*Rationality, information and progress in law and psychology (liber amicorum Hans F.M. Crombag).*
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Rationality, Information and Progress in Psychology and Law

Edited by

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Rationality, Information and Progress in Psychology and Law
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Introduction

Nikolas H.M. Roos & Peter J. van Koppen

Hans F.M. Crombag, to whom this Liber Amicorum is dedicated, is the founding father of modern Dutch Psychology of Law as well as “one of a small band of pioneers outside the United States convinced of the value of combining psychology and law”, as Sally Lloyd Bostock writes in her contribution. In his latter capacity the European Association for Psychology and Law (EAPL), of which Crombag was one of the founders, honoured him with the EAPL-award for life-time achievement in psychology and law at its 1998 Conference in Krakow.

This Liber Amicorum will be presented to Crombag on the occasion of his valedictory lecture at Maastricht University on 22 September 2000. In this introduction, we would like to sketch how Crombag came to be a founding father of Dutch Psychology of Law. In fact, his task is not yet completed, as will be explained below. In sketching Crombag’s scholarly career, we will only refer to some highlights. A complete list of the vast number of his publications can be found at the end of this book. After this sketch, we will discuss the general theme of the book and how the different contributions are related to it. Finally, we will express a number of acknowledgements to person and institutions that have been very supportive in making this Liber Amicorum possible.

Crombag as the Pioneer of (Dutch) Psychology of Law

Hans Crombag started his academic career as a researcher in the field of higher education. In 1968, after he had written a Ph.D.-thesis on the effect of membership of student fraternities and sororities on study results, he was the first to be appointed to do research on teaching and learning in Leiden University. The demand for such research increased rapidly and Crombag soon became head of the Office for educational research, which already counted almost ten full-time researchers by the mid-seventies. It became a thriving enterprise of considerable reputation. A normal course of events would have led Crombag to a professorship in educational research and in fact several offers of that kind were made to him. However, Crombag’s ambition and main interests had shifted by then. Crombag had established especially close relationships with the Leiden Law Department. Several renowned professors of this old and prestigious Faculty were impressed by young Crombag’s innovative and inspirational mind. The
Law Department nominated Job Cohen, the present under-minister of Justice of the Netherlands, as Crombag’s full-time assistant for the many projects being developed on behalf of the Law Department. One of the major projects, which started in the early seventies concerned the development of a programme to train law students in systematic case-solving. The theoretical framework of this programme was published in the book *A Theory of Judicial Decision-Making*,¹ its authors being Crombag, Cohen and De Wijckerslooth, who is at present the Dutch Chief Public Prosecutor. The success of this book and its effect on legal teaching have been considerable. The ‘Casesolving Method’ is still widely used in teaching law in the Netherlands. In fact, it is still developing as Georges Span, one of Crombag’s several Ph.D. students in legal informatics at Maastricht University, presents his AI-implementation of the method in his contribution to this book.

As early as 1975, Crombag was appointed as professor extraordinary in Psychology and Law by the recently established Law Department of the University of Antwerp, a professorship he fulfilled until 1998 when he was succeeded by Van Koppen. The Leiden Law Department took slightly longer to recognise Crombag’s great potential. In 1980, he became professor extra-ordinary professor in Leiden as well. After a sabbatical in 1982, largely spent at Stanford University, he published *A Way to Survive: Psychological Foundations of Morality and Law*,² a book that is at the heart of Roos’ contribution. In 1986, Crombag was appointed professor for the social scientific study of law at Maastricht University, where a new Law Faculty had been set up in 1982 on the basis of a plan designed by Cohen and Crombag in 1978. The programme was based on the student centred-method of problem-based learning, which entailed lowering the traditional borders between legal areas as a matter of division of labour in the teaching of law and legal research. Cohen was also made responsible for the organisation of the new faculty and its programme.

His appointment at the Maastricht Law Department finally made it possible for Crombag to spend all of his time on law and psychology and give up his job as head of the Leiden Office for Educational Research. However, his new position could no longer be combined with his Leiden extraordinary professorship, which he gave up in 1987, to be succeeded by Dick Hessing. Hessing held the position until 1997, when the Leiden Law Department decided that other subjects were more worthy of an extra-ordinary chair. Although Dutch psychologists of law will keep regretting this unwise decision of the Leiden Law Department, they can comfort themselves by the fact that Hessing had been made the second Dutch full-time professor for Psychology of Law at the Law Department of the Erasmus University in Rotterdam in 1991.

The modest – in comparison to his earlier and later books – success of *A Way to Survive* may have stimulated Crombag to try and gain more respect for a psychological approach to law through applied research and, as we now know, he has been most successful in this effort, notably through his collaboration with Van Koppen and Wagenaar, with whom he published a book on the psychology of legal evidence in criminal cases in 1992. The book was also published in English in 1993 under the by now well-known title of *Anchored Narratives*. The book caused quite a stir in the Netherlands in the form of heated debates in the popular and professional media. Some judges and other lawyers saw the book as a vicious blow to the great social prestige of the Dutch judiciary, but the world outside the Netherlands received it as a major theoretical advance. In fact, the theory is still pretty much debated, as is evidenced by Twining’s contribution.

Meanwhile, Crombag became more and more involved as an expert witness in an increasing number of cases of sexual child abuse. In these cases, the reliability of alleged early-childhood recollections often played a crucial role. In 1996, Crombag published a book on the subject together with Harald Merckelbach, a young professor of psychology at the also very young Department of Psychology of Maastricht University, which also appeared in German that same year. It contained a devastating attack on theories of repressed memories and multiple personalities as therapeutically induced artefacts, on the basis of which numerous people had been accused and convicted in the meantime. The book has had an important effect on judicial policy (see the contribution by Van Koppen and Cohen). However, as evidenced by Merckelbach and Rassin’s contribution, the struggle is not over yet.

Another manner in which Crombag has become more and more busy promoting law and psychology was as an invited expert in several news- and forum-discussions. In fact, being a media figure has become quite a burden on him, also because private persons started to respond and appeal to him. All these activities notwithstanding, Crombag succeeded to publish another book in 1997, this time together with philosopher of law, Frank van Dun, who is also a contributor. The book entitled *The Utopian Seduction*, offers a profound analysis of the psychological and historical-philosophical roots of utopianism. The subject of utopias has been of special interest to Crombag and over the years he has published several essays on it. One of the main reasons for this interest is he is a critical follower of B.F. Skinner, the champion of behaviourist

psychology, who also wrote a novel on a utopian community, called *Walden Two*, designed around his own psychology. *Walden Two*-people are carefully manipulated without their knowing it. They are content with their lives, but not happy in a conventional sense, because they do not know the difference between being happy and being unhappy. They live without great fears and without great expectations and ambitions. According to Crombag, *Walden Two* represents a horrible confusion of the knowledge and the control mentality of laboratories with real life, which calls for people with initiative, capable of creative adaptation, with no or only a very naive answer to the question *quis custodiet ipsos custodies*?

Although this delightful and very scholarly book was again well received, it is obviously unlikely to be of much support to the further establishment of Psychology of Law in the Netherlands and Flanders. Notwithstanding its many public and academic achievements and an expanding market for psychologists of law as forensic experts, its academic institutional position is still not very secure, as the demise of the extraordinary chair at Leiden has demonstrated. It is fortunate that Maastricht University has recently decided to try and build an Institute for forensic expertise with psychological expertise as the first branch. The new institute will be headed by Crombag’s (part-time) successor, Harald Merckelbach. This institute will not only concentrate on research, but also on training future expert witnesses as well as judges and attorneys. It will also provide expertise itself in cases of scientific interest. Meanwhile, Crombag has accepted a position as honorary professor for at least two more years to assist in the establishment of the institute. It would be wonderful if this project succeeded, because it would be the crowning achievement of Crombag’s efforts to establish Psychology of Law in the Netherlands.

**About this book**

On several occasions Crombag has remarked: “as regards my own person, I am the worst psychologist there is.” It seems a paradoxical statement, as Crombag’s wife, who should know best, will not hesitate to declare that she could not agree more. Crombag’s remark is quite consistent with his anti-introspective methodological position as a neo-behaviourist. However, that position in itself is problematic with regards to the relationship between the neo-behaviourist theory of human conduct and the creation and use of theories within this framework. Crombag never grew tired of teaching his students that intelligence is just a minor factor in human behaviour. If this is true, the question is raised as to how the work of academic psychologists and psychological experts should be seen. What hope is there for psychological intelligence to influence actors by rational means? This question is not just a purely theoretical one. Both Crombag and his comrade in arms, Willem Albert Wagenaar, are quite pessimistic about the practical impact of their work, as evidenced by Wagenaar’s contribution.

The question of progress and rationality in relation to Law and Psychology, has several aspects. The first is rationality and progress within Psychology of Law itself.
The second aspect is the influence of Psychology of Law on legal science and the teaching of law, and vice versa. The third aspect is its influence on legal practice. The fourth aspect, finally, is the question of human psychology in relation to rationality and progress in social evolution.

This book starts off with John Griffiths’ ‘Some Questions to Hans Crombag about Dutch Psychology of Law’, a most provocative taking to task of the scientific rationality of Dutch Psychology of Law. According to Griffiths, himself a sociologist of law, Dutch Psychology of Law has focused on applied research and has contributed relatively little to what – in his view – should be Psychology of Law’s proper field: research of the relationship between psychological characteristics of individuals and law as a variable social phenomenon. Since Griffiths does not suggest anywhere that Dutch Psychology of Law would be very exceptional in this respect, the editors thought it appropriate to let his contribution be followed by Sally Lloyd Bostock’s ‘Psychology and Law’s Evolution from an Applied to an Interdisciplinary Field’, in which she argues that the discipline has outgrown the rather narrow view of applied psychology which provided its starting point. By now, psychologists of law no longer expect a straightforward acceptance of their proposals for empirical operationalization of legal concepts nor an adaptation of those concepts if the psychological assumptions underlying them do not seem to hold. She also argues that the distinction between applied and theoretical research is very misleading, because there is quite some feedback between theory and its objects of application. This interaction is fruitful for both psychology and legal theory and doctrine. Moreover, she points to a much more diffuse influence of psychology of law on legal thinking, whereas psychologists of law have also become increasingly knowledgeable and less naive about the law.

Lloyd Bostock does not suggest that Dutch psychology of law is exceptional in this respect. However, there may be reason to be somewhat self-effacing for Dutch psychologists of law here. Lloyd Bostock refers to William Twining, who as early as 1983 put forward that psychologists of law simply assume that the legal process is indeed striving for rationality and correct decisions. However, in Twining’s ‘Good Stories and True Stories’ we can find him criticising, be it constructively, the Theory of Anchored Narratives in precisely this respect. On the other hand, in his ‘Cross-Roads of Disciplines’ appellate judge Johannes Nijboer, indeed suggests that Law and Psychology are increasingly converging and integrating in the Netherlands as well. Moreover, in Peter Van Koppen en Job Cohen’s ‘Psychologists in the Dutch Legal Domain’ it is argued that Crombag and Wagenaar are much too pessimistic about the impact of psychology of law on legal practice.

Nevertheless, Griffiths’ thesis is only countered in part by Lloyd Bostock’s view, because her argument boils down to the fact that both psychology and the law advance theoretically from their interaction. However, Griffiths would like to see psychology of law move to a social scientific understanding of the law where the kind of questions that concern lawyers, are quite different from the questions asked by social scientists. Thus, psychologist of law can use Lloyd Bostock’s arguments against Grif-
fiths only to claim that social science is not the only master they are asked and prepared to serve, but also psychology and legal theory. Moreover, when looking at the various innovative contributions to this book by psychologists on special subjects within psychology of law (Part II of the book), it can be noticed that they are all very much in the area of applied psychology. Only one of them, Dick Hessing and Henk Elffers’ ‘Mens Rea or Mens Insana’, touches on jurisprudential fundamentals, which they deliberately avoided to further discuss even though they reflect on ideas of Crombag’s which directly relate to the issue of criminal justice.

Griffiths, however, may agree that these contributions are also sophisticated, fascinating, practically relevant and evidence of progress indeed. Hessing and Elffers take Crombag’s 1981 Leiden inaugural lecture Mens Rea as their point of departure to present a mathematical psychological model of the effects of punishment on criminals. Both ‘Crashing Memories in Legal Cases’ by Elizabeth Loftus and George Castelle, and ‘Thick! A Case Study of Eyewitness Identification’ by Willem Albert Wagenaar focus on witnesses. Loftus and Castelle demonstrate how crashing memories, originally discussed in relation to the Bijlmer aircraft disaster, apply to the crashing of the TWA Boeing in 1996. Wagenaar offers a fine example of how a combination of recognition by eyewitnesses and offender descriptions given by them could aid the court in evaluating the evidence in a criminal case. In their contribution, ‘Why not Claim that They Wear Different Size Shoes? On the Status of Alters in Dissociative Identity Disorder’, Harald Merckelbach and Eric Rassin expand on the evidence that Crombag and Merckelbach presented in their book against the validity of psychiatric concepts related to recovered memories.

Friedrich Lösel’s ‘The Efficacy of Sexual Offender Treatment’, and Frans Willem Winkel, Nanneke Snijder and Eric Blaauw’s ‘Rationality and Treatment of Post-Victimization Emotional Disorders’ deal with subjects that are very important from a therapeutic point of view, but of marginal relevance for legal theory. Lösel discusses the behavioural control of sexual offenders, while Winkel, Snijder and Blaauw present research on victim treatment in law that refutes the common understanding in psychology that, as far as therapy is concerned, ‘nothing works’. Finally, Bart Groen’s ‘Reflections from the Border’ is a contribution of someone who has worked for twenty years as a State attorney in the field of Dutch immigration law, a field ridden with all kinds of uncertainties in uncovering facts. However, Groen seems to see hardly any possibilities for support by psychologists of law. Groen’s view must be quite challenging to Dutch psychologists of law, if only because they have so far not moved into this political and legal minefield which at present is Cohen’s political responsibility as under minister for Justice.

The remainder of the contributions are all by philosophers, theoreticians, informaticians and sociologists of law, all of whom are also members of the Metajuridica Section of the Maastricht Law Department to which Crombag himself belongs. George Span’s ‘An Intelligent Tool for Acquiring Legal Case Solving Skills’ has already been referred to in the preceding section. He discusses his AI-implementation of the Case Solving-Method Crombag and his colleagues developed some thirty years ago. He demonstrates how computerisation also is a tool in the further development of the method. Bart Verhey also offers evidence on how progress can be realised in his ‘Dialectical Argumentation as a Heuristic for Courtroom Decision-Making’. He makes plausible that his formal theory of dialectical legal argumentation has a potential for further development of the Theory of Anchored Narratives. Jaap Hage argues, in his ‘The Naturalistic Fallacy: A Note on a Note’, that Crombag’s suggestion that a reflection on human nature would allow bypassing the logical objections against the naturalistic fallacy, is incorrect. He also suggests that Crombag may have a very good case for the construction of a utilitarian logic, in which the step from facts to norms is included in the rules of inference. Nikolas Roos also elaborates on this theme in ‘Law as a Way to Survive: A Place for Law and Psychology to Meet?’ by re-examining Crombag’s ideas on law and evolution from his 1983 book on the psychological foundations of law and morality. In passing Roos notes that Griffiths seems to have overlooked this book when criticising Dutch law and psychology. He also argues that the combination of the theory of evolution and the neo-behaviourist theory of learning can be used as a basis for a normative-institutional theory of law as well as for explaining the historical evolution of modern law. In his view, Crombag’s idea of law and morality as a way to survive is a meeting place for the psychological, the sociological and the jurisprudential study of the law.

The critique of the historical evolution of law is also the subject of the last two contributions. Frank van Dun’s ‘The right to everything: Hobbes and Human Rights’ contains a critique of Crombag’s view that the idea of human rights is “sympathetic but naïve” and that it has its origins in classical natural law theory. According to Van Dun, the idea is not sympathetic because it comes with an idealistic hyperinflation of fundamental rights as a basis for ever greater powers of intervention given to the State, whereas it has obscured the much more realistic idea of human nature which lies at the root of classical natural law theory. Alexander Jettinghoff’s contribution ‘Total War and Twentieth-Century Legal Change’ provides a challenging analysis of the relationship between total war and the rise of the welfare state. It raises the important question to what extent Charles Tilly’s famous dictum “States made wars and wars made states” also applies to interwar-periods of state-control and mobilisation of society within the risky framework of competition of nations as institutional form of modern social evolution. The challenging question as to how psychology relates to that framework, is not discussed in this book, but now, at least, is asked.
Acknowledgements

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Some Questions to Hans Crombag About Dutch Psychology of Law

John Griffiths

Dutch psychology of law is strongly associated with the person and the scientific work of Hans Crombag. If one is in doubt as to what that discipline entails, there is no one to whom one can more legitimately turn.

Whatever doubts I may have do not concern the existence of a number of people who call themselves psychologists of law (and all the associated academic paraphernalia of professorships, graduate students and dissertations, and so forth). Nor do I doubt the importance and quality of the work these people do (for many of them, in particular Hans Crombag, this seems to me beyond question). My problem is that I am not sure I know what they mean when they use the expression ‘psychology of law’ nor how in their view that discipline is related to adjacent ones. Unless I am clear about that, I cannot know which of the writings of a ‘psychologist of law’ fall within the scope of his discipline (someone like Hans Crombag clearly does not limit himself to one area of endeavor). Nor can I judge whether progress is being made and which directions for further research seem to be most fruitful. I cannot form an opinion on the best academic location for the discipline (in law faculties or in psychology departments?) nor on its importance within a particular curriculum. And so forth. Of course, one could always take the easy way out and define psychology of law as ‘what psychologists of law do in fact’ or ‘what is to be found in this book (journal, course, congress, etc.)’ but I think everyone will readily agree that such a solution to my problem is useless. It does not afford a point of departure from which one can proceed to try to answer the sort of questions I have raised. In short, a ‘garbage-can’ approach to the question what psychology of law is, would not suffice.

In this state of mind, I took up Het Hart van de Zaak: Psychologie van het Recht, by Peter van Koppen, Dick Hessing and Hans Crombag (further The Heart of the Matter). This is the imposing flagship of Dutch psychology of law. It is a book of 805 pages, containing a large number of interesting contributions by “virtually all Dutch

1. University of Groningen, Faculty of Law.
psychologists who do research in psychology of law” (nr. 1, p. 2). Unfortunately, it sheds little light on the question what the psychology of law actually is. As I will show below, most of the contributions do not seem to belong in a book on psychology of law at all. Apparently the editors and I disagree on this point, and I would like to know why. The absence of any serious attempt on their part to indicate what the criterion is upon which the various contributions were selected – what it is that makes it possible to view them as a coherent whole – that is, the absence of any theoretical reflection about the psychology of law itself, seems to me a serious shortcoming. To the extent this is characteristic of the psychology of law as a discipline, there is fundamental theoretical work that urgently needs doing.

It seems I must risk a definition myself, accepting the likelihood that those within the discipline will not appreciate a carpet-bagger telling them what they really are or ought to be up to. I take my own discipline, the sociology of law, as an example.

An adequate definition of the sociology of law is: the sociology of law, where sociology is the study of (human) life in groups (the social aspect of human behavior) and law is specialized social control. Such a definition solves no substantial problem but it does give a point of departure for dealing with some basic matters. It localizes the discipline in relation to other disciplines (in particular, to general sociology and to law). It indicates the object (law/social control) and the basic theoretical approach (sociological): law is studied as a social phenomenon and the objective is to establish empirical relationships with other social phenomena. Only if the participants share a definition of this sort is a discussion possible about the question what belongs in a collection of essays in sociology of law and what does not. You can also make a beginning with questions such as: How many sociologists of law does a given country need? Should sociology of law be a (required) part of the law and/or the sociology curriculum? And so forth.

In an analogous way, one could define the psychology of law as the psychology of law. Its object would be the same as that of sociology of law. The difference would lie

3. The various contributions are indicated here by means of their number in the book.
4. I assume that authors choose their titles with some care. By contrast with the ‘all things to all men’ approach of many other books, journals, etc., their book is not subtitled ‘psychology and law’ but ‘psychology of law’. The introductory chapter is entitled ‘The heart of the psychology of law’.
5. I do not for a moment suggest that the situation is any better in the sociology of law. On the contrary, until I read The Heart of the Matter I naively assumed that the incoherence and lack of discipline that beset my own discipline were somehow less pronounced in the psychology of law. I suppose this was simply a case of the grass always seeming greener on the other side of the fence.
in the basic theoretical approach, in particular the level of analysis: behavior would be studied at the individual, psychological level rather than at the group level characteristic of sociology. The fundamental question would not concern the social aspects of social control but how it works at the individual level: What are the psychological characteristics of human beings that determine on the other hand the characteristics of law and on the other hand how and when law can influence individual behavior? 

If, armed with such a provisional definition, I turn to The Heart of the Matter, I find little in it that seems to belong there. The greater part of the book is not psychology of law but forensic psychology. Law and how it influences the behavior of individual actors is seldom the subject. The key questions of the psychology of law (on my definition) – what are the psychological requisites of a system of specialized social control? what is it in the psychological make-up of human beings that makes it possible for them to apply rules to their own behavior? – are rarely and only indirectly touched upon. Most of the book consists of information that psychologists and others think legal actors, particularly in the context of criminal proceedings, ought to know. The following passage from Hessing and Van Koppen’s introduction nicely captures the forensic tenor of the book (nr. 1, p. 2):

“Some of the authors [...] regularly appear as expert witnesses in civil and criminal cases. Most authors not only teach at universities but also contribute to the professional training of advocates and judges and give classes at the police academy. Many of them are consulted by the police and prosecutors in individual cases; some are even employed by the police.”

This makes it sound as if a scientific discipline is being degraded to the status of a forensic service-provider. And even with regard to their forensic activities, it does not appear from The Heart of the Matter that Dutch psychologists of law devote much time to critical reflection: missionary zeal is more in evidence in the book than scientific detachment.

7. From what Hessing and Van Koppen say in the first few sentences of their introductory chapter (nr. 1, p. 1), I do not have the impression that they would fundamentally disagree with the suggestion made here with regard to the definition and central question of the psychology of law.

8. The adjective ‘forensic’ refers to that part of a discipline that is (made) suitable for use in legal, in particular judicial, proceedings. Disciplines such as psychiatry, pathology, economics and anthropology have forensic branches that are more or less distinct from the mother discipline. In a flyer I recently received for a new book, Psychology and Law (R. Roesch, S.D. Hart and J.R.P. Ogloff, ed., Kluwer Academic Publishers, 2000), it is described as covering “all the key areas of the use of psychological expertise in civil, criminal, and family law.” That seems to me a reasonable, if perhaps a bit limited (why not tax law? is legislation covered as well as litigation?), definition of ‘forensic psychology’. Clearly, it is quite a different matter from the psychological study of law itself.

Let me test the impressions registered above by going through the contents of The Heart of the Matter, looking for the heart of the psychology of law. The book consists of 36 contributions. Of these, more than half (19) are purely forensic. Fourteen of these (nrs. 12 through 25) deal with problems of evidence, mostly the reliability of witnesses; in one case, the subject is scent-recognition by dogs!\(^{10}\) Five others deal with other forensic questions: the extent to which people associate two trade names or trademarks with each other (nr. 6), “forensic diagnosis” in visitation-rights cases (nr. 7), actor-profiles in detective work (nr. 11), and the contribution of behavioral scientists to the fight against organized crime (nr. 9)\(^{11}\) and to interrogations in sex-offence cases (nr. 10). In all five cases it is hard to find much psychology, let alone psychology of law.

Five contributions deal with a classic theme in psychology of law: legal decision-making. It appears that characteristics of the offender are less good predictors of the result of a criminal case (in particular the sentence) than the general tendency of sentencing decisions by the same court in similar cases and earlier decisions by the same judge (nr. 27). But the person of the judge appears, in another contribution, not to be a good predictor of his decisions (nr. 29).\(^{12}\) A discussion of jury trials in the United States (nr. 31) gives a clear and generally accurate account of much of the relevant law as well as of the research that has been done concerning the jury (in particular, problems of selection and the quality of jury decision-making); that much jury-research has been done by psychologists does not, however, entail that there is much psychology of law involved. Finally, in a characteristically sharp contribution, Crombag demonstrates psychologists and psychologists on law (pp. 9-23). Amsterdam: Swets & Zeitlinger, at pp. 16-17, for a few of the problems to which forensic engagement gives rise (e.g., the “ethics of taking sides”).

10. The only connection with the empirical study of things legal that I could find in this otherwise interesting and (for police practice) useful article by Van Koppen is the legal anthropologist’s insider-joke that the two suspects between whom the dog must choose are given the names Adams and Hoebel. That some psychologists make use of experiments with animals, as one critical reader remarked at this point, does not mean that using a dog to recognize scents constitutes (human) psychology, unless one intends to extrapolate from the way a dog goes to work to some proposition about human beings. No such intention is evident in Van Koppen’s case.

11. This contribution apparently comes to us so fresh from the battlefield that one of the authors, “a psychologist employed by one of the police departments [...] decided for security reasons to remain anonymous” (p. 721). The innocent reader may perhaps be forgiven if he sees nothing more dangerous in the article than ordinary common sense.

12. The classic study of judicial decision-making by Crombag, De Wijkerslooth and Cohen (H.F.M. Crombag, J.L. de Wijkerslooth and M.J. Cohen (1977) Een theorie over rechterlijke beslissingen. Groningen: Tjeenk Willink) is only mentioned in passing once in the whole book (p. 556 n. 19). Ten Kate and Van Koppen’s study of judicial decision-making is dealt with briefly (J. ten Kate and P.J. van Koppen (1984) Determinanten van privaatrechtelijke beslissingen. Arnhem: Gouda Quint (diss. Rotterdam)). In short, one of the most important areas of research by Dutch psychologists of law hardly figures in the book. It is hard to imagine why.
a number of systematic logical errors in legal decision-making, especially in connection with the assessment of evidence and the prediction of recidivism (nr. 30). What he has to say is interesting and important, but what its specific connection is with psychology of law is not explained. If, for example, Crombag’s legal-psychological point were, that because of psychological characteristics of human beings such errors are inherent in (judicial) reasoning, then he forgot to say so and to support the claim. Finally, there is a contribution dealing with prosecutorial decision-making (nr. 28), most of which is purely legal.

Three contributions deal with a classic theme in the sociology of law: litigation. One (nr. 4) seeks to explain settlement behavior in civil cases in economic terms. A second shows that civil monetary judgments often do not lead to the payment ordered by the judge (nr. 32). A third discusses the effectiveness of a Dutch law that increases the possibilities for ordering payment of damages in the context of a criminal proceeding (nr. 33). In none of these cases does the author appear to be more than incidentally acquainted with the considerable literature on the subject in sociology of law. But more important for our present purposes is that no psychology of law seems to be involved.

Three contributions deal with classic questions in criminology/penology: one (nr. 8) gives a useful survey of bio-psychological research concerning factors that correlate with “criminality and anti-social behavior”; a second (nr. 34) discusses in a superficial way a rather arbitrary selection from the vast literature on the effects of punishment; the third (nr. 35) shows somewhat laboriously that imprisonment can be a most unpleasant and psychologically difficult experience. The added value of these contributions for the psychology of law is unclear.

Two contributions are hard to categorize: a description of the use of debtor-profiles by credit organizations (nr. 5) and a useful (albeit rather unbalanced) introduction to empirical methodology (nr. 36). Neither has anything particular to do with psychology of law.

In short, several contributions seem to involve no psychology and many others do not subject law, or behavior influenced by law, to psychological analysis, but deal with a variety of psychological subjects of forensic interest. Of the 36 contributions, with the partial exception of some of those dealing with legal decision-making, I found only four that seem clearly to belong in a book on the psychology of law because they deal with law from the perspective of psychology.

When one has finally found Dutch psychology of law, what does it look like? The introductory article, ‘The heart of psychology of law’ by Hessing and Van Koppen, has already been referred to above. Without further ado they ascribe two tasks to the psychology of law: the study of law “as a behavioral technology”, and the study of “behavior that is influenced, or ought to be influenced, by law.” The terms are per-
haps not entirely well-chosen, but roughly speaking they seem to suggest the same conception of the discipline as my own tentative outsider’s definition. They proceed to emphasize the “close connection between science and practice.” According to them, “the most characteristic area of research in psychology of law is that concerning witnesses.” They seem unaware that there could be some incongruence between the tasks they ascribe to the discipline and their characterization of what it typically involves. They make no attempt to show that problems of observation and memory have anything particular to do with law, that is, that any of this falls within the scope of the psychology of law.

The second of the clearly relevant contributions is Hessing’s ‘Social norms and legal rules’ (nr. 2). He begins with the game-theoretical difficulty of coordinating purely egoistic behavior: the problem of the ‘prisoners’ dilemma’ or ‘tragedy of the commons’. Then he pronounces that people are “by nature not social but hedonistic” – peculiar assumption, it would seem, for a psychologist of law, and in any case one that is left entirely unsupported. To solve the problem that he has thereby created he pulls norms out of a hat and tells the reader that there is a process called “socialization” by which norms are “learned” so that “daily life [...] to a large extent is guided by rules.” Some degree of “pressure or reward” is, however, required, because people choose that behavior that “produces the greatest profit” (the idea of ‘learning’ norms seems to have disappeared with as little fanfare as it arrived). In short, the whole discussion is so self-assuredly banal that what should be a central mystery of the psychology of law – how is it psychologically possible that rules emerge in social life and that people can learn and follow them? – gets reduced to some elementary game-theoretical assumptions concerning the behavior of an imaginary ‘rational actor’ who has no psychological characteristics at all and resembles a computer more than a human being.

The third contribution is entitled ‘Blaming’ (nr. 3). At last we learn something about psychological characteristics of human beings with specific relevance for law: how people make moral judgments. Van Koppen and Hessing begin with a short exposition of ‘attribution theory’, which deals with the way people seek to make their social surroundings comprehensible by ascribing their own behavior and that of others to underlying internal or external causes. They show how the sense of justice can be explained as a psychological reaction to a situation of frustrated expectations, when a person has chosen for postponed gratification but his social surroundings do not ‘keep to the rules’. Because people invest a great deal in behavior intended to produce postponed gratification, every indication that the world around them is in that sense not always a just one is experienced as a serious threat. The psychological need to deal with this perceived threat gives rise to the ‘just world hypothesis’: responsibility is as-

13. The first task is framed in a rather heavy-handedly instrumental way, the second fails to limit the scope of the discipline: behavior that is influenced by law – and a fortiori behavior that ‘ought to be’ influenced by law – constituting a subject-matter that is in principle infinite and incoherent, incapable of being addressed by any scientific theory.
cried in a way that does as little damage as possible to the expectation that postponed gratifications will be realized. Van Koppen and Hessing show how a variety of phenomena and research findings can be understood as reflecting people’s efforts to “protect their assumption that the world is just.” This often leads to them making “the fundamental attribution error”: “If something bad happens to a person, or if a person does something bad, we tend to blame the person for it, primarily in order to protect our idea that everyone gets what he or she deserves.”

The idea of justice is again central in an article by Crombag and Van Koppen (nr. 26). What people consider ‘unfair’ seems to correlate systematically with the way in which a change in an existing distribution is characterized: as a reduction (for example, a lower wage) or as the withholding of an increase (in circumstances of inflation). While the two are economically-speaking identical, people are more likely to find the change unfair if it is presented as a reduction.

The second half of this article deals with procedural justice and in particular the well-known experimental research of Thibaut and Walker. This is supposed to have demonstrated that people consider a procedural form in which it is the parties who “determine what information is presented to the judge” more fair than one in which “what happens during the trial is entirely in the hands of the judge.” Psychological research is said also to have shown that the attitude, especially of losing parties, toward their experience is principally influenced by their perception of ‘procedural fairness’. All of this is dealt with briefly, assertively, and above all uncritically (about which I will have more to say shortly). Crombag and Van Koppen conclude with a trumpet-blast against the budgetary policy of the Dutch Ministry of Justice. In their view, the quality of judicial procedures is being undermined in the name of increased ‘production’. “He who erodes procedures, erodes the rule of law.” I happen to share their somber judgment, but it does not seem to me that the psychology of law affords it much support.

That’s it. As represented in The Heart of the Matter, and after cutting away an awful lot of apparently irrelevant underbrush, psychology of law in the Netherlands deals with judicial decision-making, with attribution and distributive justice, and with procedural justice and the legitimacy of judicial decisions. Perhaps a well-meaning observer from a sister-discipline can be forgiven if he utters a gentle protest against some apparent omissions. I was surprised to read nothing about Milgram’s famous obedience-experiments14 – which have been replicated in Dutch research15 – and their relevance both for our understanding of law “as a behavioral technology” and for the interpretation of a variety of legal phenomena (for instance, judicial robes). The conformism-

research of Milgram\textsuperscript{16} and others would seem to me to belong to the heart of the psychology of law.\textsuperscript{17} Important theoretical and empirical work has been done on the psychological mechanisms that make it possible for human beings to learn rules and to follow them, but all this is hardly touched upon in \textit{The Heart of the Matter}.\textsuperscript{18} In most cases, the relevant authors for these topics do not even figure in the index of names at the end of this book of more than generous proportions.

As I indicated at the outset, I read \textit{The Heart of the Matter} in order better to acquaint myself with Dutch psychology of law. For reasons set forth above, I come back from a rather extensive journey with fairly empty hands. It is perhaps ungrateful of me, but I want to conclude with some complaints about what I did find. Dutch psychology of law seems to me not only to lack a clear sense of identity and to cover but a small part of what is theoretically important in the discipline, in what it does undertake it exhibits two important shortcomings: a tendency to ignore the social context of the individual behavior it studies, and an inclination to engage in reckless extrapolation from the experimental situation to the far more complex conditions of social life.

Human behavior is influenced by various sorts of factors and it is a rather stupid (if all too common) mistake if the practitioners of one discipline concentrate so exclusively on ‘their’ factor that they lose all sight of the others. A depressing amount of writing by economists about law, for example, seems to assume that legal liability rules are perfectly applied in practice, and to have no eye at all for the influence of social norms on disputes and their resolution.\textsuperscript{19} Sociologists of law rarely pay much attention to what is known among psychologists about how people learn norms and the circumstances under which they follow them.\textsuperscript{20} For psychologists of law the blind spot

\textsuperscript{20}. They also regularly engage in loose talk about ‘attitudes’ and their supposed influence on behavior, without feeling obliged to consult the relevant psychological literature. Black goes so
seems to concern the social context in which behavior takes place: social factors rarely seem to figure as sources of influence on the individual decisions with which they are concerned. The decision whether or nor to settle a case, for example, is treated as if the parties were acting in a social vacuum (nr. 4), despite the fact that there is abundant evidence that this sort of ‘individual’ behavior gets powerful cues from the actors’ social surroundings.\textsuperscript{21} The reactions of those in the immediate surroundings of a victim are explained in terms of the ‘just world hypothesis’, on the one hand, and on the other as expressions of personal empathy; the possibility that there are social norms governing such reactions seems not to have been considered (nr. 33, p. 630).\textsuperscript{22}

In the past, judicial decision-making was similarly studied by Dutch psychologists of law as if the relevant factors were to be found exclusively at the individual level, but happily there seem on this point to be signs of change for the better. Van Koppen observes at the end of his article on judicial decision-making (nr. 29, p. 560): “The social structure and the work situation in which judges function are responsible for the fact that the influence of the judge’s personality is so small that in practice it is negligible.” In connection with decision-making by prosecutors, De Doelder and De Meijer devote more than merely passing attention to “external factors” such as the work situation within which decisions are made (nr. 28). In short, there are some encouraging indications that the two adjacent disciplines – psychology and sociology of law – do occasionally communicate with one another.\textsuperscript{23}

The problem of extrapolation is more difficult. After all, a large part of the special strength of the psychological approach to the study of law lies precisely in its well-developed experimental tradition. We certainly would not want to do without those experiments, and extrapolation to the much more complex natural setting we are ultimately interested in is therefore unavoidable. Those who denigratingly refer to experimental results as ‘artificial’ miss the point entirely. But the results do have to be far as to deny the relevance for the sociology of law of any assumptions concerning the psychological characteristics of human beings – a denial about which the only positive thing I can think of to say is that it is at least refreshingly explicit. See D.J. Black (1976) \textit{The behavior of law}. New York: Academic.

\textsuperscript{21} In connection with the role of lawyers one does read the offhand comment that they “naturally have an interest in good relationships because they regularly have to deal with each other” (p. 61).

\textsuperscript{22} Compare W.G. Verkruisen (1993) \textit{Dissatisfied patients: Their experiences, interpretations and actions}. (Diss. Groningen), in this connection: a sociological study of how people deal with dissatisfaction (with medical care), in which ‘attribution theory’ plays a prominent role but which, so far as appears from \textit{The Heart of the Matter}, is unknown to psychologists of law. Verkruisen shows how every step of the process by which an unpleasant experience is interpreted takes place under the influence of normative cues picked up from a person’s social surroundings.

\textsuperscript{23} That their influence on each other is not yet very deep appears, however, from the fact that in a discussion of decision-making by juries, the fact that there are group-influences on the decisions of the individual members is barely mentioned in passing (nr. 31, p. 603).
analyzed with great respect for the differences between the laboratory and the world of legal behavior. The problem in this connection is that psychologists of law often seem to work with an image of legal ‘reality’ that is just about as other-worldly as the circumstances in their experiments. Their reflections on the difficulties of extrapolation – if they address any thought to this problem at all – are often breathtakingly superficial.\(^{24}\)

Among psychologists of law the ‘justice’-experiments of Thibaut and Walker\(^ {25}\) described briefly above are apparently regarded as one of the highpoints of the discipline. I think Thibaut and Walker are more properly regarded as about the worst imaginable example of reckless extrapolation. Their experiments are supposed to demonstrate that both Europeans and Americans prefer an ‘accusatorial’ to an ‘inquisitorial’ form of procedure. In the first case it is the parties, in the second case the judge, who determines what evidence is considered. They associate these with English-American common law and with continental law, respectively. Their conclusion is that the ‘accusatorial’ procedural form is more consistent with people’s sense of justice, or (to make their but thinly veiled chauvinism explicit), that American legal procedure is better than its continental counterpart.

Crombag and Van Koppen repeat without blinking not only Thibaut and Walker’s tendentious operationalization of the concepts ‘accusatorial’ and ‘inquisitorial’\(^ {26}\) but also their mostly rather ridiculous extrapolations from the experimental to the natural situation. We read, for example, that Thibaut and Walker have demonstrated “that in an accusatorial regime more relevant facts are presented than in an inquisitorial regime” (p. 515). In a functioning legal system, however, the proactivity of the judge is only one, and probably nowhere near the most important, of the factors that influence what evidence is produced. The costs of securing evidence, the availability of good legal assistance, the workload of the judge, and a whole series of other factors are almost certainly far more important. If, as is common in ‘continental’ systems, the findings of fact can be reconsidered on appeal, this presumably increases the total amount

\(^{24}\) Klik and Van Koppen (nr. 31, p. 602) give, in connection with the use of ‘mock-juries’ in research concerning jury decision-making, the only warning in all of The Heart of the Matter against uncritical extrapolation from the experimental to natural settings. In the international literature there seems to be a bit more attention to this matter. See, e.g., Lloyd-Bostock, 1988, op. cit.


\(^{26}\) This pair of opposites usually refers to criminal proceedings and its main function is as the ideological vehicle with which American lawyers express their sense of superiority relative to continental criminal procedure, that they in this way associate with the Inquisition. What Thibaut and Walker’s research actually deals with is the degree of proactiveness on the part of the judge, a variable that can take on more than two polar values. To speak of ‘the’ inquisitorial or accusatorial procedural form is to confuse the matter from the outset. It is for this reason, among others, that the confident assertion that people in France or Germany, for example, “are accustomed” to “the inquisitorial procedural form” (p. 515) is highly questionable.
of evidence that is ultimately considered. Surely we must assume that people’s judgments about the fairness of a real-life procedure will be influenced by information about what happens in practice, not just in the laboratory.

We would also have to assume, I suppose, that information about the chance that one would be able to present one’s case to a judge at all would have an important influence on people’s judgment concerning the fairness of a procedural system. In that case we should have to take account of the possibility that the more proactive judge in a ‘continental’ procedure is not just an isolated, accidental feature but part of a whole system of administration of justice which makes it possible for more people to have their ‘day in court’ than would be possible in a more ‘accusatorial’ system. That such a supposition is not implausible would seem to appear from a comparison of the American system of criminal justice, in which a full trial is rather unusual, with the Dutch system in which a judicial assessment of the facts takes place in every case. Is it not possible that if people were provided with such information, they might choose for the system that under laboratory conditions they find less ‘fair’?

In short, if one wants to make meaningful comparisons between procedural regimes, one will have to compare coherent systems of rules and institutions as these function in practice, not bits and pieces of systems that can be isolated in a laboratory. If I were a psychologist of law, I would consider Thibaut and Walker a source of intense professional embarrassment, useful primarily as an example of how not to construct and interpret experimental research.

These, then, are the discoveries and reflections to which reading The Heart of the Matter in search of the psychology of law led me. I think that one can conclude with the necessary diffidence from the book that Dutch psychologists of law do not share a coherent conception of their discipline, that the greater part of what they call ‘psychology of law’ is actually forensic psychology, and that the field suffers from a serious shortage of theoretical reflection.

What does all this have to do with Hans Crombag? It is of course always legitimate to take an intellectual father to task for what his intellectual offspring are up to (especially when he publicly associates himself with their activities). But far more important is the fact that the occasion for the book in which this article of mine appears is Crombag’s retirement from his university position, not his disappearance from the

28. People may well be interested, for example, in the chance that an innocent defendant is found guilty. I am not offhand aware of a comparative study on this point, but one thing is clear: quite a bit of information has become available the last few years that seems to suggest that an ‘accusatorial’ system can be quite susceptible to miscarriages of justice (cf. recent reports concerning England, Illinois, etc.).
scientific scene. I hope that in the coming years he himself will address the question what psychology of law is. If anyone can shed light on that question, it is he.  

29. As I noted toward the beginning of this article (see note 5), the situation is no better in the sociology of law (although the problems are slightly different: the 'pull of the policy audience', for example, being more legislative than forensic). I should perhaps confess that Hans Crombag once complained to me about this, asserting that the lack of professional discipline he witnessed among Dutch sociologists of law would be unheard-of among psychologists, and suggesting that I should do something about it. I hereby return the implicit compliment.
When I first encountered Hans Crombag’s work he was one of a small band of pioneers outside the United States convinced of the value of combining psychology and law; and one of an even smaller band not focusing his work on juries or the reliability of eyewitnesses. I persuaded him to present a paper at a conference on law and psychology in Oxford in 1981, and discovered that his scholarliness on paper was combined with great enthusiasm and optimism in person. He has been a friend and ally ever since, and it is a pleasure to contribute to this book in his honour.

Hans Crombag’s passionate belief in the potential benefits of legal psychology has always been tempered by a healthy scepticism, and awareness of practical and theoretical pitfalls in the relationship between psychology and law. During the 1970’s, when I began working in the field and discovered Hans’ work, expectations for law and psychology were rapidly rising, but the models and assumptions underlying applications of psychology to legal questions were still somewhat undeveloped, limiting the scope for productive interchange between the two fields. Psychologists and lawyers were largely unfamiliar with each others’ disciplines and approaches, allowing preconceptions to flourish. Since that time, extensive and exciting changes have taken place, within law as well as psychology. In some ways expectations have moderated, and faith in the value of some traditional applied approaches has faded. But other more interesting influences and interchanges have increasingly occurred, and optimism about the field’s potential has increased rather than decreased over the time of Hans Crombag’s career. The accumulation of research and experience together with changing theoretical frameworks is enabling a much richer and more fruitful relationship to develop between the two disciplines and areas of professional practice. I shall briefly outline some of the changes, and suggest that, as they have occurred, the field has outgrown the rather narrow view of psychology and law as an applied field of psychology which provided its starting point, and is evolving into a more challenging and rewarding interdisciplinary field.

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A Starting Model

The starting model for law and psychology was a straightforward applied model. Law and psychology was viewed as an area of applied psychology, in which psychological insights and research were applied to legal problems or questions, with a view to helping or improving the law or legal processes. The activity began early in the history of psychology, and indeed ‘witness psychology’ is usually claimed to be one of the first areas of applied psychology. A version of the model which today seems almost caricatured is clearly seen in the groundbreaking work on witness psychology by Hugo Münsterberg, who began his career in Germany working under Wundt and eventually moved to the United States to Harvard University. In his book on forensic psychology, *On the Witness Stand*, he suggested that the courts should look to psychology for expertise on questions about ‘mental products’, such as the memory reports of witnesses. Scientific psychology was superior to the “unscientific and haphazard methods of common prejudice and ignorance” used by the courts, and the involvement of psychologists would in his view put courtroom decision making on a much sounder, scientific basis.

As research in law and psychology grew in the 1970’s, broadly the same approach was extended to a much wider range of topics than witness reliability, sometimes explicitly. There seemed to be a remarkable overlap between the concerns of psychologists and the concerns of lawyers. It seemed that virtually all law and legal procedures relied on common sense psychological assumptions about how people think, remember and decide, and about what influences their behaviour. Saks and Hastie, for example, in the preface to their book on social psychology in court write:

“The tasks of participants in and around the courtroom read like the table of contents of a social psychology textbook: lawyers bargain and negotiate outside of court, and in court try to change attitudes; jurors engage in social perception and social influence, and juries in group decision-making; judges integrate information to reach decisions; and evidence includes such matters as perception and recall by eyewitnesses, attributions induced through ‘character’ testimony, and psychophysiological measures of stress (lie detection). These are but the more obvious examples.”

Further, it seemed that psychology could, in principle, identify and test law’s psychological assumptions systematically and scientifically. It was anticipated that the results would be of relevance and interest to lawyers, and perhaps of value and benefit to law and to society. Saks and Hastie’s introduce the same influential book with the words:

“Every law and every legal institution is based on assumptions about human nature and the manner in which human behaviour is determined. We believe that scientific psychology can help us understand these institutions and improve them.”

“Applications of psychology to law raised the possibility of a ‘scientifically enlightened court.’”

A great deal of excellent, pioneering research was carried out within this general framework. Lawyers began to take more notice, but as the field grew it became apparent that, in general, a straightforward applied model did not work very well when it came to influencing, or improving the law. Social science findings from psychology and other disciplines were not immediately seized on to improve the law. From the outset, attempts to apply psychology to legal questions met with resistance from lawyers. Perhaps the best known illustration is the eminent evidence lawyer Wigmore’s response to Hugo Münsterberg’s book *On the Witness Stand.* but further, more recent examples could be cited. Irving wrote an article on the fate of his contribution to the 1980 Royal Commission on Criminal Procedures, to which he gave the title “Research into Policy Won’t Go!” Tanford analysed the impact of empirical research on jury instructions in the United States. He writes:

“Social scientists often assume that if their empirical research reveals that a law is not operating as lawmakers intended, their discoveries will spur law reform. However the anecdotal evidence for empirical research as a motivator of legal change is mixed at best.”

Tanford found different impacts on courts, legislatures, and rule-making commissions. Commissions had made substantial changes in the law consistent with the recommendations of social scientists; legislatures had made few changes of any kind: and the courts had made changes in case law in the opposite direction to social science recom-

recommendations. More recently Brown finds that “little use is made of psychological research in the legal arena”, and comments that “[t]he reluctance of law to accommodate scientific knowledge in a way acceptable to psychologists represents perhaps the major theme of psychological commentary upon the psychology-law relationship.”

As well as attempts to apply their research findings to law and legal procedures, psychologists’ experience of acting as expert witnesses or attempting to influence judicial policy making has also frequently been frustrating and sometimes disastrous.

Today the absence of a straightforward, universally welcomed impact in legal contexts does not seem surprising. Many contributing reasons have been identified by academic commentators, including concerns about the external validity of research, the timescale of advances in psychological research, and divergent models of man in law and psychology. Brown’s analysis identifies differences in what constitutes acceptable knowledge in each discipline as the most important source of tensions between psychology and law. At a more practical level, the influence or lack of influence of psychology in legal contexts frequently has less to do with the quality and relevance of the psychology than with professional, political and organisational considerations. A clear illustration is found in attempts by psychologists in the US to influence judicial policy-making over death qualification of jurors. Research on death-qualified juries has long provided grounds for strong empirical claims that such juries are conviction prone and unfavourably disposed toward the defendant in capital cases. Yet the political climate and public concern have ensured that it is extremely difficult to affect policy on death-qualification. After discussing in detail an attempt by psychologists to convince the Supreme Court in the case of Lockhart v McCree, Bersoff comments:

“The way in which the Supreme Court used the social science data in Lockhart is not unexpected […] Courts will cite psychological research when they believe it will enhance the elegance of their opinions but data are readily discarded when more traditional and legally acceptable bases for decision making are available.”

Psychologists working on legal topics since the early 1970’s have not been much deterred by the reception their work has received amongst lawyers. Paradoxically, as I

discuss below, having practical impact was anyway often peripheral to their concerns. Their perseverance is fortunate, since difficulties in making an immediate direct impact are easily outweighed by other, sometimes less obvious influences and benefits that have accumulated from research activity and professional practice over the past thirty years. But any expectation amongst psychologists that lawyers, or ‘the law’ will quickly and gratefully respond to psychologists findings and adopt prescriptions from psychologists has been all but extinguished.

