of offenders, who sometimes rely on a driving license for their job (*e.g.* taxi drivers and car mechanics), into account. This leads to a violation of the proportionality principle.

Last but not least, the AJD noticed that participating in an alcolock coincided with the possibility of imposing criminal sanctions on drunken drivers, which the Supreme Court had deemed problematic in light of Article 6 ECHR.[53] On both accounts (costs and benefits and criminal sanctions), the government responded in its additional report. Regarding the possibility of concurrence of sanctions, the government refers to the public prosecutor service and the judiciary without answering to the arguments of the AJD. With respect to the cost and benefits, the government mainly stresses that the costs are reasonable, considering the fact that entering into the programme allows offenders to continue to drive an automobile, which would otherwise be impossible. In the parliamentary debate, one mainly sees a repetition of arguments already brought forward by the Council of State and a reminder that the government should strive to keep the costs of the programme for participants as low as possible.

#### *3.1.6 Intermediary Conclusion*

We may conclude that on all three accounts of proportionality (suitability, necessity and costs and benefits),

49. Parliamentary Papers II 2008-2009, 31 896, nr. 3, at 9.
50. At the European Union level, this is somewhat different because services of the European Commission are instructed to explain the methodological strengths of evaluations as soon as external evaluations are transferred to Staff working documents. *See* European Commission, *Better Regulation Toolbox* (2015), at 364-74. For an example, *See*https://ec.europa.eu/food/sites/food/files/gfl_fitc_comm_staff_work_doc_2018_part1_en.pdf, at 23.
51. *Ibid*., at 30.
52. ABRvS 4 March 2015; ECLI:NL:RVS (2015), 622.
53. HR 3 March 2015 S 14/04940; ECLI:NR:HR (2015), 434.

*Table 1 Outcome alcolock case*

| | Explanatory memorandum | Council of State | House of Representatives |
|---|---|---|---|
| Empirical research | Several (foreign) studies mostly about the positive experience with alcolocks | Referring to studies mentioned in explanatory memorandum. No other evidence | Referring to study mentioned in explanatory memorandum. No other evidence |
| Suitability | Abstract goals Only foreign studies about effects but national study that advises to conduct an experiment ignored | Mentioned studies not entirely convincing about suitability: (1) lack of a parallel mandatory addiction treatment (2) risk of fraud and (3) concurrence with criminal sanctions | Repetition of arguments by the Council of State, but extra concern regarding addicted persons |
| Necessity | No comparison of regulatory alternatives: unsupported claim that there are no relevant alternatives | No attention for alternatives | No attention for alternatives |
| Proportionality stricto sensu | Costs are hard to predict because of the fact that the alcolock programme represents 'work in progress'. Costs depend on competition between the suppliers of alcolock devices and the benefits are difficult to express in monetary terms | Serious doubts about costs due to participation rate. Also concerns about concurrence with criminal sanctions not taken into account | Repetition of arguments made by Council of State and emphasis on the importance of keeping costs as low as possible |



the draft had serious shortcomings. The effectiveness of the programme was based solely on foreign experiences, but was not actually tested via an experiment as recommended by SWOV; there has been no systematic study of possible alternatives to an alcolock programme; the balancing of costs and benefits for participating in the programme appears to be built on quicksand for which the Advisory Division of the Council of State had warned prior to the bill being enacted, which turned out to be pretty accurate in light of the case law of the AJD of the same Council of State that followed upon the implementation of the bill that introduced the alcolock.

### 3.2 The Case of the Right to Contact after Partner Homicide

In the Netherlands, every year on average 26 children lose one of their parents because of intimate partner homicide. Regulating the right of contact after parental intimate partner homicide, the draft of 2016 concerning the right to contact after partner homicide introduces a mandatory procedure according to which decisions about contact between the children and the perpetrating parent need to be made by a Juvenile court. These decisions should be based on a request made by the Council for Child Protection.[54]

This Council for Child Protection is responsible for assessing the personal circumstances of children who lost one of their parents (usually the mother) because of homicide by the other parent. The council is free to obtain the children's opinion to estimate whether contact with the perpetrating parent is in their best interest. No sooner than two years after the court's decision the parent is allowed to object to a negative decision from the Juvenile court. The reason for this two-year 'cooling down' period is to give children time to recover from their (expected) traumatic experience. Moreover, the idea is to keep children as much as possible out of the conflicts between the families of the victim and the perpetrating parent. The Juvenile court usually gives custody to a certified youth care facility.

According to the draft, reducing stress and protecting the well-being of the children are the main reasons for the introduction of the new procedure.[55] Limiting contact with and access to the children is a restriction of the (remaining) parent's right to family life as protected by Article 8 of the ECHR. In the explanatory memorandum to the draft, the government considers this restriction to be a legitimate exception, which is lawful and necessary in accordance with Article 8(2).[56]

54. The (translated) formal title of the draft is 'Amendment of the Civil Code in connection with the limitation of the right of contact or access after parental intimate partner homicide'. Parliamentary Papers II 2012-2013, 33 552.
55. Parliamentary Papers II 2015-2016, 34 518, nr. 3, at 2 (82% of the involved children suffer stress) and at 4 (current legislation are insufficient to keep child's life as peacefully as possible).
56. Parliamentary Papers II 2015-2016, 34 518, nr. 3, at 6.

### 3.2.1 *Empirical Research*

The study 'Care for children after intimate partner homicide' from the Psychotrauma Centre of Utrecht University's Wilhelmina Children's Hospital,[57] mentioned in the explanatory memorandum,[58] shows the impact that partner homicide has on children, especially in case they witnessed the crime. Although their grief symptoms are relatively moderate compared with children in a control group who have also lost a loved one in another situation than partner homicide, more than half of the children experience posttraumatic stress syndromes.[59]

Nearly all children mentioned in the study received professional assistance and most of them had some kind of contact with the perpetrating parent in detention. Only in a few cases there has been some pressure from the perpetrator or from his family, but in the vast majority of the cases, the will of the child concerning (no) contact has been followed. According to the conclusions of the Utrecht University study, each placement option may work well and a (provisional) guardianship can provide the opportunity to assess and plan what is in the best interest of the child. Children should, however, not be forced into having contact with the perpetrating parent, nor should they be denied contact if such contact is desired and reasonably possible. Providing stability and safety of their situation is of great importance to the children.[60]

It is remarkable that the explanatory memorandum leans so heavily on the single study mentioned above, although there were other studies available at the time.[61] One of these studies, which compares data from ten different European Countries,[62] claims there is a need for reliable and comparable statistical data across countries in order to better understand the phenomenon of intimate partner homicide and to enable more effective policymaking improving the well-being of children, public health and welfare reform.[63] This seems to suggest a lack of reliable data at present, which raises questions about the strength of the evidence base of the proposed draft.

### 3.2.2 *Aims of the Draft*

According to the explanatory memorandum,[64] the main aim of the draft is to have as much stability and peace of mind for children involved in intimate partner homicide as possible. This does not sound as a very clear objective because what counts as 'peace and stability' leaves much room for interpretation. A second aim is to prevent 'forced contact' between children and their perpetrating parent. So far, there is no mandatory procedure for the decision about the visiting rights of the parent, which runs the risk of making children a pawn in the game of passing the buck between the families of the victim and the perpetrator.

Although the aims are mentioned by the Utrecht University study, there is no empirical evidence showing the relation between the new procedure in which a Juvenile court decides about the visiting arrangements and the well-being of the children. In other words, this procedure is not the outcome of the study and is no part of the conclusions either. In the current procedure, contact between children and their convicted parent is possible without a court decision. According to the explanatory memorandum, this is considered unsatisfactory in practice.[65] However, this is not an outcome of the Utrecht University study. Moreover, the latter study reveals that in 94% of the cases the will of the children (not) to visit the perpetrating parent is already respected. This begs the question: Why is new legislation required?