**Elaborating Applied Models – Defining the Problem**

When psychologists have hesitated to apply their research and expertise to practical legal problems, their concerns have tended to centre on validity, and on the ethical issues that arise when psychology is used in legal settings. In particular they have been concerned about external validity, since their work involves making generalisations from research settings – often the laboratory – to the ‘real world’. The issues are vitally important, but well rehearsed\(^{15}\) and I shall not re-examine them here.

Less attention was initially paid to the question of defining the problems that psychologists were attempting to solve – an essential first step in designing applied research as traditionally conceived. Twining points out that the questions that psychologists researched were implicitly based on traditional models of the functions and goals of courts, legal rules and legal procedures.\(^{16}\) Psychologists tended to take all of these at face value, and implicitly treated legal processes as striving for rationality and a correct decision. Greer, for example, wrote that psychologists made the mistake of simply assuming that the purpose of a criminal trial was to get at the truth.\(^{17}\) Twining commenting specifically on research into the reliability of eyewitness evidence, argued that psychologists had adopted a rather narrow, court-centred view of legal processes that led them to focus all their attention on processes of obtaining evidence that might be presented in court, and ignore other ‘problems’ surrounding identification and misidentification in legal procedures, such as the experiences of police suspects who are eliminated and not brought to trial, but who may nonetheless suffer severely as a result of misidentification.\(^{18}\) When identity parades were studied, the emphasis was very much on potential evidence of identification in court, ignoring other functions of the identity parade such as extracting a guilty plea.

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The problem of ‘defining the problem’ is not unique to psychology and law. It arises for all applied research. No matter how obvious it may seem what a task is, and what would count as an improvement in performance, it is easy to make false assumptions and miss the point. It is necessary to study the activity closely, or better still actually engage in it, in order to grasp what are the problems and what is the scope for improvement. Where law is concerned, the problem of defining the problem is magnified many times by the nature of the subject matter. Friedman struck a chord with many researchers when he wrote of the law and society movement:

“It uses scientific method; its theories are in principle scientific theories; but what it studies is a loose, wriggling changing subject matter, shot through and through with normative ideas.”

I have argued elsewhere that ‘defining the problem’ has been at least as problematic as the internal or external validity of research in law and psychology. Even getting started at all is problematic. What is it to define a ‘legal problem’ for the purposes of applied research, and what is it to offer a solution to such a problem? Whose problem is it, and who is the audience or client for the research? – lawyers? the police? victims? society? These are not psychological questions. Moreover they are questions that on the whole psychologists are not well equipped to tackle; but they are fundamental to any research in psychology and law that aims to be applied.

Psychologists working in the field of psychology and law today have moved on from a somewhat oversimplified approach to these questions to a much more sophisticated awareness of their complexities. Theoretical aspects of the relationship between law and psychology is examined in depth by such writers as Brown and Morley. Psychologists are very much more knowledgeable about law and legal debates, especially in the United States where qualifications in both law and psychology are increasingly found. Several leading figures such as Shari Diamond and Donald Bersoff, combine their psychological expertise with legal practice. Several of the leading psychologists in the field have been appointed to positions in law schools – Hans Crombag amongst them. Others include Professors John Monahan, Michael Saks and Neil Vidmar. In other words, there is an important and growing pool of interdisciplinary expertise. Diamond provides an exciting demonstration of the new, detailed and
realistic research questions that are posed when expertise in research and practice in both law and in psychology is combined.\textsuperscript{22}

**Breaking away from an Applied Model**

To appreciate some of the most important ways in which psychological research has and might influence (perhaps even improve) legal scholarship and practice, we may need to break away altogether from a simple model of psychology applied to law. In practice rather little work fits well into such a model, and throughout psychology, simple divisions into ‘basic’ and ‘applied’ work are increasingly being viewed as unhelpful. Insofar as there is a difference of this kind it is more one of emphasis in the goals of research than a clear dichotomy. The distinction tends to undervalue what is classed as applied work, and mask the interdependence of theory and empirical work both within and outside the laboratory.

Those engaged in psychology and law research have more readily viewed their work as applied than have researchers in other social sciences and the law, notably sociology and law. Psychology’s traditional distinction between pure, or basic and applied psychology resembles a distinction that has been drawn in relation to other social sciences between ‘social science in-law’ and ‘social science of-law’. The distinction is generally drawn in such a way as to contrast ‘social science in law’ unfavourably with ‘social science of law’. Friedman, for example, views social science in law as peripheral to the law and society movement, just as (in his view) forensic medicine is peripheral to the sociology of medicine.\textsuperscript{23} A similar distinction underlies Campbell and Wiles’ influential paper contrasting socio-legal studies unfavourably with the sociology of law in the 1970’s.\textsuperscript{24} The contrast is unmistakably evaluative. Social science in law works within a framework defined by law, serving legally defined ends: social science of law is its own authority. Social science of law, it is implied, is theoretically more sophisticated and ethically less dubious than social science in law.

The distinction is based on a simple model of applied work of the kind discussed above, and moreover, is used to denigrate such work. Dichotomies and spectrums offer beguiling tools for organising concepts and theories, but the whole line of argument is misguided and damaging to research in social sciences and the law. As I have argued elsewhere,\textsuperscript{25} the ‘in law/of law’ distinction is founded on a false alignment be-


\textsuperscript{25} E.g., B.M. Hutter & S.M.A. Lloyd-Bostock (1997) *Law’s relationship with social science: The interdependence of theory, empirical work and social relevance in socio-legal studies*. In
between empirical/pragmatic/applied work on the one hand and theoretically rich work on the other. Within psychology, empirical research is not usually denigrated as lacking in theory, but otherwise similar misconceptions about applied work are found. Theoretical discussion in socio-legal studies has too often reproduced the idea that being ‘applied’ somehow provides an escape from the need to confront theoretical questions. The sociologist Nelken, addressing the false alignment between ‘applied’ and ‘atheoretical’, writes:

“It is sometimes implied that the weakness of socio-legal studies lies in its commitment to practical, policy-making objectives. But the purpose behind an investigation is not itself a guide to its theoretical adequacy or inadequacy [...].”

Far from providing an escape from the need to address theoretical questions, applied work in a new field demands the development of new theory. Moreover, what is presented as applied research may actually be concerned primarily with developing psychological theory and contributing to the psychological literature. What Friedman and others might count as psychology in law has often been designed without reference to those who are prima facie intended to benefit, and published where those who might make use of it will not read it. This paradoxical situation probably owes much to the longstanding pressure to portray psychology research in this and other fields as ‘useful’ in order to obtain funding. The result is a far cry from Campbell and Wiles’ dismal vision of socio-legal studies as based predominantly in law departments and carried out by lawyers with a smattering of social science skills. On the contrary (but perhaps equally unfortunately) when research in psychology and law is generated in this way, lawyers are virtually excluded from all stages of the process.

Perhaps most important of all, simply to characterize law and psychology as predominantly applied in the traditional sense obscures the multiplicity of approaches and facets to the relationship between psychology and law and the potential for interdisciplinary discourse. Psychological research can ‘apply’ to law in a variety of ways, and at a variety of levels, some intended and some unintended, some explicit and some implicit, often within a single piece of research. The questions or ‘problems’ tackled may or may not be defined by lawyers, and the products of the research may or may not be

K. Hawkins (Eds.), *The human face of law: Essays in honour of Donald Harris*. Oxford: Oxford University Press.
aimed at an audience beyond psychology itself. Some of the most interesting aspects of the relationship between psychology and the law are to be found at the more theoretical and conceptual levels of law, where developments in psychology impinge on the premises of legal thinking and the terms of legal debate. Thus, psychological research on eyewitness memory modifies our understanding of the processes of memory, recall and recognition in ways that recast rather than answer questions about evidence. Research on the psychology of confessions does not merely help to develop interrogation techniques and assess the reliability of confessions, but provides theoretical frameworks that let us understand why people questioned by the police confess to acts they did not perform. Psychological research and theory has been related to legal discussion and jurisprudence surrounding the nature of childhood, discretionary decision-making, obedience to law, fault and causation, the relationship between law and morality, and models of mental illness. It becomes difficult to say whether the outcome belongs to law or to psychology, or which discipline is ‘contributing’ to which.

On analysis it is clear that work in law and psychology sits uneasily in a simple applied model, and indeed that to use such a model may limit our vision since it does not capture some of the most important aspects of the relationship between law and psychology and its potential as an interdisciplinary rather than applied field. The distinction between psychology in law and psychology of law does not work anywhere near as sharply as Friedman and others suggest. Nor does it coincide with a distinction between more and less theoretically sophisticated, ethically sound or politically committed research.

Most psychology and law research will continue to be framed as applied, if only for reasons of obtaining funding. However, our understanding of what is involved in such research is changing, and the more subtle impact of accumulated work and expertise is increasingly apparent. As Bersoff suggests, the fact that psychological material is being produced and used in legal debates and in support of reforms in itself has an impact of a more diffuse kind, establishing its credibility and relevance, and increasing the audience with some understanding of psychological ideas and perspectives. In relation to Lockhart, he notes that a full twenty-five per cent of the Supreme Court’s opinion concentrated on the psychological evidence. Social science perspectives, in-


cluding work by psychologists, have infiltrated legal scholarship to a remarkable degree, and law students are increasingly exposed to material from the social sciences and to interdisciplinary approaches. At the same time psychologists have become more acquainted with the perspectives of the other social sciences on law, and are more integrated, not only into law schools, but into the wider ‘law and society’ community that includes scholars from the other social sciences working on legal phenomena. Exposure to the thinking and theoretical frameworks of other disciplines, and the ‘multiple lenses’ of interdisciplinary scholarship can undoubtedly enrich psychology. Developments within psychology itself also continue to challenge traditional ‘scientific’ methods and approaches, especially to the explanation of social behaviour. All these developments combine to create an exciting prospect for psychology and law as an interdisciplinary field, requiring us to continue to develop new theory, and elaborate if not abandon traditional models of applied research.

Good Stories and True Stories

William Twining

Over the past decade I have visited the Netherlands many times. On almost every occasion Hans Crombag has been a significant presence. On a personal level, he has been a friendly, welcoming host and a quietly nuanced guide to what it means to be Dutch. Intellectually, he has been an important presence. Even when he did not say much, he has provided a subtle reminder of different perspectives and a questioning attitude. And, of course, how often was he silent? I consider Hans to be a friend and it is a great pleasure to contribute to this *liber amicorum*.

In the English-speaking world, Hans Crombag is best known as a co-author of *Anchored Narratives*. I make frequent reference to this text and I have felt a frustrated by not being able to consult the much more substantial *Dubieuze Zaken*, of which the English version is a redaction. As a foreign observer, I have been surprised to learn that *Dubieuze Zaken* caused such a stir and such hostile reactions. It is refreshing to find a much closer link between academic and general public debate about legal matters in the Netherlands than in my own country. However, although the tone of the book was polemical, many of the basic ideas were well grounded in Anglo-American evidence scholarship. The originality lay in applying these ideas in detail to a civil law jurisdiction, the Netherlands, and in extending them at a theoretical level, in some instances quite adventurously. I have commented on *Anchored Narratives* at length elsewhere, broadly agreeing with most of its central themes, but dissenting from some particulars. This paper elaborates briefly on just one topic, the distinction between good stories and true stories.

1. Faculty of Laws, University College London.
A central theme of Anchored Narratives is that in criminal process in the Netherlands there is a danger that ‘good’ stories will be accepted without being anchored in particular evidence and background generalizations. Stories may play an important, possibly even a necessary, part in the psychological processes involved in fact-investigation and fact-determination, but for the purposes of criminal justice they must be true, that is all the material allegations must be warranted or anchored. Seductive ‘good’ stories often push out true stories. In criminal process, stories may be necessary, but they are also dangerous.

Quite apart from serious literacy criticism, a story can be considered ‘good’ for many different reasons. It may good for a particular purpose: for example, in teaching it may be a good vehicle for making a point interestingly, clearly, or memorably. In other contexts it may be ‘good’ because it has a strong moral, or is amusing, or is a vehicle for a fecund metaphor. From the point of view of a hearer a story may be ‘good’ because it appeals to the imagination or some strong emotion, such as fear or lust or hope. And so on. In adjudication stories may appeal because they arouse interest, are persuasive, plausible, reassuring, or familiar.

In Anchored Narratives it is acknowledged that stories may be good for many different reasons, but the focus is on ‘well-formed’ stories, that is ones that are believed to be true because they have “a readily identifiable central action; and a context that provides an easy and natural explanation of why the actors behaved in the way they did.” In this context stories are considered important because they help the decision-makers ‘make sense’ of the events under consideration. Similarly, in Anchored Narratives ‘true’ is treated as empirically true. In the immediate context of exploring the theme that ‘good stories push out true stories’, it was probably adequate to define ‘true’ and ‘good’ quite narrowly. However, I shall suggest that for purposes of future psychological research on the role of stories in criminal process, more complex notions of goodness and truth may be required.

I believe that the thesis that good stories often push out true stories is generally correct. In my own writings I have extended the argument about the dangers by suggesting that in practice narrative provides a wonderful vehicle for subverting some of the cherished values of adjudication – for example by sneaking in irrelevant facts, by suggesting unproven facts through innuendo or confabulation, by shifting attention

6. Of course, in adjudication the main task of the fact-finder is to decide what happened in fact, without necessarily explaining it. For example, in most criminal cases motive is not a material fact. As every lawyer knows, in practice motive is nearly always treated as important and this corresponds to psychological literature. This suggests that human beings feel a strong need to understand ‘why?’, even if it is not strictly part of their immediate task.
7. Webster’s Dictionary defines to confabulate as “3. To fill in gaps in memory by fabrication”. The term is used in American case law, see, for example, Blackmun J. in Rock v Arkansas 483 US 44 (1987): “to fill in details from the imagination to make an answer more coherent and complete.” Psychologists sometimes prefer the more differentiated terminology
from the specific events in issue to the character(s) of the main protagonist(s) (thereby subverting the principle ‘judge the act, not the actor’), and by playing on unspoken biases and prejudices through the choice of emotionally laden terms or by the suggestion of dubious unspoken generalizations.8

In teaching about the role of narrative in legal processes, I introduce some of the main themes by telling a series of stories. I hope that they are all pedagogically ‘good’ in the sense of being interesting and in making a ‘point’, but not all are good in the narrow sense of being well-formed. Here I shall consider four examples with specific reference to the distinction between ‘good’ stories and ‘true’ stories.

1. Relevance

Once upon a time, I walked into a law school. The place was Boston. The institution was the New England Law School, formerly known as the Portia Law School, then is was an all-women’s institution. I was due to give a public lecture. The ground floor of the law school is made of plate glass and owing to a trick of the light I had walked nose-first into a plate glass window. I had had a good lunch, but I was quite sober.

When I picked myself up from the pavement I was dazed and my nose was bleeding. I found my host’s room and lay down on the floor. By the scheduled time my head had cleared and the worst of my nosebleed was over, but there was blood all over the front of my suit and I still had to dab my nose with a bloody handkerchief. With a stiff upper lip, I decided to give the lecture. At the start I explained the reason for my condition. I have never had such a sympathetic audience and my lecture was unusually well received.

This story is generally true, and can be vouched for by my host, Peter Tillers, a leading evidence scholar. When I tell it in class, I may embellish it a little, acting it out and possibly exaggerating the amount of blood. One might say that this is a moderately good story that is largely, but not wholly, true. I make it better in the telling in order to illustrate some points about relevance – in particular the point that a good story can be persuasive without being in the least relevant to the merits of the argument. Note that in this version I omit to mention the subject of the lecture (Wigmorean analysis) and the fact that the audience was potentially very sceptical, if not hostile. The information about Portia may be interesting, but it is entirely irrelevant to the point of the story.

8. Ibid.
2. ‘Holism’

Once upon a time, the Inner London Education Authority was approached by a man who claimed that he had a programme for teaching skills of facial recognition in a very short time. The core of the technique was a protocol for asking a series of questions designed to classify the features of a face, first horizontally (hairline, forehead, eyebrows, eyes, nose, mouth, chin etc.) and then vertically (ear-shape and so on). The Authority expressed cautious interest, perhaps because it thought that such skills might enhance the employment prospects of school-leavers, for instance, as security guards or immigration officials. However, they felt that the programme should be validated, so they asked a psychologist to test it. The psychologist conducted some controlled experiments involving two groups that took the course and two control groups that did not and evaluating their facial recognition skills at the end. The results suggested that those who had not taken the course were better at facial recognition than those who had taken it.

This story is based on fact. I think that it is a good story, not only in the sense that it is well formed, but also because it makes a point in a nicely ironic and quite memorable way. The point is that in ordinary life we make some judgements ‘holistically’ rather than analytically and that sometimes analysis can impede good judgement. The story is useful both in discussing ideas of coherence and in raising questions about the role of analytical techniques and stories in making judgements based on evidence, a theme close to the core of Anchored Narratives. This seems to me to be an example of good story that is probably true (though not well-anchored) which is useful in raising questions about holism and atomism in a vivid way, whether or not it is correct in all its details.

3. Confabulation

“Once upon a time, John Went to Sam’s Party. Sam Blew out the Candles.”


11. This story is borrowed, with grateful acknowledgement, from Nancy Pennington, who uses it to great effect in explaining the idea of confabulation.
When I tell this story to a class or other legal audience in Britain or the United States, I then ask how many of them did not imagine a cake. Hardly anyone claims that they did not. One gets similar, but less uniform responses, if one asks about the ages of Sam and John (English audiences tend to assume that this was a children’s party).

This is a work of fiction. It is untrue (empirically) and it can hardly claim to be well formed. But it is an excellent vehicle for illustrating the idea of confabulation in a vivid way. The hearer or audience instinctively fills in the gaps from their own stock of background knowledge and beliefs. If one knows one’s audience one can be reasonably confident not only that they will go beyond the information in the story, but also about what information they are likely to supply. However, that depends on a shared cultural experience or ‘stock of knowledge.’ On at least two occasions, when I have addressed groups of young lawyers from the Commonwealth, those from the Indian sub-continent have claimed they did not imagine a cake. Instead they assumed that there had been a power cut, because back home candles are associated with electricity failures. This neatly illustrates the point that people’s ‘general experience’ or background beliefs vary across time, place, and culture – a crucially important theme in the theory of evidence.

Clearly confabulation offers rich opportunities for ‘cheating’ in legal contexts, especially by advocates who are confident of their audience. It does not necessarily even involve overt innuendo. In adversary proceedings, where both sides are represented, an alert advocate can, at least in theory, counter dangerous examples of this kind of trap. For example, s/he can ask about the ages of Sam and John or whether there was in fact a cake. But, in practice, this will not always be easy. Again there is plenty of scope for research into the extent and varieties of confabulation in legal proceedings, for example as a means of introducing implicit, ‘unanchored facts’.

4. Parables as Evidence

My final story concerns the parable of the Prodigal Son. I have written about this at length elsewhere in relation to the idea of the ‘moral’ or ‘point’ of a story. Here I consider it from a somewhat different point of view.

I regularly use *In Re the Estate of James Dale Warren, Jr.* as a vehicle for detailed analysis and construction of arguments about questions of fact. This simulated case, 

14. The case is reproduced in full in Anderson and Twining, 1991, *op. cit.*, at pp. 305-27. This is a hypothetical case that originated as a simulated problem in the American National Trial
set in the United States in 1980, concerns a contested will executed by James Dale Warren, Sr. in a nursing home on the afternoon of his death. This new will purported to leave almost all of his estate to his son, James Dale Warren, Jr., who had been estranged from him for most of his life, but who had been recently reconciled with him. He had assiduously attended his father during the last three days before he died. The effect of the will, if valid, would be essentially to disinherit his only daughter, Susan, and her two children. Susan had lived with her father in his home during his last years until she felt that his medical condition required transferring him to a nursing home. James Sr. may have resented the transfer, but otherwise there was little evidence of any serious rift between father and daughter and convincing evidence that James Sr. adored his grandchildren for whom his house was the only home they had known. Unfortunately for Susan, she had been involved in a road accident a few days before her father’s death and had stayed away for fear that her injuries might upset the old man. Unknown to Susan, James Jr. had stepped into the breach and was in attendance while his father wrote the new will. Susan contests the will on two grounds: (1) that the testator lacked testamentary capacity at the time of execution of the new will; and (2) that the will was made under the undue influence of James Jr., the principal beneficiary. The main issues are factual.

In the context of a mock trial counsel for each party are asked to develop persuasive ‘theories’ and ‘themes’ to support their case. In this case each side latches on to fairly obvious competing images: counsel for Susan regularly develop a Dickensian image of grasping relatives fawning over a dying man; the other side counters with the parable of the Prodigal Son. ¹⁵

On one occasion, in an American law school, before assigning roles, I asked the class to discuss what themes might usefully be developed in this case. As usual, the Prodigal Son was the first suggestion. However, at this point the discussion took a surprising turn. The exchange can be reconstructed in the form of an imaginary dialogue:

WLT: Which side does the parable help?
Student 1: The son, of course.
WLT: Why?
Student 2: because it is natural for a father to be generous after reconciliation with a long lost son.
WLT: Is that the moral of the original parable?

Competition in the 1980s. It is particularly well designed in that the documentation is thorough, and the evidence is difficult to analyze, is evenly balanced and raises interesting problems of trial tactics and presentation.

¹⁵. In teaching, Anderson and I challenge the appropriateness of both of these images in this context.
4. Good Stories and True Stories

Student 3: It could be about repentance and forgiveness. That still helps James Jr.

WLT: Are you suggesting that a story from the New Testament is evidence of how fathers behave in twentieth century America?

Student 2: No. But it does support the proposition that this is reasonable behaviour on the part of the father, therefore he was not behaving irrationally.

WLT: Is that not inferring an ‘is’ from an ‘ought’?

Student 1: Well, the story sets out a familiar model of how good fathers do and should behave, like ‘best practice’.

WLT: Again, is that evidence?

Students (in chorus): Yes.

WLT: Have you read the original text of St Luke’s Gospel?

Students 1 and 2 (abashed): Well, not recently.

WLT (meanly producing the text and circulating copies from the St James’ version): Look, the father, in responding to the elder son’s complaint, explicitly says: “Son, thou art ever with me, and all that I have is thine.” (Luke 16. V. 31). In other words: “I am not disinheriting you. I am only throwing a party to celebrate.” Surely, that helps Susan.

Student 4: That’s pedantic. The popular image of the story makes it out to be about reconciliation and forgiveness and generosity. It is the image rather than the text that will have resonance with the jury. So it does help James Jr.

WLT: Is that rational?

Student 1: Counsel for Susan can point this out, if counsel for James Jr. tries to use it…

(The dialogue continued).

This is, of course, an idealized construction of the behaviour of both teacher and students. The original incident stimulated me to think further about the roles of theories and themes in argument about questions of fact and about the analogy between biblical parables and precedents in the common law. Here I want to pursue a different issue: how can a secondhand report of a parable (presumably presented as a fictitious story) be evidence of what happened in a particular situation in Middle America in 1980? The students wanted to use the biblical story to support two propositions: (i) that James Warren Sr at the time of the making of his deathbed will had testamentary

16. Subsequently, students alerted to these points have usually shied away from using both the Prodigal Son and Martin Chuzzlewit as the explicit basis for themes in presenting their arguments.

capacity to make a valid will,\(^{18}\) (ii) that James Dale Warren did not intend to disinherit his daughter and grandchildren.

A reasonable reconstruction of the two lines of argument might be as follows:

1. **For James Warren Jr.**
   1. At the moment of reconciliation between a father and his son, it is appropriate for the father to be forgiving and generous in celebrating the return of the lost sheep/prodigal.
   2. James Dale Warren Sr. was forgiving and generous in his treatment of his son at the moment of reconciliation.
   3. James Dale Warren Sr.’s behaviour was natural and appropriate for a father in such circumstances.
   4. James Dale Warren Sr.’s behaviour was not unreasonable or irrational in the circumstances.
   5. Either (a) James Dale Warren’s behaviour does not support the proposition that he lacked sufficient mental ability to make a valid will. Or (b) James Dale Warren’s behaviour was rational and reasonable and supports the proposition that he had sufficient mental ability to make a valid will.

2. **For Susan**
   1. At the moment of reconciliation it is appropriate for a father to celebrate, e.g. by throwing a party and killing the fatted calf, but it is not appropriate for him to disinherit loyal children who have stayed at home and supported him.
   2. James Dale Warren Sr’s deathbed will disinherited his loyal daughter who had stayed at home and supported him.
   3. James Dale Warren Sr’s deathbed will effectively disinherited his grandchildren whom he loved dearly.
   4. James Dale Warren Sr’s treatment of his daughter and grandchildren was not reasonable in the circumstances.
   5. This supports the propositions that at the time JDW lacked testamentary capacity, in that:
      a. JDW was not able to know the natural objects of his bounty and their claims upon him

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18. In this context ‘testamentary capacity’ means that “such person at the time of execution of the will must have had sufficient mental ability to understand the business in which he is engaged, the effect of his act in making the will, the nature and extent of his property; he must be able to know his next of kin and the natural objects of his bounty and their claims upon him; he must have memory sufficient to collect in his mind the elements of the business about to be transacted and to hold them long enough to perceive at least their obvious relation to each other and to be able to form a reasonable judgment as to them.”
b. JDW did not have sufficient memory to collect in his mind the elements of the business about to be transacted and to hold them long enough to perceive at least their obvious relation to each other

c. JDW did not make a reasonable judgement as to any aspects of the effects of his will

The story of the Prodigal Son supports propositions 1.1 and 1.3 and 2.1 and 2.4 – in other words it can be invoked by both sides. But what is the relationship between a biblical parable and a question of fact in America in 1980? One answer is that the parable provides a model for behaviour by fathers in the situation of reconciliation with prodigals. There is scope for differing interpretations of the precise scope of the moral(s) of the parable, but two points are clear from the text: (i) it is reasonable for the father to be generous, forgiving and to celebrate, but (ii) it is not reasonable for him to be so generous as to disinherit loyal, stay-at-home offspring.

The key point is that the ‘question of fact’ here involves judgements of reasonableness, the parable provides a standard or model for the behaviour of fathers in this kind of situation, and the parable has been absorbed into American culture to the extent that people do appeal to the New Testament for standards and models for good or appropriate parental behaviour. Accordingly, St Luke’s gospel is relevant, and indeed quite cogent in its support for both lines of argument. If the concept of ‘questions of fact’ includes normative judgements, for instance about reasonableness, as it clearly does, then appeals to the Bible for standards of reasonableness are relevant and can be quite cogent. Whether one wishes to call the Bible ‘evidence’ in this context is a secondary matter of semantics. The point is that it can be a source of valid, relevant, and potentially cogent arguments.

What is the implication of this for the distinction between good and true stories? Clearly, the parable of the prodigal son is a ‘good story’ in several senses, including the narrow one of being ‘well-formed’. But is it true? No claim seems to have been made that it was presented as an account of an actual historical event and Luke’s version is a secondhand account of Jesus telling a story – hearsay upon hearsay about a work of fiction. So it is not true in a narrow empirical sense. Almost certainly it never happened. But is it ‘a true story’ for the purposes of Anchored Narratives?

20. At first sight, on the interpretation given here, it gives stronger support to Susan’s case than to her brother’s. However, it should be borne in mind that the burden of proof is on Susan and the probanda require that she shows that he lacked ability and memory, i.e capacity, not that he made a mistake, or forgot, or acted unreasonably on this occasion, i.e there is an additional inferential step from this occasion to general capacity.
Conclusion

There is a great deal of scope for further psychological research into the role of narrative in criminal process and other legal contexts. For example, what psychological needs are stories satisfying in particular legal contexts? When and how do ‘good’ stories push out ‘true’ stories? What do different decision-makers consider to be good? It is for psychologists to frame the precise questions and the best methods of approaching them within their discipline. But lawyers have a role in providing accounts of the specifically legal contexts that are both realistic and sensitive to the complexities. So let me end with a cautionary tale.21 In the Anglo-American tradition an enormous amount of time, energy, ingenuity and money has been spent on research into the design and staging of identification parades (‘line ups’ in American usage). Nearly all of this research proceeds on the assumption that the only or main function of such staged events is to produce admissible and, as far as possible, reliable evidence. But this assumption is sociologically dubious. It may well be the case that in practice identification parades may serve other functions, such as persuading the suspect that ‘the game is up’ and that, in the common law system, it would be sensible to plead guilty; or that no positive identification is expected and that the absence of a positive identification may be used to eliminate a suspect or to provide a justification for closing an enquiry for lack of evidence; or there may be other latent functions. Similarly, further research into the role of stories in criminal process needs to have a sociologically nuanced and realistic picture of the complexity of these processes. Such research should not be confined to contested trials, let alone American juries, but should extend to other stages, including the investigative stage, where ‘suspect-driven inquiries’ are a real danger, as Anchored Narratives convincingly illustrates. Such a nuanced set of assumptions needs to include the ideas that stories may be considered ‘good’ in particular contexts for many different reasons and that in law almost all determinations of ‘fact’ combine both normative and empirical elements that are difficult to keep separate.

Cross-Roads of Disciplines

Johannes F. Nijboer¹

Introduction

The first course on law and psychology was taught in Leiden almost twenty years ago. This was done by Hans Crombag. His teaching not only attracted students in the official sense, but also a small number of faculty members, of whom I was one. To me – a researcher in law with some knowledge of sociology, criminology and economics – the most striking aspect was the psychological perspective on ‘thinking’ and ‘reasoning’ in relation to ‘fact-finding’ as a form of human behaviour.

By that time already, a considerable amount of psychological research had been done on legal issues, in particular on evidential themes, such as eyewitness testimony. Hans Crombag discussed the strengths and weaknesses of human cognitive abilities and the practical impact of such psychological studies on legal subjects.

We had to read the book by Nisbett and Ross on human inference for the course.² It took quite a while before most of us, trained in legal thinking as we were, could grasp some of what was actually meant by the authors. The discussions in the group disclosed a lot of ‘disciplined’ thought – on both sides. As an inter-disciplinary event this was extremely instructive, if not for the students, then at least for Hans Crombag as the teacher; taking it initially for granted, for instance, that the ‘mens rea-actus reus distinction’ fitted within all western criminal law systems, Common law and Continental law.³ Quod non, at least not without a lot of re-thinking the basic concepts of criminal responsibility and liability.

Today, thanks to this kind of experiences, we better understand the reason why it is problematic to use Anglo-American textbooks on criminology, sociology of law, law and psychology, law and economics, and also forensic sciences, in courses within the framework of Continental legal education: they contain lots of implicit assumptions about Common Law concepts and rules that the Continental students are not familiar

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with and for which no direct equivalents exist in Continental law. This is complicated by the fact that the development of law in Common Law jurisdictions is often still a product of case law rather than legislation and dogmatism. The decisions of the courts prevail in many areas over the acts of the legislator or the opinions of academic lawyers. In Continental jurisdictions\(^4\) the traditional sequence of affairs is the other way around.\(^5\)

As a consequence, much more emphasis is put on procedural law in Common Law countries, especially in law school curricula and academic writings. This has resulted in a situation where the vocabulary and the theory are much richer in English procedural law than for example in French, German and Dutch legal language. It is almost impossible therefore to find a Continental equivalent for a notion such as ‘fair process’: even the French procès equitable is less rich as a concept. The other side of the coin, however, is the relative poverty of Anglo-American legal language and theory on issues of substantive law. From my own experience I can say that it is nearly impossible to explain basic continental dogmatic concepts from the general part of criminal law, such as ‘concursus’ – including: eendaadse/meerdaadse samenloop (Dutch), concours des qualifications (French), Tateinheit/Tatmehrheit (German) – to an English class of law students.

But at the time neither Hans Crombag nor his Continental students could have had the insights into the cross-cultural aspects of our fields to tackle all the difficulties that arose. Nevertheless, the course was a success. We all learned from the interdisciplinary discussions in the classroom. And I think that all of us, who are active in fields where the disciplinary borders between law and psychology (or social sciences in general) are crossed, owe Hans Crombag much in teaching the course as he did and in pursuing the research he conducted subsequently, after taking up his professorship in Maastricht – especially the work he did together with Dick Hessing, Peter van Koppen, Harold Merckelbach,\(^6\) Willem Albert Wagenaar, and others.\(^7\)

5. Maybe the highest courts and constitutional courts, including the European Court of Human Rights in Strasbourg, are exceptions in some cases. Nevertheless in many countries the justification of decisions by such courts are seen as implementing and interpreting the legislative system rather than as products of own creativity of the courts. The French Court of Cassation, for instance, is famous for putting its decisions in a logical form which suggests that the court did not add anything to the law: every decision follows from legislation. Cf. F. Chauvaud (1999) Le sanglot judiciaire: La desacralisation de la justice. Grane: Creaphis.
Psychology and the Law (in Books and Action)

Psychology can have an added value for law at different levels. The first of course is a better understanding of human behaviour. Law is not uniquely about individual behaviour – there are many rules for legal entities in the public and private domain – but to a large extent it is. In criminal law, the ‘subjective’ elements of a crime matter and there are important psychological aspects in our conceptualisation, such as the insanity issue. But our legal understanding of criminal behaviour as such also increases by learning from psychology. From this perspective it is far from accidental that psychology has become one of the basic disciplines in the heterogeneous field we call criminology. Knowledge about human behaviour can also assist in making better rules, e.g., by avoiding the enactment of rules that in fact cannot be obeyed by many or all the subjects to whom they are addressed.

On the psychological side the emphasis shifted from a ‘clinical’ towards a ‘functional’ or ‘cognitive’ approach. The latter is also relevant for the field of procedural law. This is a field in which many rules contain pretty precise instructions for the ‘legal players’; where it is as important as in substantive law to develop realistic rules, which indeed can be followed without much trouble. An example of such a rule would be the rule that a police officer in all situations should immediately make a distinction between suspects and witnesses. The ‘impossible’ lies therein that situations are so complex that they cannot be mastered cognitively in a short period – even in relatively simple cases – and that the required distinction can be made from the very beginning. The ‘impossibility’ of rules can also lie in the combination of these. In his book on the Demjanjuk trial, Willem-Albert Wagenaar – acting as an expert witness in the case – developed fifty rules that must be observed in order to have reliable identifications of suspects by eyewitnesses. Here, the problem is one of quantity: if the rules are not internalised by training, and therefore ‘automatically’ obeyed, no one can consciously apply all fifty rules simultaneously. The paradoxical character of this example is that proposals for regulation by psychologists are questioned based on a psychological argument about the human ability to comply with it.

As said before, psychology has relevance for law in different manners. Law entails more than just rules, landmark decisions by superior courts or scholarly writings. Law is also the daily practice, the ‘law in action’. And here, I think, the relevancy of psychological research and education can be the greatest. Studying the professional behaviour of the ‘legal actors’ can provide us with useful insights into the weak and strong sides of daily practice. For instance, until some ten years ago police officers in the Netherlands hardly reported ‘negative’ outcomes of specific tests or investigations, such as a scent line-up. Such negative results – in terms of not confirming existing suspicion – were simply perceived as neutral and therefore irrelevant, instead of their relative value being understood as potential exculpatory evidence.

In the introduction I already referred to the psychological research available at the time Hans Crombag started teaching law and psychology. In the meantime this field has extended considerably and the results are much more directly available to legal practice. Contrary to some decades ago, the general opinion among lawyers on the problem of witnesses and their testimony is no longer the risk of perjury, but our concerns about the level of the cognitive capacities of witnesses. Now psychologists are called to the court to give expert opinions on the reliability of a specific statement by a specific witness, although these remain rare occasions. More often psychologists are asked to provide more general information about related subjects, such as the possibility to recognise a face from a particular distance during a rainy and misty winter day. There is a vast amount of experimental studies allowing psychologists to give an opinion with a certain not-to-low degree of probability – although the overall tendency is that our trust in witnesses as sources of evidence decrease, except that children are considered equally reliable as witnesses as adults.

Not only in terms of evidential information is psychology relevant witness statements, it is also relevant for the care and aid to witnesses and victims who are in a vulnerable position. They are perceived as persons with their own needs and rights. As a consequence the concept of witness protection has been extended from just the threatened witness to the vulnerable witness in general, including mentally retarded persons, persons in a dependent situation, and persons who are susceptible to repeated traumatisation.

As an independent expert, I was recently involved in the preparation of a Recommendation of the Committee of Ministers of the Council of Europe (the Europe of the 41 member states) concerning the protection of witnesses and the rights of the defence – known as R (97) 13. One of the main points of the recommendation is that states should maximise their efforts to find ways in which the justified needs of threatened or vulnerable witnesses are balanced against the rights of the defence. One

11. Or even more so: young children on the brands and types of current motorcars.
of the ways of doing so is to explore the possibilities of such technical devices as distance-examination, audio-video taping and closed-circuit TV. The explanatory report added to the recommendation R (97) 13 contains much information that is derived from psychological research.

Although a recommendation such as this only possesses a kind of indirect, political authority, the impact of this kind of 'soft law' must not be underestimated. In quite a number of member states of the Council of Europe important parts of the recommendation have already resulted in legislation, case law, and penal policy. In the same area the attention that is actually given to the 'bench-side manners' of judges towards witnesses is worth mentioning.

Another example of a domain in which training with the use of psychological expertise has emerged, is the training of 'players' such as police detectives (at the Dutch Rechercheschool in Zutphen many courses have been developed with the aid of psychologists) and judges (to me in my capacity as part-time judge in the court of appeal it was very helpful to take part in a course 'how to preside criminal court sessions' before I had my first experience in actually presiding over the court).

The number of issues and examples could be further extended. For the limited scope of my contribution, however, it might be enough to illustrate the degree to which a multi-disciplinary approach to legal matters has proved to be fruitful. Summarising: psychology has shown to be important to the law in its approach to criminalization, in understanding criminal behaviour, and especially in understanding human behaviour in general.

Limits

The interaction between law and psychology seems to be fruitful where the law offers an area in which both disciplines can work together, in research and education, and in

12. Soft law’ means a kind of law which is influential, but cannot be directly invoked or sanctioned in court. Nevertheless, as a source of arguments it can be relevant in legislation and investigation, prosecution, and adjudication.
13. For instance, the ‘crown witness bill’ for organised crime and ongoing experiments with videotaping of interrogations of vulnerable witnesses in The Netherlands. Foreign examples of follow-up measures were reported to me from Germany, France, Latvia, Portugal and Slovakia.
15. One of the first decisions of the Amsterdam Court of Appeal, presided by Nijboer, was quashed by the Netherlands Supreme Court (Hoge Raad). See Hof Amsterdam 29 mei 1998, Nieuwsbrief Strafrecht 1998, 146; Hoge Raad 21 september 1999, Nieuwsbrief Strafrecht 1999, 189.
using psychologists as forensic experts. In some instances psychology even offers an area where issues can be picked up by law, such as the psychological force in rape cases or repeated traumatisation. Nevertheless, both disciplines have their limits, both theoretically and practically. Law covers numerous issues that exceed the scope of individual human behaviour. The classical approach of psychology does not fit to there issues, because of its purely individual character. Sociology or social psychology might do a better job in these areas, and it is important that both psychologists and lawyers are well aware of the appropriateness and inappropriateness of psycho-legal cooperation. In my experience participants in cross-disciplinary discussions often have a kind of misconceptions about the other ‘side’. Such misconceptions usually do not appear directly, but they emerge gradually if the discussion is continued long enough and covers details of the problem area as well as general assumptions in the different disciplines. In this context three caveats of the limits of applied psychological research in law can be mentioned. The first and second of these are immediately related to the focus on individuals; the third one is a variation of an argument that can be found in many types of interdisciplinary discourses.

First, psychological research in the domain of the law is often related to ‘single-locus’-problems in the legal setting. Let us take as an example the impressive amount of research done on the identification of persons by eyewitnesses. This is of course an important subject, especially in the investigative stage of criminal cases, where it is clear that a particular criminal act was committed and the perpetrator absconded. However, the number of cases in which identification by eyewitnesses is crucial is relatively small. In reality eyewitness identification helps in finding more information in the course of the investigation, even ending in a corroborated confession by the suspect. The number of occasions in which in terms of proof identity is still the crucial issue at trial is very, very low. This is the quantitative side. The qualitative side of the argument is that the questions and problems that arise in daily practice are usually more complicated in a legal sense. For instance, it is not clear exactly what the known person – or known persons – did, and as soon as it is known a little bit, it is often unclear whether the conduct under investigation constitutes an offence. Not all crimes consist of ‘positive’ conduct; very often inactivity – i.e. just not doing what should be done – is a crucial element of a crime. And what about criminal acts committed by

18. And, it should be added, this is often not entirely understood by the researchers involved: in discussions they often depart from the assumption that the crime is not a complex thing, but ‘something’ easily understandable and that the only problem is “who has done ‘it’.”
entities, such as corporations, and their organs, for instance a board of directors? In such cases, individual conduct almost vanishes.

This brings me to the second caveat. The focus on individual behaviour is important, but this should not distract our attention from the fact that crimes very often happen within social settings and contexts that matter for the crime itself. This holds true, for instance, for complicity and incitement. Some crimes are typically group-crimes. The basic concepts already include aspects of human plurality and interaction. And this is not odd at all, since the law’s functions – in so far as it has meaningful functions – are predominantly social. For private law parallels can be readily found. Contracts and torts presuppose a plurality of humans or legal persons, whereas the phenomenon that is interesting to study cannot be reduced to adding individuals and their particular behaviour. The argument does not only relate to substantial law; but it is also related to the behaviour of the actors within the procedural system. In the area of legal decision-making by juries and judicial panels, the group aspect is very important. I would never contend that studies of individual appreciation of evidence or of individual sentencing preferences are irrelevant, but their message as a description of the practice is limited.\textsuperscript{19} We should continue to be aware of the fact that in most jurisdictions the relative important decisions are always taken by groups of people rather than by single individuals.

The third ‘caveat’ is also based on my own experience. Researchers may entertain too static and too narrow concepts of the law in their minds. Law is not static; it changes over time and very often integrates insights from elsewhere. There are also levels of the law that are not automatically consistent in the course of time. An example is the admission of almost all kinds of hearsay evidence in Dutch case law, in spite of the system of the Code of Criminal Procedure.\textsuperscript{20}

Law is like ‘the state of the art’ in many other sectors of society. It is a basic problem, therefore, that in many theories on economic subjects the law is defined as a \textit{ceteris paribus} factor and not as a variable. But it is also my personal experience that psychologists who enter the domain of law misinterpret the wording of the statutes, or even principles, by attributing a too rigid and too one-sided meaning to them. My usual example here is the famous presumption of innocence, which is not more than a prohibition against the taking of definitive measures before a person’s legal guilt has been established. It also is meant to prevent, as much as possible, that genuinely innocent people can be bothered too easily. The theorem is not meant as a factual description. In daily practice the police should concentrate on possibly guilty persons. And they are allowed to think they are.

Expectations

The ‘caveats’ just mentioned may hopefully contribute to a better understanding. I do not suggest that psychological research into the area of law always suffers from misrepresentations, but they do occur. When one is aware of this, discussions of these issues will prove to be curative. The other side of the coin is the perception of young lawyers who have not yet gone into practice. Today the study of law in Continental jurisdictions still offers training in rule-orientated thinking. Starting from legal texts, in particular the ones codified in statutes, codes, treaties and other formal rules, the law student must learn how to apply these. Although the view that these formal rules are a closed system does not hold anymore, the resulting attitude is that the legal concepts and the legal canon of accepted interpretation methods – historical, textual, grammatical, analogue – are used in all that is covered by the legal rules. In civil and criminal procedure the rules are often are quite specific. If there is no explicit rule, the conclusion is frequently drawn that the decision maker has ‘discretion’. Moreover, legislation sometimes explicitly grants discretionary power. According to Dutch law, for instance, the court can impose a prison sentence and a fine in case of theft. So, there are four options: no sanction at all, imprisonment only, a fine only or both imprisonment and fine.

This is the type of thinking with which young lawyers are equipped when they first encounter evidential matters. They see that the statutes indeed have only a few explicit rules on evidence. They infer that they should handle evidential subjects according to these rules and that for the remainder there is a broad ‘discretion’. They are not used to think in a more empirical way. Their implicit assumption therefore is that fact-finding can be done on the basis of a few rules and to decide whether or not an alleged fact has been proven is like convicting. As if it were simply a matter of discretion whether a book I drop will fall to the ceiling or on the floor. Experienced practitioners usually know better. Nevertheless, a course in psychology and law is very much recommendable as part of the training of young lawyers during law school. The critical success factors for a sound legal practice in, inter alia, evidential matters, as well as for constructive interdisciplinary collaboration in research, are: education, training and open discussion. Discussions should be thorough and basic, both relating to theoretical paradigms and assumptions, and practical understanding of the other’s fields.

The major contribution that psychologists and lawyers working together in this area will continue to make is that this type of reasoning in evidential matters is ‘un-learned’. It is my conviction that the way lawyers perceive evidence and the law of evidence itself will continue to change in a converging way: how we cope with evidential issues across our disciplinary borders will be increasingly similar. The same, by the way, is

21. Article 9a Dutch Criminal Code.
what I expect to happen across national borders – but that’s a different subject which I have treated elsewhere.\footnote{22}

I strongly believe that not all differences in perspective and conceptualisation, as well as in daily activities between the disciplines of psychology and law are irreconcilable;\footnote{23} to the contrary: by exploring further we will gain a better understanding of the possibilities and limits of our mutual efforts, especially at the cross-roads of our disciplines.

\footnote{22}{J.F. Nijboer (1999a) Keynote address. In F. Hoepfel and B. Huber (eds.), \textit{Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen} (pp. 39-56). Freiburg im Breisgau, at p. 39 ff. See also J.F. Nijboer (1999b) \textit{De waarde van het bewijs} (2nd ed.). Deventer: Gouda Quint.}

Thick!

A Case Study of Eyewitness Identification

Willem A. Wagenaar

Introduction

The plodding of expert witnesses will never end. After at least one century of advice on the correct procedures for eyewitness identification, the Police and Judiciary still refuse to learn the lessons. As a result, promising cases are lost, or innocent suspects are convicted sometimes to quite long sentences. The case of the Yellow Submarine, described in this short contribution, has not yet reached its final verdict, and can therefore still yield one of the two unwanted outcomes. Chances that the correct solution will be found have almost dwindled to zero, through the sloppy efforts of various authorities. Recently, I told Hans Crombag that the judiciary in the Netherlands seemed to gradually pick up a few lessons in this area. He expressed his pessimism, and I now fear he was right.

Trouble at the Yellow Submarine

The Yellow Submarine is a disco bar in the city of A. In the early hours of November 18, 1998, four men arrived at the entrance and requested to be admitted. The three doorkeepers, checking the rather substantial flow of visitors, recognised one of them as a troublemaker, and refused to let the group in. One of the four engaged in a not unreasonable discussion, but the doorkers Bill, Pete and Mario, none of whom can be described as really gentle, removed the group efficiently. Two of the visitors started to yell and curse the doormen. One of them ran to the parking lot and returned a few moments later with a gun, which he fired at the entrance of the Yellow Submarine.

1. Even though I am the only author of this contribution, the somewhat cynical content may betray that Hans Crombag was unknowingly watching over my shoulder. It has caused me some problems before. This contribution does not contain any references to the vast relevant literature. It would only suggest that I discuss something else than facts within the domain of general knowledge. And that is precisely the point I am arguing against.

2. Leiden University.

3. All names of persons and locations have been changed. Other relevant aspects have been kept in tact as much as possible. The information about the case could have been acquired by simply reading the newspaper, or by attending the trial of the case.
Quickly the doormen closed the doors, which contained bulletproof glass, so that nobody was hurt. Had he not done this, accidents could easily have happened, because the totally freaked-out gunman fired not less than 12 shots, at a distance of about five meters. Without the protection of the glass, every shot would have been a hit, and the gunman had no way of knowing that the glass was bulletproof. The incident was therefore, right from the beginning, treated as attempted murder for which sentences up to 15 years imprisonment can be imposed. Within a minute the four visitors had disappeared; none of the witnesses had recognized any of them. The Police could only take some pictures of the bullet marks, and ask the doormen to describe the perpetrators. They agreed that three of them came from the Netherlands Antilles, and one from Morocco. The Moroccan had only yelled and screamed. One of the Antilleans had been the gunman; the second Antillean was the person who had engaged in a discussion; the third Antillean had only stood by.

Elvis and Ali Make a Mistake, or Do They?

One week later, two of the four unknown visitors returned to the Yellow Submarine. They remained in their car, but threatened the two doormen present, Pete and Mario, gesturing that they would chop their heads off. At least that is how Pete and Mario understood it. However, receptionist Elsie called the Police immediately. When the two returned after a few minutes, they were arrested. That was not too smart of them, who appeared to be Elvis Corneliusz, an Antillean, and Ali Hassan, a Moroccan. They confessed almost immediately that they belonged to the group of four that had caused trouble the week before. They denied being the gunman; they did not even know the name of the person that had fired all those shots.

A connoisseur would realise straight away that Elvis’ and Ali’s confessions caused tremendous problems for the remainder of the case, because it made a normal line-up procedure, or identity parade, quite impossible. A normal identity parade includes the suspect, and at least five definitely innocent foils, fitting the same description. If eyewitnesses are able to identify the suspect in such a difficult ‘test’, it is proven that they have met the suspect before. Assuming that the suspect is a total stranger to them, and that the only opportunity to meet the suspect was at the scene of the crime, recognition places the suspect at the scene of the crime. If he denies having been there, the positive identification demonstrates that he is lying. But Elvis and Ali did not deny that they were present at the scene of the crime! A positive identification in a line-up would only confirm what was already known: that they belonged to the group of four. The real question was who had fired the gun; which could not be answered by an identity parade. Nevertheless, well-organized line-ups are known to yield highly reliable results; more reliable than any other person recognition method. The application of the best-possible identification method was lost through Elvis’ and Ali’s rapid confession. Maybe they were not so stupid after all.
The Police’s reaction was less clever. To confirm that Elvis and Ali really belonged to the group of four, they were shown to the doormen shortly after their arrest, Pete and Mario, in one-person confrontations. The question was: did they recognize the two as belonging to the group that had caused so much trouble the week before? Both witnesses recognized the two suspects, and they identified Elvis as the gunman. No big deal, because that was exactly why they had called the Police earlier that day: they had recognized one of the two as the gunman, and the other as the Moroccan. This earlier recognition could have been somewhat questionable, because it could have been caused by the well-known mechanism of \textit{unconscious transference}. This implies that a person is correctly identified as someone familiar to you, but that, at the same time, you are mistaken about the situation in which you met. It is, for example, not unusual for witnesses of a robbery, to recognize an innocent bystander correctly as someone who was present, but to identify him incorrectly as the robber. One can imagine a witness thinking: “From where do I know this bloke ...?”; a number of images then pass in front of that person’s eye, with the more salient images taking priority over the more mundane ones. A man firing at you from a five-meter distance qualifies as such a salient image, in which it is not impossible to replace the looks of one Antillean by that of another. Showing Elvis and Ali in the police office as suspects to the witnesses did not yield any new information, but may have enhanced the effects of \textit{unconscious transference}. Another flaw was that Elvis and Ali were still wearing the clothes in which they were arrested. That created a \textit{clothing bias}: a tendency to judge the identity of a person on the basis of similarity of clothes, instead of similarity of face and body.

The correct approach to the identification problem would have been to confront the witnesses with all four members of the group in a single line-up. In the present case this meant that first Elvis and Ali should have been interrogated about the identity of the other two men. This could have been done easily, because there was no particular hurry, and the confessions were sufficient grounds for keeping Elvis and Ali in custody.

\section*{Elvis and Roy’s Conscience}

Initially, Elvis denied any knowledge of the identity of the two other Antilleans, which was not very credible, of course. It was rather obvious that he just did not want to betray his mates. On the other hand, Elvis was not prepared to do time when he could blame the crime, rightly or wrongly, on someone else. After all, only three weeks before he had been released after four years in prison, which he had not enjoyed at all. Hence, after one week in custody, he stated that the third man, the gunman, was his half-brother \textit{Roy Oudegragt}. At the same time, Roy was wrestling with his conscience; his half-brother was arrested, while he did not lift a finger to help him. The family was also putting pressure on Roy, so that finally he gave himself up. His confession was complete and highly detailed. He explained that he had fired the gun, that he had
dumped his clothes, destroyed the gun, shaved his head, removed his moustache, and added two gold teeth. Apparently Roy knew how to do things!

Ali confirmed that Roy had been the gunman. The fourth man, nicknamed Flashy, was never found. The three others had known Flashy only for two weeks; they did not know where he lived, or what his real name was. It was again not possible to identify Roy in a normal line-up procedure, because he did not deny his presence at the scene of the crime.

At this junction in the story, everything seemed completely clear. Roy was the gunman, Elvis the one who had engaged in a reasonable discussion, Ali was the Moroccan, and Flashy – whoever he was – the fourth person who had stayed on the sidelines. But rarely are criminal cases so simple. It is hard to say whose conscience was the noblest: that of Elvis, or Roy’s? Who was protecting who, who was prepared to sacrifice himself for the other, and at what price? In this uncertain situation the Prosecution decided to charge all three, Elvis, Roy and Ali, with being the gunman. This soon proved to be justified, when Roy retracted his entire confession. He had made up a story in order to help Elvis, who could barely endure custody. But when it became clear that the charge would be attempted murder, his love for Elvis diminished. Ali also retracted his story: he had accused Elvis only after severe pressure by the Police. In reality he had not seen who fired the shots; he hardly knew the others. The investigation was back at square one. Who had been the gunman: Elvis, Roy, Ali, or Flashy?

**The Examining Judge undertakes Action**

In the Netherlands, after a fixed period of time, criminal investigation is shifted from the Prosecutor’s office to the Examining Judge. At that point Elvis and Ali were released, because Roy had confessed. Elvis used the last day of 1998 to visit the Yellow Submarine again, where he found the doormen Bill and Mario. He tried to convince the two men that they had identified him incorrectly. The effect was that Bill and Mario recognized him again as the gunman, and that the mental picture of Elvis was rehearsed. One week later, the Examining Judge started his investigation. He interrogated the three doormen, Bill, Pete, and Mario, and an inside employee, Elsie, because during the shooting she had also been behind the glass door. The key question was, of course, not whether Elvis, Roy and Ali belonged to the group of four, but who had been the gunman. The Examining Judge concluded correctly that the best method to establish this was to confront the witnesses with a set of pictures of all three men, presented simultaneously. Since none of them had accused Flashy, even though that would have been a nice escape for all of them, Flashy could be dropped from the suspect list. To exclude any possibility of a mistake, he added a fourth picture, one of Elvis, taken at home. These four photographs were first shown to Bill, who stated immediately that he recognized Elvis as the gunman, because he had seen him only one week before. That encounter was indeed problematic, because it may have in-
creased the effect of unconscious transference even further. Elvis’ counsel was probably not aware of this problem, but he immediately realised that the photographic line-up was biased against Elvis, because his picture appeared twice. He protested, and the Examining Judge conceded. He decided to show no pictures at all to the other three witnesses. As a result, the question of the identity of the gunman was no longer addressed. The Court would receive no more than the initial one-person confrontations with Elvis and Ali.

The Case against Roy

The case against Ali was dropped. It was obvious that the gunman had been one of the three Antilleans. Since Flashy was never found, only two cases remained: the case against Roy and the case against Elvis. The case against Roy came up first. The Prosecutor argued that Roy had fired the shots, but there was hardly any evidence to support his claim. Everything pointed equally to the three Antilleans. The presiding judge then came up with the splendid idea to show pictures of Elvis, Roy, and Ali to the doorman Mario, who initially had identified Elvis as the gunman. Immediately Mario said that he had been mistaken. Seeing Elvis and Roy together, he realised that Roy, not Elvis, had been the gunman. Roy’s counsel tried to make mincemeat of him, but the Prosecutor quite liked this unexpected support. A similar test was not tried on Bill, probably because he had been given a biased test in the Examining Judge’s office. It remains unclear, however, why Pete and Elsie were not tested; they had not been confronted with this sort of line-up before. In fact, they never were confronted with Roy in any way! It is quite possible that the presiding judge felt that it was not his task to investigate the case at trial, which in Dutch criminal procedure would be an incorrect interpretation of what a Court must do. The sudden reversal of Mario’s statement received much attention in the national press, but as an isolated piece of the puzzle it could never constitute convincing evidence by itself. Roy was acquitted. The Prosecutor’s office appealed, and the case against Elvis is still pending. I am curious to find out how the Prosecutor will argue, on the basis of the same defective evidence, in the one case that Roy was the gunman, and in the other that Elvis fired the shots.

Person Descriptions

Almost straight from the beginning it was obvious that normal line-up procedures for the identification of the gunman were not applicable. That was rather unfortunate, because line-ups can produce quite reliable evidence, if the proper procedures are applied. The reason for this considerable reliability is that witnesses, who do not really have a clear recollection of the looks of a perpetrator, run a high risk of identifying a foil known to be innocent. The likelihood that all four witnesses point at one person in the parade, and identify the suspect just by chance, is less than one in thousand.
As a next best identification procedure there were two possibilities. One was to confront the witnesses with a parade of all four suspects, and to ask them who of these four had fired the gun. The disadvantage of this is that all four witnesses may make the same mistake, and identify the same innocent person. Since none of the participants is a foil, the effect can be that this person is wrongly convicted. The likelihood that this will happen just by chance is about 1 percent. This is less than the risk in a proper line-up procedure, but in my opinion it would still be acceptable. As said before, this next best solution was not available, since Flashy was never apprehended. A parade with only three suspects would increase the chance of an accidental unanimous but wrong identification to about 2.5 percent. Assuming that Ali would not be chosen, because he is clearly no Antillean, the chance of a unanimous wrongful identification increases to about 6 percent. In view of the diagnostic value of other categories of evidence, I feel that even under these conditions the test should have been attempted. I find it incomprehensible that neither the Police, the Prosecutor, the Examining Judge, nor the Trial Judge, collected this highly relevant information in a systematic manner.

The next-to-next best identification procedure is the collection and analysis of person descriptions. If the description of the gunman differs substantially from the descriptions of the other two Antilleans, it can be quite informative to compare these descriptions with the outer appearances of the suspects. Again the absence of Flashy will be an obstacle, but as we will see, in practice the problem might not be so bad. It goes without saying that descriptions produced immediately after the incident are the most reliable, because less time has elapsed, and the remembered images are less contaminated by information from others. Fortunately, all four witnesses, Bill, Mario, Pete, and Elsie, produced detailed descriptions of the four men, on the very morning of 18 November. To my knowledge, nothing was done with these descriptions in a systematic manner. The descriptions are spread out over the case file, and there is no systematic overview that could lead to a conclusion. A description of the outer appearances of the suspects is also completely absent. We do not know how tall they are, or what their body weight is. Nevertheless, the person descriptions are not unpromising.

Let us consider Table 1. I have eliminated the descriptions of the Moroccan, because we already know that this was Ali. The only question is therefore: who were the others? I pointed out the three persons as ‘The gunman’, ‘The Negotiator’ (the one who started a not unreasonable discussion about their admission), and ‘The passive One’ (the one who did not get involved in the quarrelling group). Fortunately, the four witnesses kept these three roles clearly separated.
Table 1: Person descriptions in the Yellow Submarine case (B = Bill; M = Mario; P = Pete; E = Elise).

<table>
<thead>
<tr>
<th>The Gunman</th>
<th>The Negotiator</th>
<th>The passive One</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hairstyle</strong></td>
<td>B: Sides shaven, short on top</td>
<td>B: Very short, one length</td>
</tr>
<tr>
<td></td>
<td>M: Curly, smooth, not frizzy, reaching the neck, sides shaven</td>
<td>M: Bald or cropped, no tress</td>
</tr>
<tr>
<td></td>
<td>P: close shaven, ‘Island-type’ on top</td>
<td>P: Very short, with figures shaved into it</td>
</tr>
<tr>
<td></td>
<td>E: –</td>
<td>E: Very short, frizzy</td>
</tr>
<tr>
<td><strong>Face</strong></td>
<td>B: Thin, no moustache</td>
<td>B: Very round</td>
</tr>
<tr>
<td></td>
<td>M: Smooth, gold tooth, no moustache</td>
<td>M: A bit chubby, no moustache</td>
</tr>
<tr>
<td></td>
<td>P: No moustache</td>
<td>P: –</td>
</tr>
<tr>
<td></td>
<td>E: –</td>
<td>E: –</td>
</tr>
<tr>
<td><strong>Complexion</strong></td>
<td>B: Rather light</td>
<td>B: Light complexion</td>
</tr>
<tr>
<td></td>
<td>M: Not so dark</td>
<td>M: Not so dark</td>
</tr>
<tr>
<td></td>
<td>P: Lightest of all</td>
<td>P: Light complexion</td>
</tr>
<tr>
<td></td>
<td>E: Rather light</td>
<td>E: A bit darker than the gunman</td>
</tr>
<tr>
<td><strong>Posture</strong></td>
<td>B: Slim, 1.70-72</td>
<td>B: 1.65</td>
</tr>
<tr>
<td></td>
<td>M: Slim, 1.75-82</td>
<td>M: 1.75, athletic</td>
</tr>
<tr>
<td></td>
<td>P: Slim, 1.78</td>
<td>P: 1.70-74; stout</td>
</tr>
<tr>
<td></td>
<td>E: Slim lad, not more than 1.70</td>
<td>E: Larger and more portly than gunman</td>
</tr>
<tr>
<td><strong>Age</strong></td>
<td>B: 23-24</td>
<td>B: –</td>
</tr>
<tr>
<td></td>
<td>P: –</td>
<td>P: 24</td>
</tr>
<tr>
<td><strong>Clothing</strong></td>
<td>B: Light pants, denim blouse</td>
<td>B: –</td>
</tr>
<tr>
<td></td>
<td>M: Sweater with yellow-black stripes print, Gucci-style type Gucci-sweater, cream trousers</td>
<td>M: Beige 3/4 lammy coat with white collar</td>
</tr>
<tr>
<td></td>
<td>P: Sweater with red-yellow stripes</td>
<td>P: Lammy coat with white collar; model parka</td>
</tr>
<tr>
<td></td>
<td>E: No coat</td>
<td>E: Lammy coat</td>
</tr>
</tbody>
</table>

The general problem of person descriptions is that they are almost never entirely correct. The perception and storage of such information is – even in normal conditions – not so detailed that witnesses can formulate clear descriptions afterwards. There is no reason to postulate that this would improve under the emotional stress of a shoot-out. Frequently, the effect is that witnesses unconsciously supplement their sketchy impressions with additional details. There is no other way of handling this problem than
by looking for some common denominators, without worrying too much about small differences in the testimony. Only when witnesses disagree fundamentally, it may be necessary to leave out entire categories. The descriptions in Table 1 constitute a good example of what good witnesses may produce, even though they do not agree on all details. The table enables us to draw some general conclusions.

- The gunman’s head was shaven on the sides, and closely cropped on top; the style of which is nicknamed ‘Island’ in the Netherlands. The Negotiator and the passive One were bald or very closely shaven all over. The passive One may have had a small tress.
- The gunman had a thin face; the Negotiator a much more round face.
- The complexion of the gunman and the Negotiator was rather light; the passive person was much darker.
- The gunman was of slender built; the Negotiator was much heavier.
- The gunman was wearing a Gucci-style sweater with vertical stripes, black and yellow, possibly some red. The Negotiator wore a ‘lammy-coat’ with a white collar. The passive One wore a dark outfit.

I left out the figures that were shaven into the hair of the Negotiator; the presence or absence of moustache (both Elvis and Roy had a moustache that night, but Roy removed it on the day after the incident); the information on gold teeth (the witnesses described all four as having gold teeth, in the course of the investigation); and all information on length and age (these categories were simply not discriminating).

The person descriptions reveal a useful number of differences between the gunman and the one who was engaged in the discussion. Although it remains a problem that Flashy is missing, there are three pieces of information that might eliminate him as a suspect. First, nobody accused Flashy of being the gunman. It is possible that Flashy was the leader of the group, and that his power over the other three was still effective, so that none of them even dared to betray him. But this hypothesis does not square with the other two pieces of information: that the passive One was much darker, and that he had a tress. Elvis and Roy are both very light; neither of them can be reasonably called dark or quite dark. Other witnesses established that Roy had an ‘Island-style’ hairdo for several years, and also that Elvis had been bald, shaven all over. But all in all this information is rather meagre and will not stand up in court. It is hard to understand why so little effort was spent in finding Flashy. And how could the Prosecutor be so convinced that Flashy was not the wanted gunman? However, if we accept the Prosecutor’s decision, it simplifies the remaining problem considerably: who was the gunman, Elvis or Roy?

I obtained two pictures, one of Elvis and one of Roy, that show Elvis as a person with a large, round, bald head. He is portly, and definitely not “a slim lad”. Roy, on the other hand, has a thin face, has the ‘island-style’ hairdo, and is about as tall as Elvis, but rather slim, certainly not athletic. Elvis owned a lammy-coat, which was seized by the police, but not analysed for traces of gunpowder. It was never checked whether
Roy was ever seen in a lammy-coat, or in a striped Gucci sweater. Roy was never asked what he had been wearing that night. Nothing is known about the body weight of either Elvis or Roy. It is suggestive, to say the least, that Roy tried to change his outer appearance after the incident, whereas Elvis did not. Moreover, Elvis exposed himself to the staff of the Yellow Submarine twice, whereas Roy took care in staying away.

It is obvious that the person descriptions are not inconsistent, but they are definitely not sufficiently consistent to make a decisive distinction between Elvis and Roy. The hypothesis that Roy was the gunman, and Elvis the Negotiator, like all three suspects declared initially, is hereby supported. But investigations that might have confirmed this hypothesis, were miraculously left out.

**Thick?**

The title of this brief contribution suggests that the Police, the Prosecutor, the Examining Judge, and the Trial Judge failed to learn their lessons. That they made old and familiar mistakes. Judge for your self, by considering the following errors.

- Elvis and Ali were shown to Mario and Pete in single confrontations, a few hours after these witnesses identified the two men spontaneously. The police was aware that proper line-ups were not logically excluded, however, the confrontations eliminated this option. Nothing new was learned by the confrontations, but the risk of unconscious transference had been increased. The confrontations were invalid anyway, because of the effect of clothing bias.

- No systematic analysis of person descriptions was attempted. No information was sought, which may have helped to decide which description fit which subject best. No pictures were collected of Elvis and Roy prior to the night of the incident, so that their usual hairdo could be established. There was no systematic search of their clothing, and no forensic analysis of the available clothing. The Police failed to look for witnesses who could confirm whether Elvis and Roy owned a lammy-coat or a black and yellow Gucci sweater.

- The Examining Judge confronted Bill with a biased photographic line-up. Upon an objection by Elvis’ counsel, the Examining Judge decided to show no photographs to the other witnesses.

- The Court did not, in view of the fact that so much evidence was missing, refer the case back to the Examining Judge, but decided to attempt an identification test with one witness only. The other witnesses were not asked to compare the suspects. By now, they will have seen the two main suspects in the courtroom, under rather suggestive conditions, so that a fair test is precluded.
And yet, it must have been obvious to all authorities involved, that identification of the gunman from the group of suspects was the real question and the only one. With the exception of Flashy, it was obvious who were involved; the suspects never denied their involvement. If Flashy was a suspect as well, the cases against Elvis and Roy should never have been brought to trial in the first place. The possible guilt of Flashy leaves a far too reasonable alternative to allow a conviction of either Elvis or Roy. The trial of Elvis and Roy indicates that the Prosecution was convinced of Flashy’s innocence. But in that case a mass of information that might have helped to choose between Elvis and Roy, was neglected. It seems that the Police, the Prosecutor, and the Examining Judge, simply agreed to have two shots: one at Elvis, and one at Roy. The problem of discrimination between those two would simply be dumped on the Court’s green table, without these authorities realising that their prior destruction of evidence would render the problem unsolvable. The result will be that both suspects will be acquitted, if the Court performs its task well; or that one of the two is convicted, but not on the basis of the best possible evidence, so that a miscarriage of justice becomes rather likely. And all this in a case of aggravated street violence, a category of criminal conduct that our government claims to combat as a first priority.

All these errors are not new, and the solutions have been known for ages. It is sometimes said that the perpetrators of such stupid and senseless shooting parties must be rather thick. But what about the authorities who refuse to learn some of the simplest lessons?
Psychologists in the Dutch Legal Domain

Peter J. van Koppen1 & Job Cohen2

Introduction

The aspirations of an applied field such as the psychology of law go in two directions: the study of law as a behavioural technology and the study of behaviour under the law, the behaviour of participants in the legal process. The first part of psychology and law is concerned with understanding the operation of law and legal rules and their influence on legal subjects, often through decisions by legal officers. Legal rules and their applications are based on assumptions regarding the behaviour of individuals. These assumptions and their applications are available for empirical research and testing. This area of psychology and law is the study of law as a behavioural technology, and involves with such questions as: what factors influence legal decision-making; what kind of punishment is corrective; or which factors influence negotiations in the legal arena. Three fine examples, written in Dutch, in this area of psychology and law have been produced by Hans Crombag: the 1977 volume Een Theorie over Rechterlijke Beslissingen (A Theory of Legal Decision Making, with Johan de Wijkerslooth and Job Cohen), his inaugural lecture Mens Rea given in Leiden in 1981; and the product of his 1982 stay at the Stanford Advanced Studies Centre: Een Manier van Overleven: Psychologische Grondslagen van Moraal en Recht (A Manner of Survival: Psychological Foundations of Morals and Law). In the field of law and psychology, studies on law as a behavioural technology, however, are relatively scarce, especially empirical studies. We can only speculate about the reasons. The persistent difficulty in persuading legal decision makers such as judges and prosecutors to co-operate in empirical studies is one

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reason. Another is that law and its jurisprudence is quite diverse and time-related. The assumptions underlying the law are simply difficult to discover.

In any case, most psychologists of law have limited their research to the second part of psychology and law, to what we have called behaviour under the law: the wide variety of behaviour displayed by witnesses, defendants, jurors, and other participants in the legal process. This part of psychology and law is indeed more practical and has a high potential of helping legal decision makers. In many cases, triers of fact are faced with questions on the behaviour of suspects and witnesses, while psychologists can contribute to finding an answer.

Quite to the dismay of Hans Crombag, the potential and practical contribution of psychology to legal decision-making is ignored most of the time, at least in his view. In this chapter, we discuss whether this is true for the Netherlands in the areas in which psychology and law has been strongest: witness statements.

When Law and Psychology Collide

Lawyers are indeed likely to become irritated when psychologists interfere with their legal work. A fine example of this kind of irritation was generated by the publication in 1992 of *Dubieuze Zaken* (*Dubious Cases*) by Crombag, Van Koppen and Wagenaar. In *Dubieuze Zaken* the Theory of Anchored Narratives is presented. This theory is aimed at describing and explaining the decision of guilt by the trier of fact in criminal cases. The Theory of Anchored Narratives is an appropriate vehicle to explain where and how the process of deciding on a suspect is the guilt can go wrong. This was done using 35 cases specially selected to demonstrate these errors. It is precisely this method that evoked most of the comments made by lawyers.

In short, the Theory of Anchored Narratives entails the proposition that the decision on the guilt of a suspect is based on two elements. The court or jury primarily evaluate the quality of the story told by the prosecution. Secondly, stories told in a criminal court must not only be good, we want them to be true as well. The truth of a story is established by means of evidence. Proof, then, is the process of anchoring the story in shared knowledge about the world. This is done through general rules, e.g.

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7. Psychologists in the Dutch Legal Domain

‘policemen usually tell the truth in court.’ Such general rules, however, are seldom absolutely true. Witnesses sometimes err or lie, and experts occasionally do make mistakes. The rules making evidence prove something should rather be phrased like: witnesses speak the truth most of the time, and pathologists almost never make mistakes.8

The Theory of Anchored Narratives predicts that judges will anchor the narrative presented by the prosecution in their own general convictions. These convictions, or common sense rules on the state of the world, are usually left implicit. The defence has the task to make these convictions explicit and criticise them where possible. At a very minimum, the trier of fact has the obligation to anchor the evidence in common sense rules accepted by most people most of the time without further discussion. Only then, the verdict will be acceptable to all participants without further ado. In the 35 cases discussed in *Dubieuze Zaken* many instances were found in which the process did not work properly; the most notorious was a case in which the court could only have accepted the evidence if it also accepted as a general rule that babies can talk.9

Although all reviews by lawyers – and there were many – were very positive on the core issues in the volume – the Theory of Anchored Narratives – their anger was mainly aimed at the authors’ lack of knowledge of legal matters. In short: how can we believe psychologists who make legal errors in their writings? And: even if some of their comments on legal decisions were correct, judicial errors are negligible compared to “bookcases full of psychological nonsense.”10

More interesting are the comments on the methodology used in *Dubieuze Zaken*. The 35 cases discussed were considered a highly biased sample from all court cases11. Thus, the different purposes of random sampling and case studies were ignored. Re-

viewers from other disciplines were more sensitive to the important differences between random sampling and case studies as done in Dubieuze Zaken.\textsuperscript{12}

The lawyers’ critique of Dubieuze Zaken – case studies are not valid to draw conclusions on legal decision-making – is amazing in some ways. Case studies are so central to the legal profession that one would expect that lawyers are sensitive to the power of case studies, their profession typically being based on case studies. During their studies, law students discuss precedents and court decisions to discover the niceties of the law and legal rules.

Although the lawyers’ critique of Dubieuze Zaken may be peculiar, it does point at one important reason for communication problems between psychologists and lawyers: their huge differences in methods and methodological backgrounds.

\textbf{Uses of Psychologists in Court}

Differences between psychological and legal methodology is especially problematic for communication between lawyers and psychologists serving as expert witnesses in court. It should be noted that a psychologist serving as an expert witness is there to assist the trier of fact in his decision-making.\textsuperscript{13} Thus, the methods used and conclusions drawn by psychologists in court should fit the typical legal model. This model is simple: the court can only convict if the suspect’s guilt has been established beyond reasonable doubt. The trier of fact does not need to be absolutely sure of the suspect’s guilt, but the degree of uncertainty should be quite low.

Now, before we proceed, please note that psychologists usually only become involved in criminal cases if the rest of the evidence is not very strong. Only then does it become important to establish, for instance, whether a certain witness speaks the truth or whether a suspect’s confession, which was subsequently retracted, can be trusted. In such cases the trier of fact should only use the psychologist’s opinion if the method-


\textsuperscript{13} We depart from the role of expert witnesses as typically performed in Dutch courts. We are aware that in other legal systems experts have a role which is more or less aimed at serving the case of one of the parties involved. See for instance the descriptions given in E.F. Loftus and K. Ketcham (1991) Witness for the defense: The accused, the eyewitness, and the expert who puts memory on trial. New York: St. Martin. Since our arguments do not bear on this difference between legal systems, we leave it undisussed.
Psychology enables conclusions strong and firm enough to support a decision beyond reasonable doubt. Are psychologists able to draw such firm conclusions?

The most typical methodology used by psychologists is the experiment. In the experiment, differences between groups are investigated. For instance, a method is applied to assess the veracity of a witness statement and psychologists try to discover whether the method differentiates between abused and non-abused children. If the method produces statistically significant different results among abused and non-abused children, psychologists conclude that the method is useful to differentiate between their statements. ‘Statistically significant’, however, means that a difference between the two groups is found and that this difference is quite probably is not caused by coincidental and irrelevant differences between the two groups. It simply means that the independent variable has a detectable influence, is something quite different than the level of certainty required in decisions with regard to individual criminal cases. Before a psychological method can be applied in law, another hurdle must be overcome: the step from group comparison in experimental designs to application in individual cases. This was one of the reasons for Rassin, Merckelbach and Crombag to reject the application of the Criteria Based Content Analysis (CBCA) for establishing the truthfulness of child statements in sexual abuse cases. The statistical differences found in empirical research on CBCA are just not important enough to allow its forensic use.

It is clear that psychological research cannot be applied directly to the legal domain. How are lawyers dealing with these problems? We discuss two relevant matters here: psychologists serving as expert witnesses in court and the generation of general rules and procedures based on psychological research. These may partly answer the question as to whether lawyers confirm Crombag’s pessimism that scientific psychology is largely ignored in the Netherlands.

Psychologists as Expert Witnesses

The problems with the transfer of psychological knowledge to the forensic domain warrant a critical approach towards psychologists as expert witnesses by the courts. Typically, the comments by Hans Crombag and others do not entail that courts listen
too little to psychologists, but that they listen to the wrong psychologists using the wrong methods. Traditionally, for instance, clinical psychologists and psychiatrists play a large role in some criminal cases. Courts accept the opinion of psychiatrists on the toerekeningsvatbaarheid (insanity defence) of defendants rather undiscerning.\(^{16}\) Also, courts routinely accept the judgements on the veracity of witness statements, especially those of children in sexual abuse cases. This undiscerning acceptance has been discussed elsewhere.\(^{17}\) A more obscured version of the same problem can be found in cases in which individuals, mostly women, file a complaint about sexual abuse that may have happened a long time ago. If no other evidence is available, psychologists sometimes interview the alleged victim to assess whether her story is true or not. One of these cases went all the way to the Dutch Supreme Court.\(^{18}\) In this case a women accused both a brother and an uncle of having sexually abused her for some years. A psychologist was called in to study the case file and talk to the woman. The psychologist concluded that she was speaking the truth because she was suffering from post-traumatic stress disorder. This diagnosis is derived from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), a publication of the American Psychiatric Association, which is used worldwide for the classification of psychiatric disorders (American Psychiatric Association, 1994). The DSM-IV also lists a large number of criteria which all have to be met before a patient can be diagnosed as suffering from posttraumatic stress disorder.\(^{19}\) As is typical in the therapeutic setting, the psychologist diagnosed the woman loosely as suffering from this disorder, without making clear to the court the DSM-criteria on which he had based the diagnosis. A much larger problem, however, is that the psychologist argued that because the woman was suffering from posttraumatic stress disorder, it was very likely that she suffered from the sexual trauma inflicted upon her by the suspect. How does he know? The first criterion in the DSM-IV for posttraumatic stress disorder is that: “The person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; (2) the person’s response involved intense fear, helplessness, or horror.”\(^{20}\) And how did the psychologist know that the woman suffered from trauma? Because she told


\(^{17}\) See respectively, *Dubieuze Zaken*, Chapter 13; and Rassin, Merckelbach and Crombag, 1997, *op. cit.*

\(^{18}\) See HR 18 November 1995, NJ 1996, 666 (Psycholoog ondersteunt getuigenverklaring; Psychologist supports witness statement), in which the court accepted such an expert statement as valid evidence.


him. This is an acceptable basis for making this diagnosis in a therapeutic setting, but if the psychologist then uses the diagnosis to convince the court that the woman had been indeed sexually abused, the reasoning has become completely circular. These kinds of expert opinions are particularly dangerous, because psychologists in the Netherlands never tell the court how they came by their diagnosis, so the circularity of the testimony remains completely hidden from the court.  

But times are changing. Recently, the Dutch Supreme Court set standards for the testimony of expert witnesses. For Dutch law this is quite novel, since the decisions about the facts are almost completely left to the inferior – district and appellate – courts. In 1989 the Supreme Court ruled in a case in which an expert witness used the anatomically correct dolls-test to assess the veracity of a statement made by a minor in a sexual abuse case. The Court decided that if the defence seriously contested the method used by the expert, the court should explain expressly why it still used the expert’s opinion as evidence.

In the beginning of 1998, the Dutch Supreme Court broadened this decision by reversing an appellate court decision in a case in which an orthopaedic shoemaker had given an expert opinion regarding identification by means of shoe traces. The Supreme Court ruled that upon a challenge of this evidence by the accused, the appellate court should have investigated (1) whether the expert also was an expert on shoe traces; (2) if so, which methods were used to reach the opinion; (3) why the expert considered this method sufficiently reliable; and (4) the extent to which the expert was able to use this method competently. These guidelines may seem meagre to an Anglo-Saxon lawyer, but they are completely new to Dutch criminal procedure.

All of these developments are happening under the influence of the European Court of Human Rights (ECHR) in Strasbourg. ECHR decisions are binding to national courts. Decisions by the ECHR are causing the gradual return of witnesses to the courts. Some 15 years ago, courts decided almost all cases on documents. Witnesses did play a role, but only in the form of their statements as recorded by the police or by the examining magistrate (juge d’instruction). Typically, expert witnesses appeared in court in the form of their written report. Although decisions on written opinions are

still the rule, in the past few years more and more witnesses and expert witnesses were summoned to appear at the trial.\textsuperscript{25}

In short: the courts treat experts more and more critically. A development that should be applauded. Maybe, courts are starting to listen to people like Hans Crombag. Another area in which psychologist may influence the legal system is the generation of general rules and procedures. To investigate whether psychologists exert influence in this area, we discuss two subjects: identification procedures and the handling of repressed memory cases.

**Identification Procedures**

In most criminal cases the evidence is based on witness evidence. One of the most problematic witness statements is the one on the identity of the suspect where the witness never met the suspect before the crime. A witness confrontation should then be used to assess whether the appearance of the suspect corresponds to the memory that the witness has of the appearance of the perpetrator. This is done with a good line-up or photo-spread procedure, which seeks to accomplish two purposes simultaneously: to try to learn from an eyewitness who committed the crime and, at the same time, to test the accuracy of that eyewitness' identification. This dual objective is achieved by confronting the witness with a line-up of people who all conform to the general description of the perpetrator. One of these is the suspect; the others are innocent foils unknown to the witness. The witness' task is to point out the one person in the line-up he recognizes, if he recognizes anyone at all.

The result of a properly conducted line-up has a very high diagnostic value.\textsuperscript{26} It is essential, however, that the procedure minimizes the chance that the witness chooses the suspect who most resembles the memory of the perpetrator rather than the one who is recognised, or that cues suggest to the witness who is the ‘right’ suspect to choose. For example, the use of foils who are distinguishable from the eyewitness’ description reduces the effective size of the line-up, as if these foils were not even there. Moreover, it is important that a suspect’s confidence in an identification (which may initially be weak) not be artificially bolstered after the line-up by a confirmation from the investigators (that the person chosen is the one they thought was the perpetrator) or by learning that other witnesses chose the same person.\textsuperscript{27}

\textsuperscript{25} It should be noted that times are changing for experts in North America as well, as a result of a series of opinions by the United States Supreme Court, starting with the case of *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579, 1993). As a consequence, the treatment of experts in court has become more similar to the Dutch situation.

\textsuperscript{26} Wagenaar, van Koppen and Crombag, 1933, *op. cit.*

Accomplishing these things ensures that the identification results from a witness’ memory of the perpetrator and not by something else. For this purpose four procedural safeguards need to be routinely employed: (1) the person or persons who conduct the line-up or photo spread should not be aware of which participant in the line-up is the suspect, or which photograph is that of the suspect; (2) eyewitnesses should explicitly be told that the person being sought might or might not be in the line-up or photo spread and that, therefore, they are not obliged or expected to make an identification; (3) a suspect should not stand out in the line-up or photo spread as being different from the other people in the array as a result of the eyewitness’ previous description of the person sought or other irrelevant criteria; (4) at the time of the identification and prior to any feedback, a clear statement must be taken from the eyewitness regarding his or her confidence that the identified person actually is the person sought.  

Apart from a proper identity parade, tests of the witness’ memory can be conducted in two other manners: (1) mug books, on paper or on a television screen; and (2) a one-person show-up. These serve other purposes. Mug shots are photos of known criminals. If conducted properly, these are only shown to witnesses in investigations where the police have no idea where or how to find the perpetrator. Therefore, the police show the witness a selection of photos of known criminals who fit the description given by the witness. If the witness points one out, that individual becomes a suspect. This will result in a suspect-driven search, with the potential of generating erroneous identifications, and ultimately a miscarriage of justice. For this reason, the results of witness examinations of mug shots should not be used as evidence by the court.

The one-person show-up should be used in one situation only: where the witness already knew the perpetrator before the crime took place. In such cases, the identification takes place at the scene of the crime. Showing the suspect only to the witness serves to prevent administrative errors (“is this the neighbour you meant?”). If the witness knows the perpetrator by name, this procedure is unnecessary. If used in case of a witness who saw the perpetrator only at the scene of the crime, the one-person show-up is much more likely to yield false identifications than properly organized line-ups would. The one-person show-up is much too suggestive, because with this pro-

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procedure the police’s signal to the witness is: “We got him. You just have to confirm it.” If, in a proper line-up, the eyewitness has no good recollection of the perpetrator, or the suspect is innocent, it is most likely that he will identify an innocent foil, which can be detected as an error. Such error-detection is impossible with the one-person show-up.

Much is known about proper procedure for identification.\textsuperscript{31} One of the major accomplishments in the field of law and psychology is the contribution to formal standards for conducting identification procedures. Procedured standards for the United States have been published recently.\textsuperscript{32} The American guidelines are highly praised by the authors themselves. They conclude:

“Early in the 20\textsuperscript{th} century, applied psychologist Hugo Münsterberg (1908)\textsuperscript{33} claimed that psychology could help the legal system clarify the ‘chaos and confusion’ of eyewitnesses. The brilliant and influential legal scholar J. H. Wigmore (1909)\textsuperscript{34} dismissed Münsterberg’s claims with regard to what psychology had to offer at that time. Wigmore nevertheless felt that the day would come when psychology could in fact assist the legal system in its struggle with eyewitness evidence. Wigmore further stated that when psychology had something to offer the legal system regarding eyewitness evidence, the legal world would be ready to receive it. It appears that the time has come, at least in some measure. We think that both Münsterberg and Wigmore would be pleased [about our guidelines].”\textsuperscript{35}

If the Americans are right in their enthusiasm, the Dutch have reasons to throw a big party: the first version of the Dutch guidelines for identification procedures dates back to 1989; a second version was published in 1992.\textsuperscript{36} Willem-Albert Wagenaar was a


\textsuperscript{36} Werkgroep Identificatie (1989) \textit{Identificatie van personen door ooggetuigen}. Den Haag: Ministerie van Justitie, Recherche Advies Commissie, werkgroep Identificatie (voorzitter P. Bender) and revised: Werkgroep Identificatie (1992) \textit{Rapport identificatie van personen door ooggetuigen}. Den Haag: Ministerie van Justitie, Recherche Advies Commissie, werkgroep Identificatie (voorzitter P. Bender; 2e herziene druk). There is an important difference between the American and Dutch procedure. In the Dutch line-up procedure the line-up is executed
member of the committee who drafted the guidelines. These guidelines provide
drafted clear-cut rules as to how the police should conduct identification proce-
dures.  

Nevertheless, the police usually get identification procedure wrong. The most
common error committed is that a one-person show-up is used, instead of a proper
line-up, in case of a witness who knows the perpetrator solely from the crime scene.
This seems to remain a structural problem, which is caused by the following: although
the principles of a line-up are simple, organizing one means much work for the police.
People from a modelling agency must be hired to serve as foils. They must be present
at the same time as the witness, the suspect, the suspect’s attorney, the prosecutor, and
a number of policemen not involved in the investigation, and in addition the show
must be run according to the book. A one-person show-up is much easier. Besides,
Dutch courts are very lenient regarding the execution of identification procedures.
Courts routinely accept procedures that fail to meet one or more of the requirements
of a proper line-up. So, why should the police bother? It induces the police to see the
line-up as a risk. They consider the line-up much more difficult for the witness; why
run the risk that the witness does not identify the suspect as the perpetrator is courts
do not adhere to the principles of identification evidence?

Consequently, the police regularly commit every conceivable error in conducting
identification procedures. A case from 1998 provides an example of flaw is so obvious
that one wonders how such errors can occur in the first place. In this case, a witness
saw five men in a car. One of them had a gun. Five suspects had been arrested and the
policewoman running the investigation showed each of them to the witness in a one-
person show-up. Each time, the witness identified the suspect. The policewoman
honestly wrote all these errors in her report. And the largest error was still to come.

The question remained as to which suspect had held the gun. The police report
then reads as follows:

“After Dekkers had been confronted with each of the suspects, he stated that he
recognized each of them, but had not indicated yet which of the suspects had the
gun. So I asked him to point out the suspect that had held the gun. Dekkers
double blind, in that a policeman who does not know which individual in the line-up is the real
suspect escorts the witness. This rule is not part of the American guidelines. See also G.M.
who also demonstrate that the procedures in England and Wales are superior to those in the
United States.

37. There is also a small booklet which contains everything a policeman might want to know
herziene druk).
38. P.J. van Koppen and D.J. Hessing (1999) De confrontatie in de praktijk. Ars Aequi, 48,
103-107.
40. Taken from Van Koppen and Hessing, 1999, op. cit.
stated that he was not sure and hesitated between numbers 1 and 3. Subsequently, I informed Dekkers that both other witnesses had identified the first suspect as the man with the gun. I said he should not hesitate and point one out with confidence. Then Dekkers stated that he was confident that suspect number 1 had held the gun.”

An example of a more subtle error is where the police officer conducting a line-up tells a witness who is unsure which line-up member he recognizes, to “take another look at suspect number 1” or some other inadvertent (or intentional) signal that tells the witness whom to select. In these kinds of cases, the defence time and again calls in cognitive psychologists to explain to the court what went wrong. In the end, all this work will only help if Dutch courts publicly denounce departures from the identification guidelines and stop accepting all kinds of larger and smaller errors. In private, judges do tell us that they follow the guidelines in assessing witness identifications. The problem is that in these cases a firm standpoint taken by the courts usually results in an acquittal, which is seldom appealed and never published. In short: psychology and law exerted some influence on legal procedure here, although practice proves to be more resistant than one would hope and the extent of the influence remains to be seen.

**Recovered Memories**

The police may often ignore the guidelines for identification evidence; for the area of recovered memories this is less possible, because there legal psychological work has led to *binding* guidelines.

The guidelines have been made for cases in which adults claim to have been sexually abused long ago, although they have said nothing about it for years. Some of them have been silenced by fear. Others claim to have remembered nothing of the abuse for a long time and only to have become conscious of the abuse after therapy or some other experience. In the latter case, we are dealing with repressed or recovered memories. These usually involve accounts by adult women who claim to have experienced long-term sexual abuse during childhood. The women often identify multiple offenders.

Adult women often report such sexual abuse to the police or lay civil claims – or do both. In the Netherlands the possibility to take such action was recently extended, so that, depending on the offence, victims can report childhood abuse up until they are 33 years old. The judge in these cases needs to know how much value can be attached to the victims’ statements after such a long time. The veracity of their state-

41. In 1994 a law was passed in the Netherlands to extend the statute of limitation for sexual offence cases. *Wet Verlenging Verjaringstermijn Zedenzaken*, 1994.
ments is usually crucial, because other evidence is lacking or limited. The police are confronted with similar problems.

Typical of such cases is that the victim has undergone psychotherapy prior to reporting the abuse to the police. Therapy seems to play an important role in the origination of the report. This creates a problem for victims who claim to have repressed the memories of sexual abuse for a long time. There are many indications that therapy is the decisive factor in the report’s origination and that the story reported was created by the therapy. Such cases must be distinguished from cases in which the victim has always remembered the sexual abuse, but only feels strong enough to report the abuse after therapy. In both types of case the victim received therapy before reporting the sexual abuse. For this reason, the police cannot always tell from the outset with which type of memories they are being confronted.

The recovered memory cases have led to great controversy, in which by many suggest that experiences may be so traumatic that victims may not be able to deal with them in a normal way. Instead, such memories are said to become repressed, i.e. relegated to a particular part of the memory system, called the unconscious. There they lie untouched by conscious experience and therefore unaltered, but also inaccessible by ordinary mnemonic techniques. They stay active, however, in that at times they disturb normal conscious experience and behaviour in ways unknown to those who possess them.

The theory of repressed memories is controversial and has in recent years led to what is sometimes referred to as ‘the memory wars’. Many clinicians claim that they have often succeeded in recovering repressed memories of traumatic events in their patients. Others have stated that repression is not a real phenomenon. Memory, they say, does not work that way and if recovery of repressed memories seems to occur,


the resulting memories are really pseudomemories, artefacts of the psychotherapeutic methods employed by the therapists. Gradually, however, clinicians have come to admit that induction of pseudomemories during therapy is not altogether impossible.

Several studies have attempted to provide us with proof of the existence of repression. Most of these studies, however, employed a retrospective methodology, which is really inappropriate for deciding the issue. Moreover, for the occurrence of amnesia they relied on the self-reports of the alleged victims. These studies have been heavily criticised for these and other methodological flaws. For the time being we tend to


adopt Holmes’ dictum that “at present time there is no controlled laboratory evidence supporting the concept of repression”.

In the meantime, Hans Crombag and Harald Merckelbach published a volume of the subject. The book did not seem to have a direct impact, because the repressed memory cases kept coming. But gradually things changed, also under the influence of groups of individuals who claimed they were at the receiving end of unfounded accusations based on recovered memories. The Minister of Justice asked Van Koppen to write a report on the subject. Simultaneously, the chief prosecutors in the country asked a committee headed by the prosecutor-general J.C.A. Al – of which Hans Crombag was a member – to do the same. All this resulted in guidelines drafted by the then chief prosecutor in Zwolle Joost Hulsebek. Although these guidelines are more generally aimed at how the police and prosecution – for whom the guidelines are binding – should treat cases of sexual abuse in which the alleged victim is dependent on the alleged perpetrator, it reproduces the phases in police investigation as presented in the Van Koppen report, but also introduces something completely new into the legal world. In cases in which the complaint to the police (1) contains recollections of abuse before the age of 3; (2) pertains to ritual abuse; or (3) recovered memories, the police and the prosecution are obliged to consult an expert group before taking any further action. The consultation is compulsory, but the expert group’s advice is not. But please note that this advise becomes part of the case file, so that the prosecution must have strong arguments to take any steps other than those advised by the expert group. These guidelines are unique in the world and their origins can be directly traced to work done by Hans Crombag.

Conclusions

Our conclusion can be quite simple. Hans Crombag is wrong in his opinion that the potential and practical contribution of psychology to legal decision-making is most of the time ignored. It is not ignored, although relations are sometimes very tense. The public reactions of lawyers to *Dubieuze Zaken*, in which judicial decision-making in criminal cases were criticized, were very fierce. The legal profession has been much more receptive to results from research in legal psychology in areas other than the one here discussed. The two examples we offered – the guidelines for eyewitness identification and for repressed memory cases – are outright successes of legal psychology, although not across the board. Lawyers seem to listen better to legal psychologists the further away psychologists’ stay from the core business of lawyers. Thus, proposals for eyewitness identification are more readily accepted than proposals for changes in judicial decision-making. And even in the latter case, the core issues of *Dubieuze Zaken* seem to continue to trickle down onto the domain. Hans Crombag should not be so pessimistic!
Reflections from the Border

Bart Groen

Introduction

In his report on an Islamic journey, Among the Believers, V.S. Naipaul describes his visit to Pakistan in the seventies of the past century. One of his observations I quoted on occasion when dealing with immigration cases before Dutch courts, was about the ‘manpower-export’ from that country. According to Naipaul, the Pakistani economy was based not so much on agricultural export or industry, but on export of its people, on manpower export.

“The business was organized. Like accountants studying tax laws, the manpower-export experts of Pakistan studied the world’s immigration laws and competitively gambled with their emigrant battalions: visitors visas overstayable here (most European countries), dependents shippable there (England), student’s visas convertible there (Canada and the United States), political asylum to be asked for there (Austria and West Berlin), still no visas needed here, just below the Arctic Circle (Finland). They went by the planeload. Karachi airport was equipped for this emigrant traffic. Some got through; some were turned back. Germans shoot 4 Pakistanis: Illegal entry. This was an item in Dawn, sent from Turkey, on the emigrant route, and it was the delayed story of humane disabling (men shot in the leg) and capture of one batch.

Abroad, the emigrants threw themselves on the mercies of civil-liberties organisations. They sought the protection of the laws of the countries where the planes had brought them. They or their representatives spoke correct words about the difference between poor countries and rich, South and North. They spoke of the crime of racial discrimination and the brotherhood of man. They appealed to the ideals of the alien civilizations whose virtues they denied at home.”

In the seventies and certainly in the eighties of the past century, a lot of Pakistani travelled to the Netherlands. Many of them entered illegally, as did – for that matter – many of other nationalities. Most of those who came illegally asked for asylum, as many still do. They file an application for refugee status or a residence permit on the basis of humanitarian grounds of a pressing nature.

The Netherlands has an old tradition of hospitality. At least many people believe in that tradition. Whatever the historical case may be, the Netherlands now has certain obligations, under the Geneva convention on refugees, to protect persons from being returned to a country were they will be persecuted. And there is also a provision in the Rome treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms, in short: the European Convention on Human Rights, prohibiting that people will be subjected to inhuman treatment. And last but not least, the Dutch government has as a policy, based on its discretion under the law of aliens, to grant a residence permit on the basis of humanitarian grounds.

As a lawyer in the field of immigration for about twenty years – more precisely: as one of the lawyers defending decisions on immigration by the under minister for Justice – I already feel the lack of precision in the above description. There is much more to say; the definitions are more complex. I hardly dare to describe all this in such simple words. Exceptions can be made to almost everything I have written thus far.

On many occasions during those same twenty years, I discussed the matter of aliens being refused access to the Netherlands with Hans Crombag. So it did not seem too bold an idea to venture a few reflections on some aspects dealing with aliens who wish to live in the Netherlands, at least on a temporary basis, and to examine whether science has brought us better practises in that peculiar field of the law, the law of aliens. Perhaps one could even question whether – in this field – we have learned anything, be it only by practice.

I will discuss three aspects out of many: the story of the alien, the policy he or she is confronted with and the handling of the procedure. As to the last aspect: one is almost tempted to write: the processing of aliens. Needless to say that, although what I will observe is based on experience I gathered in defending decisions by the under minister for Justice, any opinion I venture is mine, not his.