### 3.2.3 *Suitability*

Whether the new procedure will be an effective remedy advancing the children's mental stability and security has not been explained in the Utrecht University study nor in the explanatory memorandum. Actually, this study only proves the contact between the children and the perpetrating parent to be problematic. In the parliamentary debate, spokesmen of the political parties call this study, requested by parliament, important and valuable without explaining why.[66] The Council of State is sceptical here because the Council for Child Protection already adheres to a protocol according to which the court that decides over custody may take into account the visiting rights and the interest of the children. According to the Council of State, there is no reason to believe that the advice by the Council for Child Protection is not taken seriously.[67]

May one reasonably expect the new procedure, according to which there ought to be a court decision in every case, to reduce the number of cases in which there is

57. E. Alisic *et al.*, *Zorg voor Kinderen na Partnerdoding; onderzoek in opdracht van het WODC* (Utrecht: Universitair Medisch Centrum; 2014).
58. Parliamentary Papers II 2015-2016, 34 518, nr. 3, at 2.
59. Alisic *et al.* (2014), above n. 57, at 7.
60. *Ibid.*, at 100-1.
61. *See* L. Lewandowski *et al.*, '"He Killed My Mommy!" Murder or Attempted Murder of a Child's Mother', 19(4) *Journal of Family Violence* (2004), 211-20; T. Wortham, 'Intimate Partner Violence: Building Resilience with Families and Children', 23(2) *Reclaiming Children and Youth* (2014), at 58-61; J. Hardesty *et al.*, 'How Children and their Caregivers Adjust after Intimate Partner Femicide', 29(1) *Journal of Family Issues* (2008), at 100-24. E. Spencer-Carver, *Social Support for Children Who Had a Parent Killed by Intimate Partner Violence: Interviews with Mental Health Workers* (Manhattan (Kansas): State University; 2008). This last study, by the way, mentions that the outcomes of the studies may very well depend quite heavily on the chosen perspective. From a feminist theory perspective, the contact between the perpetrating father and his children would probably meet with far more scepticism than in case the same matter would be studied from the perspective of the resiliency theory.
62. C. Corradi and H. Stöckl, 'Intimate Partner Homicide in 10 European Countries: Statistical Data and Policy Development in a Cross-National Perspective', 11(5) *European Journal of Criminology* (2014), at 601-18.
63. *Ibid.*, at 615. *See also* F. Koenraadt and M. Liem, 'Fataal huiselijk geweld: Doding van eigen kind, partner of ouder, Justitiële verkenningen', 36(8) *Justitiële verkenningen* (2010), at 100-14.
64. Parliamentary Papers II 2015-2016, 34 518, nr. 3, at 4.
65. Parliamentary Papers II 2015-2016, 34 518, nr. 3, at 4.
66. Parliamentary Proceedings II, at 73-3-3 and 73-3-5.
67. Parliamentary Papers II 2015-2016, 34 518, nr. 4, at 3.

contact with the perpetrating parent against the children's will? This is doubtful. Firstly, because there are only a few cases found in the study in which there was contact against the will of the children. Secondly, where there was forced contact, this usually was the consequence of a court order! In other words, from the perspective of avoiding involuntary contact between the perpetrating parent and the children, leaving the decision to courts seems to be counter-intuitive. It is far from self-evident to see courts as the most suitable decision makers in these kinds of cases if respect for the free will of children is the main aim of the legislature. Apart from that, going through a court procedure as such may also have traumatic consequences for the children.[68]
The proposers (MPs) did not respond to the Council of State's judgement that the research findings could not be seen as evidence to support this legislative initiative.[69]
The proposed legislation appears to be based on the assumption that the only reason for the homicide has been the perpetrating parent's intention to kill his partner. In his study about partner homicide, however, De Boer described many possible motives the perpetrator parent might have had to commit homicide.[70] In the advice of the Association of Family Law and Divorce Mediators, the question was raised whether the new procedure would be suitable in cases where the perpetrator's intent has been to defend the child against the other parent.[71] This raises doubt about the stereotype of the perpetrating parent found in the legislative draft. More importantly, though, there is no evidence that the new procedure will lead to more peace and stability and less forced contacts between children and the perpetrating parent.



#### *3.2.4 Necessity*

Could we ascertain the proposed procedure to be the least intrusive measure reaching the aims of the bill? In the Utrecht University study, no comparison has been made between alternative modes of regulation. Likewise, the explanatory memorandum did not refer to any study of alternatives, although, according to Section 2.3 of the Directives on legislative drafting, such a study is mandatory.
In the course of the legislative process, some alternatives are mentioned, such as a procedure according to which only the scrutiny of the Council of child protection would be mandatory, but the consequences of such options have not been studied.[72] Hence, we do not know whether lighter alternatives to decision-making by a Juvenile court would suffice to accomplish the aims of proposed legislation.
In the initial draft, avoiding communication between children and the perpetrating parent for at least two years was meant to be the rule. The idea was that courts would only decide to allow contact under exceptional circumstances. This 'no contact, unless …' was altered because of the advice of the Council of State. The core of the council's advice is to respect the balance between caring for the child's well-being on the one hand and respecting the parent's rights to contact on the other.[73]
In the revised draft, it is up to the court to make a situational decision. One might consider this to be a lighter alternative in comparison with the original idea of the draft, but no evidence is presented with regard to the effectiveness of this measure in light of the aims of the bill.
The proposed two-year cooling down term in which the perpetrating parent is not allowed to object to the court's prohibition of contact with the children is considered to be a moderate measure. In its (neglected) advice, the Council of State proposed to make courts decide about this term, given the specific circumstances of the case. In some cases, a shorter period could be in the interest of the child.[74] The proposing MPs do not want to see the perpetrating parent to object to the court within two years because of the child's well-being. Whenever it would be in the child's favour, children – but not the parents – are allowed to go to court.[75] In the parliamentary debate, two political parties differ about the necessity of the two-year term. The term should be three years (VVD) versus one year (D66).[76]

#### *3.2.5 Proportionality stricto sensus*

According to the explanatory memorandum, the costs for the new procedure fit into the current budget of the Council for Child Protection.[77] This keeps the costs out of sight, which makes a true balancing between the costs and benefits impossible. In the parliamentary debate about the proposal, nobody mentioned anything about the costs or benefits.[78]
In the Netherlands, there are fourteen cases of parental intimate partner homicide on average per year. The total amount of children involved in those fourteen cases is twenty-six. As we have seen in most cases, there is no contact between the children and the perpetrating parent against the will of the child.[79] This means that the new procedure given by this draft could only make a

68. Alisic *et al*. (2014), above n. 57, at 101.
69. Parliamentary Papers II 2015-2016, 34 518, nr. 4, at 3.
70. A.P. de Boer, *Partnerdoding. Een empirisch forensisch-psychiatrisch onderzoek; proefschrift Katholieke Universiteit Nijmegen* (Arnhem: Gouda Quint BV; 1990). In this study, De Boer examines 104 male and 20 female spouse killers who were submitted to a psychiatric examination. In 122 of the 124 cases, the psychiatrists concluded that, at the time of the deed, there was a defective development and/or impairment of the offender's mind.
71. By letter of January 12. 2015, published in: Parliamentary Papers II 2012/2013, 33 552, nr. 3.
72. This lighter alternative was mentioned in the Council of State's advice.
73. The Council of State refers to the European Convention on Human Rights, Art. 8. As the council stated, according to the convention, the parent's right to access does not depend on the child's interest.
74. Parliamentary proceedings II, 2016-2017, May 10. 2017, at 73-3-1.
75. Parliamentary Papers II 2015-2016 34 518, nr. 4, at 10.
76. Parliamentary proceedings II, 2016-2017, at 73-3-2 and 73-3-5.
77. Parliamentary Papers II 2015-2016 34 518, nr. 3, at 8. According to the explanatory memorandum, there is no need to increase the budget, because of the small amount of cases. For the same reason, the Dutch Council for the judiciary does not expect a substantial increase of the workload.
78. Parliamentary proceedings, 10 May 2017, at 73-3-1 to 73-3-16.
79. In only two out of 84 cases.

*Table 2 Outcome intimate partner homicide case*

| | Explanatory memorandum | Council of State | House of Representatives |
|---|---|---|---|
| Empirical research | One study mentioned Only about impact | Referring to study mentioned in memo. No other evidence | Referring to study mentioned in memo. No other evidence |
| Suitability | Abstract goals No evidence | Mentioned study not convincing about suitability | Implicitly convinced about suitability |
| Necessity | No comparison of regulatory alternatives | Skip 'No contact, unless' (adopted). Skip two years' term to file objections (not adopted) | Two political parties doubt need for a court decision in every case Parties differ about two years' term (less/more) |
| Proportionality stricto sensu | Costs fit into current budget | Balance between child's well-being and parent's rights is questioned Silent about small number of cases with forced contact | No comments about costs or concurring values |

difference for a few cases per year, if it does at all. That makes the balance between the legislative costs and benefits doubtful. It is remarkable that nobody questioned the balancing of the costs and benefits of this legal measure. Even the Council of State kept silent about this. There is no obvious explanation for this. Various possible reasons might be applicable, such as the following: a general feeling that the ends (should) justify the means in this case, the ethical and moral sensitivity of the matter that prevents different actors in the legislative process from critically questioning the costs, but it could also be a simple lack of facts and data about costs and benefits.

The new procedure in the draft limits the possibility of the perpetrating parent to request the Juvenile court for a new decision. This parent has to wait for two years before being allowed to object in court. The drafters expect the child to have less stress as a result of this two years cooling down term. However, there are no empirical data available to estimate whether children would suffer less stress as a result of the new procedure. Here too, there is reasonable doubt about the balance between costs and benefits. Nevertheless, those proposing the bill believe the mentioned balance between the parent's right to contact and the well-being of the child to be an argument in favour of this two-year term.[80]

### *3.2.6 Intermediary Conclusion*

The initiators of the draft lean heavily on one particular study, which has as its main outcome that children should not be forced to have contact with the perpetrating parent in order to prevent further trauma.

This single study says little about the suitability of the proposed draft and the more prominent role in the procedure for the Juvenile court because there are only a few cases a year in which children are forced to have contact against their will, and in some cases, it is even the court that decides in favour of forced contact. Other studies have not been included in the explanatory memorandum of the draft.

As far as the necessity of the draft is concerned, there has not been a study of potential alternatives to the proposed procedure. Although the initial idea of a standard two-year cooling down period has been amended because of the criticism by the Council of State, this cannot really be seen as a lighter regulatory alternative. A procedure according to which only the scrutiny of the Council of child protection would be mandatory, might be seen as an alternative, but the consequences of this option have also not been studied.

With regard to costs and benefits of the new procedure, the draft does not provide any serious information. It is claimed that the enactment of the bill will not invoke new costs for the Council of child protection or for Juvenile courts, but it is impossible to verify whether this is actually true based on the evidence provided in the draft.

## 5 Conclusion

Because the idea of evidence-based lawmaking appears to gain increasing support in the circles of lawmakers,[81] we have undertaken this study to look at the role that empirical evidence plays with regard to the motivation of normative decisions in legislative drafts. We have used the proportionality principle as the lens through which we studied two examples of legislative drafts. In the alcolock case, more quantitative data and research, such as statistics and accident data, were available, while in the intimate partner homicide case, qualitative

80. Parliamentary Papers II 2015-2016 34 518, nr. 4, at 9.

81. S. Kealy and A. Forney, 'The Reliability of Evidence in Evidence-Based Legislation', 20(1) *European Journal of Law Reform* (2018), at 40-66; A. Seidman & R. Seidman, 'ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change', 9(2) *Boston University Law Review* (2009), at 435-86.

research inspired the drafters of new legislation. The research question we raised reads:

> To what extent is available empirical research used in explanatory memoranda of two different legislative drafts, namely the introduction of an alcohol lock programme in traffic law and the protection of children in cases of intimate partner homicide, in order to justify normative legal choices, viewed through the lens of the proportionality principle?

We divided this main question into three sub-questions. The first one being whether there is a difference in how the results from qualitative and quantitative studies in the investigated cases play a role in the explanatory memoranda of legislative drafts in order to justify normative choices, judged from a proportionality perspective? Here the answer is clearly negative.

In both our cases, the empirical evidence is primarily used to show the seriousness of the problem, which the draft tries to remedy. Empirical research does not serve to prove the effectiveness of the proposed interventions.[82] Counter-evidence that might cast doubts as to the suitability, necessity and the balancing of costs and benefits is not presented. In the alcolock case, the draft relies heavily on foreign experiences without much information about the context in which these relatively new programmes operated abroad. In the intimate partner homicide case, the entire draft basically leans on a single study. This study contains no evidence that the proposed procedure to let a court decide about the visitation rights of perpetrating parents with their children will satisfy the aims of the draft. This includes the avoidance of forced contact. In this case, history learns that there have very few occasions where contact between the perpetrating parent and his children was involuntary. In the handful of cases where this was different, it was usually the result of a Juvenile court's order. This would seem to make it unlikely that the proposed measures will prevent forced contact and reduce stress for children. In both cases, there has not been an empirical study of possible lighter regulatory alternatives.

As to the question whether relevant empirical evidence is missing in the explanatory memoranda or not presented in a balanced manner, we can be brief. What is striking in the alcolock case is how little information is provided about the context in which different types of alcolock programmes were functioning abroad. More importantly, however, the drafters neglected the advice to conduct a sound experiment, which was already advised by SWOV – a specialised research institute for traffic safety research – in 1994 as the best way to study the effectiveness of an alcolock programme. This study is not mentioned anywhere in the explanatory memorandum. Taking this into account, it is not surprising that alcolock programmes come out as the best possible remedy to prevent drunken driving. When drafters only look to research concerning these kinds of programmes and do not include studies of possible regulatory alternatives, these programmes will automatically come out on top. As to the costs of the programme, the Advisory Division of the Council of State already argued that the estimation of costs and benefits was unrealistic. This later turned out to be true when participants of the alcolock programme filed a suit against the government because the regulation violated the proportionality principle due to the fact that the costs for individual participants were unreasonably high.

Regarding the intimate partner homicide case, again not all relevant empirical evidence is presented in the draft, and the evidence that is provided sometimes seems to be interpreted rather one-sidedly. The Utrecht University study, for example, reveals that in 94% of the cases, the will of the children to not visit the perpetrating parent was respected by the Council of child protection. This raises doubts as to whether the existing procedure should be changed by introducing a mandatory court decision concerning visitation rights. Other comparative studies, not included in the draft, cast doubts with respect to the reliability of the existing empirical data. What is striking is that the Council of State does not seem to be willing or able to critically assess the rather thin evidence on which the draft is based.

Finally, we have to ask ourselves how the lack of attention for empirical (counter-) evidence that does not support the aims of the draft both by the drafters and by organisations responsible for legislative scrutiny, such as the Council of State, can be explained. Vick's explanation that evidence and research that is 'closer' to what lawyers – including legislative drafters – are familiar with does not seem to hold ground in both cases, because there appears to be little difference between how the quantitative research in the alcolock case and the qualitative research in the intimate partner homicide case was dealt with by the drafters. A more likely explanation appears to be that factors other than the methodological closeness of empirical research to the drafters may provide an explanation here. Inspiration might, for example, be drawn from the literature on evaluation use.[83]

With regard to the use of the outcomes of (empirical) evaluations, the literature discerns between instrumental, conceptual and symbolic use. Instrumental use is the direct application of knowledge stemming from research to improve certain policies; conceptual use refers to the situation where no direct action has been undertaken on the basis of the evidence but where people's under-

82. This corresponds with earlier findings in research such as: R.A.J. van Gestel & M.M. Menting, 'Ex ante Evaluation and Alternatives to Legislation: Going Dutch?', 32(3) *Statute Law Review* (2011), at 1-18.