Stories

First: the story. Let me return to the Pakistani, as mentioned by V.S. Naipaul. They are just an example and I do not refer to them to imply that every person who came or comes to the Netherlands is an illegal worker. But how do we know? In the past many aliens applied for a working permit. However, the usual unemployment rate of this country made it almost impossible to grant these. So how to make the right distinction between people who should be granted refugee status or a residence permit, and who should not?

There are, of course, procedures. And a main element is the interview by the ‘contactambtenaar’ (liaison officer). That is a most important event in the procedure. The asylum seeker – as I will call him from now on – is given an opportunity to tell his story, and put forward the reasons why he should be protected in the Netherlands to an officer of the Government’s Agency dealing with these matters, the Immigratie- en Naturalisatie Dienst (IND, Office for Immigration and Naturalisation).
How do we know the alien is telling the truth? I have been confronted with the strangest histories of events, allegedly having happened in African countries. After being arrested by the police of the dictator in one of these countries, the asylum seeker tells the officer of the IND, he was brought to a hospital. There, he had been guarded by two policemen, but suddenly a door opened and a car was waiting outside. He was brought to a ship, the name of which he did not know. And thus – after some time at sea, where he was fed by an unknown man, while being locked up somewhere in the hull of a ship – he came to Europe.

If you find this a strange story, I would recommend reading The Famished Road, the Booker price-winning novel by the Nigerian writer Ben Okri. At least for me that has been a lesson about reality and how differently it can be perceived.

Talking about reality: that is what the Government’s officer is looking for. What has happened that made the alien seek refuge in the Netherlands? The officer is not the man who will refuse or grant the permit. But he will have to write a report of the interview that will enable the officer who will decide on behalf of the under minister for Justice to do so, based on the material necessary for a well-founded decision.

This is not an easy task, neither for the interviewer, nor for the decision-maker. Of course, there are simple cases, but they do not seem to be the majority. Although I have never heard Anchored Narratives by Wagenaar, Van Koppen and Crombag, mentioned by a member of the IND, some of their ideas, even rules, have been adopted in daily practise.

The asylum seeker is asked a lot of questions. To start with, there are questions about nationality, status, children and so on. What kind of education did he receive and what profession did she practice? What about his religion and her political beliefs? Any political-party membership? What kind of problems did the narrator encounter in his home country? Did his relatives suffer any harm? What were the direct reasons for leaving his country of origin or the country where he stayed?

All these questions are asked with the aim of obtaining a complete story with the key elements – or the absence of them – necessary for a well-founded decision. One should bare in mind that the asylum seeker is not asked to prove anything. It is sufficient if he gives a well-shaped narrative, with no contradictions, containing key-elements relevant for admission to the country, in short: an acceptable story.

There are, however, many stumbling blocks along the way. In the first place, there is the language. I have never heard of an asylum-seeker that spoke Dutch, nor – for that matter – of an interviewer fluent in Swahili or Urdu, so there is always an interpreter. I have no personal experience with this specific interviewing for admission. But in dealing with cases in court, I have met many interpreters who translated questions put by the judge and answers given by the alien. It has often struck me how

strange the question may be to the asylum seeker. I have also been struck by how elaborate and beside the point the answers sometimes were.

Although we cannot be without a good interpreter, his translation does not necessarily mean that the questions are understood, or the answers accepted in the way they were meant.

For the – if I may say so – more exotic countries, most interpreters are native speakers of that country or that region. But what will a woman from – for example – Sudan tell a male interpreter about sexual harassment? It has taken some time, before the IND realised that a female interpreter should be available for such cases. And what does a left-wing asylum seeker think of the right-wing interpreter from his home country? Of course – after some bitter criticism of interpreting by the National Ombudsman – there is now a better selection of interpreters. The asylum seeker is prepared for the interview, the purpose of which is amply discussed with him. He is always asked whether he has understood what has been asked and he is told that there is a possibility to complain about the interpreting. And there is always the possibility to add elements to the report of the interview – there is no policy to have the interview recorded and the transcription made available – and to correct misunderstandings, although, when these affect the key elements to such a degree that they are altered, these observations may be met – both by the IND and the court – with some scepticism.

In the second place, there is what may be described as a culture gap. I have already mentioned the embarrassment of some female asylum seekers, confronted with a male interviewer assisted by a male interpreter. But there is more. Why do asylum seekers not answer plainly yes or no to questions any Dutchman would answer that way? I once heard the story of a very old Indonesian lady – far beyond Sarah’s age – who, upon being asked whether she had any children, answered: “belum”, meaning: not yet. In some cultures you do not say no. And what about the man from Iraq speaking about his brother when it was his nephew? Was he lying, or has the word ‘brother’ a broader meaning than we assume?

There are narratives of political opponents who were able to bribe themselves out of prison. We are not used to such practices in the Netherlands, both the imprisonment of political opponents and – to the best of my knowledge, I should add – bribery. But is the conclusion justified, that the asylum seeker is not telling the truth for a country where bribery is a most accepted practice, even at the highest level?

We therefore look for anchors in the asylum seeker’s story. We ask him questions about political structures, about factions of parties – the Mujaheddin, the Kurdish Democratic Party, or – for old times sake – the Pakistan People’s Party – about cities, about events, known by the IND through the official reports from the Dutch Foreign Office. All these questions are asked to verify the story.

Nevertheless, I would suggest, that we have learned. As a result of strong criticism by the National Ombudsman and in reaction to decisions by the courts, the interrogation procedures have improved. More training has been provided for interviewers and
selection of interpreters has improved. The interviewer tries to get at the key elements. He is less looking for contradictions and more for a good factual, detailed story. Recently, the IND has been testing whether the interview could be based on the asylum seeker’s story, written before the interview. The first results are not very promising. Obviously it is not easy – even when you are more or less at ease – to write a story that gives some useful starting points for future questioning. But it must be observed that there is at least an attempt to new and probably better solutions at finding continuous problems.

However, we remain to be confronted with a problem. People who, without justification, tell a very sad story, hoping for asylum, may have bought the story. And many stories nowadays are much more detailed and much more sophisticated. They are – as many lawyers, acting on behalf of asylum seekers, are willing to admit – very well compatible with what is generally known about specific parts of a country, of social structure and particular events. They may fit in very well. But that does not mean they are true. Stories lead to policy, and policy leads to stories. Once a policy is known to the public – and it should be made known from a legal point of view, there is – or in any case there may be – a tendency for stories to be told in such way that the narrator falls within one of the specific categories of persons who are eligible for admission.

Policy-making

Policy-making is therefore the second aspect. Policy is a matter of politics, not of science. At least a policy on aliens seems to be so. The general idea behind this policy is simple: according to international rules the Netherlands is obliged to grant a residence permit not only to refugees, discussed above, but also to – for example – citizens of member states of the European Community, who wish to work in this country, or to relatives of aliens, already admitted, who fall within the scope of ‘family life’, protected by Article 8 of the European Convention on Human Rights. To date, there is no discretionary freedom. Given these international obligations, and especially the view that the Netherlands is a densely populated country, a residence permit is only granted if an essential Dutch interest is at stake or – as discussed above – on humanitarian grounds of a pressing nature.

It must be observed that under a rather wide variety of people fall within the latter category. It is not only the man or woman who fled their country and may offer substantial evidence of a real risk of falling victim to inhuman treatment. It is – to give just a few of the many examples – the bride of the Turk or the Moroccan, arriving from Turkey or Morocco. It is the asylum seeker who has waited in the Netherlands for more than three years, without having received a final decision by the Government on his application for admission.

Admittedly, three years is a long period, but there is nothing in the law that grants a right to a residence permit solely on the ground that three years have passed. In the past, the Council of State has held that no such rule exists. It is purely a matter of pol-
icy, originally aimed at speeding up matters. In that respect one cannot but admit that the policy has failed to achieve its objectives.

And – as a final example – some people who are working in the Netherlands without any permit fall within this category, but who have been here for quite a long time, paid – amongst other things – their taxes and have children in school. Nowadays, they are known as ‘witte illegalen’, white illegal aliens.

What those people have in common is, as one might expect, the fact that they induce a feeling that they should be given a residence permit of some kind. Although there is no such thing as politics without feeling, it does not mean that any policy should only be based on compassion nor should it be based on fear either. Justice, John Rawls wrote in *A Theory of Justice*, the first virtue of social institutions.

Policy on aliens – as any policy – is set out in certain rules. These rules may change, but as long as they remain the same, they should be applied equally in equal cases. The problem is that policy on aliens too often has been a belated reaction to too many kinds of political pressure. Pressure from civil-liberty groups, human rights organisations and Parliament. Too often, there has been a feeling that – strict as the rules for admission should be – an exception ought to be made for family so and so, very nice and sweet people with a sad story, now living peacefully in a village somewhere in the east of this country, accepted as members of the local community. Nothing wrong, of course, with this family, apart from their illegal status. Of course, any policy on aliens implies the possibility to admit people to this country in very special cases for which no rules exist. However, policy, in order to evade arbitrariness, supposes certain rules and in as much as any discrimination between equal cases is to be avoided, the policymakers have – or have taken up – the almost impossible task of granting admission to a special family without risking to have to grant permission to an unknown number of other families answering to the same description.

This brings to my mind a story, told to me by a former adviser to Queen Wilhelmina. It happened more than fifty years ago, and the Queen, as my spokesman told me, was discussing some requests that had been addressed to her. One of these, she felt, should be granted. The adviser said that the request did not fall within the scope of any rule. Nevertheless, the Queen felt that it should be granted. But, the adviser asked, Your Majesty, what am I to write? That Mr Secretary, said the Queen, is your problem.

And this still happens, although not always. The result is often a new rule, hopefully applicable in only a few cases. But then you are faced with yet another problem. What to do with people who rested their case before this new rule came into existence, who now claim to have been in the same position? Why not deal with them equally?

Politicians often seem to pay more attention to reacting to today’s pressure, instead of looking at the problems their solutions create for tomorrow. They seem often afraid

to make a rule today, out of sheer fear for possible reactions tomorrow. When in the sixties of past century workers from Morocco and Turkey were selected for the Netherlands, there were but a few who thought of the possibility that their families might eventually come over to this country. And when they stayed on and their families did come, it was as a result of the policy of family reunion. When some of them looked for brides or grooms for their offspring, new people entered from Morocco and Turkey, not for family reunion, but for family creation, although there was no special rule for that purpose, let alone that such a rule was based on studies – if any existed at that time – of the possible future consequences of such family creation in terms of numbers, employability, integration and acceptation.

In the past, measures have been taken whereby a new temporary rule is created, to legalize a – as one should expect: generally unknown – number of illegal aliens of a certain category. Nowadays, it sometimes seems blasphemy to use the word legalisation, because there seems to be some fear that any legalisation is not the end of the problem, but the beginning of a new legalisation. One used to say: as soon as they hear in Ankara of a regularisation, they will start the buses! Regularisation is not the only trigger for emigration of course, let alone the most important one. But it is true, regularisation does not end the problem. That can be easily illustrated by the existence of a movement to help victims of regularisation, people who have failed to meet the requirements for regularisation.

For the type of questions described above legal science, in my view, has not improved. It is perhaps not a matter of law, as it is perhaps not a matter of psychology. Sociology perhaps then? Economies? The science of emigration? Third-world politics?

Procedures

The last of the three aspects I mentioned was procedure. Let me very briefly describe the existing procedure. Any asylum seeker who comes to the Netherlands – and there have been tens of thousands every year of the past decade – is first questioned in an AC (Aanmeld Centrum, Centre for Admission). If his claim for admission is not immediately found unacceptable, he is send to an OC (Opvang Centrum, Relief and Investigation Centre), for further research into his narrative. If – after at least some months – his claim is held inadmissible, he may ask for a revision and, if such revision is refused, he may go to court. In the meantime, the under minister for Justice may grant the asylum seeker permission to stay in the country while his request is being reconsidered. If the under minister refuses a further temporary stay, the asylum seeker can request the court to grant him such a stay. During this stay the asylum seeker is given shelter in an AZC, an asylum seeker centre, where he is in the charge of the COA, the Central Organisation for the relief of asylum seekers.

Conducting all these procedures is not only a matter for the asylum seeker and the IND. More people are involved. The asylum seeker may be represented by a lawyer, and – in court – the under minister is also represented by a counsel. The IND has to
deal with the application for admission or revision within a reasonable time. How long is reasonable? How many cases will go to court? How many lawyers do you need to properly represent the under minister in Court? How many judges do you need? How much staff are these judges in need of?

You do not have to be an absolute insider to realize that the number of decisions by the IND – the output – bear relevance to the number of cases with which the court will have to deal. Is there a direct relation? Are there other factors influencing the influx? And what is the relation in terms of time? How many months after a decision by the IND will a case go to court and when will the asylum seeker have his day in court?

Over the past years, I have participated in many a meeting between the IND, representatives of the courts and the lawyers, the partners in the chain described above. How very often have we discussed the need to adequately predict the flow of procedures. And how often have we considered the clear impossibility to do so. The influx of asylum seekers seems difficult to predict. Nevertheless one would hope that some research could help in producing data to base any policy on. This is, I am afraid, not a matter for legal science. I am not aware of any psychological research into the relationship between a government agency, such as the IND, and the judiciary, as organisations. I have seen research by management offices or organisation consultants on the relationship between the partners in the chain, above. I cannot say their observations are without use for daily practice, but they fail to come up with any solution coming close to creating a smoothly flowing procedure.

One of the factors that can cause hiccups in processing – apart from the unpredictable influx – is a decision by Parliament. In some cases it is even the absence of a decision by Parliament, or the time it takes to reach a decision.

Another factor is a judicial decision on a matter of principle. For example: it can happen that the IND suspend the issue of all decisions on applications by asylum seekers from – say – Afghanistan until Parliament has given the green light for considering those applications on their individual merits. Once given, the IND sends out a thousand negative decisions. If one of these is not upheld in court for reasons of principle, affecting all thousand, you have a problem. Withdraw all the decisions? Or continue the fight through the courts? If the IND withdraws its decision, the decision has to be reviewed. This must be done by those who otherwise would prepare decisions for – say – Iraqi or other Afghani. Now you have a new hiccup in the flow. One could argue that such hiccups are to be expected. This may be true, but the question remains: when and where are they to be expected? The hiccup I have just described caused by a judicial decision, and some court decisions are not so easy to predict.

Is there any feedback from court proceedings to policy? Are policy-makers influenced by court decisions? You can be sure of that! In the first place, if the court does not uphold a decision by the under minister for Justice, the rules underlying that decision, will be adapted in such a way that, in future, setting aside can be avoided, either by changing the rules or by adapting their wording.
In the second place, the application of the rule can be adapted. The way in which an appeal based on Article 8 of the European Convention is to be considered, has been greatly influenced by the wording of decisions by both the European Court and the Council of State. And at a lower level: observations in decisions by Presidents of the District Courts have been of importance for the way cases of asylum seekers are handled by the IND.

**Conclusion**

Learning, for an organisation such as the IND, is not an easy process. There are some veterans in the service, but a lot of young people too. They come and go. That affects what one might describe as “the collective memory”. And there is always the pressure of numbers. Numbers of asylum seekers and numbers of procedures.

As I wrote earlier, stories lead to policy, policy leads to stories. One should not be too optimistic about the possibilities of the law and its application when we wish on the one hand to be strict and on the other to be protective, if not caring.

In the invitation for a contribution to this Liber Amicorum, Hans Crombag is described as a passionate sceptic. In my experience the best attitude towards the law of aliens is, however, that of a sceptical person of passion.
Mens Rea or Mens Insana

Theoretical Explorations into the Good, the Bad, the Ugly and the Foolish

Dick J. Hessing & Henk Elffers

Introduction

In this contribution we take Hans Crombag’s *Mens Rea* as a starting point for developing a thought-experimental model to explain criminal behavior and the appropriate reactions of society to that behavior.

According to Crombag, every crime (*actus reus*) must be followed by punishment, if there is a guilty mind (*mens rea*). That is, if the offender is able to learn through punishment, it is useful to impress upon the criminal once more the penal contingencies through punishment. That is, teaching him that – if we can help it – crime has its costs as well. If, however, the offender does not have *mens rea* as a consequence of an impaired mind, punishment is useless. In that case, only confinement to a psychiatric hospital is an appropriate reaction of society in order to lower crime.

We take this dichotomy, this digital point of view – a guilty mind or a sick mind – as a starting point to develop a new model of punishment. First, we discuss the main punishment models that are justifications of the criminal law – the retributive and the utilitarian model – and explain our preference for the latter approach. Subsequently, we argue that the dichotomy is inadequate when trying to explain the core aspects of a criminal act and should be replaced by a two-dimensional model, in which the two dimensions of the criminal act are (1) a sensitivity to future outcome of the crime and (2) a sensitivity to the outcome for the victim. Using a utilitarian punishment model, these two dimensions also determine the appropriate reactions of society to a single criminal act and to crime in general.

1. Faculty of Law, Erasmus University Rotterdam.
3. We have used the terms ‘offender’, ‘criminal’, ‘perpetrator’ and ‘lawbreaker’ interchangeably.
Punishing a Criminal Act

In general two models for justification of the criminal law are distinguished: absolute and relativist models. According to de Keijser “the most prominent difference between the two groups of theories is in their temporal perspective. Utilitarian theories are forward-looking. The justification for the practice of legal punishment is found in its supposed beneficial effects (utility) for the future […]. Retributivist theories, on the other hand, are retrospective and non-consequentialist. The justification for the practice […] is found in a disturbed (moral) balance in society; a balance that was upset by a past criminal act. The act of punishment in itself is just, deserved and morally good since it is supposed to redress that balance.”

Many authors take these two models as a general classification for a more detailed elaboration. Enschedé and Jörg and Kelk add contract theories and mixed theories to absolute and relativist theories. In their opinion, contract theories are based on the fiction that citizens, by entering voluntarily into a social contract that breaching the contract will lead to punishment, while mixed theories justify punishment on retribution, but also demand that the sanction is aimed as much as possible at preventing recidivism. Roos adds appeasement of the victims to retribution on the one side, and special and general deterrence on the other. In his opinion, appeasement of the victims can be seen as a useful effect of incapacitation.

From a psychological point of view punishing a perpetrator has a logic of its own, which is transparent to the perpetrator himself, because punishment is an extension of behavioral repertoires that are learned in childhood through reinforcement contingencies.

cies such as reward and punishment. Hessing and Elffers distinguish three phases and three kinds of rules that are learned when growing up: in the first phase, that of compliance (early childhood), the child is dependent on the parents who have the power to punish or reward his behavior. Complying leads to a satisfactory relationship where punishments are avoided and rewards are received. In trying to get accepted by his peers, a child will try in the second phase to identify himself with his peer group by adopting their social norms. Finally, in the third phase, that of internalization, the young adult will accept social influence, because it squares with his own norms and values. The three norms that correspond with these three phases are legal, social and moral norms.

One of the functions of criminal law here is to remedy a deficient learning process by once more – by force of legal sanction – impressing the legal norms, i.e. the contingencies of society.

Retaliation, on the other hand, teaches the offender quite a different lesson. It instructs him that, when caught and punished, society has the right to hit back: an eye for an eye, a tooth for a tooth. In other words, it simply delivers the message that society has outfitted him and wants revenge.

Punishment and reward as a means of controlling behavior are not mirror images. Reward indicates ‘repeat what you have done’ and in that sense rewards are very effective. There is no alternative; people are drawn to rewards like bears to honey. Punishment, however, indicates: ‘stop what you are doing’, but does not teach desirable responses. Or, as Walters, Cheyne and Banks put it: “Punishment lacks the apparent consistency of reward that stamps something in and encourages the individual to then use it.” Punishment can also produce negative side effects, such as inducing fear and hostility or behavioral choices that are even less approved of, such as retaliation. In that sense, compared to a reward, punishment is a very ineffective agent for change.


14. R.L. Atkinson, R.C. Atkinson, E.E. Smith, D.J. Bem and E.R. Hilgard (1990) Introduction to psychology (10th ed.). San Diego: Harcourt Brace Jovanovich, p. 264. Since the punishment can be experienced as a revenge, it can itself lead to retaliation. In some cultures, this can lead to feuds that may be passed from generation to generation, like the notorious feuds between the Hatfield and McCoy families in Kentucky and Virginia in the late 19th century (see J.E. Pearce
We conclude that, if we want punishment to be effective, we should look for a model of punishment that both imprints the contingencies of society once more, and at the same time teaches the offender alternative, more desirable forms of behavior. It is for this reason that we embrace the utilitarian view: the utility of punishment is served by the reduction and prevention of crime through such methods as individual and general deterrence, rehabilitation and incapacitation.\textsuperscript{16}

\textbf{Crombag’s Mens Rea}

According to Crombag, criminal acts are a form of behavior that pose a direct threat to the physical, material or social interests of other people.\textsuperscript{17} This kind of behavior should be prevented or, when it happens, stopped as soon as possible. The primary function of penal law is to threaten with punishment so as to prevent delinquent behavior or to punish the lawbreaker when such behavior has occurred. Punishment therefore has a useful effect, in that it is an individual and general deterrent.

To explain this position, Crombag analyses the determinants of behavior. Answering the question why people do what they do, Crombag takes the central proposition from Skinner that “behavior is shaped and maintained by its consequences.”\textsuperscript{18} That is, in a given situation a certain behavior is regularly followed by a rewarding result or consequence, whereas different behavior in the same situation is not followed by a rewarding consequence or even results in punishment. This regular relationship between situation, behavior and consequence is called an environmental contingency. The rewarding consequence is called a positive reinforcer; the punishing consequence is called a negative reinforcer.

Departing from Skinner, Crombag accepts the notion of a memory, where information is stored about these contingencies. That is, there is a memory, which has knowledge about the world and the contingencies of that world.\textsuperscript{19}

In short, Crombag’s model has the following elements: (1) it is the combination of the environment and the anticipations derived from memory about the possible con-

\textsuperscript{15} “To eliminate undesired behaviours, it is always preferable to reinforce the alternative, desired behaviour than it is to punish the undesired behaviour.” See P.G. Zimbardo, M. McDermott, J. Jansz and N. Metaal (1995) \textit{Psychology: A European text}. London: HarperCollins, p. 260.
\textsuperscript{17} In this article we have left out ‘victimless crimes’. For an illuminating analysis on this matter, see H.F.M. Crombag (1983) \textit{Een manier van overleven: Psychologische grondslagen van moraal en recht}. Zwolle: Tjeenk Willink, pp. 126-138.
\textsuperscript{18} B.F. Skinner (1972) \textit{Beyond freedom and dignity}. New York: Knopf.
\textsuperscript{19} Crombag, 1981, \textit{op. cit.}, pp. 9-14.
sequences of behavior that can be defined as the adequate cause of behavior; (2) (almost) all behavior is based on learning; (3) changing behavior is a matter of learning, that is: teaching the acting organism that the environmental contingencies have changed, and (4) learning has occurred when the behavior has changed.

Punishment from an utilitarian point of view is only rational if two conditions are met: (1) there must be reason to assume that the actus reus is a consequence of impaired learning in the past, and (2) the actor must be capable of learning. For that reason, we do not punish mentally disturbed perpetrators, because their state of mind makes it impossible for them to learn the contingencies of the world. It is highly unlikely that punishing them will result in a learning effect for the future.

In the sixties and seventies, the dichotomy mens rea or mens insana was more or less simplified and reduced to a single definition, the medical model: offenders were not bad, they were sick and punishment ought to be replaced by treatment. Before long, however, it was realized that in this medical model treatment, especially consisting of indeterminate sentences, proved to be even harsher ‘punishment’ than serving a specific time in prison. In past decades, we have witnessed a return to the classic punitive model, where the criminal is sane, partly sane or completely insane and where treatment and punishment are treated as separate or even competing modalities.

20. For the development of our model it is not necessary to distinguish between the two elements of mens rea that Crombag discusses: knowledge of circumstances and foresight of consequences. We assume that in case of a crime there is knowledge of circumstances, and in our model we concentrate on the foresight of consequences. For the same reasons that Crombag adduces, we will also disregard the distinction between conscious and un-conscious guilt. See for a more recent discussion D. Carson (1995) Criminal responsibility. In R.H. Bull and D. Carson (eds.), Handbook of psychology in legal contexts (pp. 277-289). New York: Wiley.


This one-dimensional view results in either a prison sentence, a prison sentence followed by a confinement to a psychiatric hospital, or just confinement to a mental hospital.\(^{24}\)

In Crombag’s opinion – and we concur– there is hardly any difference between a prison sentence and a confinement to a psychiatric hospital. From a practical point of view, they only differ in their supposed effectiveness.\(^{25}\) In past decades, we have come to realize that the deterrent effect of punishment equals the treatment effect of therapies given in psychiatric hospitals, in that both models of behavioral change procedures – if executed separately – do not seem to be very effective.\(^{26}\)

To conclude this description of Crombag’s position, we arrive at the following: the utilitarian approach to punishment is sufficient. Punishing serves the purpose of teaching the offender the contingencies of the world. If the criminal – because of an impaired mind – is unable to learn, treatment in a psychiatric hospital is the alterna-

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tive. We take this digital position and develop it into a two-dimensional model, in which each dimension is defined as a variable.

A Thought-Experimental Rational Choice Model for Considerations about Committing a Crime

In line with the utilitarian model, we follow the rational choice tradition to model the decision to commit a crime by assuming that the would-be lawbreaker is calculating the expected outcome(s) of the crime, and assesses whether this outcome is more than zero.\textsuperscript{27} If the outcome is positive, he decides to commit the crime, otherwise he will refrain from it. We will not discuss the yardstick by which such a decision maker will compare his options. Economists often use the term ‘utility’ for such an abstract evaluation of outcome. The (neo-classical) economic model describes the decision to commit a crime as choice behavior under uncertainty, where people commit a crime when the expected utility of the criminal act outweighs the utility of other, more legal acts.\textsuperscript{28} It is a rational calculation of the costs and benefits of legal and illegal acts. The individual, as a rational man, only weighs the expected outcome against objective chances of getting caught and the severity of the punishment. Using this model as a prescriptive model – this is what any rational man ought to do given the contingencies of the situation – almost everybody would, for instance, evade taxes.\textsuperscript{29} If the tax evader is caught and punished, this negative outcome will not change the behavior of the tax evader. That is, next year he will evade tax again. He is, therefore, like a professional gambler who knows that losing once in a while is part of the game and already incorporated into his model, and sticks to his strategy as long as the final outcome in his analysis is favorable to him. If, however, the tax evader experiences more costs than expected – for instance in the case that the tax officials have changed the contingencies by increasing their efforts to detect and punish tax evasion – he will (have to) adjust his utilities by increasing the costs of the act of tax evasion. This change in utilities might then result in less (frequent) tax evasion. However, empirical data show that the average taxpayer does not follow this narrowly defined rational choice model. Ap-


\textsuperscript{29}D.J. Hessing (1988) \textit{De regels van het spel}. Arnhem: Gouda Quint (inaugural lecture Leiden).
parently, he uses other considerations – such as feelings of guilt, loss of self-respect or loss of respect from others – in calculating his utilities, i.e. he has a comprehensive definition of utility. In our analysis we assume this comprehensive rational model of man. Important is that it is up to the person in question what he counts and perceives as his utility. This will, in general, be different for different persons.

We propose that for a would-be perpetrator it is useful to discern three separate entities:

- **The direct proceeds of crime**, i.e. what its commission will bring him immediately, minus the cost of committing it. We will denote this entity as: \( D = \) the Direct result for the person himself at the moment of the crime, (benefits minus costs). As noted above, what counts as direct result is only partly objective, and people will incorporate different things into their \( D \)'s. We assume \( D \) to be positive, otherwise no rational person would consider to commit a crime.

- **The future costs of crime**, i.e. the effect of the possibility of being caught, prosecuted, convicted and punished; possibly also the effect on their reputation, and changes in their life after the crime. Again, which elements are relevant is highly personal, though, of course, objective elements (objec-
tive probability of being caught, objective distribution of sentences imposed) play a role. This entity is denoted as: $F$ = the result for the person himself in the Future, which is what an action will yield for the actor in the future (expected costs), the future starting immediately after the crime. We assume $F$ to be negative or zero.

- The indirect costs of crime, i.e. the negative value of the crime for others, the victims. We denote this entity as: $V$ = the result for the others, (Victims), which is what an action will cost others. $V$ is negative.\(^{34}\) Again, we must account for personal differences here; it is the future offender’s evaluation of what it will cost the victim.

We propose to distinguish people with regard to the these factors along two dimensions:

- The degree of sensitivity to future costs of crime;
- The degree of sensitivity to outcome for others, i.e. to the indirect costs of crime.

**Degree of sensitivity to future costs of crime:** some people are considering the future effect of their actions, possibly subtracted as future costs, others simply do not think about these consequences. We denote the degree of sensitivity to future outcome by parameter $\alpha$, for which it holds that $0 \leq \alpha \leq 1$. This condition means that nobody values future outcome more than present outcome, where $\alpha = 1$ means that future outcome is weighted quite the same as present outcome, and where $\alpha = 0$ denotes that the actor has no eye at all for future consequences.

**Degree of sensitivity to outcome for others:** we contend that subjects differ in the degree to which they are sensitive to what others will suffer as costs as a result the subjects’ actions. Some people fully take into account (as part of the value of an action for themselves) what others will suffer. But then again there are also people who will only consider what their actions will mean to themselves.\(^{35}\) We denote the degree of sensitivity to outcome for others by the parameter $\beta$, for which it holds that $0 \leq \beta \leq 1$. This con-

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34. As we are discussing crime, we are not considering here that the victim could benefit from the perpetrator’s actions.

dition means that nobody values outcome for others more than for themselves, while \( \beta = 1 \) means that outcome for others are counted (weighted) as own outcome.\(^{36}\)

Using these factors, we model the evaluation of a possible crime as a reaction to the result \( R \) defined as

\[
R = D + \alpha \cdot F + \beta \cdot V
\]

We will analyze (*) in a sensitivity diagram, a two-dimensional diagram in which \( \alpha \) and \( \beta \) are varying (Figure 1).\(^{38}\)

**The Sensitivity Diagram: The Good, the Bad, the Ugly and the Foolish**

*The Good.* In the upper right corner of the sensitivity diagram we find persons with both \( \alpha \) and \( \beta \) approaching 1. Such a person is perfectly aware of the costs and values what it will cost others if he decides to commit a crime, and he is aware as well of future consequences. We call such persons ‘the good.’\(^{39}\) These individuals will in general act (pro-)social, that is, most of their acts will fall within the prescribed area of society. Their behavior will remain within the limits of the law, because they are well aware how their acts will affect others, as well as by the threat of punishment. If – depending on their position in the area – they do have the inclination their behavior is kept in check by the (perception of the) deterrent effect of punishment (on others). If they break the law, it will presumably be in cases where the costs to the victim will be minimal and no severe punishment is anticipated: they will now and then pay less taxes than they ought to, they sometimes break parking laws or drive faster than is allowed, but in general they stay within the scope of legally prescribed behaviors.

*The Bad.* For a person in the lower right corner \( \beta = 0 \) and \( \alpha = 1 \). He can be characterized by a total neglect of what others have to fear or suffer from his actions, but he is

\(^{36}\) This means that altruism is not considered here, which would be expressed as \( \beta > 1 \). In the context of crime this seems a natural restriction.

\(^{37}\) Notice again that all parameters \( D, F, V, \alpha, \beta \) in the equation are personal parameters, which may be different – even in the same circumstances – for different persons.

\(^{38}\) These two sensitivities can, in principle, have an orthogonal relationship. By this we mean that we assume that both capacities are unrelated. This assumption is a theoretical assumption in that for the model it is irrelevant whether in real life an individual can be found with complete sensitivity for the outcome for the victim and no sensitivity at all for his own outcome, or vice versa.

\(^{39}\) “Experience suggests that some people conform without seriously thinking of doing otherwise, others try to conform and succeed, others try again without succeeding, and some do not try at all”, N. Walker (1968) *Crime and insanity in England.* Edinburgh: University Press.
fully capable of incorporating into his considerations what will be the expected consequences of his actions. He will be called ‘the bad’. To this group of individuals belong persons who will perform illegal acts fully aware that their acts are criminal and the consequences of these acts for other people or society. Punishment here is an effective way of keeping them within the boundaries of the law, given a punishment model with a fixed sentencing system that is severe enough to outweigh the benefits of the illegal act.\textsuperscript{40}

\textit{The Ugly.} People in the lower left corner have both $\alpha$ and $\beta = 0$. They neither consider others’ costs, nor what the future may bring for themselves. There are individuals who we will see committed to an institution: the dangerous psychopath or sociopath.\textsuperscript{41} He constitutes a threat to other persons and to society in general. Punishment does not have any effect on his behavior; treatment or confinement in a psychiatric hospital, is the only solution. This is ‘the ugly’ person.


The Foolish. Finally, for a person in the upper left corner $\alpha = 0$, but $\beta = 1$. Such a person is not able to take into consideration future consequences, but he is sensitive to what it would cost others, if they became victims of his crimes. In this area, the individual has a psychological defect, but in general acts within the limits of the law. If he is harmless, he will – most probably – be part of everyday society, sometimes in need of psychological or psychiatric treatment or supervision. If, however, he is harmful, he will – most probably – be harmful to himself, which might be reason for commitment to a psychiatric hospital. This individual will be named ‘the foolish’.

*Figure 1: Sensitivity diagram*
Notice that, as $V$ is negative, it holds that, for people having the same $\alpha$ value and other things being equal, the one in the upper area (large $\beta$) sets the outcome of an action always lower than someone in the lower area (small $\beta$). Likewise, as also $F < 0$, for two persons with equal $\beta$ value, the person on the right side of the diagram (large $\alpha$) sets the outcome of his crime lower than the one on the left side (small $\alpha$). This means that the value of the crime is gradually decreasing from the lower left to the upper right area. Thus, other things being equal, there is a diminishing tendency to commit crimes along that diagonal (Figure 2). This means that, when $D$, $F$, and $V$ are fixed, people with a low $\alpha$ or $\beta$ value more readily decide to commit crimes. For any given value of these three parameters we can divide the sensitivity diagram by a line sloping downwards. In the area left below this line crime pays, and in the area right above this line, crime does not pay: Figure 3.

The possible effect of the threat of punishment on persons with different positions in the sensitivity diagram can be analyzed as follows. The direct proceeds of crime are thought to be immediate, i.e. they constitute part of $D$ (the other part of $D$ are the costs to be made for committing the crime). On the other hand, we regard expected punishment as delayed costs, which the lawbreaker will receive with a certain probability in future, i.e. they form a (negative) part of the component $F$ and are therefore affected by the $\alpha$-sensitivity. Thus, people who are not counting future outcomes ($\alpha \not< 0$, left hand side of the sensitivity diagram) are not really sensitive to the threat of punishment. If, on the contrary, $\alpha$ is not decreasing (i.e. moving to the right in the sensi-
Figure 3: Two areas: crime / no crime.

Activity diagram), it becomes, in principle, possible that $\alpha \cdot F$ (which is negative) offsets $(D + \beta \cdot V)$, the summated direct proceeds and indirect costs of crime. Clearly, this will occur more readily when $\alpha$ is high, $\alpha \neq 1$.

However, it is by no means clear that $\alpha \cdot F$ can be high enough to offset the direct proceeds of crime less the indirect costs of crime, as $F$ will be, of course, only the expected punishment, and is dependent on the probability of being caught, of being prosecuted, of being convicted and on the probability distribution of the severity of the sanction received. For reasons of convenience, we denote this complicated process with just two parameters, the (personally evaluated value of) the punishment $P$ to be received, and the (objective) probability $\gamma$ that such a sanction will be imposed on the perpetrator, i.e. $F = \gamma \cdot P$. In the resulting function $R$ this means

$$R = D + \alpha \cdot \gamma \cdot P + \beta \cdot V$$

Since for most crimes $\gamma$ tends to be low, it follows that – especially when $\alpha$ is not near 1 – the second term is indeed negative, but rather small in size, unless the value of the punishment $P$ is draconian. In that case, it will be almost certain that the resulting $R$ remains positive.

This is even more so, when $\beta \neq 0$, as is the case with egoistic people. Observing that $V$ is negative, we see that for egoistic people this negative contribution to the value function has less impact, lowering the direct proceeds of crime only slightly, and
Figure 4: High or low deterrence.

therefore making it more difficult for the punishment term to alter the total sum of the three terms to be negative.

Let us now examine what this model implies for crime. We can rewrite the equation \( R = 0 \), which denotes the borderline between choosing or not choosing for crime, by using (*) as

\[
D + \alpha \cdot F + \beta \cdot V = 0
\]

which is the equation of a line in the \((\alpha, \beta)\)-plane. Rewritten, we have

\[
\beta = \frac{D}{V} - \left(\frac{F}{V}\right)\alpha
\]

(boundary equation\(^{42}\))

As crime usually does more harm to others than yield benefits for the perpetrator, we will assume that

\[
D < -V
\]

or equivalently that

42. As the coefficients of the borderline are dependent on \(D, F, V\), this is again different for different persons.
which implies that the borderline crosses the left-hand vertical axis \((\alpha = 0)\) in the sensitivity diagram (Figure 4). Moreover, as both \(F\) and \(V\) are negative, it holds that \(-\left(\frac{F}{V}\right)\) is negative as well, which implies that the borderline is sloping downwards. Whether the border line crosses the lower axis \((\beta = 0)\) or the right hand axis \((\alpha = 1)\) in the sensitivity diagram is dependent on the relative size of \(D\), \(F\) and \(V\). For heavy deterrence (large negative \(F\), in fact the condition is: \(F + D < 0\)) the former will occur, for less deterrence the latter may occur (Figure 4).

\[0 < -\frac{D}{V} < 1\]

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**Preventing Crime at the Individual and Societal Level**

Let us now consider a person who decides to commit a crime. According to the model, this means that his \((\alpha, \beta)\) lie below the borderline. What can be done to prevent that this person, when facing a choice again, will again end up in this area and decide to commit a crime?

There are several possibilities for trying to prevent this from repeating itself. First, we look at altering the characteristics \(\alpha\) or \(\beta\) of the person, i.e.:
By increasing his $\beta$ sufficiently, the person will cross the borderline (Figure 5).

By increasing his $\alpha$ he may cross the borderline as well, (Figure 6), but this will not always be possible; in some cases (i.e. some configurations of $\beta$, $D$, $F$, $V$) even raising $\alpha$ to 1 will not be sufficient to pass the borderline (Figure 7).

By increasing both $\alpha$ and $\beta$, the person will cross the borderline (Figure 8).

The second series of possibilities involves moving the borderline downwards by altering its parameters, $F$, $D$ or $V$. This can occur in two ways:

The main possibility is by increasing the deterrence, by making $F$ larger (in absolute size, it is, of course, negative). This will result in a steeper downward slope of the borderline (Figure 9), such that indeed the original point $(\alpha, \beta)$ is passed.43

The second possibility is by reducing the direct proceeds of the crime, e.g. by increasing the necessary costs for committing the crime (increased security measures), or by decreasing the value of the result of the crime (e.g. making it more difficult for stolen goods to be sold, and so forth). This results in a

43. Rule nr. 1 by Bentham: Outweigh the profit of the offence (quoted in Crombag, 1981, op. cit., p. 16).
lower value of $D$, hence the borderline starts at a lower point on the left hand axis. Because the slope coefficient is not depending on $D$, we see the borderline being slightly lowered (Figure 10), again passing the perpetrator’s point $(\alpha, \beta)$.

Notice that, from an analytical point of view, altering $V$ is also possible. In practice it seems neither possible nor ethical to manipulate $V$ in such a way that it increases the damage a crime does to victims. It would result in both lowering the borderline and letting it slope down more steeply, thus making it possible to pass the lawbreaker’s $(\alpha, \beta)$-point with the borderline.\(^\text{44}\)

Outlining these theoretical possibilities is one thing, but how can we influence these parameters? Let us first look at the ‘environmental engineering’ as proposed at (d) and (e) above. Is it possible that we can manage to increase deterrence in such a way that the borderline is substantially shifted to the lower left? We are not very optimistic, generally speaking, about the possibilities to enhance the objective elements in the

\(^44\) An argument here might be that the evaluation by the victim of certain crimes (the costs) might have changed e.g. rape in the past and at the present.
deterrence. Figures such as Figure 9 start already at an optimistic level\(^{45}\) that can only be imaginary in most real environments, and realistic cases would display a much flatter line. Increasing those deterrence levels to a satisfactory degree may therefore be not more than wishful thinking.\(^{46}\) And to gain as much as in Figure 9 we need indeed a dramatic increase of the deterrence.\(^{47}\) But, as stressed above, we may also try to influence a person’s perception of \(F\). If we can influence him by altering his utilities with respect to being caught and punished, we may gain considerably. Of course, this is the traditional reason for punishing. By actually serving punishment, the offender may realize that the (experienced) severity of it (hence the negative utility) is much harsher than he had realized when calculating his utilities. On the other hand, it is possible – in theory – to try and let people take into consideration elements that they had not included before, such as stigma, social disapproval or guilt, in their evaluation of the consequences. If we were to succeed in that, we would enhance subjective deterrence, while keeping its objective elements as they were. Notice that punishment as such does not result in these effects: more is required than just serving sentences. We need an educational effort here to strengthen people’s \textit{mens rea}. We will return to this point later.

\(^{45}\) The ‘before’ line in that diagram was actually constructed with a 35% probability of being caught and a sanction severity twice the direct proceeds of crime \(D\), while the damage for the victim was 1.4 times the value of the proceeds of the crime.


\(^{47}\) The ‘after’-line increased the probability of being caught to the unrealistic value of almost 80%, other parameters remaining as in the preceding note.
At the prevention side, making the commission of a crime more expensive, and less valuable in its gross result, we again have to differentiate between the objective and the subjective elements of the proceeds of crime. Objectively, we may perhaps expect some real possibilities when we consider crimes against property: increased security measures, making it less easy to dispose of stolen goods, etc. For other types of crime, such as violent crimes, we see few possibilities here: a human life is a human life, a fact we cannot alter. However, it is exactly at the subjective level that – in principle – we can try and influence the value of $D$. If we can teach people to incorporate those (negative) elements into their $D$ that they did not take into account in an earlier evaluation of their utility, we can perhaps lower $D$ considerably (e.g. loss of self-respect, loss of respect from others, guilt). Again, we have to realize that altering utility functions in this way is by no means an automatic effect of punishment as such. It calls for ‘mens rea’-education again.48

48. This change in utility, for instance, may also be the result of the growing disapproval of aggressive behavior we have observed in the past decade.
Changing Sensitivities

Changing $\alpha$ or $\beta$ means changing at the same time the way in which a person views the world in two respects. This is certainly not easy. This is especially the case where either $\alpha$ or $\beta$ approach zero. What about altering a person’s $\alpha$, his capability (or preference) for taking into account future – presumably negative – consequences? One problem here is (absence of) a relationship between objective and subjective probabilities of deterrence, especially the chance of being caught. Another problem here is the question of how much personality traits can change under external influence. Most longitudinal research shows remarkable consistencies in personality traits

49. Again we stress the thought-experimental nature of our model. We are not interested, therefore, in the reliability and validity of psychiatric judgments on a person’s mental state. For a discussion of the possibilities of feigning to be insane to avoid legal punishment see M.L. Perlin (1996) Myths, realities, and the political world: The anthropology of insanity defense attitudes. *Bulletin of the American Academy of Psychiatry and the Law*, 24, 5-26.
over longer periods of time.\textsuperscript{51} Impulsiveness or low self-control seems to be a candidate for change.\textsuperscript{52} Can this trait be altered?\textsuperscript{53} At first sight this seems rather a difficult task, but it is here that we see the only non-educational use and value of punishment. By serving a sentence a person gets a much better impression of how disagreeable it is to be confronted by consequences he had not really foreseen (as his $\alpha$ is so low). This might indeed be effective in raising people’s $\alpha$.

Let us now look at $\beta$, the degree to which an individual is distressed by the damage he does to others. A low $\beta$ implies an utterly egoistic person, who has no regard for others’ pains and interests whatsoever. Can this be changed? If at all, it certainly is not going to be changed by punishment as such, and it will require quite an effort. What is

\textit{Figure 10: Decreasing direct proceeds.}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure10.png}
\caption{Decreasing direct proceeds.}
\end{figure}

\vspace{1cm}

\begin{enumerate}
\item Notice that this is different from altering $F$, the evaluation of the future consequences where these consequences actually occur.
\end{enumerate}
needed is a form of (re-)socialization, education, social training or coercion.\textsuperscript{54} This type of approach is, of course, in psychiatric treatment, victim confrontation courses, probation, and so on. We need to strengthen to this type of criminal \textit{mens rea} in the sense that he should learn to develop feelings of guilt or empathy with respect to his prospective victims.\textsuperscript{55} This kind of education does not seem to be served by punishment.

\textbf{Conclusion: Functions of the Model}

The model described above has several functions. In the first place, it is a quantitative model for considerations in the decision-making process relating to committing a crime. These considerations are based on two dimensions: sensitivity to future outcome for the offender himself (the benefits and costs) and sensitivity to the outcome for others (the victims). The resultant therefore is based on a cost-benefit analysis.

The second function of the model is its use in assessing the appropriate – e.g. based on the criminal’s sensitivities – reactions of society. It follows that these reactions have two components. The first component is based on the perpetrator’s sensitivity to future outcome for himself. That is, his ability to learn from (changes in) the deterrence, the perceived chance to be caught and the perceived severity of the punishment when caught. The second component is based on the perpetrator’s sensitivity to the outcome for others. That is, his ability to learn, through treatment, to take the outcome for other people into account. Whether this modality of learning is called therapy, treatment or education is simply a matter of choice.\textsuperscript{56}

In this case learning means learning from punishment, or learning from treatment or therapy. The model shows that the appropriate reaction of society in most cases will be a mix of both learning modalities, given the fact that the perpetrator is almost always deficient in both dimensions. That is, depending on the position of the perpetrator in the model, society’s reaction should be either punishment, treatment, or a balanced combination of both punishment and therapy.\textsuperscript{57}


\textsuperscript{57} As the Sienese citizen and poet Bindo Bonici, member of the Nine Governors and Defenders of the Commune and the People of Siena, put in the 14th century: “The just
Given that society (e.g. the penal system) will have knowledge of the costs of the act for others (the victims), and – through psychiatric evaluation – the possibilities for learning (in both modalities), it will be possible to calculate the exact quantitative mix of punishment and treatment that will move the position of the perpetrator from the black area to the white area in Figure 2.\textsuperscript{58} We use the term ‘exact quantitative mix of punishment and treatment’ on purpose, since it follows from our model that only a simultaneous reaction of society to both dimensions of the perpetrator will be efficient. Prisons and mental institutes should merge and change into a new form, where each individual criminal gets his just deserts and what he needs to enable him to return to society.\textsuperscript{59}

In some cases of course, this evaluation will show that the perpetrator is unable to learn and will require ‘treatment’ for the rest of his life, that is, being confined a mental institution. This treatment can be the result of not being able to learn not to take future costs into account (the foolish), or not being able to take the costs for others into account (the bad). The former will be confined mainly for his own protection, the latter for the protection of others.

Finally, the model also pretends to be an analytical tool for society in general when trying to lower the level of crime by either changing $\alpha$ or $\beta$ at a general societal level. Given that we know how many individuals enter the penal system after having been caught for a crime, and assuming that we can make an educated guess about the composition of this population with regard to both sensitivities $\alpha$ and $\beta$, it is possible in theory to make a cost-benefit analysis of changing the level of deterrence by analyzing the costs of different elements of deterrence (police, penal system, prison system and mental institutes).\textsuperscript{60} In principle, the model is both a quantitative tool in developing a magistrate will need to correct and educate.” (cited in R. Starn (1994) Ambrogio Lorenzetti, The Palazzo Pubblico, Siena. New York: Braziller, p. 70).

\textsuperscript{58} We admit that this statement is rather strong, since it suggests that we should be able to measure both $D$ and $F$. Although this will not be a problem to the extent that these quantities are objectively determined, we have argued above that part of these quantities are subjectively defined, and hence not easily accessible.


new policy in order to decrease the level of crime in society and a quantitative model for evaluating the outcome of this policy.61


61. The authors are quite aware of the audacity of the claims represented by their model. However, in their view, Hans Crombag’s work deserves such a bold undertaking.
Crashing Memories in Legal Cases

Elizabeth F. Loftus & George Castelle

What happens when people witness an event, say a crime or accident, and are later exposed to new information about that event? A great deal of research conducted over the last quarter century has been devoted to the influence of new information on the recollections of such witnesses. An all-too-common finding is that after receipt of new information that is misleading in some way, people make errors when they report what they saw. The new, post-event information often becomes incorporated into the recollection, supplementing or altering that recollection. People have been led in these studies to recall stop signs as yield signs, broken glass that wasn’t there, a straight haired man as having curly hair, and even something as large and conspicuous as a barn in a bucolic scene that contained practically no buildings at all.