83. M. Alkin and J. King, 'The Historical Development of Evaluation Use', 37(4) *American Journal of Evaluation* (2016), at 568-79; B. de Laat & K. Williams, 'Evaluation use within the European Commission (EC): Lessons for the Evaluation Commissioner', in M. Loud and J. Mayne (eds.), *Enhancing Evaluation Use: Insights from Internal Evaluation Units* (Thousand Oaks: Sage Publications; 2014), at 147-74; A. Balthasar, 'Institutional Design and Utilization of Evaluation: A Contribution to a Theory of Evaluation Influence Based on Swisse Experience', 33(3) *Evaluation Review* (2009), at 226-56; D. Fleischer and C. Christie, 'Evaluation Use', 30(2) *American Journal of Evaluation* (2009), at 158-75.

standing has been affected; symbolic use concerns the situation in which the mere existence of research or evaluation is used to convince stakeholders rather than any aspect of the outcomes of the research.[84] Looking at our two cases, one gets the impression that the way in which empirical research is applied in the process of legislative drafting is predominantly 'symbolic'. This would indicate that it is not the type of research, the methodological closeness to lawyers, the validity of the research or the conclusiveness of the outcomes that determines whether empirical research will be taken into account. Instead, empirical research appears to be primarily used to defend politically desired outcomes.

Especially in the more sensitive case of the intimate partner homicide, legislative drafters might realise that, for example, State Councillors and MPs will find it very difficult to critically assess research that claims to support victims of a horrible crime. On a deeper level, as Rachlinski has argued, evidence-based law is problematic in itself,[85] because the scientific rationality in the legislative process often conflicts with deeply held moral and political beliefs. The question is to what extent one may expect from legislative drafters acting on behalf of a politically responsible minister that they are going to use empirical evidence running against the normative (*e.g.* moral, ideological, political) choices of their political superiors? Is it not more likely that draftsmen will be inclined to look for facts, arguments and empirical research that can be used to support the passing of the draft, while leaving the counter-arguments and counter-evidence to the opposition in Parliament?

In case the latter would be true, we believe our proposal to assess legislative drafts through the lens of our proportionality test becomes all the more important. Not only is it a way to systematically study how empirical data and scientific evidence are used to prove that proposals for new legislation are suitable to accomplish the aims of the draft, the necessity of the interventions and the balancing of costs and benefits, but it can provide courts afterwards with valuable information to strike down pieces of legislation that infringe upon the rights of citizens in a disproportionate manner because empirical data and scientific evidence with regard to the proposed solution to certain policy problems were ignored. In other words, courts opting for a process-oriented review could perhaps benefit from the fact that during the preparatory phase, the outcomes of the proportionality test were set aside. By doing so, the ex post evaluation of legislation by courts and the ex ante evaluation of legislative drafts by legislative scrutiny boards, such as the Council of State, might re-enforce each other. In case both draftsmen and political actors start to realise that courts will no longer shy away from a stringent proportionality review, they could become more careful with the way in which empirical data and scientific evidence are used to promote new pieces of legislation.

84. *See* K. Johnson, S. Toal, J. King, F. Lawrenz & B. Volkov, Research on Evaluation Use: A Review of the Empirical Literature 1968 to 2005', 30(3) *American Journal of Evaluation* (2009), at 378.

85. J. Rachlinski, 'Evidence-Based Law', 96 *Cornell L. Rev.* 901 (2011).

# Making Sense of the Law and Society Movement

**Daniel Blocq & Maartje van der Woude***

**Abstract**

This article aims to deepen scholarly understanding of the Law and Society Movement (L&S) and thereby strengthen debates about the relation between Empirical Legal Studies (ELS) and L&S. The article departs from the observation that ELS, understood as an initiative that emerged in American law schools in the early 2000s, has been quite successful in generating more attention to the empirical study of law and legal institutions in law schools, both in- and outside the US. In the early years of its existence, L&S – another important site for the empirical study of law and legal institutions – also had its center of gravity inside the law schools. But over time, it shifted towards the social sciences. This article discusses how that happened, and more in general explains how L&S became ever more diverse in terms of substance, theory and methods.



## 1 Introduction

In 2001, Theodore Eisenberg published a review on the emergence of Empirical Legal Studies (ELS), in which he explained how ELS brought a great deal of empirical scholarship on law and legal institutions back into the law schools.[1] He observed, 'much of the empirical study of law was segmented across varying disciplines with no center […] The growth of ELS has given law-related empirical scholarship a center, albeit a diffuse center, in law schools'.[2] Eisenberg's observation, regarding the segmentation of law-related empirical scholarship, prompts questions about the pre-ELS era. Why was empirical scholarship on law and legal institutions segmented across disciplines? And has it always been this way?

In answering these questions, this article focuses on the evolution of the Law and Society Movement (L&S) – an important alternative site for the empirical study of law and legal institutions. The article notes that L&S, at the time of its emergence, also had its centre of gravity inside the law schools. Over time, that centre gradually moved away from law schools towards the social sciences. We explain why the shift occurred and how the movement became ever more diverse in terms of substance, theory and methods.

But the article does not stop there. In effectively contributing to debates about the relationship between ELS and L&S, the paper observes that L&S, in spite of its enormous breadth and diversity, has not been without boundaries or direction. In the article, we identify a particular set of traits that characterise L&S. Consideration of these traits is useful not only for deepening our understanding of L&S but also for reflecting on the nature and character of ELS, in the Netherlands and beyond.

Two words of caution are in order at this point. First, we do not aim to provide a complete overview of the evolution of the L&S. Instead, relying on a combination of past reviews, presidential addresses[3] and interviews with leading L&S scholars,[4] we highlight several processes and turning points that contributed to the nature of L&S. Second, in reflecting on the evolution of L&S, we focus on developments in the United States. We acknowledge the fact that very valuable socio-legal work has occurred outside the United States. But we also observe that North American scholarship has been dominant in the evolution of the L&S.

Finally, there is a need for clarification of the label ELS, or at least how it is understood in the context of this article. We understand ELS as a movement that emerged in American law schools in the early 2000s. Like the L&S, ELS is interdisciplinary in nature. But as several scholars have noted, unlike L&S, the centre of gravity of ELS lies chiefly within the law schools.[5] Furthermore, ELS is often characterised as a movement

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1. T. Eisenberg, The Origins, Nature, and Promises of Empirical Legal Studies and a Response to Concerns' 5 *University of Illinois Law Review* (2011) 171.
2. Eisenberg, above n. 1, at 1719.
3. Presidential addresses of the Law & Society Association (LSA) do not perfectly reflect the field. Sometimes the 'projects' that presidents imagine are not in line with the 'practice' of Law-and-Society scholarship. *See* R.L. Abel, 'Law and Society: Project and Practice', 6 *Annual Review of Law and Social Science* (2010) 1, at 5. That said, we also observe that the selection of a president with a specific profile and at a particular point in time – partly – reflects the interests of law-and-society members at that moment. Furthermore, we notice that law-and-society presidents use their knowledge of the field to shape their addresses. The addresses thus offer a glimpse into wider debates in L&S over time.
4. These interviews have been conducted by UC Berkeley's Center for the Study of Law & Society, and are available at: https://www.law.berkeley.edu/centers/center-for-the-study-of-law-society/conversations-in-law-and-society/(accessed on July 18, 2018).
5. Eisenberg, above n. 1; *see also* M. Suchman and E. Mertz, 'Towards a New Legal Empiricism: Empirical Legal Studies and New Legal Realism', 6 *Annual Review of Law and Social Science* (2010) 555, at 556.

with a preference for positivist and quantitative research.[6]

Outside the United States, ELS sometimes seems to be defined more broadly, to incorporate *all* empirical research conducted on law and legal institutions. This broader definition allows for a diverse set of scholars to be brought under a single umbrella. It is inclusive and helps connect researchers. But to make sense of the different approaches to empirical scholarship, a narrower definition of ELS, like the one adopted in this article, can be useful. Such a definition enables identification of commonalities and differences across the field. Identification of these properties can in turn help us advance empirical research on law and legal institutions as a whole.

## 2 Origins

Law and Society shares its intellectual roots with ELS. Both movements can be traced back to the beginning of the twentieth century when legal scholars in Europe and the United States started to move beyond a purely doctrinal study of law. In Europe, we observe how collaboration between legal scholars and social scientists intensified as a result of the expansion of the administrative state. This collaboration served to increase the effectiveness and efficiency of policy and law, both instruments of social control.[7]

In the United States, where Sociological Jurisprudence and Legal Realism gained traction, legal scholars also developed an interest in the impact of law. But in doing so, they mainly focused on the effect of *judicial decisions*.[8] In addition, legal realists wanted to better understand the human determinants of court rulings. Contrary to the belief that these decisions were the outcome of mechanical application of legal principles to actual cases, legal realists argued that judicial decisions were made by human beings who were themselves subject to all kinds of norms, beliefs and emotions that affected the outcome of particular cases.[9]

Legal Realism influenced legal education and had an impact on debates in legal theory. Yet its impact on American jurisprudence waned after World War II. In the early 1960s, some scholars started to demonstrate renewed interest in the study of law and society and set up the Law and Society Association (LSA) in 1964. The Association, its annual meeting, and its flagship journal – the Law & Society Review, launched in 1966 – allowed for further and 'routinized intellectual exchange' on questions related to the interaction between law and society.[10] Four factors appear to have contributed to the renewed interest in law and society and the establishment of the LSA: (a) heightened respect for social sciences; (b) the civil rights movement and the war on poverty; (c) funding opportunities; and (d) an awareness that law-on-the-books was not the same as law-in-action.

Increasing respect for the social sciences surfaced after World War II. Indeed, '[b]y the end of World War II, the social sciences had become a respectable third wing of U.S. higher education'.[11] Advances in survey research, many of which occurred during the war, had allowed the social sciences to further position themselves as an enterprise similar to the physical sciences. In searching for universal behavioural laws or regularities, social science increased its standing and became an important instrument for policymaking.[12]

The link between social science and policy was also appealing to many of the early members of the L&S who were committed to addressing societal problems – most notably, problems related to the civil rights movement, the war on poverty, and crime.[13] From the perspective of legal scholars, collaboration with the social sciences allowed for sounder policy and judicial decision-making. From the perspective of social scientists, attention to law and policy was important for the definition of meaningful questions and for the employment of research output in useful ways.[14]

The actualisation of these normative commitments was facilitated by unprecedented institutional opportunities.[15] The Russell Sage Foundation, the Walter E. Meyer Research Institute, the Ford Foundation and the American Bar Foundation stimulated and funded entire research centres and other new research initiatives. Influential hubs for law-and-society research,



6. Theodore Eisenberg, one of the founders of ELS, explained how ELS 'helps the study of law and the legal system to join part of a larger *probabilistic* revolution […] ELS employs a methodology that is usually, but not always, the methodology of statistical analysis'. *See* Eisenberg, above n. 1, at 1719, emphasis added. *See also* E. Chambliss, 'When do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies"', 71 *Law and Contemporary Problems* (2008) 17, at 24; Suchman and Mertz, above n. 5, at 558.
7. M. M. Feeley, 'Three Voices of Socio-Legal Studies', 35 *Israel Law Review* (2001) 175, at 177-78.
8. N.E.H. Hull, 'Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism', 38 *Duke Law Journal* (1989), 1302, at 1305-08; B. Tamanaha, 'A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"', 36 *Law and Social Inquiry* (2011) 197, at 303, 305-8.
9. E. White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America', 58 *Virginia Law Review* (1972) 999; *see also* B. Leiter, 'American Legal Realism', in M.P. Golding and W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 50; J. Skolnick, 'The Sociology of Law in America: Overview and Trends', 13 *Social Problems* (1965) 4, at 7.
10. F.J. Levine, 'Goose Bumps and "The Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-five Years', 24 *Law and Society Review* (1990) 7, at 10.
11. S.S. Silbey, 'Law and Society Movement', in H.M. Kritzer (ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia* (2002) 860, at 861.
12. B. Garth and J. Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State', 32 *Law and Society Review* (1998) 409, at 412.
13. Abel, above n. 3, at 3.
14. *See generally* Garth and Sterling, above n. 12.
15. A more opportunistic reading of this episode suggests that some of the early law-and-society scholars were drawn into the movement in part *because of* the openings that emerged. *See* Garth and Sterling, above n. 12.

which emphasised interdisciplinary training and exchange, emerged in Berkeley, Denver, Northwestern, Yale and Wisconsin.[16]

Several leading L&S scholars who were interviewed for the *Conversations in Law & Society* lecture series (CiL&S), organised and published by University of California, Berkeley's Center for the Study of Law & Society, also signalled frustration with contemporaneous scholarship in law schools. Lawrence Friedman and Joseph Gusfield argued that the study of black-letter-law was too limited, partly in light of discrepancies between 'what the law said and what people were doing'. Laura Nader pointed out that she 'felt lonely in the law schools'. And Steward Macaulay observed that there was a need to make law schools 'a more critical place'.

## 3. Evolution

In the early years of the L&S, collegial relations existed between lawyers and social scientists. Tensions were nonetheless present. 'Social scientists and lawyers were at times allies, but they also competed to define and to gain ascendancy over the new social expertise'.[17] In the 1970s, concerns of legal scholars started to dominate the debate. At the time, 'the center of gravity of the field moved toward law, leaving the social science disciplines for the most part *outside*'.[18] Rita James Simon, one of the early members of the LSA board, similarly explained that social scientists 'were still considered handmaidens and sort of technicians that had to supply just very technical answers to legal scholars who would then (1) frame the problem and (2) analyze what the data really meant'.[19]



### 3.1 Gap Studies

The central role of gap studies in early law-and-society scholarship was illustrative of the dominance of legal concerns during the 1960s and 1970s.[20] Building on legal realism, many law-and-society scholars focused on the identification and understanding of gaps between law-on-the-books and law-in-action.[21] This focus was importantly informed by the legal – not social science – assumption that law-on-the-books and law-in-action are generally aligned.[22] Until today, scholars both within and outside L&S associate law-and-society research with the study of law-in-action.[23] To illustrate, Macaulay's renowned article on the (non)use of law between contract parties – a classical gap study – is frequently used as an example of law-and-society research.[24]

The popularity of gap studies, in the early years of the L&S, also emerged from desires for social engineering. Law played an important role in that scheme; law helped the state realise its engineering objectives.[25] But sometimes, law did not realise those objectives. Evaluation in the form of 'legal policy research' was then called for.[26] But there were also other forms of gap studies, including research that focused on the manifestation of *un*intended (side)-effects of law.[27]

In the mid-1970s, critiques on gap studies slowly started to emerge from within L&S itself. One of the staunchest critics, Richard Abel, argued that the central assumption underlying gap studies – the assumption that social behaviour is commonly in line with legal prescripts – was problematic. He observed, 'Why should we expect harmony between law and behavior rather than some other relationship – dissonance, for instance, or a purely accidental conjunction?'[28] Abel reasoned that the assumption of harmony made sense in an era in which '[l]egislation [still] expressed and clarified values already immanent in the society [and when] adjudication merely reasserted the values enunciated by previous judges'.[29] But during a time in which 'the actions of those who do govern must be seen as making a difference, a difference phrased in terms of the realization of goals, not just the expression of values', the assumption was less obvious.[30]

In an interview for Berkley's *Conversations in Law and Society*, Susan Silbey also argued against gap studies. But she did so for a different reason. Where Richard Abel pointed out that a gap between law-on-the-books and law-in-action is common and not surprising – and, therefore, not clearly worth documenting as such – Susan Silbey observed that many citizens *do* comply with the law, and that scholars should pay more attention to compliance rather than non-compliance. She explained,