Admittedly most of the studies involving post-event contamination of memory involved relatively neutral experiences, often presented to subjects in films or slides. Some scholars have argued that when people see something particular upsetting or traumatic their memories are immune to the kinds of post-event influences that occur with more neutral experiences. But this argument is contradicted by a stunning piece of empirical research conducted by Hans Crombag and his collaborators. This research demonstrates so clearly how even memory for highly upsetting events is malleable. Not only does the study provide valuable theoretical information, but also its

1. University of Washington, Seattle.
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high level of ecological validity had made it enormously useful in court cases when the matter of the malleability of memories of actual witnesses to highly traumatic events has been at issue.

Crombag et al.’s Crashing Memories Study

In the Crombag et al research, Dutch citizens tried to recall the crash of an El Al Boeing 747 into an apartment building in Amsterdam. The crash occurred on October 4, 1992 shortly after the cargo plane had taken off from Amsterdam Schiphol Airport. At 6:28 pm it crashed into an 11-story apartment building, killing the four crewmembers aboard the plane and 39 people inside the building. Within the hour television crews were filming the fire and the rescue of survivors from the building. For days this was the top news story, and virtually everyone in the country knew about it. There was no TV film of the actual crash, and no computer animation showed the plane crashing.

Ten months after the crash, subjects were interviewed for the first study. They were asked a leading question that presumed that the moment of the crash had been shown on TV: “Did you see the television film of the moment the plane hit the apartment building?” If “yes”, they were asked whether they could remember how long it took for the fire to start. Of 107 respondents, 55 percent claimed to have seen the event, and proceeded to answer the next question about the time it took for the fire to start. 59 percent said the fire started immediately upon impact, 23 percent said it took a little while, and only 18 percent said they could not remember. In a second study an even larger proportion (66%) of respondents said they had seen a TV film of the crashing plane. Many reported highly specific memories (e.g., the plane was already burning when crashed, that it hit the building horizontally, that it disintegrated after impact) that they could not have seen. The researchers reported that, according to known information, the fire actually started immediately, the plane crashed nose down and almost vertically, and the body of the plane fell to the ground. These facts were covered in subsequent news coverage, “but apparently these subjects had formed images of their own.”

This occurred despite the fact that a little thinking would have made subjects realize that the planted information – that the crash moment was captured on television – was highly improbable.

Explaining their results in the cleverly-entitled article, “Crashing Memories,” the researchers hypothesized that the erroneous witnesses “seem to have imagined the various scenes using their common sense. These images have become very real to them, and since to many subjects the source of these images was not obvious, the suggestion that they had seen them on TV, for many proved irresistible.”

7. Ibid. p. 102.
8. Ibid. p. 102-103.
et al. further speculated that dramatic events may be even more vulnerable than ordinary events to post-event influences, because they are often highly publicized and by their very nature may more readily evoke visualization, thus interfering with our ‘source monitoring’ capabilities.⁹

Crashing Memories and the Crash of TWA 800

One of my earliest opportunities to make use of Crashing Memories was when I consulted on a case involving a horrifying crash of an Trans-World Airlines airplane, referred to by the flight number TWA 800. The accident occurred about 8:30 p.m. on July 17, 1996. Much to the dismay of the agency assigned the responsibility of investigating the cause of the crash (The National Transportation Safety Board, or NTSB), rumors circulated for years that a missile caused the crash. Even after intense investigation that seemed to clearly implicate problems with the center fuel tank, the missile theory could barely be laid to rest.

So an important question for the NTSB was “Why do people think they saw a missile if there was no missile?” Of course, part of the answer might lie in the perceptual difficulties, or illusions in perception created by the particular angle of viewing, lighting conditions and so on. I discuss this possibility later on. But, it was equally important to consider the impact of post-event suggestion in bringing about potentially false reports of missiles. Since witnesses can be inadvertently influenced by post-event information, and can do so even for traumatic experiences, it was important to examine the sources of information that may have intervened between the initial observations of the crash and the subsequent memory reports of witnesses.

Consider these events in temporal order. As stated, the accident occurred in the evening on July 17, 1996. Within days, the media was discussing the ‘missile’ theory and publishing accounts of witnesses that might be consistent with that theory. For example, on July 19, the New York Daily News ran a story with the headline “Was TWA Jet Shot Down? Missile Attack, Bombing Probed.”¹⁰ The story opened with a paragraph speculating about a missile: “Investigators are probing whether a Paris-bound TWA jumbo jet that crashed off Long Island, killing 230 people, was deliberately blasted out of the sky by a bomb or possibly a surface-to-air missile.” In addition to the headline and the opening paragraph, the word ‘missile’ appeared an additional nine times in the story, sometimes in the context of reporting that investigators were trying to “nail down whether the tragedy was triggered” in this way, sometimes in the context of the Clinton administration and other law enforcement sources raising “the

harrowing possibility” of a missile, and sometimes in the context of a graphic illustrating how a shoulder-fired missile might operate. Supposedly consistent with the speculations about a missile were the reports by witnesses of a flare streaking toward the ill-fated Boeing 747 just prior to explosion.

Of course it is true that the ‘bomb’ theory was also being advanced simultaneously, but critical to this analysis is the fact that the ‘missile’ theory and/or reports of upward streaking lights or flares were repeated innumerable times in US media sources in the days following the crash. On July 19, at 6:30 p.m. ET, ABC World News reported: “The FBI is continuing to treat the crash site of TWA flight 800 as a crime scene while they await the recovery of wreckage that could point conclusively to a bomb or missile fired at the jet.”11 The missile theory was advanced as one of the “two main contenders” in terms of what could have destroyed the aircraft. Also on the evening of July 19, CNBC via Rivera Live reported that “It would be like throwing a rock at a duck.” That’s how one military official responded today to the theory that a shoulder-fired missile might have brought down TWA Flight 800.” The anchor went on to say that whether a missile or a bomb was involved, “the developing consensus tonight among most experts is this: The explosion that killed 230 people was no accident.”12 A critical witness supporting the on-going missile theory was interviewed for this program – Major Fred (Fritz) Meyer, who was introduced as a National Guard pilot who was flying a helicopter in the area. He said “The light- the streak of light appeared to be red-orange in color. Now I have never seen that before. I have never seen a shooting star in broad daylight, but that’s what it looked like, except for the color and the fact that it – I saw it during daylight.” He went on to say that he saw it arrive at a point in space where he saw a small explosion, then, two seconds later, another explosion which grew to a huge fireball that totally engulfed the first explosion. Meyer’s remarks were followed by those of Newsweek Investigative Reporter Mark Hosenball who called the Meyer theory “pretty preposterous”, in part because of the absence of other radar targets in the area and the implausibility of a Stinger missile being able to travel sufficiently high to reach the TWA plane. A retired Admiral also discounted the missile theory.

The missile theory was widely repeated the next day, July 20. Reuters World Service reported: “The world’s media has all but decided that TWA flight 800 which crashed off the coast of Long Island was blown up by a bomb or downed by a missile.”13 The Washington Times told readers that “The FBI is ready to take over the investigation

from the NTSB if evidence of a bombing or possibly a missile attack is found.” Fritz Meyer’s account was credited as helping to generate speculation about a missile. For example, the Houston Chronicle began its July 20 article with its interview with Meyer. “Imagine you see a shooting star enter the atmosphere,” said Meyer, 56, a New York lawyer and pilot with the 106th Rescue Wing of the Air National Guard, whose eyewitness account, along with reports of an unexplained blip on a radar screen, has helped to generate speculation that a surface-to-air missile might have brought down the jumbo jet. 

The missile theory also was being advanced on the Internet. By July 19, 1996 Evan Gillespie would write on rec.aviation.piloting: “It is interesting how much evidence there is that it was hit by a missile.” By July 22, The New York Times was reporting that 10 unnamed witnesses recalled seeing something streak toward the plane before the explosion and mentioning speculation about a stolen boat and the possibility of a missile fired from the surface.

These are but a few examples of extensive media coverage of the missile theory that occurred soon after the crash. Interviews conducted with individuals prior to exposure to extensive coverage could at least be said to be free of its influence, although of course other sources of influence might not be ruled out. Interviews conducted after this extensive coverage run the risk of suggestive influence. Of course over time there would be more and more information provided that had the potential for influencing the recollections of eyewitnesses regarding a missile, and the beliefs of non-eyewitness citizens about the plausibility of the missile theory. Fairly sophisticated websites were created. Pierre Salinger’s widely publicized views, occurring around March 1997, were undoubt edly a contributor. Salinger’s credentials as former ABC-TV correspondent and press secretary for President John F. Kennedy, lent credibility to his claims, such as the claim that an Air France plane traveling near the site of the TWA 800 crash was directed to avoid the area because of possible missile traffic. Although the original witnesses to the crash had by then presumably solidified their personal recollections through rehearsal, these later post-crash sources of information undoubtedly had strong influence on the beliefs of non-eyewitnesses about (a) the validity of the missile theory and (b) the government officials who tried to downplay that theory.

The Recollections of Major Fritz Meyer

Major Meyer would be interviewed many times, and would continue to play an important role in advancing the missile theory. Because of this relatively large role, it is worth examining his recollections in more detail. Although previously interviewed extensively by the media, Meyer was apparently more formally interviewed on July 24, 1996 and a NTSB Interview Summary exists of this interview. Here the National Guard helicopter pilot reported that on the night of the crash he was on a training flight with co-pilot Chris Baur and flight engineer Dennis Richardson. He described seeing a streak of light having the trajectory and image of a shooting star, moving from right to left. It was “almost horizontal”, with a gentle descending curve, lasting for 1-2 seconds after which he saw an explosion. Then, 1-2 seconds later, there was a second explosion that engulfed the first, resulting in a fireball four times the size of the setting sun. It descended slowly, taking approximately 8 to 10 seconds to impact the ocean. Flying toward the impact, they observed bodies and pieces of aircraft. Meyer’s co-pilot, Christian Baur, was interviewed by the FBI on July 23, according to a NTSB summary. He reported first seeing a flare and asked the crew if it was a “pyro”, meaning flare. He saw a succession of multiple explosions which “bled into a fiery monolith.” His first thought was a mid-air collision. Seven miles from impact, they immediately flew towards to crash site, seeing pieces of debris and bodies – most of which were without clothing and some were headless. Baur thought the might have seen something in the air prior to the explosion, but also claimed that he never saw a missile smoke trail. He was re-interviewed on July 25, and at this time reported seeing a flare like object, a white beam with the head of the beam appearing red and crackly, moving from left to right before exploding. He had the impression that something struck the front of the airplane. Flight engineer Dennis Richardson, interviewed for the first time by the FBI on July 20, was first alerted to the problem when he heard Baur say “Dennis, is that a pyro?” and described events from that point afterward. His story had little or nothing to contribute to the missile theory.

Meyer and Baur were both interviewed again on January 11, 1997, some six months after the crash, and this time their interviews were tape recorded by the NTSB. These interviews would prove valuable in understanding some of the factors that could have influenced the reliability of their accounts. Meyer reported seeing a streak of light, similar to a shooting star, in a gentle descending trajectory, red-orange in color. He mentioned going home after the crash, very depressed, and having 5-6 drinks in order to get to sleep. He also mentioned discussions with his fellow pilots, occurring perhaps an hour later or maybe the next day, in which they discussed the time taken for the fireball to fall. Realizing that the estimates were probably off, he commented: “Our memories were distorted.” Meyer discussed his recurring dreams (“like a loop of tape”), and his inability to sleep in the week after the crash. One week later he was so distracted he drove his car over a curb and blew a $250 Pirelli tire and had to buy a
new one. Eventually, he said, he “saw” what he was looking at, called the FBI, and told them “what had come out of this dream.”

In his January 1997 interview, Chris Baur mentioned how he had talked to others and they helped each other remember things. In the days after the crash, he had apparently been haunted by the number of bodies, most decapitated or amputated. He was having flashbacks, and decided to undergo hypnosis to see if he could remember more. The hypnosis was performed by David Ruvola, also interviewed by the NTSB in January, 1997. Ruvola had a side business at home doing hypnosis and reported that Baur had contacted him because of problems sleeping. Ruvola used progressive relaxation and guided visualization until Baur “saw” the impact and explosion and became extremely emotional. Under hypnosis, Baur described a sparkler type of thing, high, with a white-pitch glow impacting, followed by two explosions and a large flame falling toward the ocean. Ruvola was asked whether a hypnotist can induce information into a client, and revealed his awareness of that possibility that hypnotists can do this and must be careful: “there have been cases regarding false memories,” he acknowledged.

Thus we see that Meyer and Baur were deeply upset by their experience, had sleep difficulties, and one of them even underwent a somewhat questionable hypnotic procedure to try to clarify his memory. Hypnosis is not a reliable technique when used for this purpose. Moreover, there is no evidence that dreams can reliably tell us what happened in our past. Despite these difficulties, Meyer would continue to be a pivotal figure in the missile theory. One year after the crash, on July 29, 1997, the Riverside Press-Enterprise would report on his views, beginning the story this way: “A military eyewitness to the TWA flight 800 disaster who was the first rescuer on the scene says the jetliner and 230 people aboard were knocked out of the sky by an explosive projectile, probably a military warhead, and not by some internal mechanical catastrophe.” Meyer apparently told the Press-Enterprise that while he could not be sure it was a missile, he was convinced he saw an “ordnance explosion” burst near the plane just before it blossomed into a deadly fireball. He complained that the FBI and NTSB investigators had treated him perfunctorily and did not ask him many questions about his conclusions when they talked. (Interestingly the transcript of the NTSB interview of Meyer in January 1997 runs for 48 pages). He described that streak of light again that he saw from a distance of 10 miles. It was reddish-orange and had a trajectory of a shooting star, virtually horizontal with a gradual descending curve. The streak traveled from west to east, and a violent explosion that resembled a “flak explosion” followed. Flak is antiaircraft cannon fire that explodes near its target and fragments into shrapnel, and was not mentioned in Meyer’s earliest accounts. A question arises, then, whether Meyer’s memory is shifting in the direction of being more consistent with the

missile scenario. As for why Meyer would see streaks traveling in one direction, and co-pilot Baur would see them traveling in the other direction (east to west), is explained away by the speculation that Baur’s head was down when Meyer first saw a streak. Meyer’s account is bolstered in this story by missile specialist Paul Beaver, who called Meyer’s account “very compelling evidence of some kind of projectile” hitting TWA 800.

To recap, there are some issues concerning the recollections of Major Meyer. Not only might these recollections be influenced by his own response to the crash, his interactions with others, but also there may be inadvertent changes in those recollections in the direction of making them more consistent with the missile theory. His recollections have been extensively publicized along with what the public views as high quality credentials (pilot training and experience, military experience with missiles) and these aspects may in part be responsible for keeping the missile theory alive with some segments of the population.

The Suffolk County Interviews

The crash occurred just off the coast of Long Island, not far from New York City, in a county called Suffolk. A number of witnesses were interviewed by the Suffolk County Police Department, and some of those valuable interviews took place relatively soon after the crash. On July 19, Mr. & Mrs. Keyser were interviewed by Detectives. They had been driving in a southerly direction when they saw a large reddish flaming fireball where a plane had descended. “No observation of any object or projectile from the ground to plane was witnessed.” On the other hand, numerous witnesses apparently spontaneously reported recollections consistent with a ‘missile’ theory. Ms Rosa Gray who was on Smith’s Point Beach said she saw double orange flares streak upward and explode into a large orange fireball. Mr. Edwin Evans, interviewed on July 20, had been fishing in the nearby ocean. He saw a white wispy flare trail that went straight up. He watched it for about 5 seconds, when it turned into an orange burst. Also on July 20, Tom Dougherty was interviewed. He had been leaving Dockers Restaurant when he saw an orange/white glow rising skyward. He thought it was a flare or fireworks from the beach. At the top of trajectory he saw a whitish glow and an object dropped into the ocean, on fire. These were among the many individuals who saw ascending streaks or flares.

In fact, by October 1997, the NTSB was aware of 183 witnesses who observed a streak of light. Of these, 102 gave information about the streak: 96 (94%) said it originated from the surface, with significantly more of these individuals reporting that it originated from sea than land (according to an analysis by NTSB staff member Norm Wiemeyer reported on 10/16/97). Another analysis of the 183 streak-seers revealed that large numbers of them described the path as ascending.

Why did so many witnesses observe ascending flares or streaks? One explanation is that they saw the aircraft continuing to rise after the nose portion had broken off.
Others find this explanation unconvincing. For example, some professionals do not believe the aircraft could have climbed as it is alleged after the decapitation, due to a violent and gross shift in the center of gravity of the aircraft which, they argue, would more likely force the craft to fall like a stone.\textsuperscript{19} Perhaps an answer lies in the analysis of perceptual errors, rather than memory errors. For example, NTSB perception expert, Donald Mershon, made the point that potential witnesses would not likely be looking directly at the aircraft but would undoubtedly have their gaze turned away. Even a distance of 10 degrees from the plane’s position (approx. the width of the hand held flat at arm’s length) could decrease performance by a factor of 3 compared to foveal vision. This analysis does not explain why so many more witnesses saw ascending rather than descending streaks.\textsuperscript{20} Mershon also discussed problems that humans have with the perception of motion. Errors in motion perception are influenced by an observer’s own direction of motion, as well as by the human tendency to under-perceive the distance of objects that are far away.

According to one source, a number of the witnesses who immediately reported their observations to law enforcement were never contacted again. For example, Tom Dougherty was still waiting to be contacted by the FBI or NTSB in January, 97, according to a source close to Dougherty. For many who saw the ascending streaks, and for their friends and acquaintances, no satisfying explanation for these observations has been provided. The failure to contact critical individuals for more information may be further fuelling the speculation that the government is not interested in doing more than is needed to confirm its favored theory. An October, 1997 story in the Riverside Press-Enterprise raised questions about the failure of the FBI, CIA, FAA and NTSB to conduct follow-up interviews with three witnesses known to have seen an ascending object strike TWA 800, and whose observations had apparently been recorded within hours of the disaster.\textsuperscript{21}

The CIA Video-Enactment

In November 1997, the media reported that the criminal investigation of TWA flight 800 was closed. The CIA prepared a dramatic video re-enactment of the plane’s final 49 seconds, intended to rebut speculation about missiles. Newsweek reported on the ‘explanation’ for why witnesses thought they saw a streak of light arcing toward a plane moments before a giant explosion.\textsuperscript{22} It was apparently because the plane continued to climb after the nose was decapitated, producing a streak seen by witnesses.

\textsuperscript{19} Shoemaker, personal communication.
\textsuperscript{20} D. Mershon (1997) Report on perceptual issues raised by statements of eyewitnesses to the crash of TWA flight 800.
\textsuperscript{22} M. Hosenball & S. Van Boven (1997,) Re-creating flight 800’s final seconds. Newsweek, 38.
Some 20 seconds after the initial nose-decapitating explosion, there was a larger explosion, resulting in a fireball that was mistaken for missile detonation. Dramatic photographs of this theoretical reconstruction were published widely. For example, in the Seattle Times, three photographs were reproduced from the CIA animation under the headline “What probably happened to TWA 800.” Many were unconvinced. A few days later the Seattle Times reported that “French families of TWA Flight 800’s victims said yesterday they can no longer trust the U.S. investigators and are hoping French authorities will find those responsible for the 1996 crash.” The president of the Victims of Flight 800 Association, Jose Cremades, who lost his 15-year-old son Daniel in the explosion, was quoted as saying “We no longer have faith in the United States. We will trust the justice system of our country and support the French investigating judge.”

Why were people unconvinced by the CIA video-re-enactment, which even Newsweek would characterize as a “rational rebuttal to speculation about a mystery missile”? As it happened, I had showed the CIA tape to a large class of college students, midway through their course in Cognitive Psychology, and solicited their reactions. Amongst the reasons why even after viewing the CIA tape people still believed that TWA Flight 800 may have been struck by a missile were these:
- Experienced military pilots said they saw a missile hit the plane. If these guys don’t know the difference between a missile strike and a non-missile explosion who does?
- Our military has shot down civilian planes before. The Navy is known to have a quick trigger (i.e., when they shot down the Iranian Airliner, and, at first, the government denied it.
- Numerous eyewitnesses believe they saw an object heading up …shortly after that an object engulfed in flames headed down.
- It is estimated that 100,000 people might have witnessed the explosion. The FBI interviewed 4,000, and of these 285 purportedly support the government’s theory. But what did the other 3715 witnesses say? Or, in the words of another student, “The mere fact that only approximately 5% (225/4000) of the eyewitness accounts were analyzed in the CIA report robs credence from their conclusions, and leaves open the possibility that some facts were left out or ignored in the interest of maintaining consistency with the CIA’s own prerogatives. This oversight leaves me unconvinced.”
- A pilot the night before the accident claims to have seen the firing of what appeared to be a missile.

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Although many of the students were persuaded by the tape that a missile was not responsible, a number remained unconvinced – primarily persuaded by the eyewitness testimony.

**Report to the NTSB**

To recap, the NTSB was perplexed about the inconsistencies in the eyewitness accounts, and particularly the large number of witnesses who seemed to be claiming to see missiles, or had perceptions that were consistent with the missile theory. Physical data and data from other sources suggested that the existence of a missile was highly unlikely, and that the cause of the crash was most likely mechanical in nature. They had an intense interest in understanding the development and pervasiveness of reports that they strongly believed to be false. The psychological research on post-event information, coupled with the detailed analysis of post-event influences in the TWA case, went a long way towards helping them understand what may have led to the numerous instances of faulty memory. Here is why. Past work on post-event information typically involved distorting memory for the detail of a relatively neutral type of event, such as a film of a crime or accident. For example, mock witnesses who saw an accident involving a stop sign could be persuaded that it was a yield sign. Mock witnesses who saw a scene with a straight-haired man could be led to remember that he had curly hair. But these were not highly emotional events. These were not details, it could be argued, that really mattered.

In terms of helping government investigators to appreciate the relevant of scientific work on misinformation, the “ecological validity” of the Crombag *et al.* study was enormously helpful. The study involved an actual airline crash. It involved affected citizens who were questioned about key aspects of the crash. The results showed high levels of post-event influence. It went a long way towards helping the NTSB investigators appreciate the relevance of psychological findings to their important task.

The Crombag *et al.* study also played a role in another important recent mishap involving an airplane accident. This case concerned U.S. Marines who were flying a jet in the Italian Alps when it severed a gondola cable, plunging 20 people to their death. Witnesses testified against the Marine crew saying that the aircraft was flying low and fast through a mountain valley before clipping the gondola cables. The behavior of the plane was described as reckless. One witness even placed the aircraft at a particular location at a height of 600 feet lower than it actually was. An analysis of post-event influences, such as the media coverage, revealed a large degree of suggestion. European coverage of the accident, particularly in Italy, was critical of the crew, using terms such as “cowboys” and “Rambos” to describe marines. Was the post-

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event suggestion responsible for faulty eyewitness testimony? Expert testimony in this case was introduced to explain how post-event information can contaminate or distort recollection. The Crombag study was used to show how memory can be distorted even for the details of an airplane accident. If convicted of the serious charges, the two accused Marines faced life in prison. However, the military jury did not find them guilty.

The Crombag study was again helpful in demonstrating to the jury that the scientific work in psychology was relevant to understanding distortions in this case. Although scientists can often readily appreciate that a particular study has relevance to a situation that is seemingly far removed from the specifics of the scientific materials, it is sometimes hard for jurors to appreciate that relevance. Having even a single study to point to that uses materials or stimuli that are closer in content to the situation to which one wishes to generalize enables greater appreciation of the relevance. We now turn to a brief general discussion of some specific issues concerning expert testimony that attempts to introduce scientific findings into a particular court case.

The Impact on the Criminal Justice System

As our two air crash cases illustrate, the Crombag study has had significance in unexpected places, including the criminal justice system in the United States. The American criminal justice system relies heavily on the testimony of eyewitnesses to crime. In recent years, however, a small but significant number of prisoners have been able to have their convictions re-examined in light of newly developed technologies, primarily DNA testing. The results have been disturbing.

In a 1996 study by the National Institute of Justice, 28 cases of wrongful convictions were explored. All 28 cases involved persons who were convicted at trials that were conducted before the development of DNA testing and its availability in court proceedings. In all 28 cases, after conviction at trial and lengthy prison sentences, DNA testing of the physical evidence ultimately established the prisoners’ innocence and resulted in their freedom. Of the 28 cases, 25 involved convictions that were based largely upon erroneous eyewitness testimony.

Because of the disturbing number of prisoners who are now known to be convicted based on erroneous eyewitness testimony in American courts, there is a growing realization that, in order to reduce the risk of wrongful convictions in the future, the significance of eyewitness testimony must be re-examined and presented to American juries in a different light. Because American juries rely so heavily on eyewitness testimony, it is crucial that jurors understand what psychologists have learned about the

malleability of memory and the effect of post-event information in introducing error into eyewitness accounts.

Unfortunately, American courts have several barriers to the introduction of psychological research into evidence at trial. First, the research must be shown to be relevant to the issues at trial. More important, however, the research must be shown to be reliable and properly applied to the issues at trial. In this regard, when lawyers in American courts offer proposed testimony from psychologists to discuss research regarding the fallibility of eyewitness testimony, they often encounter opposition and exclusion of the testimony from evidence at trial. The opposition is often based on two claims. First, opponents argue that studies of the malleability of memory are often based on laboratory experiments involving university students, rather than on actual events in the real world, and therefore cannot accurately be applied to real life situations. Second, the opposition to the use of psychological research is often based on the claim that laboratory studies in controlled settings do not involve the stressful and traumatic events that are often the subject of criminal trials.

Crombag's study is significant for the American criminal justice system because it resolves both of these objections to the introduction of psychological research in the courtroom. Because Crombag's study involved memories of an actual traumatic event, it confirms that the principles learned from laboratory studies with university students also apply to memories of traumatic events occurring in daily life. It is precisely this confirmation provided by Crombag's study that overcomes the opposition to the introduction of memory research into evidence in American courts. As Crombag's study becomes more widely known and appreciated in the United States, the results of his work will aid American courts in allowing the introduction of scientific evidence to educate jurors in properly assessing the weight that should be given to eyewitness accounts. In this manner, Crombag has made an invaluable contribution to the ongoing effort to avoid the unquestioning reliance on eyewitness testimony that has resulted in so many injustices in the past.

Why not Claim that They Wear Different Size Shoes?

On the Status of Alters in Dissociative Identity Disorder

Harald Merckelbach & Eric Rassin

Introduction

The April/May 1999 issue of the Dutch periodical *Hersenwerk 2002* (Brainwork 2002) announced good news for science, but bad news for Hans Crombag and those other critics of the concept of multiple personality disorder or Dissociative Identity Disorder (DID) as it is currently known. On its front page, this newsletter/periodical/bulletin headed that “so far, nobody succeeded, but thanks to research at Groningen, the Dissociative Identity Disorder now becomes a measurable disorder.” What happened? The article below the headlines provided a detailed account. Briefly, it stated that patients with DID possess different identities, which are termed ‘alters’. These alters are often not aware of each other. That is, they are ‘amnestic’ for memories that reside in other alters. Patients regularly switch from one alter to the other and this is accompanied by substantial changes in the ability to retrieve information from autobiographical memory, precisely because autobiographical memory is not integrated, but scattered over various alters.

The article then goes on to say that the condition of DID is typical for those who were seriously abused during childhood. Yet, DID is the subject of many heated discussions. According to the article, research at Groningen University Hospital now puts an end to those discussions, because with the help of PET-scans it shows that the different alters of DID patients do exist. This is how the researchers conducted their experiment: DID patients were exposed to trauma-related words while they were in one of two conditions. In one condition, their traumatic alter (i.e., an alter who was aware of the traumatic childhood events) was induced, while in the other condition, an alter who was unaware (i.e., amnestic) of the traumatic experiences was induced. Meanwhile, brain activity was recorded with the aid of PET scan techniques along with more peripheral measures (i.e., heart rate, blood pressure). If alters of DID patients represent genuine entities, one would expect that they react differently to the trauma

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words. That is exactly what the researchers observed. The traumatic alters responded with hyperactivity in the left temporal area to the trauma words. These alters also exhibited raised heart rate frequencies and blood pressure during exposure to trauma words. Nothing of the sort was found when the amnestic alters were confronted with trauma words. Especially the differences in heart rate and blood pressure between traumatic and amnestic alters were quite dramatic. Indeed, one of the senior researchers is quoted as saying that “you don’t have to be a professor to see the differences.”

DID Experts on Alters

By and large, DID is a recognised psychiatric disorder. That is, the widely used Diagnostic and Statistical Manual of Mental Disorders lists DID as a psychiatric disease. According to DSM-IV, DID is characterised by “the presence of two or more distinct identities or personality states[...]. At least two of these identities or personality states recurrently take control of the person’s behavior.” DSM-IV adds that the patient has an “inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness.” This criterion refers, of course, to the amnesia for certain childhood experiences that is thought to be typical for at least some alters of the patient.

While DSM-IV is silent about the origins of alters, many clinicians assume that they are the product of severe and recurrent traumatic childhood experiences. In the words of psychiatrist Ross, one of the leading experts on DID: “DID is a little girl imagining that the abuse is happening to someone else. This is the core of the disorder, to which all other features are secondary.” According to DID experts, the rationale behind the trauma-DID connection is easy to understand. The development of alters is the way in which severely traumatised children try to compartmentalise overwhelming emotions and memories that are linked to trauma. This type of coping is referred to as ‘dissociation’ and when dissociation becomes a habitual coping style, it produces DID. However, experts emphasise that full-blown DID is not easy to recognise. It requires a skilled psychiatrist or psychologist to diagnose the disorder. For example, DID expert Kluft notes that about 80 percent of the DID patients exhibit no or only subtle signs

of their disorder. Therefore, a number of sessions are needed to establish the diagnosis and during these sessions, one important task of the therapist is to uncover alters. In line with this, DID specialist Ross maintains that “you don’t have a case of DID until you have talked to the alters.” After all, DID patients themselves are often not aware of their alters or feel ashamed about them and try to hide their multiplicity. In this view, DID is a hidden or latent syndrome that is not evident when patients enter treatment.

Critics on Alters

Skeptics have raised a number of critical points about the expert view on DID. For one thing, sceptics stress that the DSM-IV definition of DID is vague and overinclusive. More specifically, sceptics argue that this definition relies on an outdated concept of personality, namely personality as a single, unitary homunculus that resides somewhere in the brain and controls our behaviour, i.e. has causal force. It is only when one subscribes to this problematic idea that it becomes possible to talk about multiple alters or homunculi in the case of DID. Meanwhile, modern academic psychology views personality as the position of an individual on an array of dimensional traits such as extraversion, introversion, and neuroticism. These traits correlate with actual behaviour, but the correlations are by no means overwhelming.

Another point raised by critics of DID is that alternative accounts of this condition are possible. In short, critics contend that the alters of DID patients may well be products of social creation or iatrogenesis during treatment. Perhaps the most succinct formulation of this position has been offered by psychologist Nicholas Spanos, who argued that in the case of DID, patients “come to believe that their alter identities are real personalities rather than self-generated fantasies.” According to Spanos, alters are not entities with causal force, as suggested by DSM-IV, but rather metaphors that patients learn from their therapists and/or from exposure to canonical examples that can be found in books, TV talk shows, movies and so on. In Spanos’ words: “patients

learn to construe themselves as possessing multiple selves, learn to present themselves in terms of this construal, and learn to reorganise and elaborate on their personal biography so as to make it congruent with their understanding of what it means to be a multiple [...].”

The idea that alters of DID patients are artefacts of the way in which some clinicians approach these patients accords well with certain facts that are known about the epidemiology of DID. For example, the incidence of the DID diagnosis has rapidly increased in recent decades. Likewise, the mean number of alters per DID case has grown dramatically from 2 in the 1940s to 24.1 in the 1990s. Another curious fact is that DID is only rarely diagnosed in older people and young children. Also, DID is supposedly rare in South Africa, Japan, Britain or Eastern Europe. Indeed, it has been argued that the recent epidemic in DID cases is predominantly a North-American phenomenon, with only one exception. As Hacking wrote, “the only place that multiples flourish overseas is in the Netherlands.” Finally, there is evidence that the large majority of DID diagnoses are made by a small number of psychiatrists and psychologists. Even in North-America, only about one-quarter of board-certified psychiatrists feels that the DID diagnosis is rooted in firm scientific evidence. To recap, all these facts seem difficult to understand when one assumes that DID is a common outcome of abused children’s dissociative defence against traumatic experiences. On the other hand, DID experts have stressed that many of these facts are understandable once one realises that only with recent advances in psychiatric assessment, clinicians have become sensitive to the possibility of DID in their patients.

Medicolegal Ramifications

How, then, should one conceptualise alters in DID? Are they metaphors that patients learn from their therapists, with which they describe and reorganise their chaotic behaviour, as critics suggest? Or are alters causal antecedents of such behaviour, as DSM-

13. Id. p. 143-144.
IV and many – but by no means all\textsuperscript{18} – DID experts suggest? To be sure, from a purely academic point of view, discussions about the ontological status of alters in DID are fascinating. They border on philosophical issues about the nature of consciousness, personal identity, brain-behaviour relationships and so forth. More importantly, however, the way in which experts conceptualise alters also has far-reaching medicolegal ramifications. These can be grouped into three categories.

The first category consists of those DID patients who start to accuse their fathers or other relatives of sexual abuse in childhood after they have uncovered alters containing such memories in therapy.\textsuperscript{19} To the extent that these recovered memories of childhood abuse give rise to criminal proceedings or civil lawsuits, their validity becomes an urgent issue. Thus, in this respect, the debate on DID overlaps with that on the veridicality of traumatic memories recovered in therapy.\textsuperscript{20} A staggering example of this category is provided by the case of ‘witness X1’ in the pre-trial investigations of the Belgian child murderer Marc Dutroux. During a period in which the Dutroux affair was extensively covered by the media, witness X1 contacted the police and claimed that she possessed intimate knowledge of Dutroux and his position in a large network of child abusers, many of whom allegedly occupied high places in Belgian society. X1 also claimed that she suffered from DID, which involved 169 distinct alters. The police investigators interviewed X1 on many occasions. These interviews lasted for hours and often took place during the night. The investigators were coached by psychotherapists familiar with X1 and sympathetic to the idea of DID. During at least one of the interviews, alters of X1 were invited to react to mug shots of potential victims of Dutroux and his network members. While the alters were not able to correctly identify the images, they reacted with non-verbal panic reactions to some of the material and this was taken by the police as evidence for positive identification.\textsuperscript{21} Expert testimony by a committee of psychiatrists confirmed that X1 suffered from DID and that the etiological factor responsible for this condition was “massive abuse.” This conclusion was widely cited by the media to support the credibility of the accusations levelled by X1 against politicians, lawyers, and so on. However, during a more fine-grained analysis of the X1 testimony by several Belgian prosecutors, it became clear that the privileged knowledge X1 claimed to possess was in many respects incorrect.\textsuperscript{22}

\textsuperscript{18} DID expert Ross is a notable exception. Ross, \textit{op. cit.}, writes: “The most important thing to understand is that alter personalities are not people. They are not even personalities […]. The patient pretends that she is more than one person” (p. 144).
\textsuperscript{22} See, for an example, \textit{De Morgen}, April 30 1998, p. 6.
The second type of complication that may arise when the diagnosis of DID surfaces in a legal context pertains to situations in which a DID patient denies responsibility for a criminal act by one of his or her alters. Consider a criminal defendant with a diagnosis of DID. A number of philosophers and psychiatrists have argued that on a strong version of the DSM-IV definition of DID, one should seriously consider this criminal defendant’s claim that he or she is innocent, because it was not he or she who committed the crime, but an alter. In the USA, a DID-based insanity defence has been raised in at least 20 court cases, of which at least 4 had not-guilty-by-reason-of-insanity or incompetence-to-stand-trial outcomes. Given the growing popularity of DID diagnoses (cf. supra), there is every reason to expect that in the years to come, courts will be regularly confronted with the phenomenon of DID defendants pleading insanity or diminished capacity. Germene to this issue is also Loewenstein and Putnam’s observation that about 35 percent of patients with DID claim to have a homicidal alter.

Likewise, Lewis and associates noted that “in our clinical experience, we found that among the male outpatients seeking treatment for dissociative identity disorder at our clinic, a substantial percentage (64%) had demonstrated rageful behavior that came just short of homicide.” On the other hand, Dinwiddie and colleagues remind us that in forensic cases, the distinction between DID and malingering is extremely difficult to make. The famous Los Angeles Hillside Strangler case illustrates their point. In this case, the suspect Ken Bianchi was charged with 10 murders and there was abundant forensic evidence against him. On the basis of their hypnotic sessions with Ken Bianchi, a psychologist and a psychiatrist argued that Bianchi was suffering from DID and that an alter of Bianchi, named Steve, was involved in the crimes. According to their view, Ken Bianchi knew nothing about Steve and the murders. How-

23. E.g., S.E. Braude (1996) Multiple personality and moral responsibility. Philosophy, Psychiatry and Psychology, 3, 37-54. Braude (p. 51) concludes: “Hence, we might be justified, from a largely pragmatic point of view, in regarding the multiple as only marginally (or perhaps only theoretically but not practically) responsible for an alter’s emergence and subsequent behavior, especially outside the therapeutic setting. And in that case, we might prefer to determine moral responsibility only at the level of behavior of specific alters.”

24. E.g., E.R. Saks (1995) The criminal responsibility of people with multiple personality disorder. Psychiatric Quarterly, 66, 119-131. Saks (p. 127) contends: “Whether multiples’ alters are different persons, different personalities, or parts of one complex personality, then, they should generally be found not responsible for their crimes.”


ever, other experts argued that Bianchi was deliberately faking multiplicity in order to avoid the death penalty. Bianchi did not succeed with his insanity plea and was convicted on 8 counts of murder, but his trial illustrates the sharply differing opinions on the forensic aspects of DID.29

The third category of legal complications that may arise when one accepts a literal interpretation of alters has to do with civil rights. This point is nicely summarised by Piper: “Another problem is that the fragmented person approach casts serious doubt on whether the patient has one of the major moral and legal attributes of personhood – the ability to choose. Can such a collection of personalities legally choose to sign (itself? himself? themselves?) into a hospital, voluntarily enter into a sexual relationship, make a legally binding will, or enter into a contract to buy a car? If one truly respects the idea of autonomous personalities, these questions must be answered in the negative.”30 During a malpractice suit of a woman who said that she was misdiagnosed with 120 alters by psychiatrist Kenneth Olsen, part of the discussion revolved around Dr. Olsen’s use of the term “internal group therapy” on his billing reports.31 Although fraudulent billing practices were not an issue during this lawsuit, the example underlines the point raised by Piper. That is to say, there is nothing wrong with claiming group therapy reimbursement for treating alters if one accepts the idea of autonomous personalities.

The Alters are Real

In sum, then, accepting the idea that alters of DID patients represent real rather than artefactual phenomena would have far-reaching consequences for the way in which courts should handle cases involving DID patients. Therefore, the important question to be asked is whether there is compelling evidence to take the alters of DID patients as authentic manifestations of separate identities. In this context, some clinicians32 have pointed out that marked changes in handwriting, demeanour, and voice of DID patients may provide evidence for the reality of different people in one body. However, critics have countered that this line of argumentation is, at best, naïve. Consider a theatre play in which one actor has to play two different roles. To help the audience

29. Hacking, op. cit., (p. 49. 50) notes that the Bianchi case recapitulates a French trial that took place in 1892. During that trial, the accused pleaded that he was innocent because an alter had committed attempted murder. The expert witness for the defense was the famous neurologist Charcot. Expert witnesses for the prosecution argued that the accused was schooled in his disorder that was referred to as “latent epilepsy” and “somnambulism.”
32. E.g., Lewis et al., op. cit.
differentiate between these two roles, the actor would strategically use explicit changes in voice, demeanour, and so on. Thus, such superficial changes do not invalidate the view that the alters are therapy-induced enactments or, if you like, role-playing. In the words of Simpson, “any sensible actor or faker would definitively adopt such superficial differences.” In fact, this argument can be made even stronger. Advocates of DID seem to agree that alters are primarily manifestations of a severe disruption in autobiographical memory. Thus, one would expect that DID patients do not exhibit abnormalities in the more automatized types of memory that guide procedural motor output such as handwriting. Indeed, assuring that amnestic boundaries between alters are restricted to autobiographical memory, superficial changes involving such procedural knowledge can be easily interpreted as signs of strategic role enactment.

Some authors have relied on formal memory tests to document the existence of multiple identities in DID. One of the best controlled studies is that of Eich and collaborators. In this study, nine patients with DID were subjected to explicit and implicit memory tasks while in two different alter states, each claiming to have no conscious awareness of the other’s memory. In this way, the authors examined to what extent transfer of information from one to the other alter may occur. Replicating the results of a previous single-case study, Eich and co-workers found that words presented to one alter were not recalled by the other and vice versa. Yet, unlike DID patients’ performance on this explicit free recall task, their performance on an implicit test of picture fragment completion suggested substantial transfer of information from one to the other alter. That is, if one alter had to identify a series of degraded pictures, the other alter subsequently required less perceptual detail to identify the same pictures. By and large, this suggests that the amnestic barriers typical for DID pertain to explicit, but not to implicit memory. In a follow-up study, Eich and colleagues showed that this discrepancy in inter-alter transfer of explicit and implicit knowledge could not be reproduced in a sample of simulators. In that study, mental health professionals familiar with the condition of DID were instructed to create two mutually amnestic alters. There were no indications that one simulated alter performed better on the picture identification task when the other sham alter had been previously exposed to the pertinent object information. Post-experimental interviews made it clear that the simu-

lators believed that since they were supposed to enact mutually amnestic alters, there could or should be no transfer of perceptual information from one to the other alter. Accordingly, the authors concluded that their results are “suggestive of a qualitative difference in the implicit memory performance of DID patients versus simulators.”\footnote{Eich \textit{et al.}, 1997b, \textit{op. cit.}, p. 473.}

**The Alters are not Real**

While the Eich \textit{et al.} studies certainly belong to the best of their kind, some critical remarks are in order. To begin with, it is unfortunate that the authors did not combine DID patients and simulating controls in one and the same experiment. Secondly, the picture completion data of the simulators show that the implicit memory task was extremely sensitive to strategic control. That is, simulators could control their responses on this task in such way as to make it look ‘real’. If simulators can do this, DID patients can do it as well, and, perhaps, the discrepancies in implicit memory transfer between DID patients and simulators reflect different views on how alter metaphors should be expressed. Thus, the Eich \textit{et al.} findings do not refute an interpretation of alter behaviour in terms of metaphors and strategic role enactment. It is also noteworthy that some authors claim to have shown an absence of implicit memory transfer between the alters of DID patients, a finding that is difficult to reconcile with the Eich \textit{et al.} results.\footnote{Peters \textit{et al.}, \textit{op. cit.}}

As things stand, experimental studies on memory performance of alters do not support a literal multiple-persons-in-one-body interpretation of DID. On the contrary, findings available in this domain of research are highly confusing and it is probably time to invite DID experts to articulate more precise predictions as to the types of amnestic barriers that may occur with multiple alters of DID patients. In the absence of such predictions, any type of outcome may be interpreted as support for the idea that alters do exist in “some” sense. Meanwhile, if one truly believes that the multiple-persons-in-one-body idea is an accurate description of what is going on in DID, the most coherent prediction one could make is that neither explicit nor implicit autobiographical memories can leak from one alter to the other(s). If one takes this view, there is no reason to expect that procedural memory (e.g., skilled motor output) fluctuates as a function of the alter that is controlling behaviour. Results on memory performance of alters are far removed from such a pattern of findings. They certainly do not falsify the idea that alters are socially created metaphors.
The Biology of Alters

To elucidate the status of alters in DID, some authors have adopted a biological approach. The idea behind this approach is as follows: suppose one asks a DID patient to alternate between different alters. And suppose that physiological activity is measured during such alternations. If one were to observe that the alters differ in their physiological profile, this could be evidence that they are more than just iatrogenically created metaphors in the minds of patients and therapists. The article about the PET research at Groningen University Hospital with which we began this chapter is a fine example of this type of reasoning. Another illustration is provided by a functional magnetic resonance imaging (fMRI) study described in a recent issue of *New Scientist*. On its cover page, *New Scientist* announced that “now we can watch multiple personalities in the brain.” In the pertinent study, one DID patient was instructed to switch from her adult alter Marnie to her eight-years old amnestic child alter Guardian while fMRI brain recordings were made. Interestingly, when Marnie was in control, hippocampal activity was relatively normal, but as Guardian emerged hippocampal activity was found to be decreasing. While this result is presented by *New Scientist* as an innovative contribution to the biological underpinnings of DID, the biological approach to DID has, in fact, a long tradition spanning almost a century. At several points in that history, breakthroughs have been heralded. Indeed, the first was in 1908, when Prince and Petersen showed that the alters of a DID patient reacted with different skin conductance activity. The next development took place in the fifties when studies appeared demonstrating that alter states differed in terms of EEG activity. Then, in the seventies, evoked potential studies were published in which it was found that alter states are accompanied by fluctuating evoked potentials. One typical study was that by Larmore and co-workers who recorded evoked potentials in a patient with four alters. The authors concluded that “the average visual evoked potentials (AER) for each personality were quite different from each other [...] such as would be expected if four separate individuals had been tested.”

Thus, modern neuroimaging research on DID finds itself in the good company of many researchers who documented substantial variations in physiological activity between alter states. Are we to conclude, then, that the accumulated evidence shows that alters are genuine agents rather than metaphors? The answer is a simple no. Summarizing the literature on psychophysiology and DID, Miller and Triggiano explain why

the answer must be negative: “In general, the neurophysiologic studies have suffered from methodological flaws that make generalisation of their findings difficult. Such shortcomings include an overreliance on the single-subject, case-study design, as well as a lack of adequate experimental controls.”44 The latter point raised by these authors is especially serious and to demonstrate this, we will give an experimental illustration.

A Little Experimental Control

Our experiment relied on a sample of 28 undergraduate students (20 women) with a mean age of 19.9 years (range: 18-24 years).45 Students heard an audiotaped version of a highly aversive narrative.46 They were instructed to vividly imagine themselves in the described situation. The narrative was about a student who causes a severe motor vehicle accident while (s)he is on his (her) way to an important job interview. The story ends with a description of the victims, namely a mother and her baby (“you hear her cry out, she’s dead! She’s dead! My baby is dead!”). Next, students were confronted with two series of 12 words in a within-subject design. In each series, half of the words (associative words) referred to the story (e.g., “baby”; “crying”), while the other half (control words) was not associated with the story (e.g., “illness”; “fire”). Of course, associates and control words were matched on emotionality.47 One series was presented to the participants while they simulated an amnestic alter. That is, participants were instructed to behave as if they had never ever heard the narrative. The other series was presented to the same participants while they simulated a traumatic alter. That is, participants were told once more to identify with the main character of the narrative. Participants’ skin conductance responses (SCRs) to the associates and control words in both conditions (i.e., simulating an amnestic alter or a traumatic alter) were measured. Of course, series and conditions were counterbalanced across participants so as to eliminate possible order effects. After the experiment proper, participants completed several questionnaires, among which a scale on fantasy proneness (Creative Experience Questionnaire; CEQ).48

Table 1 shows mean SCRs of amnestic and traumatic ‘alters’ to associates and control words. As can be seen, the amnestic alter reacted with higher SCRs to the control

44. Miller & Triggiano, op. cit., p. 49.
47. A pilot study (N = 10) generated associates and control words. Words were selected form a large pool of words in such a way that associates and control words differed significantly in the extent to which they referred to the narrative, but not in their emotional value.
words than to words associated with the story, a difference that attained significance

\[ t(27) = 2.1, p < .05, \text{two-tailed} \]. In contrast, mean SCRs of the traumatic alter to control words and associates did not differ significantly \[ t(27) < 1.0 \]. In this condition, the absence of heightened SCRs to associates is probably due to the emotional provocative nature of the control words, which might have made it difficult to detect superior SCRs to associates.

Differential SCR responding of the amnestic alter to control words and associates disappeared \[ t(17) = 1.3, p = .20 \] when the analysis was confined to participants scoring relatively low on the fantasy proneness scale. However, differential responding of the amnestic alter was highly evident \[ t(9) = 2.3, p < .05 \] for participants scoring relatively high on this scale.

Two conclusions can be drawn from these results. To begin with, it is relatively easy for normal people to enact multiple alter states in a way that these states are accompanied by different physiological profiles. More specifically, our findings show that people asked to play the role of an amnestic alter react with reduced SCRs to personally relevant cues. One could counter that role-playing amnesia might produce real amnesia. Yet, post-experimentally collected free recall data in our experiment indicated that students remembered more associates than control words and that there were no differences in this respect between the amnestic and traumatic alter condition. Thus, our findings show biological differences between role-played alters in the absence of true memory effects. Secondly, these differences seem to be most robust in people scoring high on fantasy proneness, i.e., people who are talented in role-playing.

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Table 1: Mean Skin Conductance Responses (square-rooted) of undergraduates \((N = 28)\) to words associated with the emotional narrative (associates) and to control words in the amnestic (“you never ever heard the narrative”) and in the traumatic (“you identify with the main character of the narrative”) condition (standard deviations are given between parentheses).