> We were so preoccupied with the gap that we weren't paying attention to the meaning, we weren't paying attention to what happens except in that gap. And so it seems to me that the turn that had happened in the scholarship was to notice that in fact what things are called and how they are called is part of their effects, not just the behavior. So it was sort of a step aside. By looking at the gap, we were looking at the tails of the distribution. What we needed, the next thing, we needed to look at the hump. *Why do most people go along* […] Most of the work following was about the

16. Garth and Sterling, above n. 12.
17. Garth and Sterling, above n. 12, at 412.
18. Garth and Sterling, above n. 12, at 409, emphasis added.
19. Quoted in Abel, above n. 3, at 3; cf. Feeley, above n. 7, at 184.
20. R.L. Abel, 'Law Books and Books About Law', 26 *Stanford Law Review* (1973) 175; Feeley, above n. 7.
21. J.B. Gould and S. Barclay, 'Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship', 8 *Annual Review of Law and Social Science* (2012) 323, at 324-25.
22. Abel, above n. 20, at 185-86.
23. *e.g.,* S. Macaulay, L. Friedman and E. Mertz, *Law in Action: A Socio-Legal Reader* (2007).
24. S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', 28 *American Sociological Review* (1963) 55. In this article, Macaulay explained that business partners generally make little use of legal sanctions in planning commercial exchanges and in solving commercial disputes. Macaulay thus challenged a central assumption of law-on-the-books – the assumption that the law governed these kinds of exchanges and disputes.
25. Feeley, above n. 7, at 178.
26. Feeley, above n. 7, at 184.
27. *See also* Gould and Barclay, above n. 21.
28. Abel, above n. 20, at 185.
29. Abel, above n. 20, at 186.
30. Abel, above n. 20, at 186.

> meanings system and the circulating narratives and schemers are what encourage the compliance, the conformity or the legitimacy of the law (emphasis added).

These and other critiques on gap studies contributed to shifts, from legal concerns to social science concerns, in the L&S.

### 3.2 Formal Legal Institutions

A second way in which the dominance of legal concerns transpired in the *early* years concerned the main objects of investigation: formal legal institutions. Most research focused on the operation of courts, lawyers, juries and, to a lesser extent, the police. In search of a law-and-society canon, Carol Seron and Susan Silbey tellingly indicate, 'Students of law and society have historically pursued the study of law-in-action in (1) courts, (2) lawyers' offices, (3) juries, (4) regulatory agencies, (5) police work, (6) citizens' interactions with those legal actors and agencies'.[31] In his 1986 presidential address, Stewart Macaulay lamented the preoccupation with legal actors and thus implicitly underlined that focus. He argued:

> My case is very simple: I'll argue that we must look beyond the behavior of judges, lawyers, cops, crooks, and eyewitnesses as well as data concerning how many of what kinds of cases come before the courts. We need to understand the behavior of *people* who comply with or shade and evade the law. We need to consider when and why *people* turn to lawyers or use other means of solving problems. We need to understand what conduct by legal officials *people* will applaud or tolerate. To understand these and other things, we must understand *people*'s knowledge of and attitudes toward the legal system.[32]

## 4 Transition

Critiques by Macaulay, Abel and like-minded scholars from L&S arguably helped gradually shift the emphasis in research away from the concerns and interests of legal scholars to those of social scientists. But these critiques were not the only sources that triggered change. Transformations of the political landscape and developments in the philosophy of science were equally important.

### 4.1 Change in the Political Landscape

The L&S emerged at a time in which governance in the United States was undergoing important change. The state was making ever more attempts at controlling and directing the behaviour of its citizens; the state became more 'activist', both at the national and at the local level. In this context, law-and-society scholars could play an important role, helping governments develop laws and policies in support of their attempts at social engineering.[33] Through their work many socio-legal scholars tried to contribute to progressive social change and tackle problems like poverty, drugs and racism.[34]

Under the Reagan- and Bush administrations, the desire to support political leaders changed. Abel explains, 'Eight years of Reagan and four of George H.W. Bush coincided with a major shift in the L&S project. With conservatives in the White House (and increasingly the federal judiciary), there was less interest than earlier in increasing the efficacy of law'.[35] Law-and-society scholars, mostly liberal, were critical of the political establishment, and started to emphasise and study the – sometimes – ineffective nature of law and policy. In his widely discussed work *The Hollow Hope*, Gerald Rosenberg, for instance, showed great scepticism about the possibility for social change through litigation.[36]

### 4.2 Developments in the Philosophy of Science

Along with the changing political landscape we could also observe developments in the philosophy of science: postmodernism and critical legal studies gained ground at the expense of positivism. Looking back at the late 1970s, Michael McCann argued, 'The prevailing mode of inquiry in the early decades was gap studies […] Then, in the late 1970s, several waves of critical theory […] began to interrogate the promises of rights in more analytically ambitious ways'.[37] Lynn Mather similarly observed, 'By the 1980s, law and society critics of positivism raised serious challenges to the [positivist] paradigm and articulated postrealist, interpretive, and constitutive approaches to law'.[38] And in 1984, David Trubek published an article with the revealing title 'Where the Action is: Critical Legal Studies and Empiricism'.

Critical and postmodern approaches to the empirical study of law and legal institutions were particularly prevalent at the University of Massachusetts, where scholars such as Patricia Ewick, Sally Merry, Austin Sarat, Susan Silbey and Barbara Yngvesson were running the Amherst Seminar on Legal Ideology and Legal Process. The program of the Amherst Seminar stimulated serious reflection on the practice of socio-legal studies.[39] Members of the seminar called for interpretive work and argued against narrow positivism. Susan Sil-



31. C. Seron and S.S. Silbey 'Profession, Science and Culture: An Emergent Canon of Law and Society Research', in A. Sarat (ed.), *The Blackwell Companion to Law and Society* (2004) 30, at 35.
32. S. Macaulay, 'Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports', 21 *Law and Society Review* (1987) 185, at 186, emphasis added.
33. J. Simon, 'Law after Society', 24 *Law and Social Inquiry* (1999) 143, at 145-46.
34. *See also* M. Galanter, 'Presidential Address: The Legal Malaise; Or, Justice Observed', 19 *Law and Society Review* (1985) 537, at 538-39.
35. Abel, above n. 3, at 8.
36. G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).
37. M. McCann, 'The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era', 48 *Law and Society Review* (2014) 245, at, 246.
38. L. Mather, 'Reflections on the Reach of Law (and Society) Post 9/11: an American Superhero?', 37 *Law and Society Review* (2003) 263.
39. *See for example* C. Harrington and B. Yngvesson, 'Interpretive Sociolegal Research', 15 *Law and Social Inquiry* (1990) 135; D. Trubek and J. Esser, 'Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box?', 14 *Law and Social Inquiry* (1989) 3.

bey and Austin Sarat furthermore argued, 'At the same time that we have been insisting on bringing sociology to law, we have done less well attending to the forces that frame our descriptions of legal institutions and their environments. We have not done very well at promoting a sociology of the sociology of law'.[40]
During these years, in which the Amherst Seminar was rather dominant in law-and-society research, many studies on legal discourse and legal ideology emerged.[41] Furthermore, research on interpretive action and legal consciousness flourished.[42]

## 5 The 'Big Tent'

By the early nineties, L&S had transformed into an interdisciplinary and methodologically eclectic movement – sometimes referred to as a pluralistic association or a 'big tent',[43] which 'is getting bigger all the time'.[44] It is clear that there are different opinions with regard to the size of the LSA tent. In discussing the values of the LSA, Howard Erlanger illustrated the eclecticism. After asking himself, 'What are the values that characterize the LSA?' he explained:

> We are committed to each other and to the development of the field, even though we are not always sure what 'the field' is. We are a community that is open to new theories, methods, and substantive topics. And we are a community that seeks to be welcoming to new scholars and to those who aren't the predominantly white, male, U.S.-based scholars who founded LSA. Although we may not always get it right and more work remains to be done, I believe that the history of LSA as an institution is the history of a commitment to these values.[45]

Many scholars within the L&S indeed appear to have embraced the inclusiveness.[46] Lynn Mather, for instance, also observed, 'A strength of law and society has been its inclusivity and openness to new perspectives, whether disciplinary, theoretical or methodological'.[47] The many presidential calls for *further* expansion through issues such as inclusion of international scholars and consideration of issues pertinent to those scholars,[48] through attention to new themes like violence,[49] and by calling for more activist and policy-oriented work exemplify the appreciation of inclusiveness.[50]
As mentioned, not all law-and-society scholars have appreciated the increasing breadth or inclusiveness of the movement. To some it has been a cause for concern. In the same address in which Erlanger celebrated diversity, he also observed, 'All this is not to say that valuing diversity in scholarly style is cost-free […] we have valued breadth over focus and parsimony […] To the extent that law and society seeks to be an independent discipline with its own theory and methods, there will be pressure to define a much more focused core, and to set boundaries.'[51] In a review of Kitty Calavita's *Invitation to Law & Society: An Introduction to the Study of Real Law*,[52] Austin Sarat bemoaned the state of affairs, writing

> In the late 1980s, I enthusiastically participated in a set of meta-debates about the nature of law and society as an intellectual endeavour and about the directions that law and society research might most profitably take […] At that time, it still seemed meaningful to talk about a law and society paradigm and to refer to law and society as a 'movement.' Two decades later it no longer seems appropriate to do so. Even as the field has flourished, the law and society paradigm has decomposed. What was a paradigm is now what Kitty Calavita […] rightly refers to as a 'perspective.' What was a movement has become what she refers to as a 'mentality'.[53]

The increasingly eclectic nature of the L&S has spurred the emergence of new factions, associations and journals. Law-and-society scholars with a stronger interpretivist bent started the Association for the Study of Law, Culture and Humanities in 1998, and launched the journal *Law, Culture and Humanities* in 2005. Some law-and-society scholars with a preference for positivist and quantitative work co-initiated or jumped on the bandwagon of ELS. These initiatives have not necessarily led to an abandonment of the LSA. Instead, we find eminent scholars, such as Valerie Hans and Austin Sarat, taking up positions of leadership in different associations.

40. Silbey and Sarat, 'Critical Traditions in Law and Society Research', 21 *Law and Society Review* (1987) 165, at 165-66.
41. *See for example* J. Conley and W. O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (1990); L. Mather and B. Yngvesson, 'Language, Audience, and the Transformation of Disputes', 15 *Law and Society Review* (1980-81) 775; S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans* (1990); A. Sarat and W.L.F. Felstiner, 'Law and Strategy in the Divorce Lawyer's Office', 20 *Law and Society Review* (1986) 93.
42. *See generally* S.S. Silbey, 'After Legal Consciousness', 1 *Annual Review of Law and Social Science* (2005) 323.
43. H.S. Erlanger, 'Organizations, Institutions, and the Story of Shmuel: Reflections on the 40th Anniversary of the Law and Society Association', 39 *Law and Society Review* (2005) 1.
44. M. Friedman, 'Coming of Age: Law and Society Enters an Exclusive Club', 1 *Annual Review of Law and Social Science* (2005) 1, at 2.
45. Erlanger, above n. 43, at 4.
46. *See* D.M. Engel, 'Making Connections: Law and Society Researchers and Their Subjects', 33 *Law and Society Review* (1999) 3; Erlanger, above n. 43, at 6; Galanter, above n. 34, at 537-38.
47. Mather, above n. 38, at 278.
48. Mather, above n. 38.
49. C.J. Greenhouse, 'Tuning to a Key of Gladness', 32 *Law and Society Review* (1998) 1.
50. C. Seron, 'The Two Faces of Law and Inequality: From Critique to the Promise of Situated, Pragmatic Policy', 50 *Law and Society Review* (2016) 9.
51. Erlanger, above n. 43, at 8.
52. K. Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (2010).
53. A. Sarat, 'From Movement to Mentality, From Paradigm to Perspective, From Action to Performance: Law and Society at Mid-Life', 39 *Law and Social Inquiry* (2014) 217, at 218.

# 6 Characteristic Traits

In spite of its diversity, L&S is not without direction. The movement has several characteristic traits, some of which are precisely about diversity – a conscious and very deliberate diversity. We discuss three traits below. A fourth trait, involving the space that L&S offers for both positivist *and* interpretivist work, emerged in the previous discussion on developments in the philosophy of science.

## 6.1 State Law, Non-State Law and Informal Rules

Attention to state law and formal legal institutions has always been central to law-and-society scholarship. But over time, scholarly interest in non-state law increased. To be sure, non-state law was a principal object of investigation in legal anthropology already before the organisation of the LSA. But in the early years, legal anthropologists were not as visible and influential in the formal organisation of the L&S as they would later become.[54]

The increasing prominence of legal anthropologists in the L&S, and the expansion of research on legal pluralism from colonial contexts – old legal pluralism – to the developing world – new legal pluralism – paved the way for or implied a broader approach to the study of law and legal institutions.[55] In her 1989 presidential address, Felice Levine also reflected on the issue, writing:

> The centrality of law has always been an issue of tension in sociolegal studies […] In order to understand law, our scholarly work must not only focus on isolating and explaining patterns of departure from law but also look at law in different locales. Coming to understand law with a little 'l' in everyday lives is consistent with calls that date back to the 1960s and early 1970s […] While the call is not new, it has been endorsed more readily in principle than in practice. One explanation of this ambivalence may flow from the influence of legal scholarship and the apprehension that a broader definition of boundaries might strip our incipient field of a field.[56]

Despite initial concerns about attention to law with a little 'l', non-state law and informal rules have taken up a prominent role in contemporary law-and-society scholarship.[57] The *Journal of Legal Pluralism and Unofficial Law* and Sally Falk Moore's widely cited work on semi-autonomous social fields testify of the role.[58]

Another arena where we observe an increase in attention to non-state law is regulation. Past research has shown that industries sometimes regulate themselves.[59] This self-regulation implies an increase in non-state laws in companies – an increase that has in turn spurred research on enforcement and compliance with these non-state laws (*Ibid.*).

## 6.2 Social Justice and Social Change

In addition to consideration of non-state law, we also observe that social justice became a more central concern. Where the early presidential addresses focused on formal legal institutions,[60] or images of state law,[61] we find that more recent addresses tend to focus on questions of justice,[62] rights,[63] oppression and inequality.[64] In these addresses, state law and formal legal institutions seem to take a back seat. An (implicit) assumption is that these issues – state law and formal legal institutions – are at the service of justice and quality. And that warrants a focus on justice, rights, oppression and (in)equality as such. In that vein, Michael McCann reminds us that attention to 'rights' is not new within the L&S, writing

> Perhaps no topic, short of law itself, has been more central to the sociolegal legacy of scholarly inquiry than that of rights. It is worth remembering that Law and Society as an intellectual movement and professional association was born in the era of the U.S. civil rights movement. The first volume of the Law & Society Review was published in 1966, when the ink was still drying on the 1964 Civil Rights Act and 1965 Voting Rights Act. In fact, the first special issue of LSR in 1967 (Vol. 2, no. 1) was on school desegregation in the United States.[65]

But in those early years, we also observe a great deal of work that tries to focus on state law and formal legal institutions without putting much emphasis on the fairness or justness of those institutions. To illustrate, in his 1982 presidential address, Herbert Jacob emphasised the need for effectiveness. He argued, 'To understand

54. *See also* Eisenberg, above n. 1, at 1716.
55. S.E. Merry, 'Legal Pluralism', 22 *Law and Society Review* (1988) 869.
56. Levine, above n. 10, at 20-21.
57. As Munger observes, 'Faithfulness to insight has led law and society scholars away from studies of liberal legal institutions on their own terms and toward highly contextualized studies of law in organizations, in communities, in families, in everyday life. Powered by a critique of law that decentres or deconstructs the authority of law, law and society research locates the role of law in the very fabric of social relationships, consciousness and identities.' *See* F. Munger, 'Presidential Address: Inquiry and Activism in Law and Society', 35 *Law and Society Review* (2001) 7, at 10-11.
58. Moore 1973.
59. *See for example* R. Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors* (1990); J. Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (1988).
60. *See for example* Galanter 1985; H. Jacob, 'Presidential Address: Trial Courts in the United States: The Travails of Exploration', 17 *Law and Society Review* 407 (1983))
61. Macaulay, above n. 32.
62. S.S. Silbey, '"Let Them Eat Cake": Globalization, Modern Colonialism, and the Possibilities of Justice', 31 *Law and Society Review* (1997) 207.
63. McCann, above n. 37, at 245.
64. R. Lempert, 'A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009', 44 *Law and Society Review* (2010) 431.
65. McCann, above n. 37, at 246. Frank Munger also pointed out, 'The inception of the law and society field in North America, and in many other societies, was motivated by a belief in the simple proposition that law should stand for equality and for justice'. *See* Munger, above n. 57, at 7.

courts is rewarding in its own right, and if we understand them more fully, we might be able to help design them to do their work more *effectively*.' (1983: 419, emphasis added). The implicit assumption here is that the objectives underlying the organisation of formal legal institutions – objectives set by legislators and policymakers – are unproblematic. And therefore attention to effectiveness is justified. As law-and-society scholars started to become more critical of government over time, questions of effectiveness moved to the background. Indeed, there are no references to effectiveness in the more recent presidential addresses.

Law-and-society's commitment to social justice also connects to a concern for progressive social change. This concern does not only manifest itself in research that is informed by questions related to justice and equality. It also transpires in calls for policy-oriented research and engagement with activism,[66] that is, calls for contributing to the resolution of (in)justices identified in research. The renowned debate between Joel Handler and Sally Engle Merry illustrates the concern for progressive social change that binds many – but not all – law-and-society members.[67] In his presidential address, Handler lamented the increasing dominance of postmodernism in (law-and-society) research.[68] Sally Merry offered a rejoinder in the presidential address that came right after.[69] Interestingly, the debate was not about the ontological or epistemological value of postmodernism per se. Instead, it focused on 'the value of postmodernism for *transformative politics*'.[70]



### 6.3 Global North and Global South

Another important characteristic of the L&S concerns its international orientation. While North American scholars have been dominant inside the LSA – all past presidents have been employed by universities in the United States – L&S scholarship shows considerable geographical diversity. In 1968, *the Law & Society Review (LSR)*, the flagship journal of the LSA, devoted a special issue to 'Lawyers in Developing Societies with Particular Reference to India'. In the 1970s, we find work on excuses to criminal responsibility in East Africa,[71] deviance in Singapore,[72] the legal revolution in Turkey,[73] and political leadership and legal change in Mexico.[74] To be sure, most manuscripts in *LSR* focused on American law and legal institutions in the 1970s. But as the above examples and other *LSR* articles from this period show, we observe a genuine interest in questions arising in the Global South, already in the early days of the L&S. Work of leading scholars within the L&S such as Sally Falke Moore, Sally Engle Merry, John and Jean Comaroff and also Marc Galanter obviously illustrate this early interest in the Global South.

In an interview for Berkeley's *Conversations in Law & Society*, Laura Nader discussed the relevance of such a global perspective and the need for comparison. She argued, a bit provocatively, 'I realized you had to do comparison. You can't just look at one place. That's the problem with people who study American law [….] Or the way Europeans look at law. They are very ethnocentric.' And that ethnocentrism creates obstacles to a full understanding of the operation of law and legal institutions inside the societies that we as scholars respectively live in. She observed, 'You study the Zapatec, and of course you look in the mirror. That whole notion of using what you find abroad to look at your own society permeates my work.' That notion was probably important to many legal anthropologists. But it seems to have also appealed to political scientists within L&S, many of whom currently study socio-legal questions in the Global South.

## 7 Conclusion

In this article we have offered reflections on the evolution of law-and-society research. Through these reflections we made a modest attempt to explain how the L&S changed from a field in which concerns of legal scholars and practitioners were prevalent to one in which social scientists seem to have become more influential. Presidential addresses and reviews of the L&S have furthermore shown that the field has become very interdisciplinary and eclectic in terms of research methodologies. This diversity has been celebrated by some and bemoaned by others.

The development towards ever more inclusiveness may result in at least two outcomes for Law and Society. On the one hand, we can imagine L&S turning into a platform, rather than a unified movement. That platform would be made up of different voices and audiences.[75] The emergence of sub-fields within L&S would, in this scenario, be appreciated rather than seen as problematic. The field of L&S would continue to grow and flourish, without people worrying too much about what this means for the central scope, core and message of the scholarship coming out of it. In a second scenario, L&S would be more sceptical of the diversity. It would strive

66. (Seron 2016); *See* Munger, above n. 57.
67. *For an exception see* S. Liu, 'Law's Social Forms: A Powerless Approach to the Sociology of Law', 40 *Law and Social Inquiry* (2015) 1.
68. J.F. Handler, 'Postmodernism, Protest, and the New Social Movements', 26 *Law and Society Review* (1992) 697.
69. S.E. Merry, 'Resistance and the Cultural Power of Law', 29 *Law and Society Review* (1995) 11.
70. Handler, above n. 68, at 697; *see also* Merry, above n. 69, at 11.
71. L. Kato, 'Functional Psychosis and Witchcraft Fears: Excuses to Criminal Responsibility in East Africa', 4 *Law and Society Review* (1970) 385.
72. G. Count-van Manen, 'A Deviant Case of Deviance: Singapore', 5 *Law and Society Review* (1971) 389.
73. J. Starr and J. Pool, 'The Impact of a Legal Revolution in Rural Turkey', 8 *Law and Society Review* (1974) 533.
74. J.F. Collier, 'Political Leadership and Legal Change in Zinacantan', 11 *Law and Society Review* (1976) 131.
75. Malcolm Feeley already observed in 2001 how socio-legal studies 'speaks with at least three voices […] It speaks as policy analysis, a handmaiden to law. It also speaks in the traditional language of the social sciences. Thirdly, it may be gaining a voice of its own, reflecting a belief that law is a distinct form of ordering that merits its own position among the scholarly disciplines, separate from both scholarly fields and the professional concerns of law'. *See* Feeley, above n. 7, at 175).

for a common core and a set of relatively well-defined boundaries of the field. By doing so, L&S could perhaps play a more prominent and active role in deepening scholarship. At this stage, it is hard to speculate on the likelihood of either one of these, and perhaps other, scenarios.

We finally hope that this article can contribute to current discussions, in the Netherlands and beyond, about the development of ELS broadly defined, that is, *all* scholarship focusing on the study of law and legal institutions. By offering insights on the character of L&S, we anticipate a better understanding of L&S, and thus a debate on the relationship between ELS and L&S that rests on *sound* assumptions about L&S. We specifically hope that this understanding of L&S will bring scholars, engaged in the empirical study of law and legal institutions, further together. It seems to us that a broad definition of ELS, which seems to be rather current in the Netherlands, encompasses a great deal of L&S research.

The characteristic traits of L&S, identified in this article, may finally help deepen discussions on the relationship between L&S and ELS. These discussions have, all too often, revolved around dichotomies such as quantitative versus qualitative or applied versus more fundamental. Serious reflection on the L&S traits may enrich – ELS – debates about empirical research on law and legal institutions, bring people on opposite sides of the methodological spectrum together, and bring empirical scholarship to the next level, both within and outside the Netherlands.




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