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<tr>
<th>Alter</th>
<th>associates</th>
<th>control words</th>
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<tbody>
<tr>
<td>amnestic</td>
<td>.26 (.40)</td>
<td>.37 (.33)</td>
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<tr>
<td>traumatic</td>
<td>.33 (.37)</td>
<td>.36 (.37)</td>
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49. Interestingly, some older studies have suggested that such a pattern is typical for patients with genuine as opposed to simulated amnesia. See for examples, S.P. Cercy, D.J. Schretlen & J. Brandt (1997) Simulated amnesia and pseudo-memory phenomena. In R. Rogers (red.), Clinical assessment of malingering and deception (pp. 85-107). New York: Guildford.
Simulating Amnestic Alters

Attempts to clarify the status of alters found in DID patients by means of biological techniques (e.g., peripheral physiology, EEG, PET scans, fMRI) are uninformative unless they include a control group, preferably a control group consisting of fantasy-prone individuals. To our knowledge, no such study has been conducted.\(^{50}\) Therefore, the PET research at Groningen University Hospital, or the single-patient fMRI experiment described earlier, cannot be considered ground breaking studies. Meanwhile, given the seductive power that neuroimages have in the courtroom,\(^{51}\) the preliminary announcement of these studies might have a misleading effect on judicial decision-making in cases that involve DID.

Over the past few years, a number of studies have shown that, under certain conditions, normal people need relatively few prompts to take on the role of an amnestic alter. For example, in a pioneering study by Spanos and co-workers,\(^{52}\) college students were asked to play the role of an accused murderer who was confronted with strong forensic evidence. The role players were not informed about DID or alters. They underwent a simulated psychiatric interview of the Ken Bianchi type. The large majority of the role players (81\%) enacted an alter in response to subtle cues from the interviewer that “there might be another part” of the accused. In most cases, it was this second alter that admitted responsibility for criminal behaviour, while the primary alter simulated amnesia for the second alter.

Given the fact that others were able to replicate these findings,\(^{53}\) it is safe to conclude that they represent robust enactment phenomena. But how should one interpret them? Carson and Butcher were quite right when they remarked that when healthy college students give a convincing portrayal of a person with a broken leg, this does not imply that broken legs do not exist.\(^{54}\) Yet, these authors seem to miss an impor-

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50. As an aside, it should be noted that the only study that comes close to this design found more significant EEG differences between role played alters of a normal than between alters of DID patients. See P.M. Coons, V. Milstein & C. Marley (1982) EEG studies of two multiple personalities and a control. *Archives of General Psychiatry, 39*, 823-882. These authors (p. 825) concluded: “It is not as if each personality is a different individual with a different brain. Instead, to put it simply, the EEG changes reflect changes in emotional state.”
54. R.C. Carson & J.N. Butler (1992) *Abnormal psychology and modern life*. New York: HarperCollins, p. 209. Carson & Butler’s remark touches upon a fundamental issue, namely people’s appreciation of simulation studies when they yield results that contradict current theories. Chinn and Brewer (1993, p. 19) noted that under such circumstances, people are quick to emphasize the limitations of simulation studies. As one of their subjects said about a laboratory simulation of meteor impact that produced anomalous findings for this subject:
tant point here. The question is not whether DID patients are real patients or simulators. They are, by all standards, real patients. The important issue is whether their alters are genuine agents that can be held accountable for, say, illegal behaviour. The DSM-IV description strongly encourages such an interpretation, yet the enactment phenomena documented by Spanos and others suggest that when faced with social dilemmas, even normal people may resort to amnestic alters that are made responsible for socially undesirable behaviour. Interestingly, attributing deviant behaviour not to oneself, but to internal forces that are uncontrollable, is a widespread explanatory style among offenders.55 Invoking alters to make sense of one’s behaviour is not equivalent to deliberate faking, but it definitely is a form of “effort after meaning” in which metaphors and real behavioural antecedents may easily become mixed up. There is no point in clinicians or forensic experts fostering this confusion.

In their scholarly review of the literature on DID, Lilienfeld and colleagues present several examples of treatment interventions that seem to be predicated on the belief that alters in DID are independent actors.56 These examples include asking to meet an alter, giving names to alters, and encouraging alters to write letters to each other. Accordingly, Lilienfeld et al. conclude that “many or most influential authors in the DID treatment literature treat alters as independent entities or even personalities, at least during the early phase of treatment.”57 While such a treatment approach is consistent with the DSM-IV typology of DID, it is certainly not justified by the experimental literature on memory functioning and psychophysiological responding in DID diagnosed patients and normals enacting DID.

Conclusion

The older literature on DID offers some bizarre claims as to the literal status of alters. For example, there are anecdotal reports of alters differing in their allergic reactions, in their response to medication, and in their eyeglasses. Such anecdotes lead Simpson to pose the following question: “Why not claim that they wear different size shoes?”58 While this was meant as a reductio ad absurdum argument, the German DID expert Huber tells us that one of her DID patients does have her shoe sizes vary (37, 38, or


57. Lilienfeld et al., op. cit., p. 513.
39) with her alter states. Huber writes: “I can even identify her different alters, because the colour of her eyes changes (from brown to blue).” To be sure, it is easy to recognise this as nonsense. Still, a literal interpretation of alters can also be found in the DSM-IV and in many serious articles on DID written by experts in the field. It is this interpretation and its medicolegal implications that have served as the main impetus for studies examining differences in memory functioning and physiological reactivity between various alter states of DID patients. The idea that alters should be considered as agents with causal force is not borne out by these studies. Most importantly, these studies do not refute an interpretation of alters in terms of role enactment.

Recent reviews by DID experts seem to suggest that they too have abandoned over-literal interpretations of alter activity. For example, Gleaves notes that “what is critical to understand is that acknowledging a patient with DID to have genuine experiences of alters as real people or entities is not the same as stating that alters are actually real people or entities.” Obviously, this formulation is reminiscent of the position that alters exist largely as a result of role enactment in which patients become absorbed. Thus, it is time to de-emphasise the many-people-in-one-body view on DID advocated by DSM-IV. What remains, then, is the idea that unlike normal people, DID patients do not hold a subjective sense of unitary identity. Clearly, such a modest view on alters has no ramifications for legal responsibility issues. It does, however, have far-reaching consequences for the way in which future editions of DSM should portrait DID and its alters.

60. Gleaves, op. cit., p. 48.
The Efficacy of Sexual Offender Treatment

A Review of German and International Evaluations

Friedrich Lösel

Introduction

Hans Crombag, to whom this volume is dedicated, is one of the modern pioneers in the field of psychology and law. Beyond the specific topics of his impressive research, he has continuously dealt with basic ideas and problems in linking the two disciplines. Here, his work is an interface between the recent Anglo-American upswing and the European traditions in this field. In particular, it brings together both the social-philosophical and the empirical-experimental aspects of law. From the latter point of view, law is a technology for controlling behavior and insofar an important branch of applied psychology.

An actual example of the legal problem of behavioral control is intervention with sex offenders. Particularly due to single cases of sexually motivated child murder, the general public in many countries has become highly sensitive about this topic. As a consequence, new legal and procedural regulations have been planned or already put in force. In Germany, for example, there was an atypically quick reform of the penal law that went into effect on January 31, 1998. The new regulations are a mixture of the punishment and treatment orientations in crime policy. For example, the reform...
contains more severe sentences for serious sex offenses, lower thresholds for preventive detention, stricter criteria and extended assessments in cases of vacancies or early release from prisons, enforced treatment regulations, and an increase in treatment places in social-therapeutic prisons.\(^8\) Whereas various parts of this reform have met widespread approval among experts, others have been criticized because their efficacy is questionable and they even bear the risk of negative side effects.\(^9\)

According to the new law, sexual offenders with a prison sentence of more than 2 years face obligatory referral to a social-therapeutic prison if they seem to be treatable. This is a substantial modification insofar as the former regulation in § 9 of the Prison Law, treated the transfer to social-therapeutic prisons only as an option. Because there were still not enough places in social therapy – currently approximately 900 – the new obligatory regulation has been postponed until January 1, 2003. To increase the number of available treatment places, various federal states have already created or are planning new social-therapeutic departments or prisons. However, social-therapeutic institutions are more expensive than ‘normal’ prisons. It is questionable whether enough places will be available until 2003. This issue recalls the original legal basis of social-therapeutic prisons in 1969 that never went into effect.\(^10\) However, even if we put the financial aspect aside, the new regulations are questionable from a scientific point of view. For example, some authors emphasize motivational problems with forced treatment.\(^11\) Although this is a relevant point, it should not be reduced to the issue of ‘truly voluntary’ or ‘intrinsic’ motivation to change. Treatment motivation in forensic settings is not an all-or-none category but multidimensional and dynamic in its components.\(^12\) Probably more important is the problem that the new legal regulations are based primarily on good intentions and political aims and much less on empirical facts. There is no systematic reference to the content of treatment, quality standards, and proven success in reducing re-offending. Thus, it remains unclear whether this part of the new law is in fact a technology for preventing recidivism or primarily a symbolic act.


Against this background, the present chapter briefly addresses the current state of outcome evaluations of sex offender treatment. I shall address methodological issues as well as results. Because methodological problems are almost unavoidable in such a complicated field as sex offender treatment, most studies contain more or less serious threats to internal or external validity. Therefore, I shall not draw far-reaching conclusions from single studies, but focus on the more balanced pattern of research integrations. During the last decade, such meta-evaluations have successfully differentiated and overcome stereotypes in the long-lasting discussion on ‘nothing-works’ in general offender treatment. However, whereas there are hundreds of controlled studies on offender treatment in general and particularly on juvenile delinquency, much less research addresses the subgroup of sexual offenders. Furthermore, treat-
ment methods differ markedly between countries and are embedded in the wider legal and cultural context.18

For these reasons, the first part of the paper is restricted to evaluations from German-speaking countries. In the second part international, mainly North-American, findings on sex offender treatment are discussed and compared with the German findings. Finally, some conclusions are drawn for further research and practice.

Evaluations in German-Speaking Countries

The treatment of sex offenders in German-speaking countries mainly takes place in social-therapeutic prisons or in forensic hospitals. Social-therapeutic prisons are similar to structured, hierarchical therapeutic communities and include a broad range of psychotherapy and social training as well as educational and work programs.19 In contrast to most evaluations in North America, studies on social-therapeutic prisons do not address specific treatment programs or modules but the institution as a whole. Meta-analyses of evaluation studies on social-therapeutic prisons reveal a small positive effect for offender treatment in general.20 Treated offenders have an approximately 10 (±5) percent point lower recidivism rate than similar offenders in regular prisons. However, although these studies partially include treatment of sex offenders, most of them do not deal specifically with this group. The same applies for most studies on the treatment of offenders in forensic hospitals.21

A systematic literature review on sex offender treatment in German-speaking countries reveals only four studies that contain more or less equivalent comparison groups.22 Only one study with a small number of sex offenders is based on a random-

ized design.\textsuperscript{23} Although this overall state of research does not meet the criteria of experimental and quasi-experimental evaluation,\textsuperscript{24} we must take into account the respective practical problems. For example, serious and violent offenders in need of treatment cannot be assigned simply to untreated control groups or waiting control groups in which interventions may be postponed for years. This is particularly the case for forensic hospitals that cannot be compared with regular prisons. Furthermore, even randomized designs are confronted with threats to internal validity such as dropout or demoralization and frequently end up as less well-controlled quasi-experiments. Construct validity is often also questionable. For example, in complex settings it is difficult to isolate the effect of a specific program from other influences such as a charismatic governor, institutional climate, educational measures, staff motivation, or group processes among inmates. As Weisz et al. have shown for treatment in child psychiatry, there are substantial differences between model projects and the everyday practice that question the generalizability of results.\textsuperscript{25}

Because we rarely can expect a perfect design in everyday practice, we should not ignore information from methodologically weaker studies on sex offender treatment.\textsuperscript{26} Therefore, the present overview includes studies without untreated control groups. Table 1 contains data from the 20 studies that we have found published between 1983 and 2000. One German study on castration that was first published in English is also included.\textsuperscript{27}


\textsuperscript{27} R. Wille and K. M. Beier (1989) Castration in Germany. \textit{Annals of Sex Research}, 2, 103-133.
As most studies do not contain comparison groups, it is not possible to compute standardized effect sizes. Sometimes, sample sizes are too small to draw sound conclusions from the single study. Due to the overall lack of research, I included these studies but \( n \)-weighted summary statistics.

Outcomes reported in Table 1 refer to new officially registered sex offenses (in Germany, documented in the Federal Central Register). Sex offenses that remained unconvicted are not covered. The restriction to sexual offenses excludes recidivism in

### Table 1: Evaluations of Sex Offender Treatment in German-Speaking Countries.

<table>
<thead>
<tr>
<th>Study</th>
<th>Country</th>
<th>Setting</th>
<th>Therapy</th>
<th>( n )</th>
<th>Follow-up (M, years)</th>
<th>Recidivism %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ahrens (1990)</td>
<td>D</td>
<td>FH AMB</td>
<td>HO + PT</td>
<td>30</td>
<td>3.8</td>
<td>13.3</td>
</tr>
<tr>
<td>Berner &amp; Bolterauer (1995)</td>
<td>A</td>
<td>STP</td>
<td>PT / HO</td>
<td>46</td>
<td>5.0</td>
<td>30.4</td>
</tr>
<tr>
<td>Berner &amp; Karlick-Bolten (1986)</td>
<td>A</td>
<td>STP</td>
<td>PT / HO</td>
<td>53</td>
<td>5.0</td>
<td>39.0</td>
</tr>
<tr>
<td>Dessecker (1996)</td>
<td>D</td>
<td>FH</td>
<td>NS</td>
<td>36</td>
<td>2.0</td>
<td>3.9</td>
</tr>
<tr>
<td>Dimnek &amp; Duncker (1996)</td>
<td>D</td>
<td>FH</td>
<td>NS / PD</td>
<td>41</td>
<td>7.7</td>
<td>25.6</td>
</tr>
<tr>
<td>Dolde (1996)</td>
<td>D</td>
<td>STP</td>
<td>ST / PD</td>
<td>10</td>
<td>7.4</td>
<td>50.0</td>
</tr>
<tr>
<td>Dünkel &amp; Geng (1994)</td>
<td>D</td>
<td>STP</td>
<td>ST</td>
<td>12</td>
<td>10.0</td>
<td>29.0</td>
</tr>
<tr>
<td>Fehlenberg (1997)</td>
<td>D</td>
<td>FH</td>
<td>PD</td>
<td>40</td>
<td>7.0</td>
<td>20.0</td>
</tr>
<tr>
<td>Gabbert (1987)</td>
<td>D</td>
<td>FH</td>
<td>ST</td>
<td>14</td>
<td>10.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Gretenkord (1994)</td>
<td>D</td>
<td>FH</td>
<td>ST / CB</td>
<td>67</td>
<td>8.5</td>
<td>20.9</td>
</tr>
<tr>
<td>Heinz et al. (1996)</td>
<td>D</td>
<td>FH</td>
<td>ST</td>
<td>58</td>
<td>3.7</td>
<td>8.6</td>
</tr>
<tr>
<td>Menghini &amp; Ernst (1991)</td>
<td>CH</td>
<td>FH</td>
<td>HO</td>
<td>19</td>
<td>11.0</td>
<td>31.6</td>
</tr>
<tr>
<td>Micheroli &amp; Battegay (1985)</td>
<td>CH</td>
<td>AMB</td>
<td>HO</td>
<td>7</td>
<td>3.0</td>
<td>28.6</td>
</tr>
<tr>
<td>Müller-Iserner &amp; Thomas (1992)</td>
<td>D</td>
<td>FH</td>
<td>ST / CB</td>
<td>18</td>
<td>3.6</td>
<td>5.6</td>
</tr>
<tr>
<td>Ortmann (2000)</td>
<td>D</td>
<td>STP</td>
<td>ST</td>
<td>20</td>
<td>5.0</td>
<td>20.0</td>
</tr>
<tr>
<td>Schönhage &amp; Schazman (1983)</td>
<td>D</td>
<td>FH</td>
<td>PD</td>
<td>14</td>
<td>2.3</td>
<td>0.0</td>
</tr>
<tr>
<td>Wagner et al. (1997)</td>
<td>A</td>
<td>AMB</td>
<td>PD</td>
<td>63</td>
<td>2.3</td>
<td>12.7</td>
</tr>
<tr>
<td>Wiederholt (1989)</td>
<td>D</td>
<td>STP</td>
<td>PD / HO</td>
<td>58</td>
<td>2.0</td>
<td>32.7</td>
</tr>
</tbody>
</table>

**Overall** | 772 | 6.5 | 19.3

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a. D = Germany, A = Austria, CH = Switzerland.


c. HO = Hormonal / cyproterone acetate, PT = Psychotherapy, ST = Social therapy and social training, PD = Psychodynamic therapy, CB = Cognitive-behavioral therapy, HOC = Hormonal / castration, NS = Not specified.

d. Number of treated offenders.
violence, property offenses, or other forms of criminal behavior. Normally, and in contrast to public stereotypes, sex offenders have higher recidivism rates in nonsexual than in sexual crimes (see below).

Due to exclusion criteria, treatment dropouts, and individuals who could no longer be traced, samples are not fully representative for the respective treatment populations. In most studies, the reported recidivism rates refer to treated samples without dropouts. Thus, they represent a positive selection.

Follow-up periods vary greatly and are sometimes too short for a sound evaluation of the outcome. Occasionally, discharges from forensic hospitals are followed by referrals to other institutions. In such cases, the real time in freedom is shorter than the follow-up period. A long follow-up period is more important in sex offenders than in other criminals. Among serious nonsexual offenders, the recidivism rate typically peaks during the first few years. It drops notably approximately 4 to 5 years after release from prison, and then levels out asymptotically. Among sex offenders, this curve does not flatten out as much, so that substantial recidivism or sexual deviance can still be observed even after very long periods.

The mode of treatment could be categorized only roughly (see Table 1). The contents of interventions in social-therapeutic prisons or forensic hospitals are often rather heterogeneous and cannot be subsumed to specific program types as required for differential evaluations. For practical reasons, there is also an overlap between hormonal and psychosocial interventions. Some studies try to separate the specific or additional impact of pharmacological treatment. However, the respective groups are small and not fully comparable (e.g., hormonal treatment may be selected for offenders with a more specific history of sexual crimes). Several studies fail to report important characteristics of treatment. Although it sometimes was possible to infer these data from personal knowledge about the respective institution, serious ambiguities remain.

The duration of treatment is very different. It varies between 0.8 and 6.0 years and may depend closely on setting and offender variables.

Offender characteristics also differ greatly. Only the mean age is relatively similar (28-36 years). As far as data is reported, the proportion of offenders with prior sen-

sentences varies from 24-100 percent; of child molesters, from 30-100 percent; of rapists, from 0-60 percent; and of exhibitionists, from 0-32 percent. Only 8 studies report differentiated results for child molesters (62.0% of the subsample), rapists (29.3%), and exhibitionists (8.6%). Prior offense history also is rarely differentiated in outcome evaluation. Due to this lack of data, I shall primarily refer to the general but vague category of ‘sex offender.’

Table 1 shows rather different outcomes. Rates of sexual re-offending vary between approximately 42 percent and zero. The mean recidivism rate (weighted for sample size) is 19.3 percent ($SD = 2.9$). Due to the small number of studies, heterogeneity of data, methodological weaknesses, lack of information, and other problems mentioned above, detailed moderator analyses bear the risk of artificial results. Therefore, the present analysis focuses on the question of general efficacy. Only some moderator trends will be mentioned below.

The overall mean of 19.3 percent sexual recidivism is lower than general recidivism rates found among offenders released from social-therapeutic prisons. These groups show recidivism rates larger than 50 percent and serious re-offending (new prison sentences) in approximately 40 percent of cases (follow-up periods of ca. 5-10 years). In forensic hospitals as well, the recidivism rates for sex offenders reported in Table 1 are lower than those for other patients. For example, Leygraf shows that an average of approximately 45 percent recidivism and 30 percent renewed incarceration can be anticipated among those released from forensic hospitals (mean follow-up intervals of 7-10 years). Recidivism is lower only among clients selected for open institutions.

The finding that the recidivism rates in Table 1 are lower than those of general offender treatment cannot be attributed to a specific program efficacy. As mentioned above, Table 1 reports only offense-specific or sexual re-offending. However, only a minority of sex offenders specialize in this area of criminality. This is demonstrated, for example, by a current study of the German Criminal Center. In this evaluation, sex offenders sentenced in 1987 were followed up in the Federal Central Register until


12. The Efficacy of Sexual Offender Treatment

1996. Data on a sub sample indicate that 51.5 percent of child molesters recidivated. However, only 20.4 percent were registered for a new sexual offense. Similarly, 60.1 percent of the rapists re-offended, but only 13.7 percent were reconvicted for sexual crimes. The respective results for exhibitionism were 81.4 percent (54.7%). This confirms observations from other countries that many sex offenders are multiply deviant. For example, Hanson and Bussière’s meta-analysis, which integrated 61 studies assessing 23,393 sex offenders, revealed a general recidivism rate of 36.3 percent compared with only 13.4 percent for sex offenses (child abuse: 12.7%; rape: 18.9%). The studies had shorter follow-up intervals than the German data (from 6 months to 23 years with a mean of 5.5 years and a median of 4.0 years). Lower rates of sexual recidivism compared with general recidivism may result from the different base rates of various offenses. They also may have something to do with the above-mentioned differences in the dynamics of re-offending or in official registration. For example, Beier reassessed various sex offender groups directly and after very long periods (averages of 19 to 28 years).

The proportions of persistent ‘dissexuality’ in the sense of sexually motivated social failure were much higher than the respective rates of penally recorded recidivism.

When we refer to the data from the Criminological Center, we can conclude that the overall sexual recidivism rate of 19.3 percent in treated sex offenders is in a similar range as that in general sex offender populations. For a more precise comparison, I computed an overall recidivism rate for the data of the Criminological Center according to the proportions of different offender groups in the treatment studies (as far as this had been reported). This resulted in an estimate of 21.4 percent registered sexual recidivism in the general sex offender population. The difference of approximately 2 percentage points is not significant. However, we must bear in mind that these results do not refer to equivalent groups. First, the general sample includes at least some treated offenders. Second, those who were given non-custodial sanctions are probably more low-risk individuals. Third, time in freedom is at the upper range of the studies from Table 1. However, for those comparison subjects who had been incarcerated in a prison or a forensic hospital, the actual probation period was shorter. In these cases, time in freedom may be close to the mean from Table 1.

In another approach to estimating treatment efficacy, one can compare the recidivism rates of treated sex offenders with those who have been selected as comparison groups in the four studies mentioned above. For this analysis, I used general recidivism as a second outcome criterion (not reported in all studies). Results are shown in Table 2.

Table 2: Overall Recidivism Rates in Treated Sex Offenders and in a Combined Comparison Group (sample size in brackets).

<table>
<thead>
<tr>
<th></th>
<th>Treated</th>
<th>Untreated</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Recidivism</td>
<td>19.3%</td>
<td>23.3%</td>
<td>n.s.</td>
</tr>
<tr>
<td></td>
<td>(772)</td>
<td>(276)</td>
<td></td>
</tr>
<tr>
<td>General Recidivism</td>
<td>43.5%</td>
<td>73.2%</td>
<td>&lt;.001</td>
</tr>
</tbody>
</table>

The treated and untreated offenders exhibit a small difference of approximately 4 percentage points in sexual recidivism. Thus, there is a 16 percent reduction of reoffending with the untreated groups. However, this effect is not statistically significant, and we cannot rule out differences in risk or other offender characteristics. Therefore, the efficacy of treatment remains questionable. However, there is an interesting pattern with respect to type of reoffending: Untreated sex offenders show higher general recidivism than treated sex offenders. There are two plausible explanations for this result: (a) In the prevailing practice before the recent Penal Law Reform, only a small proportion of sex offenders were referred to treatment. Perhaps, there was a selection of those cases that seemed to be more disordered and specialized in sexual crime instead of general criminality. (b) As described above, the various forms of psychosocial treatment are a mixture of elements addressing sex offending, general antisocial behavior, personality disorders, and other psychiatric problems. Perhaps, traditional sex offender treatment in German-speaking countries is more successful on general criminality than on sexual offending. Both conclusions indicate the need for more differentiated implementations and evaluations of specific programs and groups in sex offender treatment. This is also suggested by some preliminary results on moderator variables in the data from Table 1. In contrast to expectations, length of follow-up did not correlate positively with recidivism on the bivariate level ($n$-weighted $r = -.03$). However, this was mainly due to the study on castration from Wille and Beier that had the largest sample of treated offenders, a rather long follow-up period, and a very low recidivism rate.\(^{37}\) When I excluded this study from our data set, recidivism rate and length of follow-up correlated positively ($r = .33$). Eliminating this untypical study does not question its design and outcome. It is even one of the few studies with a relatively sound comparison group. However, the untreated group was a less favorable selection because its members had originally consented to castration, but either withdrawn their consent or had been turned down after assessment by an expert committee. The control group also contained slightly more young offenders, more offenders with low intelligence, and more pedophiles than the treatment group.

Although older studies without control groups also showed low recidivism rates after castration, legal and ethical reasons as well as serious negative side effects have strongly reduced its application in most countries.

Multiple regressions with follow-up entering as first predictor revealed that treatment in forensic hospitals is associated with less recidivism than treatment in prisons with more \((p < .05)\). Traditional psychotherapeutic and psychodynamic approaches tend to show slightly more recidivism than cognitive-behavioral and social training modes of intervention. However, one should not prematurely generalize such findings because the number of studies is small, treatment classification is sometimes ambiguous, and other potential moderators are not controlled. We must also bear in mind that dangerous offenders may be not released from forensic hospitals whereas prison sentences are determinate. With respect to offender characteristics, in some studies child molesters showed a better outcome than rapists or nonviolent sex offenders. Others, however, found the opposite. Such inconsistencies can also be found in the international literature and may be due to superficial offense categories rather than more detailed classifications of sex offenders. For example, as far as documented, our data suggest that offenders with a specific sexual disorder such as pedophilia show higher recidivism rates than child molesters in general. As far as documented, several studies also indicate that dropouts had higher recidivism rates than those who regularly terminated treatment. Although this could be expected from research on social-therapeutic prisons and international studies of sex offender treatment, one study also suggests that offenders who were referred back to normal prisons managed rela-

39. E.g., L. Gretenkord (1994) Gewalttaten nach Maßregelvollzug (§ 63 StGB). In M. Steller & K.-P. Dahle and M. Basqué (Eds.), *Straftäterbehandlung* (pp. 75-89). Pfaffenweiler: Centaurus.
tively well.\textsuperscript{45} This result may be an artifact. However, if it can be replicated in larger samples, it may indicate local flexibility in case management practice.

### International Evaluations

Even from an international perspective, few well-controlled evaluations of the treatment of sex offenders are available. Hall, for example, included only 12 methodologically sound studies in his meta-analysis of institutional and ambulatory sex offender treatment programs.\textsuperscript{46} Polizzi \textit{et al.} found 13 adequately designed studies of prison- and non-prison-based sex offender treatment programs.\textsuperscript{47} A meta-analysis of offender treatment in Europe contained only 3 controlled studies on sex offenders.\textsuperscript{48} A much larger number of relevant studies can be reached only if syntheses are not restricted to well-controlled research.\textsuperscript{49}

However, as mentioned above, we should bear in mind the manifold research problems in clinical practice.\textsuperscript{50} Due to these, even well-controlled studies can make only a rather limited contribution to our knowledge about sex offender treatment efficacy.\textsuperscript{51} To give an example of good research and its problems, I shall sketch the evaluation of a cognitive-behavioral treatment program by Marques \textit{et al.}\textsuperscript{52} In this study, incarcerated sex offenders were selected according to various criteria and treated in a multi-component program. The program elements were designed to help offenders recognize risk factors for recidivism, develop adequate coping mechanisms, improve their


social skills, control stress and anger, build up appropriate knowledge on sexuality, and so forth. The program also contained a phase of preparation for release and a 1-year aftercare program. The authors evaluated a treatment group that had completed the regular program (72 prisoners convicted of sexual child abuse; 22, of rape). The treated group was compared with two control groups: an untreated volunteer control group \((n = 79; 18)\) of persons who had declared their willingness to undergo treatment, and a second control group \((n = 78; 18)\) that had not volunteered for treatment but was matched with the other two groups for age, offense type, and legal biography. Although this second control group is a strong part of the design, it was only possible to match a few static variables. There may still have been manifold differences in motivation, personality, and other dynamic predictors. Offense categories, for example, are not a sufficient marker of such individual differences. There could also have been some experimental rivalry and placebo-like influences in the control group. The recidivism interval was between 33 and 48 months. New arrests for a sex offense or another violent offense were recorded. Results showed that the eight dropouts performed worst of all (37.5% recidivism). Of those receiving treatment for rape, 9.1 percent were recidivist with a new sex offense and 22.7 percent with another violent offense. Among those treated for child abuse (no incest), the equivalent rates were 7.9 percent and 4.0 percent. Among voluntary controls (non-voluntary controls in parentheses), 27.8 percent (11.1%) of rapists were recidivist with a sex offense and 33.3 percent (22.2%) with some other violent offense. Rates for untreated controls incarcerated for child abuse were 10.1 percent (12.8%) and 13.9 percent (6.4%). This results in a mean program effect of approximately 7 percentage points less sexual recidivism and approximately 5 percentage points less other violent recidivism than in controls. However, this small effect is not statistically significant and due primarily to the contrast with voluntary controls who may have been subject to demoralization effects. It becomes even smaller when the dropouts are also included in the treatment group. We should further bear in mind that the sub samples were small, and one rapist already accounted for approximately 5 percent. Although this is a well-controlled study that was awarded the highest methodological rating from Polizzi et al., there are various threats to internal and statistical validity and problems in grouping. This is almost unavoidable in clinically relevant treatment research that is often based on much smaller samples.

Integrative meta-evaluations may balance the methodological problems of single studies and enhance statistical validity. An early review has been presented by Furby et al. This study integrated follow-up data on both treated and untreated sex offenders.

The 42 studies of more than 3,000 persons revealed no evidence that treatment was effective. Although treated persons were overall less frequently recidivist than untreated controls, the study designs and programs showed too many methodological problems.

In the 1990s, a number of other reviews on treatment and recidivism of sex offenders were published. Most authors arrived at an overall rather cautious but slightly positive evaluation of efficacy for at least some programs and offender groups.\(^55\) Marshall et al., for example, concluded that comprehensive cognitive-behavioral programs and combined psychological and hormonal therapy are effective in reducing recidivism in child molesters and exhibitionists but not in rapists.\(^56\) Overall, the current state of outcome evaluations is more promising than it was 10 years ago. However, methodological problems still justify the skepticism expressed by.\(^57\) Thus, the interpretation of


findings remains controversial, particularly with respect to recidivism. To place our results from the German-speaking countries in an adequate framework, I shall discuss some of the recent quantitative reviews in more detail.

Alexander located 359 English-language studies on sexual offender treatment published between 1943 and 1996. At first glance, this seems to be an impressive body of research. However, the author had to exclude studies not only due to decisions about the content of her analysis (e.g., no studies on females, developmentally disabled offenders, biomedical treatment, or castration) but also because they overlapped with those in other reports, had unclear outcome, were reviews, or only described treatment without any reference to efficacy. The remaining 79 studies contained 9,383 treated and 1,605 untreated offenders. Of the overall sample, 9.3 percent were classified as juvenile sex offenders, 4.8 percent as adult rapists, 19.5 percent as adult child molesters, 3.0 percent as adult exhibitionists, and in the remaining 63.4 percent, the offense type could not be specified. The overall recidivism rate was 13.0 percent in the treated subjects and 18.0 percent in the untreated. The study did not test for statistical significance but used three plausible criteria of relative strength of outcome patterns: First, a recidivism rate of less than 11 percent; second, at least 100 subjects in each cell; and third, a spread of at least 10 percent between treated and untreated subjects (properly: 10 percentage points). Juveniles had the best outcome (7.1% recidivism in the treated group; however, recidivism rate for untreated subjects was not available), followed by child molesters (14.4% vs. 25.5%), exhibitionists (19.7% vs. 57.1%), and rapists (20.1% vs. 25.8%). Although the results for juveniles and child molesters are particularly promising, none of the comparisons met all three criteria of strength. In the unspecified groups, treated subjects even had a slightly higher recidivism rate (13.1%) than the untreated ones (12.0%). Furthermore, as far as follow-up periods had been reported in the single studies, one quarter of treated juveniles had 3 years and child molesters did not exceed a 5 year maximum. There were tendencies toward better outcomes in studies from the 1990s and nonlinear relations between recidivism and length of follow up.

The very broad category of ‘group/behavioral/other’ type of intervention was most frequent (70.5% of the treated subjects) followed by unspecified programs (21.9%) and relapse prevention (7.6%). The latter treatment model is normally based on contains cognitive-behavioral techniques and stepped care. The lowest recidivism rates

were found for relapse prevention (7.2%) followed by unspecified treatment (13.1%),
and group/behavioral/other programs (13.9%). Relapse prevention ranged below 10
percent in all offender categories. However, in spite of this encouraging result, only
the comparison for child molesters met all three criteria of strength. With respect to
setting, outpatient treatment showed 11.5 percent recidivism; prison programs, 9.4
percent; treatment in hospitals, 16.6 percent; and unspecified or mixed locations, 12.5
percent. The result for untreated offenders was 17.6 percent. However, all differential
analyses were not controlled for length of follow up and other potential moderators.
Compared with the research from German-speaking countries, the overall results
from Alexander suggest approximately 6 percentage points less recidivism in treated
groups. However, this might be due to longer follow-up periods and partially different
groups (e.g., adults only, pharmacological treatment included).

The meta-analysis from Polizzi et al. reviewed 21 studies of prison- and non-
prison-based sex offender treatment completed in the last 10 years. The authors
used a 5-point scale to evaluate methodological rigor. Eight studies were too low in
quality for further consideration. Seven other studies received a score of 2 indicating
that there was a control group without demonstrated comparability to the treatment
group. Only four studies obtained a score of 4 that indicates a comparison between
multiple units with and without the program, controlling for other factors, or a non-
equivalent comparison group with only minor differences evident.

In one of the good quality studies on prison-based programs, treated child mole-
sters had fewer reconvictions for sexual, violent, or both crimes (44%) than offenders
in one control group (48%) but more than offenders in another control group (33%).
However, no difference reached statistical significance. In a second study on cogni-
tive-behavioral treatment, high-risk sex offenders had significantly fewer sex offense
reconvictions (14.5%) than controls (33.2%). The treated offenders also had signifi-
cantly fewer sex offenses that resulted in a return to federal prison (6.1%) than pro-
gram non-participants (20.5%), however, there was no significant difference in non-
sexual offenses (32.1% vs. 35.0%).

*Preventing crime: What works, what doesn’t, what’s promising*. Washington, DC: Report to the
U.S. Congress.
Clearwater Sex Offender Treatment Program: Paper presented to the 14th Annual Conference
of the Association for the Treatment of Sexual Abusers, New Orleans, LA.
One of the highly scaled studies of non-prison-based sex offender treatment was from Marques et al.\textsuperscript{65} As shown above, it revealed only small and non-significant effects. The second study also referred to cognitive-behavioral treatment.\textsuperscript{66} Treated child molesters had significantly fewer sexual offenses (13.2\%) than the non-treatment comparisons (34.5\%). Two other relatively well-controlled studies addressed treatment of exhibitionists.\textsuperscript{67} These showed a non-significantly better outcome of a program for modifying sexual preference (39\% vs. 57.1\%) and a significant effect of a cognitive-behavioral program (23.6\% vs. 57.1\%).

Although these results are methodologically more sound than those from German-speaking countries, they are also rather heterogeneous. The sexual recidivism of treated sex offenders varied between 2 and 44 percent. I computed a mean rate of 13.9 percent. Effect sizes ($d$ coefficient) ranged between .70 and -.23, indicating that there were evaluations with medium treatment effects as well as ones in which controls performed better. For sexual recidivism, I computed a mean effect size of $d = .17$ that is equivalent to $r = .09$. Six out of 13 studies showed significantly positive effects. Four of them contained a cognitive-behavioral program. Non-prison-based programs were evaluated as being more effective than prison-based approaches. Thus, results on treatment type and setting are relatively consistent and promising. However, the authors emphasize that the data base seemed too small for differential conclusions about particular groups of sex offenders.

The meta-analysis from Hall contains 12 relatively well-controlled treatment studies.\textsuperscript{68} The studies were published between 1988 and 1994. Half of them referred to institutional treatment; the other half, to outpatients. Juvenile and/or adult sex offenders had been treated with different methods (e.g., cognitive-behavioral therapy, behavior therapy, multisystemic therapy, family therapy, group therapy, drug therapy, and surgical interventions). The various measures were grouped into the three main categories of treatment (behavioral, cognitive-behavioral, and hormonal). However, drug therapy typically involved some psychotherapy as well. The number of participants (treatment and control) ranged from 16 to 299 (total $n = 1,313$). As a consequence of exclusion criteria, most studies contained only two thirds of the offenders who were initially available for study. The follow-up intervals ranged from 1 to 11 years ($M = 6.85$).

In treated groups, recidivism rates ranged from 3 to 44 percent ($M = 18.8\%$); in untreated control groups, 6 to 75 percent ($M = 26.8\%$). Thus, the treated groups show overall 8 percentage points or 29.6 percent less recidivism than the control groups. The range and mean recidivism rate among treated groups is nearly the same as the one we found in the German-speaking countries. However, in the German data, the comparison samples showed less recidivism than the control groups in Hall's study. Recidivism rates of treated offenders were somewhat higher than the 13 percent in Hanson and Bussière’s meta-analysis on sex offenders in general.\(^69\) However, the latter data contain less high-risk offenders.

Hall used the correlation coefficient $r$ ($\phi$) as one measure of effect size.\(^70\) In the lower ranges, this is approximately half of $d$. Effect sizes in the single studies varied between .55 and -.14, indicating a range from large to negative effects. The mean effect across all studies was .12. This outcome is not only in line with the .09 from Polizzi \textit{et al.}\(^71\) but also with general research on offender treatment.\(^72\) Effect sizes were significantly larger in studies that had higher base rates of sexual recidivism. Depending on these rates, similar success rates in the treatment groups (10-15\%) led to a large positive effect,\(^73\) a small positive effect,\(^74\) or even a negative effect.\(^75\) Probably, the range in control group outcomes reflects not only the base rate or risk level of the respective offenders but also the psychosocial influences in the comparison conditions. Even when the control group receives no other form of intervention, treatment is never compared with ‘nothing.’ Thus, a large effect size may be a consequence of good treatment as well as of very bad control conditions. Although Hall’s (1995) results provide some support for such reasoning,\(^76\) there was no significant outcome

difference between studies in which the comparison conditions involved some treatment versus those that involved no treatment.

There were also various differential effects in Hall’s meta-analysis: Effect sizes were significantly larger in studies of outpatient treatment and in studies with follow-up periods longer than 5 years. Most important is the finding that cognitive-behavioral measures as well as hormonal therapy had above-average effects (in both cases, an $r$ of approximately .30). Purely behavioral methods, in contrast, generally showed unfavorable effects (-.10). This could be due to the aversive methods in behavioral programs for sex offenders. These are restricted to the specific stimulus situation and probably do not promote self-control. The finding that cognitive-behavioral approaches are the most promising psychosocial treatment methods for sex offenders is supported by Polizzi et al.77 and other authors.78 Although sex offenders with abnormal hormone levels tend to be the exception rather than the rule,79 in some cases, antiandrogen therapy may be an adequate combination. In Hall’s meta-analysis, two studies on hormonal treatment reached effect sizes of over .50.80 One applied pharmacological treatment,81 the other is the study of castration mentioned above.82

Although Hall showed significant differential effects,83 we should be cautious about generalizing the results to daily practice. In most studies, over one third of offenders were excluded, primarily on the basis of psychopathology, denial of offenses, or management problems in prisons. Due to the small study sample, classifications were

based on only three to five studies. For example, if the untypical study on castration were to be excluded, efficacy of hormonal treatment would be much lower. The castration study with its very long follow-up and low recidivism rate has also contributed substantially to the unusual finding that longer follow-up intervals had better effects than shorter ones. This contradicts the results in Furby et al.\textsuperscript{84} as well as those in general meta-analyses on offender treatment.\textsuperscript{85} However, there is some support in the meta-analysis of Alexander.\textsuperscript{86} If Hall’s finding can be replicated with a larger number of well-controlled studies, this could relate to the above-mentioned long-lasting motivations and the special features of the course of recidivism in sex offenders.

**Conclusions and Perspectives**

This brief overview on outcome evaluations of sex offender treatment suggests that there is a lack of methodologically sound research in German-speaking countries. Although randomization or equivalent control groups are an ideal that rarely fits the constraints of clinical practice, more studies are needed that fulfill basic requirements of evaluation design. From 20 studies during the last 15 years, we can estimate a mean rate of approximately 19 percent sexual re-offending. This rate is similar to what we know about recidivism in the general population of sex offenders or approximately 4 percentage points (16\%) lower than that in nonequivalent comparison groups. However, it is not yet possible to demonstrate a significant treatment effect on sexual recidivism. Interestingly, there are clearer effects on nonsexual recidivism. Small sample sizes, lack of detailed information on the content of treatment and offender characteristics, overlap between different types of programs, global evaluations of institutions (and not programs), rather heterogeneous groups of offenders, different exclusion and dropout rates, and various other methodological problems are obstacles for a sound moderator analysis. Particularly in relation to the recent Penal Law Reform in Germany, there is an urgent need for an increase in evaluation studies as well as research on specific program elements.

Although the state of research is better in English-speaking countries, particularly in North America, it still reveals many methodological problems. As a result, the main conclusions are based on little more than a dozen well-controlled studies. According to meta-analyses, the mean recidivism rate of treated sex offenders is approximately 13-19 percent. This is in the same range but slightly better than in the research from

German-speaking countries. Although there are various studies with less than 10 percent sexual recidivism, lower overall rates do not seem to be controlled sufficiently for differences in length of follow up or offender characteristics. Comparisons with control groups suggest an overall effect size ($r$) of $0.09 - 0.12$. This is in line with what we have learned from the many more studies on general offender treatment. Here, mean effect sizes in meta-analyses vary between 0.05 and 0.18, and a small effect size of approximately $0.10 +/-.05$ is a realistic estimation of the general effectiveness of offender treatment. Similar to the research on ‘what works’ in offender rehabilitation, there seem to be significant differences between modes of sex offender treatment. Comprehensive cognitive-behavioral programs, or, in specific cases, combinations with hormonal treatment are particularly promising and may reach mean effect sizes larger than $0.20$. Again, these results are similar to what we have learned in general offender treatment in which large meta-analyses have demonstrated particularly good outcomes for cognitive-behavioral and multimodal programs, whereas low-structured psychodynamic, unspecific, and other approaches had overall weaker effects. However, in sex offender treatment, the database is still too small for broad generalizations of differential effects. The same holds for offender types, although subgroups of child molesters seem to reveal the most promising outcomes. Positive results must be replicated under clearly defined institutional conditions and in relatively homogeneous offender groups.

Even though treatment studies have included serious sex offenders, criteria of exclusion and dropouts produce a positive selection in current evaluation research. There is a particular need for more controlled research on the daily practice of treatment. The same applies for combinations of psychosocial measures and drug therapy.


with antiandrogen or - with aggressive offenders - serotonin reuptake inhibitors. Sweeping pro and contra discussions on psychosocial versus pharmacological sex offender treatment should be abandoned in favor of individualized concepts like those that are now standard in depression therapy.

Outcome differences between various modes of treatment also should not be used to continue the rivalry between ‘schools’ of psychotherapy. Labels such as ‘behavioral,’ ‘cognitive-behavioral,’ ‘psychodynamic,’ and so forth can be misleading for practical work. Instead of broad labels, we need to compare the specific content of programs that may overlap between different basic orientations. Even psychoanalysts, for example, did not recommend their classical therapy, but more structured and educational approaches when treating antisocial behavior. Various concepts of cognitive-behavioral and psychodynamic therapy seem to differ less than it is often claimed. As process research on psychotherapy has shown, successful interventions also depend on interpersonal variables such as emotional quality, openness, and cooperation between client and therapist. In accordance with these results, therapist style as well as program content are relevant for sex offender treatment.

Concepts of sex offender treatment should be based primarily on the actual theoretical and empirical knowledge about the respective problem behavior. There is now a wide range of mainly cognitive-behavioral techniques that can be combined according to the type of problems, the personalities, and the motivations of the respective sex offenders. As in general offender treatment, the risk principle, need principle, and responsivity principle may provide a framework for selecting relatively successful

programs. Perhaps, future developments should refer even more to basic research on social information processing. This approach is not only important for juvenile violence but is also promising in the field of sexual offending.

More research is also needed on relevant variables that go beyond treatment type, setting, and superficial characteristics of offense type. For example, one important requirement for differential treatment indication is a detailed and dynamic assessment of offenders. Here, analyses of offender subtypes, psychological characteristics, and comorbidities are needed. This should include complex qualitative assessments as well as standardized instruments as marker variables.

More attention should also be paid to differentiations of the context. Although institutional settings should be the last resort, ambulatory treatment will often be inadequate for reasons of security. Instead of controversies on institutional versus ambulant measures, it is necessary to differentiate and evaluate measures in both fields and combine them in through- and after-care programs.


There is also a clear lack of research on the organizational climate and regime of sex offender treatment. Such characteristics refer to social relations, attitudes and involvement of the personnel, cooperation, support, and so forth.\textsuperscript{103} Although these features are rarely investigated, they are highly relevant in treating sexual offenders.\textsuperscript{104}

**Integrity of program implementation** is a further important factor in successful treatment.\textsuperscript{105} Although there are various studies on this issue in general offender treatment,\textsuperscript{106} it has still not been addressed sufficiently in sex offender programs. Effective program implementation requires skilled and credible change agents; thorough selection, training, and supervision of staff; as well as a good climate and effective bureaucratic structures in the organization.\textsuperscript{107}

Natural **protective factors and mechanisms** should also receive more attention in sex offender treatment and research. Compared with other areas of antisocial behavior,\textsuperscript{108} we know very little about such processes in sexual re-offending. Although security problems may curtail opportunities for working with family members, respective support cannot be helpful only for victims and partners but also for the offenders themselves.\textsuperscript{109} Similarly, neutralization of the peer networks of rapists or child molesters may exert a protective effect against recidivism.\textsuperscript{110}

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What is probably most important in sex offender treatment is an adequate aftercare and relapse prevention. As Alexander has shown, such programs yield rather good effects. Systematic relapse prevention is necessary to consolidate the competencies acquired during treatment, to provide control of risks, and to cope with crises that may arise. Such programs need a well-established network for crisis intervention and specifically experienced probation officers. Alongside the legal regulations, it is important to build up cooperation routines and multi-agency networks. To take advantage of therapeutic relationships that have been formed already, therapeutic prisons and forensic hospitals should provide ambulant services for relapse prevention.

Although there is growing evidence that specific programs may work in some groups of sex offenders and in specific contexts, their efficacy has to be evaluated realistically. As in general offender treatment, typical effect sizes are lower than those reported for psychotherapy of various other disorders. However, it should not be forgotten that the latter often reveal better preconditions for treatment in terms of clients, institutions, and the social environment. They frequently apply ‘softer’ and more short-term outcome measures as well. The smaller effects in sex offender treatment are also due in part to statistical limits: If the failure rate in control groups is only 20 percent, even successful programs cannot lead to large effect sizes (= differences in percentage points of recidivism). In this case, even a 100 percent success rate in treatment would result in an effect size of only \( \phi = .33 \). However, already small effects may be a substantial improvement in the percentage of success compared to untreated groups. This can pay off from a cost-utility perspective, without mentioning the benefits in terms of preventing psychophysical injury to victims. Prentky and Burgess, for example, have demonstrated financial benefits for small effects of a program for child sexual offenders (pp. 13-152). New York: Plenum; and A. P. Spencer (1999) Working with sex offenders in prisons and through release to the community. London: Jessica Kingsley.

molesters.\textsuperscript{116} Even in medical treatment fields, similarly small effect sizes are not infrequent.\textsuperscript{117} They are important when a measure is effective under unfavorable conditions or no better alternative is yet available.\textsuperscript{118} Both are the case in sex offender treatment.

Although we cannot expect one ‘gold standard’ for successful treatment of sex offenders, the last decade has brought some progress in our knowledge about adequate approaches. However, we need much more systematic research and quality management in practice to reach the level of relatively proven technologies. If policy does not invest in this issue, the current public attention and legal reforms in many countries may not lead to the preventive efficacy they intend.


Unlike some 20 years ago the notion that the provision of psychological support to crime victims and to victims involved in traffic accidents constitutes an integral part of the criminal justice mandate is currently broadly adhered to. As part of this mandate, an elaborate system of support facilities, in close cooperation with the police and the judicial authorities, emerged in over a hundred countries, worldwide. In the early days of victim assistance, the main psychological service offered to crime victims was relatively simple emotional counseling, in the form of providing ‘tea and sympathy’. In most western countries, due to an emerging climate of professionalism this state of affairs has rather dramatically changed over the last 10 years. Most Western support organizations nowadays go way beyond tea and sympathy, and offer victims facilities aimed at supporting victims to cope with the psychological aftermath of a criminal victimization. They aim _inter alia_ at preventing the emergence of or the shortening of the duration of post-victimization emotional distress syndromes, such as Acute Stress Disorder (ASD), Post Traumatic Stress Disorder (PTSD), and Adjustment Disorder (AD).^4^
The most common approach in Victim Support (including organizations, such as Slachtofferhulp Nederland (SN) in the Netherlands, the US National Organization for Victim Assistance (NOVA), and the British National and Irish Association of Victim Support Schemes (NAVSS, IAVSS)) is that the actual work with crime victims is done by volunteers. There is a serious dearth of studies documenting what these volunteers actually do with victims during their personal 'supportive encounters'. Given the fact that such encounters are not necessarily 'therapeutic', it is extremely hard to thoroughly evaluate their therapeutic outcome. Moreover, it should be noted that volunteers do not have extensive psychological expertise. In this situation, the implementation of Structured Trauma Writing (STW) – a procedure in which victims write about their traumatic experiences in a structured manner, i.e. on the basis of specific instructions – in Victim Support may be an interesting option. STW-procedures do not require extensive expertise, and thus can be implemented relatively easily with some focused additional training of volunteers. In addition, they make the actual encounter more transparent and professional.

The most well known form of STW involves Pennebaker exercises. His brief written emotional expression task calls for experimental participants to write an essay that expresses their feelings about a traumatic experience in their life (e.g., ‘write about your deepest thoughts and feelings about a trauma’), whereas control participants write about innocuous topics (e.g., ‘write about your plans for the day’). Studies using this paradigm have examined differences between experimental and control participants across a wide variety of outcomes including health center visits, affect, immune measures, and re-employment status. A controversial finding no doubt, is that a brief, written emotional expression intervention can impact overall health – including psychological well-being, physical health, and general functioning, over a number of months. Interest in the topic has resulted in numerous articles in prestigious journals. A meta-analytic review of such studies conducted by Smyth, however, revealed substantial empirical support for such outcomes. More interestingly, Smyth also concluded that “studies in which Pennebaker was not listed as an author had slightly higher mean effect sizes than those studies in which Pennebaker was listed as an author.” This result indicates that, although Pennebaker was involved in a majority of

International Classification of Diseases (ICD-10) developed by the World Health Organization (WHO).

13. Treatment of Post-Victimization Emotional Disorders

studies included in this research synthesis, effects generated by other research groups are both reliable and not significantly different in magnitude.

Basically, two theoretical mechanisms are assumed to mediate the relation between STW and beneficial outcomes, (1), the idea that writing provides victims with an opportunity to disclose, and more particularly to ‘dis-inhibit’, suppressed trauma material, and (2) that writing facilitates the creation of a narrative around the episode, and that ‘narrativation’ – or a transduction of the experience into language – is ‘automatically’\(^8\) associated with the emergence of more positive cognitions regarding the episode.

*Pathogenic Avoidance: ‘Suppression’*

There is substantial empirical evidence supporting the first hypothesis. A detailed review of thought suppression studies that have focused directly on the effects of suppressing negative, emotionally relevant thoughts, and an in-depth discussion of the implications of this work for understanding the development and persistence of trauma spectrum disorders,\(^9\) such as post traumatic stress disorder, were recently provided by the Canadian psychologist Purdon.\(^10\) The findings reported by Wegner and his associates, that deliberate thought suppression (avoidance) can result in a subsequent increase in frequency of thoughts had, a remarkable impact on recent conceptualizations of various emotional disorders.\(^11\) Avoidance of stimuli associated with the trauma, including thoughts and feelings associated with it, is one of the characteristic symptoms of PTSD. In some of its conceptualizations, this avoidance is assumed to play a role in the persistence of the disorder, because it disallows full activation of the fear structures maintaining the phobic response to stimuli associated with the trau-

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8. Data reported by Winkel and Blaauw point to the risk that emotionally expressive writing for some types of victims (e.g. pessimists) may be counter-productive. See F.W. Winkel and E. Blaauw (2000) Structured Trauma Writing (STW) as a victim-supportive intervention: Examining the efficacy of emotional ventilation and downward writing. In R. Roesch & R.R. Corrado and R.J. Dempster (eds.), *Psychology in the courts: International advances in knowledge*. Amsterdam: Harwood Academic (forthcoming). Their data provide initial support for a salience hypothesis, suggesting that for pessimists writing about negative emotions relating to the victimization make these victims more aware of these negative emotions, and thus results in increased psychological distress. Such outcomes generally underline the necessity of conducting rigorous evaluation studies of structured writing procedures.


matic event and/or terminates exposure to those stimuli, which jointly interfere with habituation processes.\textsuperscript{12}

Rassin, Merckelbach, and Muris showed non-clinical participants a distressing film.\textsuperscript{13} After the film, half of the participants were instructed to suppress all thoughts about the film, whereas the other half was given no further instructions. Participants were recalled to the lab five hours later and asked to report on the experience of film-related thoughts during the intervening period. Frequency of film-related thoughts was assessed using a retrospective self-report measure. Results indicated that participants who had suppressed thoughts about the film reported more frequent film-related thought occurrences. Rebound effects of thought suppression were cross-validated in various other studies, utilizing a similar paradigm with non-clinical subjects.\textsuperscript{14} Harvey and Bryant, moreover, offer some initial evidence for rebound effects in a clinical sample of traumatized victims involved in motor vehicle accidents.\textsuperscript{15}

\textbf{Cognitive Shift}

The second hypothesis suggesting that cognitive shifts underlie the beneficial impact of STW is commonly advanced, too. Van der Kolk, Burbridge and Suzuki examined the sensory modalities, in which traumatic memories were experienced, e.g. as a story, as an image, in sounds, as a smell, as bodily feelings, or as emotions. Most of their subjects initially remembered the distressing episode in the form of somato-sensory flashback experiences, as “visual, affective, auditory, or kinesthetic imprints. As the trauma came into consciousness with greater clarity, more sensory modalities were activated, and a capacity to \textit{tell} what actually had happened emerged over time.”\textsuperscript{16} Most of their subjects reported that they initially had no narrative memory of the episode: they could not tell a story about what had happened. Initial storage is thus mainly in terms of sensory fragments that have few or no linguistic components. These outcomes lead Van der Kolk \textit{et al}. to suggest that the incapacity to weave a coherent narrative out of these disparate sensory imprints and a failure to express the episode in communicable language lie at the very core of the pathology of Post Traumatic Stress Disorder (PTSD). Like Van der Kolk \textit{et al}. Pennebaker’s guiding idea was

14. See Purdon, 1999, \textit{op. cit.}
that a translation of upsetting experiences into words could promote physical and mental health. He recently noted that “a growing number of researchers from several disciplines have begun investigating why talking or writing about emotional upheavals can influence mental and physical health.”

For example, investigators have now found that writing about traumatic experiences produces improvements in immune function, drops in physician visits, and better performance at school and work. Similarly, other studies indicate that the failure to talk or acknowledge significant experiences is associated with increased health problems, autonomic activity, and ruminations.

Following the theoretical lead offered by the cognitive shift hypothesis, Winkel and Blaauw have argued that STW-procedures that are explicitly directed at fostering cognitive shifts may work better than the original ‘undirected’ Pennebaker type of instructions. Their outcomes offer initial support for this assumption. In terms of clinically significant improvements, their downward writing task, in which victims were explicitly instructed to write about the episode from a more optimistic perspective, particularly the idea that they were coping relatively well in comparison to others, resulted in a much more substantial reduction of post-writing intrusion responses than an enhanced ‘pure’ emotional expression instruction. Clinically significant improvements on intrusions emerged in respectively 50 versus 21 percent of the clients (and in .05% of the control participants). However, not all clients improved significantly, e.g. exhibited reduced symptomatology after downward or emotional expressive writing. A downward writing procedure may not work very well for individuals who typically engage in upward coping comparisons, i.e. in victims who perceive their own coping to be worse than that of similar comparison-others. Such outcomes underline the necessity to develop alternative types of writing instructions. Counterfactual writing, the clinical utility of which is preliminary examined in this study, may provide such an alternative.

Table 1: Therapeutic use of ‘counter-attitudinal shift’.

<table>
<thead>
<tr>
<th>Type C: Traumatic Memory</th>
<th>E.g., I deserve this, because if I would have done more, it would not have happened (Episode (E) – Negative Cognition – Emotional Response).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counterfactual Writing</td>
<td>E.g. Victims are ‘instructed’ to write about E, and / or their way of responding to E from the perspective: I do not deserve this, I did what I could! (‘Positive Cognition’).</td>
</tr>
<tr>
<td>Counterfactual Shift</td>
<td>Due to attempts to avoid cognitive dissonance, or due to cognitive elaboration (e.g. ‘overwriting’ the ‘old cognition’) the victim becomes more convinced of the counterfactual position.</td>
</tr>
<tr>
<td>Facilitation of Trauma Resolution</td>
<td>Trauma resolution: Episode – ‘Installed’ Positive Cognition -&lt;-&gt; Emotional Response.</td>
</tr>
</tbody>
</table>

**Counterfactual Writing**

The phenomenon of ‘counter-attitudinal shift’ has been very well documented empirically in the early socio-psychological studies relating to cognitive balance theories, including the theory that people aim to avoid discomfort or tension (dissonance) due to cognitive inconsistencies, or contradictions between elements of their cognitive system.\(^{21}\) Counter-attitudinal writing constituted the prototypical paradigm in numerous pertinent studies.\(^{22}\) For example, Cohen conducted an experiment at Yale University shortly after a campus riot in which the students felt that the police acted in a brutal manner.\(^{23}\) Cohen asked Yale students to write essays that were contrary to their own opinions, e.g. strong and compelling defenses of the police actions. When each student had completed his essay, he was asked to indicate his own private attitudes toward the police. Results indicated that students developed attitudes that were more consistent with the content of their essays. As in other studies, students became more convinced of the idea that the counter-attitudinal position reflected their true private attitudes toward the police actions. The focus of the present study is to explore the idea that this phenomenon can be exploited therapeutically (see Table 1).

Most victims do not develop persistent traumatic memories in response to criminal exposure. A substantial minority of victims, however, does exhibit trauma-symptomatology in terms of Type C memories. The duality model of traumatic memory (see Table 2) suggests conditions under which this is a likely outcome. Negative appraisal

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processes are assumed to underlie these types of traumatic memories. The idea that negative cognitive schemata underlie the emotional (e.g. fear) responses to the episode is common among cognitive psychologists. Examples of potential negative appraisal processes include: (a) negative thoughts during the episode (e.g. a lack of mental planning due to thinking about ways to escape or protect oneself physically or emotionally during the episode); (b) subsequent negative appraisals of actions and feelings during the episode (e.g. self-blame, and internal character attributions); (c) negative appraisals of social interactions following the episode (victim blaming responses from others; perceived lack of social support/empathic reactions); (d) negative appraisals of PTSD symptomatology (catastrophic interpretations of intrusions and distress, such as ‘I am (going) crazy’); and (e) global negative beliefs about the self (lack of self-worth), the world (lack of predictability, meaningfulness, or benevolence), or the future (a sense of foreshortened future). Such negative appraisal processes provide the starting point of Table 1, which further clarifies how counterfactual writing may facilitate trauma resolution.

Case Study

Participants

Clients were recruited via advertisements in two university newspapers, *Ad Valvas* and *Folia Civitatis*. Readers who still experienced problems with a negative life event, such as involvement in a criminal victimization, or a motor vehicle accident, were invited to participate in a study of psychological functioning. Participants were 13 females, with a mean age of 31 years (age range 17 – 72 years). They reported various types of criminal exposure, including early incest experiences, direct involvement in a traffic accident, or the sudden, unexpected death of a loved one, due to a traffic accident or suicide.

25. The case study formed part of the 1999-2000 Psychology and Law Research Practical in which social-psychology students participated for course credit. We are indebted to these students for their gathering data.
Tabel 2: Trauma resolution: A model of counterfactual writing.

**Dual Structure:** TMs are stored networks involving (1) Episode (E) – (2) Emotional Response Associations (initial ‘encoding’ starts during ‘exposure’);

**Dual Control:** The development of persistent TMs is determined by the interaction of (1) trauma susceptibility and (2) episodic features, or TM = f (P x E), in which P = Person / victim, and E = Environment / victimization. High susceptibility is present where the victim’s susceptibility profile is characterized by an abundance of risk / vulnerability factors, and a deficit in resilience / protective factors. The main episodic feature is the arousal potential of the episode. Arousal potential is high where exposure to the episode elicits strong initial fight-flight – responses in the victim.

**Dual Susceptibility:** Susceptibility includes both (1) intra-personal (pre-victimization), and (2) interpersonal / social (post-victimization) variables; Susceptibility includes a (1) cognitive and / or an (2) emotional dimension. Cognitive vulnerability is e.g. present where the victim is characterized by an ‘Beckian’ style of information-processing; emotional vulnerability is present where the victim exhibits an emotional / anxious style of processing (e.g. pre-victimization neuroticism, or negative affectivity, or emotional re-activity)

**Dual Forcefield:** The relative contribution of susceptibility and episodic features to TM-formation is variable. Under some conditions (1) susceptibility ‘overrules’ episodic features, under other conditions (2) the reverse is true.

**Dual Storage:** Episodes and associated responses may be stored (1) consciously, or (2) unconsciously. Controlled (1) processing results in explicit (‘verbally accessible’) TMs, automatic (2) processing in implicit (‘situationally accessible’) TMs. High initial arousal limits the opportunity for controlled processing.

**Dual Source:** In hyperAffective, or (1) type A TMs the main mechanism underlying the episode associated emotional responses are (the initial) hyper-arousal responses; in hyper-Cognitive, or (2) type C memories stored appraisal processes are the main underlying mechanism. Type A is more likely to emerge where high arousal potential is combined with emotional vulnerability; Type C where low to moderate arousal potential is combined with cognitive vulnerability. Type A trauma-resolution requires desensitization – focused interventions; type C trauma resolution interventions focusing on ‘rescripting’ or cognitive re-structuring.

**Dual Retrieval:** TM-retrieval may be (1) controlled (e.g. when the victim is talking to others about the episode), or (2) automatic. Automatic retrieval is not in the conscious control of the victim, but emanates from ‘triggered’ (e.g. due to an implicitly stored cue) activation. TMs brought back into working memory may consist of explicit and implicit type A or type C components. Re-storage can be associated with cognitive or affective modification of the ‘original’ TM.

**Measures**

Post-victimization distress was measured in terms of Intrusions and Avoidance. Intrusions were assessed via the 7-item Intrusion sub-scale, and Avoidance via the 8-item
Avoidance subscale of the Impact of Event Scale (IES).\textsuperscript{26} This scale has been shown to have reliable psychometric properties. Joseph has concluded that IES “has provided, at least historically, what might be described as the gold standard self-report measure in trauma research.”\textsuperscript{27} The items on the IES were developed from statements most frequently used to describe episodes of distress by people who had experienced recent life events. Each of the intrusion and avoidance items were administered using 4-point frequency scales (i.e., 0 = not at all, 1 = rarely, 2 = sometimes, and 5 = often) in relation to the past week, so that the total Intrusion score has a possible range of 0 to 35, with higher scores indicating greater frequency of intrusive thoughts. Likewise, total Avoidance scores had a possible range of 0 to 40.

**Procedure**

All clients participated in 4 sessions of structured writing, spanning a two-week period. In the first two sessions all clients were requested to write about their negative life experiences for about 45 minutes, along the lines suggested by Pennebaker. The instructions thus focused on emotional expression and ventilation. In the latter two sessions clients engaged in a (explicit – condition (1) or implicit – condition (2)) counterfactual writing task. In condition (1) clients were first presented with a list of 31 negative cognitions (e.g. I am weak, I am worthless, I cannot protect myself, I am powerless, I am unimportant, I don’t have control, I am guilty, I failed, etc.). They were requested to select those negative cognitions with which they identified most strongly. Clients were then presented with a similar list of 31 positive cognitions, which basically represented the total opposite of the negative cognitions listed (e.g. I am in control, etc.). Clients were requested to select and mark these corresponding positive cognitions. Next, they were requested to write about their traumatic experience from the perspective of these selected positive cognitions. In condition (2) clients were only presented with the list of positive cognitions. It was suggested to these clients that the previous writing sessions most probably had revealed various negative cognitions. They were now requested to select the corresponding positive cognitions from the list presented, and to write from the perspective of these latter cognitions. Condition (1) thus more explicitly guided clients in the process of identifying potential negative cognitions. The lists presented were derived from the pertinent literature, and contain statements that are frequently used by victims.


Table 3: Pre- and post-writing Means (Standard Deviations) on the Impact of Event Scale, and the Intrusion and Avoidance sub-scales by type of Counterfactual Writing Instruction.

<table>
<thead>
<tr>
<th></th>
<th>Pre-test</th>
<th></th>
<th>Post-test</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M</td>
<td>Sd</td>
<td>M</td>
<td>Sd</td>
</tr>
<tr>
<td>Both writing conditions combined</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact of Event Scale</td>
<td>42.4</td>
<td>8.2</td>
<td>36.3</td>
<td>9.4</td>
</tr>
<tr>
<td>Intrusions</td>
<td>21.6</td>
<td>3.3</td>
<td>18.4</td>
<td>4.1</td>
</tr>
<tr>
<td>Avoidance</td>
<td>20.8</td>
<td>6.6</td>
<td>17.8</td>
<td>6.2</td>
</tr>
<tr>
<td>Writing condition 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact of Event Scale</td>
<td>43.6</td>
<td>5.7</td>
<td>35.6</td>
<td>5.8</td>
</tr>
<tr>
<td>Intrusions</td>
<td>23.2</td>
<td>1.9</td>
<td>18.8</td>
<td>3.7</td>
</tr>
<tr>
<td>Avoidance</td>
<td>20.4</td>
<td>6.7</td>
<td>15.8</td>
<td>3.6</td>
</tr>
<tr>
<td>Writing condition 2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact of Event Scale</td>
<td>41.6</td>
<td>9.9</td>
<td>37.4</td>
<td>11.4</td>
</tr>
<tr>
<td>Intrusions</td>
<td>20.6</td>
<td>3.7</td>
<td>18.4</td>
<td>4.6</td>
</tr>
<tr>
<td>Avoidance</td>
<td>21.1</td>
<td>7.1</td>
<td>19.0</td>
<td>7.3</td>
</tr>
</tbody>
</table>

Results

The main outcomes of the case study are summarized in Table 3. An examination the table suggests that participants’ post-writing scores on the Impact of Event Scale have more favorable values than their pre-writing scores. Writing thus appears to have a beneficial impact on symptomatology.

This impression was substantiated by an analysis of variance, which included time as a within-subjects, and type of writing instruction as a between-subjects factor. Significant time main effects emerged on IES \( (F(1,10) = 8.63; p < .01) \), both with regard to Intrusions \( (F(1,11) = 13.52; p < .01) \) and Avoidance \( (F(1,10) = 4.60; p < .05) \). No significant interactions emerged (all \( F \)-statistics smaller than 2.50; \( p > .05 \)). In view of the small sample size, and thus a small power to detect ordinal interactions, this outcome could be expected. However, a visual inspection of the table clearly reveals that effect sizes in the explicit counterfactual writing condition were more substantial.

Discussion

It would be utterly irrational to assume that support is necessarily therapeutic because of the fact that it was provided by a Victim Support Organization, such as Slachtof-
ferhulp Nederland. Crombag and Merckelbach convincingly demonstrated that support, under some conditions, may be anti-therapeutic.\textsuperscript{28} It would be utterly pessimistic though to assume that supportive interventions from such organizations hardly make a difference. Today, we are actually moving closer to recognizing the specific therapeutic approaches which will make a difference for specific victims and their specific treatment settings.\textsuperscript{29} The emergence of ‘empirically supported treatment guidelines’ published by the American Psychological Association,\textsuperscript{30} the ‘practice guidelines’ published by the American Psychiatric Association,\textsuperscript{31} the therapeutic jurisprudence approach in psychology and law\textsuperscript{32} and ‘guides to treatments that work’\textsuperscript{33} clearly marks the end of the ‘nothing works’ era, that was initiated by Eysenck’s 1952 landmark paper ‘The effects of psychotherapy’, in which no evidence of psychotherapy’s effectiveness was noted.\textsuperscript{34} On its way from ‘tea and sympathy’ to more professional psychological counseling, Victim Support may become a major ally in promoting the ideals of evidence-based therapeutic power by making their supportive interventions more transparent. STW-procedures may contribute towards reaching that goal. The outcomes of the case study presented give further credence specifically to the potential clinical utility of combined STW-instructions, in which emotional expressive writing sessions of the classic Pennebaker’ type (providing an opportunity to break the self-perpetuating intrusion – avoidance/suppression cycle) are followed up by cognitive shift – focused writing sessions,\textsuperscript{35} on the basis of downward or counterfactual instructions. Ideally, such combined procedures are smoothly woven into ongoing personal victim – helper contacts. Initial personal contacts should in that case aim at clarifying the precise nature of negative appraisal processes underlying the formation of traumatic memories, while the contents of writing sessions could be utilized to further

\textsuperscript{28} Crombag and Merckelbach, 1996, op. cit.
structure and guide additional follow-up supportive contacts. This ideal situation opens up the possibility to create tailor-made counterfactual instructions. Such instructions may have added clinical significance over a ‘one size fits all’ type of instruction. *Quod est demonstrandum.*
An Intelligent Tool for Acquiring Legal Case Solving Skills

G.P.J. Span

Introduction

One of the founding fathers of our Faculty of Law is Job Cohen who used to work with Hans Crombag in Leiden. They collaborated on a project involving a theory on how to solve legal cases. A few years after the foundation of our faculty, Hans Crombag also moved to Maastricht. By then, Job Cohen was responsible for teaching legal skills and he introduced a method for legal case solving, based on his work with Hans Crombag. This method has been used ever since, but with varying success. The success of the method depended strongly on the teachers’ acceptance of the method and their skills and enthusiasm to convey it to the students. To make the method teacher-independent, we decided in 1997 to try to make a computer implementation of this method. We started the project called JUCA together with the Open University in Heerlen. As the project evolved, we decided to make our own version (CoCo: Computer Ondersteund CasusOplossen; Computer Assisted Case Solving), because, at that time, the Open University did not wish to include any artificial intelligence (AI) in the program and for us it was an essential ingredient.

As a result of my doctoral research (supervised by Crombag and Cohen) on the development of an intelligent tutoring system (ITS) for case solving, I was convinced that, from an educational point of view, the program had to use AI-techniques to support its user in the best possible way. We started with the development of CoCo in the summer of 1998 and completed a working version in December 1999. The CoCo-program has become an ITS-shell that can be filled by a case constructor with a

1. Maastricht University, Faculty of Law, Department of educational innovation and information technology.
variety of legal cases. It can present these cases to the students, who can try to solve them with the aid of the program. This chapter will elaborate on the case-solving method as introduced by Hans Crombag in 1977 and its implementation in the computer program CoCo. Furthermore, this chapter will show how the method had to be altered in order to create a computer program. I will focus on the advantages as well as the disadvantages of having a computerized version of the method.

How to Solve Legal Cases

The process of solving legal cases strongly depends on the knowledge and experience of the problem solver in the problem area and the complexity of the case.⁴ Crombag et al. argue that for very inexperienced case solvers it is completely impossible to solve a case because they lack insight. The only way they can solve cases is by trial and error, and for complex cases this entails failure. They can reach to a solution of the case if more experienced problem solvers show or instruct them how to solve the case. But that does not make them case solvers, because they merely follow instructions. Only when they gain experience is there a chance that they are able to solve cases on their own.⁵

Crombag did some studies in which he tried to discover how experienced problem solvers dealt with this process of problem solving. He discovered that these problem solvers where not able to describe their problem solving process completely. They could only describe parts of it. These problem solvers considered problem-solving a form of art, which can only be achieved by long-term experience, and which is performed more or less intuitively.⁶ Experiments showed that these experienced case solvers had already found a (possible) solution for the case in an early stage of the problem solving process, which they tried to support with arguments during the process (working towards a solution). Moreover, the observer of these mental experiments concluded that the case-solving process was chaotic and unsystematic, whereas the case solver thought that this was not the case. Afterwards he⁷ told the observer that he had worked on several parts of the solution at the same time.⁸ From this experiment, one can draw the conclusion that case solving is a skill that can be acquired by observing experienced case solvers and by doing it yourself.

⁴ Crombag et al., 1977, op. cit. p. 17.
⁵ Crombag et al., 1977, op. cit. p. 18.
⁶ Crombag et al., 1977, op. cit. p. 20.
⁷ For the sake of readability, we will only use masculine personal pronouns.
⁸ Crombag et al., 1977, op. cit. p. 21.
Case Solving, a Rational Reconstruction

In 1969, Crombag et al. started with a rational reconstruction of the case-solving process for educational purposes: they wanted to design an instruction set that first-year law students could use in order to solve simple legal cases. Simple cases are cases that can be solved using simple legal rules or which involve simple legal dilemmas. They made some restrictions as to what kind of cases could be solved with this instruction set: (1) private-law cases could be solved; (2) the facts of the case are not disputed. All facts necessary for solving the case are given and none of these facts have to be proven; (3) only cases with one plaintiff and one defendant; and (4) there must be consensus about the legal content of the rules that are used to solve the case. There should be no discussion about how these rules had been formed or how the legal provisions of these rules must be interpreted.

A simple rational reconstruction of the case-solving process is depicted in the left part of Figure 1 and consists of eight steps. These eight steps were developed by Crombag et al., which led to a more complex scheme (right part of Figure 1). The idea is that the student must make an outline of the case. Based on this outline the student must find out what the legal problem(s) is (are) in this case in terms of what the plaintiff can claim under the law and on what legal grounds. For this it is important that the student is able to make a proper qualification of the case facts and events that took place. The better this qualification is, the likelier it will be that the student is able to solve the case properly. If the legal problem is clear enough, the student can try to solve it (Step 5 gives the student the possibility to explore different problem definitions). In Step 7, the student must consult legal sources, such as law books, case law and legal textbooks, in order to find the conditions under which the problem/claim can be solved/sustained. Crombag et al. say that the conditions which form the legal rule are not always clear. It depends on the translation of the claim/problem. Based on this translation, certain conditions will not be placed in the legal rule and some will remain implicit. For instance, when P claims the ownership of an object (movable property), Crombag et al. believe that the legal rule to be formed does not need to have any of the conditions that involve movable property, nor the explicit condition ‘object’. When the legal conditions are determined the student must test whether they are fulfilled or not (Step 10).

12. Rational reconstruction is even more complex, because Crombag (1977) worked out a version that decides upon the questions whether or not the defendant disputes the plaintiff’s claim or makes a counter-claim (pp. 74-76). Subroutine A is also worked out (p. 62) and is a sub-analysis of a condition using a new legal rule.
Figure 1: a simple and more advanced rational reconstruction of the case solving process by Crombag et al. (1977, op. cit. p. 54-55).
It is at this point that it looks like Crombag *et al.* only use rules that have cumulative conditions. Rules with alternative conditions – or even more complex rules using combinations of AND, OR and NOT to connect the conditions – are not given in their instruction set. To decide whether a condition is met in the legal case in hand, the student must test the condition. To test a condition, the student must find case facts or events that immediately answer the question whether the condition is met or not. Sometimes the meaning of the conditions is not sufficiently clear to test them. If this is the case, the student must look for new legal rules that better describe the conditions. This is done in Subroutine A and is called a sub-analysis of this condition. The sub-analysis is a recursive procedure that ends when all the conditions are tested against the case facts. This is one of the major problems in the instruction set, because it is not always (unambiguously) clear whether the case facts can be qualified in such a way, that they can be used for testing a condition.\(^\text{15}\) If there are not enough facts to decide whether a condition is fulfilled, then this is a problem that will not be dealt with using Crombag’s rational reconstruction. Cases the outcome of which depends on a burden of proof and cases depending on facts that need to be proven were excluded. When every applicable rule is tested, we have to decide which rule we want to apply to the case and find out whether the results are acceptable. If we deem the solution not acceptable, we must search for another rule that can be applied as a more acceptable solution to the case. Eventually, the case can be solved and a judgement can be passed.

### Using Rational Reconstruction in Legal Skills Training

This rational reconstruction as to how to solve legal cases has been used as a model for educational purposes ever since.\(^\text{16}\) Most of the Dutch law faculties use this model with slight adaptations. The version of the model we used in Maastricht consists of the following seven steps:

1. Define the legal problem which must be solved by:
   - Classifying the legal problem area (private, public, criminal law, etc.);

\(^{15}\) Crombag *et al.*, 1977, *op. cit.* p. 68.

• Determining the legal action that can be taken in this case.

2. Make a qualification of the relevant legal facts of the case regarding the legal problem found in Step 1.

3. Make a selection – using the outcome of steps 1 and 2 – of possibly applicable rules used for solving the legal problem;

• If there are several applicable rules to choose from, select the rule which will most likely solve the case. The other (alternative rules) can be used later on in Step 6.

4. Make a logical analysis of these rules in terms of legal conditions resulting in a legal consequence (make an abstract logical formula of every rule using proposition logic).

5. Test each legal condition of each legal rule using the qualification of the relevant legal facts in order to decide whether or not the conditions are fulfilled in this case;

• When all (necessary) conditions have been tested, the legal consequence can be logically derived from the logical formula of the legal rule;

• If the condition of a rule is unclear and therefore cannot be tested, try to find a new legal rule that clarifies this condition. Steps 3 to 5 must be repeated to find this rule.

6. Answer the problem using the derived legal consequences of the rules that can be applied to the case. Also decide whether the answer is acceptable (according to one’s sense of justice). If the answer is unacceptable, it is possible that the applied rule is not the right one, so Steps 3 to 6 must be repeated to find an alternative rule.

7. Render a written judgement for this case using the knowledge taken from Steps 1 to 6.

From years of experience using this method we can conclude that both students and teachers still find it difficult to solve cases with the aid of this model. Teachers, because the model is too explicit and does not involve intuition; students, because the model is very abstract and does not support their lack of legal knowledge.

Most of the tasks that have to be accomplished in this model are accomplished through explicit and thorough legal knowledge of the domain combined with a strong sense of justice. This is also the major problem in teaching legal case solving to first-year students. Our experience is, that these first-year students do not possess thorough legal knowledge of the problem-area that they could use to find and solve the legal problems satisfactorily. They lack a strong sense of justice and they find it difficult to analyze an abstract legal rule in the form of legal conditions leading to a legal consequence. They only have a common-sense notion of logic and therefore no proper understanding of how proposition logic works, which is used to construct the legal rules and derive their outcome. And, finally, they find it difficult to use an abstract legal rule in a concrete legal case in order to verify whether the rule applies.

In sum, students lack expertise and therefore do not know where to begin to solve a case (what legal problems they need to solve). Even Crombag's instruction set does
not provide enough guidance on how to proceed. For educational purposes, more instruction is needed and more guidance. But this takes time and practice and the law faculty is not too keen on spending time on solving cases so explicitly. A computer program that can help students learn how to use the method and let them practice could therefore bring some relief.

The Educational Objectives for Computer-assisted Legal Case-solving

First, we need a program that supports and incorporates the theoretical model for case-solving. Second, we need a program that guides the students through the process of case-solving. The program should not be too rigid, enabling the students to explore the legal domain. On the other hand, exploring evidently wrong solutions must not be allowed. The computer model must, however, be able to support sidetracks and the possibility to return to the right track leading to the solution of the case. The solution of the case may not always be fixed, but must be based on valid argumentation. The computer program must also help the students with the logical construction of rules and must give them some visual support for deriving the legal consequence of a rule. The ultimate goal is that students, by interacting with the program, practice legal case-solving and develop a sense of justice and an awareness of how to deal with the case solving process.

Design Problems Tackled while Implementing the Model of Case-solving

When thinking about implementation of the theoretical case-solving model, some design problems had to be solved. For instance, in order to make the flow of the program smoother and focus the attention of the student, per step, on a specific skill we had to alter the case-solving steps a little (see also Figure 3). This resulted in the following seven steps:
1. The first step is defining the problem that needs to be solved in the case. The computer offers the problem(s) to be solved to the student in the form of (a) Boolean question(s).
2. The second step involves the selection of a possibly applicable legal rule that may be used to solve the legal problem in Step 1, by selecting the source of law from which this rule can be derived.
3. The third step involves analyzing the rule of law from Step 2 and is divided into two steps:
   a) determining the legal conditions of the selected rule (the legal consequence is given by the computer).
   b) constructing a proposition logical formula of this legal rule using the legal conditions and the logical expressions AND, OR and NOT.
4. In the fourth step, the student has to test the legal conditions of the rule on the basis of the qualification of the relevant legal facts in order to decide whether or not the conditions are met in this case. In this step the legal consequence of the rule is eventually derived. If a condition cannot be tested, a ‘sub analysis’ can be made for this condition, Steps 2 to 5 repeating (see figure 2).

5. The fifth step is used to decide whether this rule must be applied in order to solve the case (or give a value to a sub-analyzed condition). If two derived rules are conflicting the student has to choose which one to use and on what legal grounds. If the student decides not to use the derived legal consequence in the case, the student goes back to Step 2 in order to find an alternative rule. Steps 2 to 5 will be repeated for this alternative rule (this is called an 'alternative analyses' of a legal rule).

6. In the sixth step, the student must have an answer to the problem using the derived legal consequence of the rule that can be applied to this case. The student must also decide whether this answer is acceptable. If the answer is deemed unacceptable, there is a possibility that (one of) the applied rule(s) is not the right one, so Steps 2 to 6 must be repeated for an alternative rule (this is also called an 'alternative analysis' of a legal rule).
7. In the final step, the student must pass a judgment for this case in a written form using the knowledge taken from Steps 1 through 6.

From the above description of the steps, one can see that we have altered the simple and complex rational reconstruction model used by Crombag (Figure 1) in several ways:

**Figure 3**: A more complex computer model for case solving in CoCo including the routines for a sub- and alternative analysis.
1. The computer program does not support the factual reconstruction of the case. During the first step, the student must select a proper problem-solving question. In order to do so, the student has to study the case description carefully and make this factual reconstruction and classification of the case domain in his mind and, if possible, qualify the case facts.

2. The computer program does not support selecting and analyzing more than one legal rule at one time. The student must select a source of law that contains the legal rule which can provide an answer to the problem selected. If there are several legal rules, the student must decide which one is most likely to succeed and start analyzing that one.

3. Since the student has selected a particular source of law, all the conditions of the legal rule under construction must be within this source of law. The problem is, that the more knowledge the student has, the more conditions the student will find in this source of law. Moreover, the case description and the problem definition will also influence the depth of the rule analysis. For this reason, the student needs a clue in order know to what detail the rule must be analyzed. The computer program will tell the student, therefore, how many conditions there are in this legal rule.

4. Conditions can be tested on the basis of case facts, arguments provided by the case constructor, and derived legal consequences. Testing a legal condition by using case facts is a process of qualifying these facts. In CoCo it is not possible for a condition not to receive a value. The logical value of a condition can be obtained directly by testing; indirectly through a sub-analysis; or even a combination of these. It is possible that this value differs depending on the weighing of the combined facts and arguments used in testing.

5. The student can only choose one rule to solve the case. In real life, it is possible that rules with the same legal consequence co-exist and be applied alternatively. Moreover, it is possible that the student has derived a legal consequence with the outcome of another rule of law analyzed earlier. In that case, the student has to choose which one to use and on what legal grounds. In Dutch law, priority between rules can be established with the help of the following priority-rules: ‘lex superior derogat legi inferior’, ‘lex specialis derogat legi generali’ and ‘lex posterior derogat legi priori’. The student needs to be constantly aware of this (also when choosing rules for sub-analysing a condition), because in step 5 the program will ask him the reason why he prefers that rule.

6. Solving the problem is merely a translation of the value of the derived consequence of the applied rule with regard to the Boolean question in Step 1 that needs to be answered. If this means that the answer to the question is unacceptable, the student has to decide whether to continue or look for alternative rules that can be used to solve the case. In our program, the question whether the outcome is acceptable or not is important, because the student is not able to examine all alternative rules for solving the case beforehand (as he would have done using Crombag’s instruction set).
Another problem that had to be tackled was the way in which students were to identify legal conditions in a source of law. It is impossible to let students type in the description of the legal condition, because there is a too large variety of good descriptions. Also from an educational point of view, it is not desirable that the student can choose from a finite set of possible descriptions, because the student could choose by recognition rather than knowledge. Therefore, in CoCo we let students mark words from the source of law in order to identify these words as a possible condition. To maintain flexibility, we make use of minimum markers and maximum markers. Minimum markers are the words that need to be marked in order to identify a condition. Maximum markers are words that students are allowed to mark next to the words within the minimum markers. Words outside the borders of maximum markers may not be marked in order to identify the condition. When a student has marked the proper words, the computer provides the corresponding description of the legal condition. The same solution, using minimum and maximum markers, has been chosen for the purpose of identifying relevant case facts in the case text.

It is our experience that legal students are not happy making typical proposition logic expressions in constructing the logical formula of a legal rule. Notations such as “(p AND NOT q) OR r” are far too abstract for the average law student (see also Figure 4). We learned that students found it easier to understand the implications of a rule when this rule was shown as a sort of electrical circuit diagram where the conditions are the switches and the consequence the light bulb. So on the basis of this metaphor, we constructed a graphical environment in which students could construct the formula in the form of parallel and series connections between conditions (see Figure 4). After they have been tested, the condition boxes (originally gray) turn green or red according to the test result (true or false). Eventually, the student has to derive the logical value of the consequence of the legal rule. If the student makes a mistake at this point, it is very easy to show why it is a mistake. We can color the connecting lines between the colored conditions in order to visualize what the color of the consequence should have been (does the electrical current light up the bulb or not?).

17. The screen shots that are used for this illustration are in Dutch, because the computer program and its content are in Dutch.
We discovered that it would be useful at several points in the program if it had a certain knowledge of proposition logic, for instance, for the following tasks:
1. The program must know whether the student has tested enough conditions in order to derive the consequence of a rule.
2. The program must be able to derive and graphically visualize (see above) the logical value of the consequence of a rule in order to test whether the student has derived the consequence correctly.
3. When a student composes a logical formula for a legal rule, the program must be able to test whether this formula is a correct representation of the rule. The case constructor has represented the rule in a certain way, but in proposition logic the same rule can be represented in various ways. For instance, the rule “\( \neg (p \land q) \lor r \)” can also be represented as “\( \neg p \lor \neg q \lor r \)”. Consequently the program must be able to test whether the student’s formula is logically the same as the case constructor’s formula, and if they are not the same, the program has to provide the student with intelligent feedback as to what is wrong with the student’s formula.

The first two problems can be tackled by implementing an inference mechanism that is based on proposition logic. If this inference mechanism can derive a solution
given the values of the tested conditions, the student is also allowed to assess the consequence. Since the computer is able to derive the consequence, it can test the student’s solution and even graphically represent the correct solution.

The third problem, however, is far more difficult to solve. Whether two formulas in propositional logic with the same consequence and the same conditions are equivalent can be tested in several ways (truth tables, semantic tableaux, resolution, etc.). We decided to rewrite both the student’s and the teacher’s formula in a disjunctive normal form and sort the logical groups and conditions unambiguously. By doing so, we should get exactly the same logical groups and conditions for both formulas. If the student’s rewritten formula misses a group, we can tell the student that his legal rule does not apply the case represented by the conditions of the missed group. If the student’s formula has a group too many, we can tell the student that the case represented by that group should not be decided upon by the proper legal rule. This way the computer can generate useful educational feedback when students make mistakes in creating a formal representation of a legal rule.

A problem we had to solve is that we wanted to reuse legal rules that were analyzed in solving a particular case for testing different events (in time and place) of the case. The idea is that the legal rule is the same, but the conditions of the legal rule have different meanings in testing. Consider the following case: “Mr. A wishes to sell his house. So his real-estate agent puts up a ‘For sale’-sign in Mr. A’s garden. Mr. B passes the sign and wants to buy the house. He asks the real-estate agent the price of the house, which is $220,000. Mr. B visits Mr. A and inspects the house. Upon inspection, Mr. B tells Mr. A he wants to buy the house for $200,000.”

The legal rule (article 6:217 section 1 BW) provides that there is ‘a contract of sale’ where there is an ‘offer’ and ‘acceptance of that offer’. The question now is whether the sign in the garden constitutes, or the real-estate agent mentioning the price is an offer, or the announcement of Mr. B that he wants to buy the house for $200,000 or is it perhaps the acceptance of an offer? When testing the abstract condition ‘offer’, it is unclear what circumstance in this case is considered an offer. We decided therefore to let the student make this abstract condition explicit in terms of the case. For instance, the condition ‘offer’ in this case may stand for ‘the ‘For-sale’-sign in the garden is an offer’ or ‘The real-estate agent mentioning the price is an offer’ or ‘Mr. B mentioning the purchase price is an offer’. By choosing one of these alternatives, the student states explicitly the meaning of the condition and the computer knows exactly what implication of the condition is tested. In this way, a legal rule, which can be applied more than once, depending on the different situations in the case, will have the same abstraction level and can be tested frequently with different implications. Thus, several implications of an abstract rule can exist within the set of rules that govern the case solution. We are now able to even solve different problems using the same case (problem space), because we can use the derived results from the one problem as arguments or derived facts for the solution of another problem within the case.
We want to avoid students getting frustrated because they are not able to accomplish a certain task within the process of solving a case. We need therefore express educational feedback when students make mistakes and if they continue making these mistakes after the feedback has been provided, the program must show them how they should have accomplished the task and, if possible, why. In this way, the student will always be able to reach a solution for the problem he had to solve.

**Advantages and Disadvantages of a Computerized Version**

There are several disadvantages of having a computerized version of the case-solving method:

- There is a closed-world assumption for solving a case in CoCo. Facts and arguments that are not expressly stated in the case description or provided by the case constructor are nonexistent and cannot be used. Furthermore, only the legal rules provided by the program can be used for solving the case, whereas in the real world there may be other rules that can also be used to solve the case.

- There is no flexibility as to what conditions can be used to construct a legal rule. There are a fixed number of conditions in the rule and the description of these conditions. If a student has a different insight into the subject matter or a higher level of expertise than the case constructor expected, it will be difficult for this student to find the correct conditions.

- Testing conditions is sometimes a tedious experience. The combination in which case facts and arguments can be used to test a condition is not always clear. In CoCo, the case constructor can construct more than one test rule for a condition (test rules define the combination of facts and arguments leading to a particular value for the condition), but this still does not fully solve the problem. If there are more combinations of facts and arguments it is difficult for the case constructor to foresee all possible combinations of these facts and arguments.

- Because the case description must be so explicit in CoCo in order to find case facts, the students will not learn to translate a case description represented in normal language into a typical legal case with legal terms.

- In CoCo it is not possible for the student to focus only on the crucial facts of the case and the conditions of a rule. He has to formalize all the rules that are needed for solving the case. Furthermore, he needs to test all the conditions that are necessary for solving the case explicitly even if it is absolutely clear to him that a particular condition has or has not been met.

- The program will provide and help the student with the steps he has to take to solve the case. There is no guarantee that the student will recollect and follow the steps when he has to solve a case without the help of this computer program.

- Because we teach the student to solve cases with the aid of CoCo, we are not able to test his skill on paper, because he has never constructed a legal rule on paper.
The graphical representation of the rule is not easy to create on paper, so if we want to test the student on paper without the computer we need a different system of annotation. The program, however, translates the graphical representation of the rule into a notation scheme that can be used for on-paper representation of the rule. The program also provides the student with instructions on how to make an on-paper representation of the rule. However, the student cannot make this on-paper representation of the rule with the aid of the program. So they cannot practice this task.

- It is not clear whether really complex cases can be solved using CoCo. We have never tested CoCo with very complex legal cases, but we are sure that there will be cases that cannot be solved using CoCo.
- Legal problem solving using CoCo is a process involving considerable computer skills. Furthermore, students tell us that legal problem solving in CoCo feels like a mathematical process instead of a legal process. This is merely because of the explicit and very important role of the formalization of legal rules and the use of proposition logic. It is also this part of the program that puts students off.
- Watching an experienced human problem solver will still be more instructive than using a computer program.

There are also advantages in using a computer program for legal problem solving:

- In the real world students feel lost at times, because they do not know where to begin and what material to use during the problem-solving process. In CoCo they always know what to do next and where to start. The closed-world assumption can be very comforting to these people.
- By formalizing legal rules, students gain more insight into the operation of these legal rules. Furthermore, students need very explicit legal knowledge in order to formalize a legal rule. They have to think very hard and read the source of law very carefully in order properly to construct the rule. This analytic experience is a basic skill that is used throughout the legal field, although most of the time not so explicitly.
- When an experienced case solver solves a case, he will only deal with the crucial facts and rules that are particular and essential for solving the case. In CoCo, an inexperienced student can discover these for himself by analyzing and testing all necessary rules and will acquire knowledge that way. Only at Step 7 is he requested to state the crucial facts and conditions that have led to his judgment.
- Learning the case-solving method is teacher-independent now. All students will learn the same method and all cases are solved in the same way (although the solutions may differ). Using CoCo as an assessment tool all students can be tested the same way and the assessment of their work is more impartial.
- Even inexperienced case solvers are able to solve cases with CoCo. They will make a lot of mistakes, but eventually, with the help of the program, they will solve the case and have learned something through the experience.
Students are not solely depending on experienced case solvers who will show them how to solve a case. With the computer program, they can solve cases on their own and in their own time, and do this over and over again. This way, they are able to gain more experience.

Wishing a computerized version of the case-solving method, we had to make a more explicit model of how cases can be solved than Crombag et al. described in their work. This model must deal with all sorts of problems a legal practitioner is faced with. Most of the time he may not even be aware that this could be a problem. For instance, can rules, that have the same legal consequence and the same or different values derived for these legal consequences, all be valid in this problem space? We also had to deal with rules that did not have the exact same legal consequence, but these legal consequences exclude each other, they cannot be fulfilled at the same time. Furthermore, we had to deal with rules that are used to derive the value of a condition using a sub-analysis. If these rules do not have a finite set of conditions, there is a problem. For instance, when a rule consists of a non-exhaustive list of conditions, it is obvious that the legal consequence of the rule will take place when any one of these conditions is met. But if none of these conditions has been met, it is not so obvious that the legal consequence will not occur, because there may be an implied condition that still is relevant for reaching the legal consequence. If a rule is used in a sub-analysis that has as a legal consequence the negation of the condition that is sub-analyzed, we must take care in passing the value of the derived consequence to the sub-analyzed condition. For this reason, the CoCo-program has become (also from a legal point of view) a very complex program and designing CoCo-cases far from easy.

Conclusions and Future Work

Basing ourselves on the work of Crombag et al., we constructed an ITS-shell called CoCo that can be used by a case constructor to formalize a legal case and by students to learn how cases can be solved using a generic method. This generic method is translated into an explicit computer model that helps the students find their way through the process of solving legal cases. In order to do this, we had to slightly alter Crombag’s model dealing with problems such as: defining legal problems, using alternative rules, dealing with conflicting rules, how reuse legal rules for different events in the same case, how find conditions in a source of law, how put a legal rule into a logical formula for using a formal language, how test conditions by weighing facts, arguments and derived conclusions and how transpose value of a derived conclusion onto a the legal condition. By making this computer model we feel we have made Crombag’s initial ideas more explicit. On the other hand, the case-solving process (in the computer model and in Crombag’s model) is still too simple to deal with complicated legal cases containing a burden of proof or requiring the formulation of a new legal rule.
The steps of the computer model are based upon the different legal skills needed for solving legal cases. These steps must be taken expressly by the student in order to reach the solution for a specific case. Each step has its own educational goals and therefore its own educational responses. The educational responses are case-dependent and will be derived by the computer from explicit legal knowledge (introduced into the system by the case constructor) as to what the student can do at that moment based on what he has done. The system uses AI-techniques in order to ascertain whether the student takes steps that can be supported by the generic computer model. Because of this, the system supports different solutions and different paths to reach solutions. In this way, the system is consistent with legal practice. A solution can only be reached by explicit argumentation as to why a certain condition is really applicable to the case or not. In the end, the system presents an overview of the complete path that has led to the solution of the case. The student can use this overview and the knowledge from each and every step for passing judgment on the case.

At the moment, there are seven cases available within the CoCo-system. The program and cases are made available to over 600 first-year students. We provided them with a good introduction to the method and a well-documented user manual for working with the CoCo-program.

There were some initial programming errors that needed to be fixed. We also overestimated the student computer skills. However, students who gave the program a serious try were enthusiastic. From a case constructor’s point of view, it was found easier to create new cases in CoCo from scratch than to translate cases from the time before the computer program. The main reason for this was that the facts which must be derived from the case text were harder to find when using the old materials. When constructing our own cases we made the case facts more explicit in the case text. Thus the testing of conditions is now more uniform. From an educational point of view, we would like to make the program even more intelligent, constructing a specific student report that shows the student the skills he masters (following the individual steps of the computer model) and the skills that need to be practiced. This can be done on a case-by-case basis. Eventually, the student can be shown his progress through the cases. Furthermore, we construct a report on the student’s domain knowledge. We could confront the student with this lack of knowledge of a certain legal rule or of the relations between legal rules in a specific domain or of the meaning of certain legal conditions. The student’s legal reasoning can also be used to make some statements about his knowledge of the domain. At the end we could also say something about the student’s knowledge of formal logic and his use of the logical derivation rules. We can even use these student-reports to make a suggestion in the next case the student has to solve. At the moment, all these features are available in a special program that we have designed to grade the student’s test results.

In the first-year curriculum at the Maastricht University Faculty of Law, one of the two skills-exams will involve solving a case with the aid of the CoCo-program. In June
2000 15 night-class students were tested that way. As said before, we have developed a special program that can analyze and assess the test results of the students. All students passed the test. From the results it was obvious that they practiced a lot with the CoCo-program. There is a good chance that next year the day-time students will also be tested using the CoCo-program.
Dialectical Argumentation as a Heuristic for Courtroom Decision-Making

Bart Verheij

Introduction

In his 1994 article ‘On the Artificiality of Artificial Intelligence’, Crombag claims that artificial intelligence (of the symbolic kind) is of little psychological relevance. According to Crombag, our understanding of the mind (and of the legal mind in particular) is hardly enhanced by artificial intelligence research. The main reason for his opinion is that there is no indication that the human brain is like a digital computer in structure or in behaviour.

I agree with Crombag that digital computers and the human brain are very different in structure. However, no one – not even the far too optimistic advocates of good old fashioned artificial intelligence of the 60s – has ever expressed an opinion to the contrary.

I disagree with Crombag that digital computers and brains are different in behaviour. Of course a desktop computer (often used for text and message processing only) is very different in behaviour from the human brain, but that is irrelevant. In an important sense, digital computers and brains can be similar in behaviour. The key point is that digital computers can be programmed, and that there is virtually no limit to the kinds of programs that can run on digital computers. From the perspective of information processing, digital computers are good approximations of implemented universal Turing machines, which essentially means that they can be programmed to mimic any kind of information processing.

Yes, any kind. Not only logical reasoning and playing chess, but also interpreting visual data and finding analogies are forms of information processing. Even legal reasoning can fruitfully be viewed as a kind of information processing. Thagard’s introduction to cognitive science offers many examples of what he calls the computational-representational view of the mind.

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This does not mean that if a digital computer mimics certain brain behaviour, it mimics this behaviour at all levels of inspection. Of course not: a digital computer is not the same as a human brain. If one probes deep enough, the differences become obvious. It remains a miraculous fact that at a sufficiently high level digital computers can mimic any kind of information processing behaviour. Even though, internally, the digital computer Deep Blue and Kasparov’s brain found their chess moves in very different ways, at the level of playing grandmaster chess Deep Blue’s and Kasparov’s behaviour was very similar.

The only limitations of the information processing capabilities of digital computers are computational speed and memory, but these are being reduced at a rapid pace.

Crombag paraphrases the well-known connectionist challenge to artificial intelligence of the symbolic kind, advocating neural network models. The challenge boils down to designing a model with a slightly deeper level of detail than in symbolic artificial intelligence. Instead of only looking at the entire brain as an information processor, the role of individual brain cells and their interconnections is taken into account.

Interestingly, a more recent challenge to traditional artificial intelligence does not consider the level of the individual brain too high (as in the connectionist challenge), but too low. The higher level of interaction of the brain with its environment and with other brains is given due attention.

The best models of brain behaviour must, of course, take all interconnecting levels of examining the brain’s behaviour into account: the low level of brain cells, the intermediate level of the brain, and the high level of communicating brains interacting with their environment.

However, the psychological relevance of artificial intelligence is not to be found in the claim that digital computers can behave as the brain does. The importance of the rise of artificial intelligence is that it has added a powerful tool to the research methodologies of psychology: models of brain behaviour can now be successfully implemented on digital computers.

This new methodology has at least three advantages. First, the objective of implementing a brain behaviour model on a digital computer sets very high standards to the design of the model itself. It must be unambiguous, precise and detailed. The popularity of formal modeling is a consequence of this. Second, computer models show objectively determinable behaviour that can be the object of empirical study. As a result, the testability of brain behaviour models has increased. Third, it is easy to conduct experiments with computer models. Parameters of a model can be adjusted and the behavioural consequences can be studied. This leads to useful ‘pre-empirical’ testing of brain behaviour models. Many unwanted or unexpected types of behaviour pre-

4. Crombag, 1994, _op. cit._
5. Some think that the brain-cell level is not sufficiently detailed. Even the level of the quantum physics of the brain has been defended as essential, though, in my view, unconvincingly.
dicted by the model can be spotted in the modelling phase, instead of at the later phase of empirical testing.

In the present paper, two approaches towards modelling legal decision-making are discussed and compared: the anchored narrative and the dialectical argumentation approach. The former (by Crombag, Van Koppen and Wagenaar) originates from psychology of law, the latter from artificial intelligence and law.

Modelling Legal Decision Making

Trying criminal cases is hard. The problem faced by a judge at trial can be expressed in a deceptively simple way though: in order to reach a judgement, the judge must apply the legal rules to the facts of the case. In a naïve and often criticized model of legal decision-making (the view of the judge as the bouche de la loi), the judgement is reached by applying the legal rules that match the case facts. This naïve model of legal decision making can be referred to as the subsumption model.

A problem with the subsumption model is that neither the legal rules nor the case facts are available to the legal decision-maker in a sufficiently well-structured form so as to make the processes of matching and applying a trivial matter. First, there is the problem of determining the legal rules and the facts in the case. Neither the rules nor the facts are presented to the judge in a precise and unambiguous way. Judges have to interpret the available information on the legal rules and the facts.

Second, even if the legal rules and the case facts would be readily available, the processes of matching and applying can be problematic. For instance, it may not be clear whether a fact falls under a particular rule’s condition. Additional classificatory rules are then needed. In general, it may occur that applying the legal rules leads to conflicting judgements on the case in hand, or to no decision at all. In the latter case, it is at the judge’s discretion to fill the gap; in the former, he has to resolve the conflict. In either case, the judge should provide some further justification for his opinion.

As a result of these difficulties, many consider legal decision making as a kind of gradual theory construction. By selecting and interpreting the available material (legal codes, police reports, court pleadings, etc.), the decision maker constructs a preliminary theory on the applicable rules, the facts proven and the appropriate judgement. He then performs a number of checks on the preliminary theory. Are there no inconsistencies? Is the judgement justified? If necessary, the theory is adapted to remedy possible weaknesses.

In several disciplines, models of legal decision making have been designed along the lines of gradual theory construction. For instance, in psychology of law, Crombag, Van Koppen and Wagenaar have proposed the anchored-narrative approach towards

the modelling of legal decision-making. Legal decisions are seen as structured stories, anchored in common knowledge.

When Crombag, Van Koppen and Wagenaar contrast their theory with logical inference theories, they allude to the possibility of extended logical systems that are better suited as models of legal decision-making than the subsumption model. Especially in the field of artificial intelligence and law, such extended logical systems have indeed been designed. Among the topics addressed in such extended legal logics are exceptions, inconsistencies, gaps, contingent validity and rule properties. Below, the focus is on a theory of dialectical argumentation, characterized by the exchange of arguments and counterarguments, as designed and developed within the context of the experimental argument assistance system ArguMed.

**Anchored Narratives**

In their books, Crombag, Van Koppen and Wagenaar present the theory of anchored narratives as a model of legal decision-making. The starting point of the theory is that proof in a criminal trial essentially consists in telling a good story. In the following, the theory of anchored narratives is summarized. More information about the theory and many examples of it can be found in the books mentioned.

In the theory of anchored narratives, judges make two assessments in criminal cases. First, they determine whether the stories of the parties before them (i.e., the prosecution and the defense) are plausible. Here the quality (or goodness) of the stories is at issue. Second, judges assess whether the available evidence is sufficiently supported by facts. This is where the anchoring of stories is examined.

Crombag, Van Koppen and Wagenaar consider their theory to be part of the tradition of narrative theory in cognitive psychology. In this tradition, stories (or narra-

tives) provide the context that gives meaning to their elements. This can even be illustrated by the following mini-story:

Peter fired a gun. George was hurt.

When told this mini-story, one is inclined to assume that George was hurt by Peter’s firing the gun. This is however not an explicit part of the story, and can be false.

In their discussion of the quality of stories, Crombag, Van Koppen and Wagenaar focused on story grammars. They picked the story grammar as proposed by Bennett and Feldman, and extended by Pennington and Hastie. According to Bennett and Feldman, a good story has a central action, to which all elements of the story are related. A good story does not have loose ends. Moreover, in a good story the setting of the action unambiguously explains why the central action occurred as it did. If it fails to do so, there are elements missing from the story, or there are contradictions. Note that the constraint of a central action can explain why one is inclined to assume that George was hurt by Peter firing the gun: by the assumption, the two elements of the mini-story are connected.

Crombag, Van Koppen and Wagenaar describe how Pennington and Hastie have extended Bennett and Feldman’s theory. Pennington and Hastie distinguish three types of factors that can explain actions: physical conditions, psychological conditions and goals. Again, a general setting connects the elements. In the context of criminal cases, a good story must contain the accused’s motive, and show that the accused had the opportunity to commit the crime.

An experiment by Pennington and Hastie has shown that a good story of a criminal case (i.e., a story that contains all the elements prescribed by the story grammar) does not guarantee a unique outcome. It turned out that by different selections and evaluations of the evidence test persons arrived at outcomes ranging from first-degree murder, through second-degree murder and manslaughter, to self-defense. In another experiment, Pennington and Hastie showed the influence of story order on judgements. It turned out that if a party’s story was told to the test person in story order rather than random order, such as the witness order, the test person more easily followed that party’s story in the judgement. It turned out that if the prosecution’s story was told in story order, while the defence’s story was told in random order, the accused was convicted in 78 percent of the cases. If, on the other hand, the prosecution’s story was told in random order and the defence’s in story order, the accused was convicted...

in 31 percent of the cases. Crombag, Van Koppen and Wagenaar conclude that telling the story well is half the effort.

Crombag, Van Koppen and Wagenaar claim that story anchoring is needed in order to justify why a story is assumed to be true. For instance, the statement by a policeman that he saw Peter firing a gun at George, can support that Peter indeed fired a gun at George. By itself, the evidence consisting of the policeman’s statement does not prove that Peter fired a gun at George. If the policeman’s statement is considered as proof, it is as a result of accepting the general rule that policemen tell the truth. Rules need not be universally true; there can be exceptions. No one believes that policemen always tell the truth, but many hold to the belief that policemen tell the truth most of the time. According to Crombag, Van Koppen and Wagenaar, there are common sense, generally true rules that underlie the acceptance or rejection of a piece of evidence as proof. They refer to such rules as anchors.

Crombag, Van Koppen and Wagenaar note that different legal systems not only use different rules as anchors, but even opposite rules. They give the example of the assessment of confessions. Under English law, a conviction can be based solely on the accused’s confession, whereas in Dutch law, additional evidence is required. This suggests that the English apply the anchoring rule that confessions are usually true, and the Dutch the opposite rule: that confessions are often untrue.

Since the rules used as anchors can have exceptions, it may be necessary to show that a particular exception does not occur. Crombag, Van Koppen and Wagenaar discuss the example of the truthfulness of witnesses.14 Even if one assumes that witnesses normally tell the truth, the rule is not a safe anchor if the witness has a good reason to lie. Additional evidence is required, for instance, the testimony of a second witness. Even if both witnesses are unreliable, because they have good reasons for lying, it can be argued that, if their testimonies coincide, the combined statements suffice as proof. In that case, the anchor would be that usually lying witnesses do not tell the same lies. There is, however, again an exception: if the two testimonies are not independent, for instance, because the witnesses have conferred, the anchoring is again not safe. Below, I return to this discussion of the truthfulness of witnesses in the context of dialectical argumentation.

In the theory of anchored narratives, stories are hierarchically structured. The main story may consist of substories that in turn contain sub-substories, and so on. The idea is that each substory is a further specification of the story or one of its parts. In each substory, a rule is used as an anchor to connect one or more pieces of evidence to the decision of the story or to part of the decision. A difficulty arises from the fact that the rules used as anchors often remain implicit. Making the naïvely adopted rule explicit may prompt us to reject it.\(^{15}\)

When one reaches to a deeper level in the story hierarchy, the anchors will become more and more specific, and as such safer. For instance, at a high level, the anchoring rule could be that usually witnesses tell the truth, while at a deeper level it could be replaced by the rule that witnesses with no good reason for lying normally tell the truth. The figure on the previous page illustrates the theory of anchored narratives.\(^{16}\)

The use of rules as anchors provides the theory of anchored narratives with a deductive element. A decision follows from the evidence on the basis of a general rule. According to Crombag, Van Koppen and Wagenaar, anchoring is not equal to subsuming under a rule, since rules can have exceptions.\(^{17}\)

Crombag, Van Koppen and Wagenaar use their theory of anchored narratives in order to explain what they call dubious cases (or dubious convictions). In their terminology, a criminal conviction is dubious, if the District Court’s judgement was reversed by the Court of Appeal, because of a different appreciation of the evidence, or if the defence attorney remained strongly convinced of his client’s innocence, even after

(repeated) conviction. Thirty-five of such dubious cases were obtained from criminal lawyers, or selected from the cases, in which one of the authors served as an expert witness. Crombag, Van Koppen and Wagenaar claim that their set of cases supports the theory of anchored narratives, since the anomalies which occurred in the cases can only be explained by their theory.

**Dialectical Arguments**

Another approach towards legal decision-making does not focus on stories, but rather on the dialectical nature of argumentation: argumentation does not only involve support by reasons, but also attack by counterarguments.

In a standard view, arguments express the way in which a conclusion is supported by a set of premises. In this view, arguments can be thought of as reason/conclusion-structures, or as formal derivations. The following argument serves as an example:

(1) Peter shot George because witness A states that Peter shot George. Consequently it should be investigated whether Peter murdered George.

In this argument, the statement that witness A declares that Peter shot George, is a reason for the conclusion that Peter shot George, which in turn is a reason for the conclusion that it should be investigated whether Peter murdered George. The argument does not explicitly state why the testimony is considered a reason for the occurrence of the shooting incident, nor why the shooting incident is a reason for the murder investigation. One could, for instance, argue that witness testimonies are often truthful, and that shooting incidents are to be investigated. Below we return to such backings of argument steps (that are logically comparable to the anchors of Crombag, Van Koppen and Wagenaar).

In the standard view, there is no room for the idea of counterarguments. However, it may be the case that one statement in an argument attacks another statement. An example is the following:

(2) It looks as if Peter shot George, because witness A states that Peter shot George. However, since witness A is unreliable, A’s testimony does not support the conclusion that Peter shot George.

---

In the argument, the statement that witness A is unreliable, attacks the alleged connection between the reason that witness A states that Peter shot George, and the conclusion that Peter shot George.\(^{19}\)

Arguments that not only contain supporting reasons, but also attacking reasons, are dialectical arguments. Argument (2) is an example. Dialectical arguments are a generalization of the arguments in the standard view, in which arguments only contain supporting reasons.

Dialectical arguments arise naturally if one studies defeasible argumentation, which is currently the topic of much research. In defeasible argumentation, an argument that first justifies its conclusion, may in a later stage no longer do so since it is attacked and defeated by a counterargument. In the following, a theory of dialectical arguments is outlined. An earlier version of the theory has been used in the development of the argument assistance system ArguMed.\(^{20}\)

Dialectical arguments are structured sets of statements (here we restrict ourselves to finite dialectical arguments). Each dialectical argument is constructed from an initial statement, by consecutively adducing statements supporting or attacking previous statements.

In the following figure, a dialectical argument is graphically represented. It is constructed from the initial statement that it should be investigated whether Peter murdered George, by first adducing the statement that Peter shot George as a reason for the initial statement, and second the statement that witness A states that Peter shot George as a reason for the statement that Peter shot George.

The dialectical argument above is not dialectical in its proper sense, since it does not contain attacking statements. The following figure represents a proper dialectical argument:

20. Verheij, *op. cit*. An argument assistance system is a computer program that serves as an aid to draft and generate arguments. Argument-assistance systems should be distinguished from the more common automated reasoning systems. The latter automatically perform reasoning on the basis of the information in their 'knowledge base', while the former merely assist the user's reasoning process. For more information, the reader is referred to the author's web site on automated argument system at www.metajur.unimaas.nl/~bart/aaa/. ArguMed and its predecessor Argue! can be downloaded.
Here the statement that witness A is unreliable attacks the connection between A’s testimony and the shooting incident. Statements can also attack other statements, as in the dialectical argument represented in the following figure. Here, B’s testimony that Peter did not shoot George is a reason attacking the statement that Peter shot George.

The connection between a reason and a conclusion cannot only be attacked, it can also be supported. An example is given in the following figure. The statement that witness testimonies are often truthful, is adduced as a reason supporting the connection between A’s testimony and the shooting incident.

The statement that witness testimonies are often truthful serves as a backing of the supporting argument step.21

Dialectical arguments can be evaluated contingent on a particular set of (defeasible) assumptions. The following figure shows an evaluated dialectical argument.

The argument is evaluated on the basis of the assumption that witness A states that Peter shot George. It then follows that Peter shot George, and that it should be investigated whether Peter murdered George. Assumptions are preceded by an exclamation mark, all other statements by a question mark. Statements that are not assumptions, are referred to as issues. In the argument above, all three statements are evaluated as justified, which is indicated by the use of a dark, bold font. The statement that witness A states that Peter shot George, is justified, since it is an assumption and there is no statement attacking it. The other two statements are justified, since there are reasons justifying them.

Since statements can be attacked, the statements in an evaluated dialectical argument are not necessarily all justified. An example is shown in the following figure.

The statement that witness A is unreliable is a second assumption. It has the effect that A’s testimony is no longer a reason justifying the statement that Peter shot George. As a result, the statement that Peter shot George is not justified: it is not an assumption, and there is no supporting reason justifying it. The statement is also not defeated, because there is no attacking statement defeating it. The light, italic font indicates that the statement that Peter shot George, is neither justified nor defeated.

The following figure shows an evaluated dialectical argument in which a defeated statement occurs.

The statement that witness B states that Peter did not shoot George, attacks the statement that Peter shot George. Since it is an assumption, it is justified, and therefore it defeats the statement that Peter shot George. The bold struck-through font indicates that the statement has been defeated. If the statement that Peter shot
George, had been an assumption, instead of an issue, it would still be defeated. All assumptions are defeasible: if there is an attacking statement defeating an assumption, it is defeated.

Not all dialectical arguments can be evaluated on the basis of any set of assumptions. An example is the argument in which there are opposing testimonies with regard to the shooting incident:

If the two witness statements are assumptions, the dialectical argument cannot be evaluated. The statement that Peter shot George, would have to be justified, since there is a statement justifying it, and, at the same time, defeated, since there is a statement defeating it.

If a dialectical argument can be evaluated with respect to any set of assumptions, the evaluation is not necessarily unique. Multiple evaluations occur, for instance, if two statements attack each other. The figure below shows the two evaluations that arise if the statements that Peter shot George and its negation attack each other.

In the appendix, a formal version of the theory of dialectical arguments is briefly presented. The formal version uses two connectives $\rightarrow$ and $\times$ in order to express the support and attack relation between statements, respectively. A sentence of the form $\varphi \rightarrow \psi$ (where $\varphi$ and $\psi$ are sentences) expresses that the statement (expressed by the sentence) $\varphi$ supports the statement $\psi$, and the sentence $\varphi \times \psi$ expresses that $\varphi$ attacks $\psi$. Using this logical language, the evaluated dialectical argument in the following figure can be formalized as a one-step *Modus ponens* derivation:

$$
\frac{p \rightarrow q \quad p}{q}
$$

Here $p$ abbreviates ‘Witness A states that Peter shot George’ and $q$ ‘Peter shot George’. In the *Modus ponens* derivation, the implicit assumption $p \rightarrow q$ underlying the argument step occurs as an explicit premise. One could read $p \rightarrow q$ for instance as ‘If witness A states that Peter shot George, then Peter shot George’.
The sentences $\varphi \rightarrow \psi$ and $\varphi \not\rightarrow \psi$ can be thought of as the warrants of supporting and attacking argument steps. The warrant of an argument step can itself be supported, as is shown in the evaluated dialectical argument below.

If $r$ abbreviates the sentence “Witness testimonies are often truthful”, then the argument can be formalized as a derivation consisting of two chained instances of *Modus ponens*:

$$
\begin{array}{c}
 r \rightarrow (p \rightarrow q) & r \\
 p \rightarrow q & p \\
 & q 
\end{array}
$$

In the derivation, the conditional sentences $p \rightarrow q$ and $r \rightarrow (p \rightarrow q)$ occur as premises, making implicit assumptions of the argument explicit. Statements supporting the warrant of a supporting argument step are similar to Toulmin’s backings and Crombag, Van Koppen and Wagenaar’s anchors.

Note that *Modus ponens* derivations only correspond to dialectical arguments which do not contain attacking statements, nor statements supported by more than one reason. As a result, the notion of a dialectical argument is a true generalisation of the notion of a *Modus ponens* derivation.

**Dialectical Argumentation**

The dialectical arguments as discussed earlier can be taken as the starting point for a theory of *dialectical argumentation*. Here dialectical argumentation is considered as a process involving several kinds of events, or *argument moves*:

- *Statements are made*, either by raising an issue, by making an assumption, or by changing an issue into an assumption or vice versa.

- *Statements are supported*, by adducing a new reason for a statement, by drawing a new conclusion from a statement, or by turning a statement into a reason for another statement.

- *Statements are attacked*, by adducing a counterargument to a statement, by adding a new statement to which an earlier statement is a counterargument, or by turning a statement into a counterargument to another statement.23

An important characteristic of dialectical argumentation is that the statuses of the statements can change during the process. A statement may, for instance, be justified at one stage, whereas it is defeated at the next. Below, an example of a line of argumentation is discussed, based on the truthfulness of witnesses.24

A line of argumentation can start, for instance, with two statements, viz. that Peter shot George and that witnesses A and B state that Peter shot George. Since the former statement is an issue (as is indicated by the question mark), it is not justified (and also not defeated). The latter statement is justified since it is an assumption (as indicated by the exclamation mark) that is not attacked by another statement.

The double testimony is turned into a reason for the issue whether Peter shot George. As a result, the issue is now justified, since there is a justifying reason for it.

On second thought, the connection between reason and conclusion is turned into an issue (as indicated by the change in color25): do A and B’s testimonies really justify

23. Here, the possibility of *withdrawing* statements is not considered. Withdrawal occurs, for instance, in two types of situations: 1. The statement was an assumption, which one no longer wants to assume. 2. The statement is defeated by a counterargument. In the present context of dialectical arguments, the former type of situation can be dealt with by turning an assumption into an issue, and the latter by raising the counterargument as a statement attacking the defeated statement. In neither of these withdrawal situations, a new type of argument move is needed.


25. In the black and white version of the paper, the change in color is unfortunately hardly visible. The color version can be obtained from the web at www.metajur.unimaas.nl/~bart/papers/.
that Peter shot George? The reason is no longer justifying, and the conclusion that Peter shot George no longer justified:

The line of argumentation continues by making explicit why A and B’s testimonies would justify that Peter shot George. A backing of the supporting step is adduced, viz. that witness testimonies are often truthful. As a result, it is again justified that Peter shot George.

Some further investigation on the case shows that the witnesses A and B are unreliable, for instance, because they have good reasons to lie. As a result, the general rule that witness testimonies are often truthful, fails to serve as a backing. It does not justify that A and B’s testimonies justify that Peter shot George. The issue whether Peter shot George is again not settled: it is neither justified nor defeated. The result is the following evaluated dialectical argument:

Note that the supporting connection between the backing that witness testimonies are often truthful, and the warrant of the argument step that Peter shot George, because of A and B’s testimonies, is a dotted line. This indicates that the backing does not justify the warrant.

Suppose that an expert states that the counterargument that the witnesses are unreliable, is no good: normally lying witnesses do not tell the same lies. This expert statement attacks and defeats the counter-argument of A and B’s unreliability. In the following figure, this is indicated by the use of a dotted connection between the attacking and the attacked statement. The regular truthfulness of witnesses again works as backing, and it is once more justified that Peter shot George.
It turns out, however, that the expert’s opinion that normally lying witnesses do not tell the same lies, is irrelevant, since the witnesses have conferred. It is no surprise, therefore, that they tell the same stories, and if they are unreliable, they might well be the same lies. A and B’s unreliability again serves as a counterargument, and prevents the regular truthfulness of witnesses from serving as a backing of the initial argument that Peter shot George, because A and B testified that he did.

Finally, the issue whether Peter shot George is settled by C’s testimony that Peter did not shoot George. It follows that the conclusion that Peter shot George is defeated. The following argument also shows the reason why C’s testimony settles the issue:
The evaluated dialectical argument contains, for instance, the following information:

- The *prima facie* reason that witnesses A and B state that Peter shot George, does not justify that Peter shot George.
- Since witness testimonies are often truthful, A and B’s testimonies would normally justify that Peter shot George. This is not the case here, because the witnesses are unreliable.
- It could be argued that the unreliability is irrelevant, since lying witnesses do not tell the same lies. However, this counter-argument is ineffective, because the witnesses A and B have conferred.
- The conclusion that Peter shot George is even defeated, because witness C states that Peter did not shoot George. As a backing, it is adduced that witness C is a policeman.

During the line of argumentation outlined above, the status of the issue whether Peter shot George, changed at each stage, and was eventually settled as defeated.

The theory of dialectical argumentation as outlined above can be used to formulate heuristics for courtroom decision-making. Such heuristics prescribe at what point a judge can stop his line of reasoning and at what point he must continue it in order to reach a better decision.

When can a line of argumentation stop? Four types of questions need to be answered in the affirmative:\textsuperscript{26}

1. *Is any (justified) assumption sufficiently obvious?*

\textsuperscript{26} A precondition for stopping a line of reasoning is that the dialectical argument or arguments can be evaluated here in only one way with respect to the assumptions. For present purposes, this precondition is not further discussed.
If not, the assumption should be turned into an issue, and requires support of its own. In criminal court settings, statements taken literally from a testimony or a police report, can often serve as sufficiently obvious assumptions. Notice that their obviousness does not imply that they are justified; since assumptions are defeasible, they are not immune to counterarguments. Other examples of sufficiently obvious assumptions include generally agreed upon facts and rules. In the ultimate dialectical argument above, the statement that witnesses A and B are unreliable is an example of a statement that is not sufficiently obvious and requires further support. It should therefore be turned into an issue.

2. For any justifying or defeating statement, is it clear why it is supporting or attacking in the first place?

If it is not clear, backing of the argument step is required. A reference to a general rule laid down in a legal code or in a precedent can serve well as a backing of an argument step. An example of an argument step that needs further backing can be found in the ultimate dialectical argument above: it is worthwhile to make explicit that policemen’s testimonies are often truthful.

3. For any statement that is not justified, have all statements that can support it been adduced as reasons?

If not, the additional reasons should be adduced. Even prima-facie reasons that are considered non-justifying, should be adduced, because it is instructive to make explicit the reason why it is non-justifying. It may turn out, for instance, that there is no backing or an undercutting exception.

4. For any statement that is not defeated, have all statements that can attack it been adduced as counterarguments?

If not, the additional counterarguments should be adduced. Also non-defeating counterarguments should be adduced to make explicit why it is not defeating. For instance, there could be a counter-counterargument or no backing.

If a question is answered negatively, each of the actions prescribed can lead to changes in the evaluation. For instance, if an assumption is turned into an issue, and there is no justifying reason for it, it will no longer be justified. If a statement has not been defeated and a new counter-argument is adduced, the statement can still be defeated.

The main sources of information that can or even should be used in answering the four types of questions, are the law (as, e.g., laid down in legal codes, treaties, and precedents), case materials (e.g., testimonies by witnesses and experts, police reports and court pleadings) and the decision maker’s own knowledge and experience.

If all four questions are answered in the affirmative, the line of argumentation can be stopped, and the statements justified in it can be regarded as a good decision from the perspective of the theory of dialectical argumentation. It should be noted that the resulting evaluation of the decision is not an absolute notion. Additional or deviating insights or information may change the answers to the four types of questions, and
may require that the line of argumentation be continued. For instance, new information may show that there is an exception thus far not thought of.

As a result, the ‘dialectical structure’ of a legal decision is not only a tool for the legal decision maker, but also for his challengers, i.e., the prosecution, the defense, and an appellate court. All answer the questions for themselves, and thus find clues to undermine or strengthen the argumentation.

**Comparison of Approaches**

The theories of anchored narratives and dialectical argumentation outlined above are closely related in several respects. In either one, the problems of exceptions, conflicts and justification are addressed. In addition, a solution is sought for the problem that legal decision-making is not a straightforward application of the legal rules to the facts of the case, but is a gradual process of ‘theory construction’.

In the theory of anchored narratives, these problems are addressed by conceiving of legal decisions as nested stories. If the story of a verdict is problematic, for instance, because there is an exception or a conflict, a substory is needed, in which the problem is addressed. Such a substory will have to be more specific in either of two senses: an explanation has to be given for an assumption that was taken for granted in the original story, or a more specific rule is used as an anchor.

In the theory of dialectical argumentation, the focus is on the dialectical arguments that underlie a legal decision. Further argumentation is required if the current dialectical arguments are problematic. It may be necessary, for instance, to adduce supporting or attacking statements.

There are strong similarities between the two theories. Both adopt a process model of legal decision-making. In the theory of anchored narratives, stories are refined by including substories, until a story of sufficient quality and anchoring is found. In the theory of dialectical argumentation, dialectical arguments are constructed, changed or extended, for instance, by making new statements or adding new reasons and counterarguments.

In both theories, some kind of justification may be required in order to show why a particular conclusion is supported by a reason. The theory of anchored narratives refers to anchors, the theory of dialectical argumentation to warrants and backings. In both, exceptions and conflicts are clues to enhance the preliminarily constructed theory on a good decision in the case at hand. In the theory of anchored narratives, exceptions and conflicts are resolved by the use of more specific anchoring rules. For instance, because of the possible unreliability of a witness, the anchoring rule that witnesses are often truthful can be replaced by the rule that witnesses who do not benefit from their own testimony are often truthful. In the theory of dialectical argumentation, exceptions and conflicts give rise to counterarguments. The exception that a witness is unreliable may, for instance, be adduced as a counterargument by which a witness testimony is no longer assumed to be truthful.
There are also differences between the two theories. The first is that the theory of anchored narratives is story-based, whereas the theory of dialectical argumentation is argument-based. A second difference is the following: the theory of anchored narratives is formally less explicit than the theory of dialectical argumentation. Stories are expressed in natural language, while arguments have a formal, logical structure. Third, the theory of anchored narratives is empirically backed by real, dubious cases. In contradiction, the theory of dialectical argumentation is supported by computational models, such as the argument assistance system ArguMed. Finally, the theory of anchored narratives also discusses ‘non-logical’ elements of legal decision-making. For instance, in the discussion of the quality of stories, particular elements of a good story are prescribed, e.g., the issues of the accused’s identity, the actus reus, and mens rea. The theory of dialectical argumentation, on the other hand, is wholly logical.

Conclusion

It may be concluded that the theories of anchored narratives and of dialectical argumentation, although coming from different disciplines, viz. legal psychology and artificial intelligence and law, respectively, exhibit an interesting convergence as to the problems addressed and the solutions proposed. And yet the two approaches are very different. The anchored narratives approach could, for instance, be strengthened by a more explicit description of its elements more explicitly, while the dialectical argumentation approach could gain from empirical testing.

We have found at least one topic, viz. the heuristics of legal decision-making, where the fields of legal psychology and artificial intelligence and law can benefit from each other’s findings. Consequently, Crombag’s pessimism with regard to the psychological relevance of artificial intelligence for understanding the legal mind is unwarranted. Legal psychology can benefit from the higher standards of modeling following from the need of computer implementation, while artificial intelligence and law can learn from the stronger empirical orientation of legal psychology.

Appendix: A Formal Version of the Theory of Dialectical Argumentation

The basis of the theory of dialectical argumentation is a logical language with two two-place connectives: $\rightarrow$ and $\nabla$. The former is used to express that a statement supports another, the latter to express that a statement attacks another. Examples of sentences are $p \rightarrow q$, $p \nabla q$, $p \nabla (q \rightarrow r)$ and $p \rightarrow ((p \rightarrow q) \nabla (r \rightarrow s))$. Here $p$, $q$, $r$ and $s$ abbreviate logically elementary sentences.

27. Verheij, op. cit.
A (dialectical) theory is a pair of sets of sentences \((\Sigma, \Delta)\), so that \(\Delta\) is a subset of \(\Sigma\) and \(\Sigma\) is ‘closed under disconnection’, i.e., if \(\varphi \rightarrow \psi\) or \(\varphi \times \psi\) is in \(\Sigma\), then \(\varphi\) and \(\psi\) are also in \(\Sigma\). The set \(\Sigma\) represents the set of statements of the dialectical theory, the set \(\Delta\) the set of (defeasible) assumptions. The elements of \(\Sigma \setminus \Delta\) are the issues of the theory.

A dialectical argument is a set of sentences \(\alpha\), that is recursively defined by the following construction rules:

1. If \(\varphi\) is a sentence, then the singleton set \(\{\varphi\}\) is a dialectical argument.
2. If \(\alpha\) is a dialectical argument with \(\psi\) a sentence in \(\alpha\) and \(\varphi\) any sentence, then \(\alpha \cup \{\varphi \rightarrow \psi, \psi\}\) and \(\alpha \cup \{\varphi \times \psi, \psi\}\) are dialectical arguments.
3. If \(\alpha_0, \alpha_1, \ldots, \alpha_i, \ldots\) (where \(i\) ranges over the natural numbers) is a sequence of dialectical arguments such that, for all \(i\), \(\alpha_i\) is a subset of \(\alpha_{i+1}\), then the union of the \(\alpha_i\) is a dialectical argument.

Note that for finite theories (i.e., with a finite set of statements), the third construction rule is not needed: any infinite sequence of dialectical arguments as it occurs in the construction rule is constant from some point onwards.

By their definition, dialectical arguments can be thought of as having a tree-like structure (cf. the figures as referred to earlier). There are two types of ‘links’ between statements, viz. supporting and attacking links, expressed by sentences \(\varphi \rightarrow \psi\) and \(\varphi \times \psi\) respectively. Since the links are themselves expressed as sentences, there may be statements supporting or attacking them. If a dialectical argument can be constructed as in the definition, starting from the singleton set \(\{\varphi\}\), then \(\varphi\) is a final conclusion of the argument. Dialectical arguments can have more than one final conclusion.

If \(\varphi\) is (a sentence expressing) a statement of a dialectical theory \((\Sigma, \Delta)\), then the dialectical argument concerning \(\varphi\) with respect to \((\Sigma, \Delta)\) is the dialectical argument with final conclusion \(\varphi\), which is maximal with respect to set inclusion among the subsets of \(\Sigma\).

Let \(T\) be a set of sentences and \(\varphi\) a sentence. Then \(\varphi\) is supported by \(T\) if there is a finite sequence of sentences \(\varphi_0, \ldots, \varphi_n\) (for some natural number \(n \geq 0\)), such that \(\varphi_n\) is equal to \(\varphi\), and each sentence \(\varphi_i\) in the sequence is either in \(T\), or has predecessors \(\varphi_j\) and \(\varphi_j \rightarrow \varphi_i\). The sentence \(\varphi\) is attacked by \(T\) if there is a finite sequence of sentences \(\varphi_0, \ldots, \varphi_{n-1}, \varphi_n\) (for some natural number \(n \geq 1\)), such that \(\varphi_n\) is equal to \(\varphi_{n-1} \times \varphi\), and each sentence \(\varphi_i\) in the sequence is either in \(T\), or has predecessors \(\varphi_j\) and \(\varphi_j \rightarrow \varphi_i\).

A dialectical interpretation or extension of a dialectical theory \((\Sigma, \Delta)\) is a quadruple \((\Sigma, \Delta, J, D)\), where \(J\) and \(D\) are subsets of \(\Sigma\), such that the following holds:

0. \(J\) and \(D\) are disjoint, i.e., have no sentences in common.
1. \(\Delta\) is a subset of \(J \cup D\).
2. \(J = \{\varphi \mid \varphi\text{ is supported by }\Delta \cap J\}\).
3. \(D = \{\varphi \mid \varphi\text{ is attacked by }\Delta \cap J\}\).
The sentences in J are said to be \textit{(dialectically) justified} in the interpretation, the sentences in D \textit{(dialectically) defeated}.

Any dialectical interpretation of a theory \((\Sigma, \Delta)\) – if existing – gives rise to an evaluation of the dialectical arguments concerning the sentences in \(\Sigma\), as discussed earlier in an informal way.

If there is a dialectical interpretation of a dialectical theory \((\Sigma, \Delta)\), the theory is \textit{dialectically interpretable}. Not all dialectical theories are dialectically interpretable, and not all dialectical theories are uniquely interpretable in a dialectical way.

A \textit{partial dialectical interpretation or stage} of a dialectical theory \((\Sigma, \Delta)\) is a quadruple \((\Sigma, \Delta, J, D)\), where \(J\) and \(D\) are subsets of \(\Sigma\), so that the following holds:

\begin{enumerate}
\item \(J\) and \(D\) are disjoint, i.e., have no sentences in common.
\item \(J = \{\varphi \mid \varphi\ \text{is supported by} \ \Delta \cap J\}\).
\item \(D = \{\varphi \mid \varphi\ \text{is attacked by} \ \Delta \cap J\}\).
\end{enumerate}

The set \((J \cup D) \cap \Delta\) is the \textit{scope} of the stage, the set \(J \cup D\) its \textit{extent}.

A set of sentences \(C\) is an \textit{argument} if \(C\) is consistent, i.e., if there is no sentence that is both supported and attacked by \(C\). An argument \(C\) is \textit{incompatible} with an argument \(C'\) if the union of \(C\) and \(C'\) is not an argument. An argument \(C\) \textit{attacks} an argument \(C'\) if \(C\) attacks a sentence in \(C'\).

For any dialectical theory \((\Sigma, \Delta)\), an argument \(C\) is a \((\Sigma, \Delta)\)-\textit{argument} if \(C\) is a subset of \(\Delta\). A \((\Sigma, \Delta)\)-argument \(C\) is \textit{dialectically justifying} with respect to the dialectical theory \((\Sigma, \Delta)\) if it attacks any \((\Sigma, \Delta)\)-argument \(C'\) that is incompatible with \(C\).

A sentence is \textit{(dialectically) justifiable} with respect to a dialectical theory \((\Sigma, \Delta)\) if it is supported by a dialectically justifying argument. A sentence is \textit{(dialectically) defeasible} with respect to a dialectical theory \((\Sigma, \Delta)\) if it is attacked by a dialectically justifying argument.

A stage \((\Sigma, \Delta, J, D)\) of a dialectical theory \((\Sigma, \Delta)\) is \textit{dialectically justified} if \(\Delta \cap J\) is a dialectically justifying \((\Sigma, \Delta)\)-argument with respect to \((\Sigma, \Delta)\).

A stage \((\Sigma, \Delta, J, D)\) of a dialectical theory \((\Sigma, \Delta)\) is \textit{maximal} if it has maximal scope. A stage is \textit{preferred} if it has maximal scope among the dialectically justified stages of the theory.

Any dialectical interpretation of a theory is maximal and preferred, but not vice versa. A preferred stage is not always maximal, and a maximal stage not always preferred. If a theory \((\Sigma, \Delta)\) is dialectically interpretable, any sentence in \(\Delta\) is dialectically justifiable or defeasible, but not vice versa.

\textit{The union lemma.} If \(C\) and \(C'\) are compatible, dialectically justifying \((\Sigma, \Delta)\)-arguments, then \(C \cup C'\) is a dialectically justifying \((\Sigma, \Delta)\)-argument.

\textit{The separation lemma.} If \(C\) and \(C'\) are incompatible, dialectically justifying \((\Sigma, \Delta)\)-arguments, then there is a sentence \(\varphi\) in \(\Delta\), such that \(C\) supports \(\varphi\) and \(C'\) attacks \(\varphi\).
The importance of the separation lemma stems from the fact that the separating sentence can be chosen from among the assumptions of the theory, i.e., in $\Delta$. Together, the two lemmas show that dialectically justifying arguments are the local building blocks of dialectical interpretations, and form the key ingredients in the proof of the theorem below.

A theory has more than one preferred stage if, and only if, there is a sentence $\varphi$ that is both dialectically justifiable and defeasible with respect to the theory. If a theory has different preferred stages, then there is an assumption of the theory, that is defeated in one preferred stage and defeated in the other.

A sentence $\varphi$ is dialectically justifiable in the context $C$ with respect to a dialectical theory $(\Sigma, \Delta)$, if there is an argument $C'$ containing $C$ that dialectically justifies $\varphi$ with respect to $(\Sigma, \Delta)$. A sentence $\varphi$ is dialectically defeasible in the context $C$, if there is an argument $C'$ containing $C$ that dialectically defeats $\varphi$.

A stage $(\Sigma, \Delta, J, D)$ of a dialectical theory $(\Sigma, \Delta)$ is disambiguating if there is no sentence $\varphi$ that is both dialectically justifiable and dialectically defeasible in the context $\Delta \cap J$.

Theorem

a. A theory has no dialectical interpretation if, and only if, for any disambiguating stage $(\Sigma, \Delta, J, D)$, there is a sentence $\varphi$ in $\Delta$ that is neither dialectically justifiable nor defeasible in the context $\Delta \cap J$.

b. A theory has a dialectical interpretation if, and only if, for some disambiguating stage $(\Sigma, \Delta, J, D)$, all sentences $\varphi$ in $\Delta$ are dialectically justifiable or defeasible in the context $\Delta \cap J$.

c. A theory has two or more dialectical interpretations if, and only if, there are (at least) two incompatible disambiguating stages: $(\Sigma, \Delta, J, D)$ and $(\Sigma, \Delta, J', D')$, such that all sentences $\varphi$ in $\Delta$ are dialectically justifiable or defeasible, both in the context $\Delta \cap J$ and in the context $\Delta \cap J'$.

The theory above can be generalized to a language with two connectives: $\rightarrow$ and $\times$, the first two-place, the second one-place. A sentence $\times \varphi$ expresses that $\varphi$ is defeated, and a sentence $\varphi \rightarrow \times \psi$ that $\varphi$ attacks $\psi$. A sentence $\varphi \times \psi$ is seen as an abbreviation of the sentence $\varphi \rightarrow \times \psi$. The resulting theory of dialectical justification and defeat is called DEFLOG (as yet unpublished).

The discussion finishes with an overview of the types of argument moves as discussed earlier. Let $(\Sigma, \Delta)$ be the initial theory and $(\Sigma', \Delta')$ its successor. Since we do not consider withdrawing statements (cf. note 23), it holds that $\Sigma$ is a proper subset of $\Sigma$.

1. Making a statement

For some $\varphi$, $\Sigma' \setminus \Sigma$ is a subset of $\{\varphi\}$ and $\varphi$ is not in $\Sigma$. 
2. **Supporting a statement**
   For some $\phi$ and $\psi$, $\Sigma' \setminus \Sigma$ is a subset of $\{\phi, \phi \rightarrow \psi, \psi\}$, while at least one of $\phi$, $\phi \rightarrow \psi$, $\psi$ is not in $\Sigma$.

3. **Attacking a statement**
   For some $\phi$ and $\psi$, $\Sigma' \setminus \Sigma$ is a subset of $\{\phi, \phi \vDash \psi, \psi\}$, while at least one of $\phi$, $\phi \vDash \psi$, $\psi$ is not in $\Sigma$.

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The Naturalistic Fallacy

A Note on a Note

Jaap Hage

Introduction

Hans Crombag, author of a book on the biological and psychological basis of behavioural norms, may have felt that he was liable of being accused of having committed the ‘naturalistic fallacy’, the illegitimate derivation of normative or evaluative conclusions from purely factual premises. In a brief paper, called ‘A Note on the Naturalistic Fallacy’, he made an attempt to parry such accusations. The argument in this paper is fundamental to the whole enterprise of evaluating norms from the perspective of empirical sciences and for this reason plays an important role in Crombag’s scientific oeuvre. In this paper, I will restate Crombag’s argument and examine it to determine which conclusions can be drawn from it, and which not. My conclusions will be that Crombag does not adduce sufficient reasons to remove the naturalistic fallacy from the philosophical map, but that he makes it sufficiently plausible that empirical sciences can play a useful role in the rational evaluation of norms.

Crombag’s Argument

The central question that Crombag addresses in his paper is whether the naturalistic fallacy is really fallacious. As his main target, Crombag takes the classical text by Hume, which is often considered to contain the first delineation of the naturalistic fallacy. In this text, Hume notes that authors on moral philosophy often move imperceptibly from purely factual to deontic propositions, holding what ought or ought not to be done. Hume then observes that it seems altogether inconceivable how these deontic conclusions are deduced from the factual ones, which are entirely different.

1. Department of Metajuridica, Maastricht University.
After quoting Hume, Crombag continues by posing several questions of his own. The first question is where do norms come from, if they cannot follow from facts. He divides this question into two related ones: ‘How did the norms that we have or believe we have, come into existence?’, and ‘Why are these norms binding?’

To answer these questions Crombag discusses four arguments. The first one is by Bentham, who departs from the assumption that mankind is under the governance of two masters, pleasure and pain. These two tell us what we ought to do, and determine what we will do. Crombag interprets pleasure as that which promotes individual survival, and pain as that which hinders it. In his interpretation Crombag believes Bentham’s assumption to be borne out by biologists. Seeking individual survival is trivially crucial for survival.

However, how does it follow that survival value is relevant for what we ought to do? In answering this question, Crombag presents an argument worth quoting:

“Because there is no alternative for the species. For the species the only alternative would be non-existence, which is obviously counter-factual. The fact that homo-sapiens (still) exists, implies that, although adaptation may not always have been perfect, a critical number of its members so far have been adaptive more often than not. For individual members of the species this need not be true, but they do so ‘at their peril’.”

Briefly summarised, it reads that the need to adapt to the circumstances imposes constraints on human behaviour that individuals must heed in order not to risk their own lives and the survival of the species. Without this survival, the question what ought to be done would not even arise. This leads Crombag to the conclusion, ascribed to Bentham, but implicitly adopted, that what ought to be done springs from the factual source which is the existence of human life. As a consequence the correct method of acquiring moral knowledge is the empirical method, namely the establishment of what contributes to life.

The second argument Crombag discusses, stems from Skinner. Now that we have discussed Bentham’s argument, we can be brief about Skinner’s. His conclusion is that norms are conditional statements of fact: if you want to be positively reinforced, you ought to do this or avoid that. Survival has been replaced by positive reinforcement, but the upshot of the argument remains the same: norms are answers to the demands posed by factual situations. In order to achieve particular effects, survival in the case of Bentham (as interpreted by Crombag), and positive reinforcement in the case of Skinner, human beings ought to behave in a particular way. Crombag notes that these norms are hypothetical imperatives in the Kantian sense. They do not prescribe unconditionally, but are based solely on the hypothesis that some goal is pursued. Kant assumed that there are also categorical, that is unconditional, imperatives. But Crombag hastens to add that he does not know of any; ‘even the most sacred norm of the inviolability of human life must yield in a situation of self-defence’.
The third argument, or rather point, stems from Ullman-Margalit, who claimed that ‘certain types of norms are solutions to problems posed by certain interaction situations.’ Again, norms are presented as means to an end.

As a fourth argument, Crombag himself points out that norms are meaningless if they prescribe behaviour of which humans are not capable. This shows, according to Crombag, that certain factual states of affairs exclude certain norms. This is the negative counterpart of the conclusions from the previous three arguments, which hold that certain facts about the world necessitate certain norms.

Has Crombag Refuted the Naturalistic Fallacy?

Let us assume that Crombag’s fourfold argument is correct in the sense that it establishes that factual states of affairs make certain norms necessary, or at least highly desirable, and other norms meaningless. Can we then say that, under this assumption, Crombag has shown the naturalistic fallacy to be not fallacious at all? Remember that Crombag formulated two questions which he attempted to answer:

How did the norms that we have or believe we have, come into existence? Why are these norms binding? It seems to me that Crombag’s fourfold argument has provided at least the beginning of an answer to the first question. The factual situation in which mankind lives explains, at least to a large extent, the norms that exist. In particular, it seems not necessary to add premises other than factual ones to complete the explanation.5

It is less clear whether Crombag has even attempted to answer the second question. At best, he has given reasons why it may be rational to adhere to particular norms, on the assumption that one wants to survive (as a species), be reinforced positively, or resolve particular problematic situations. In other words, Crombag has given reasons for the truth of particular hypothetical imperatives, or technical norms, as they are also called. Such technical norms are comparable to recipes for the preparation of certain dishes, and it has, to my knowledge, never been disputed that the truth of such recipes can be ascertained by empirical means.

To answer the second question, Crombag should have provided an argument for the binding nature of what Kant called categorical imperatives, or – in more plain language – for the binding nature of certain prescriptions that hold irrespective of the goals one pursues. In his discussion of Skinner, Crombag explicitly denies the existence of such norms. This explains why he does not even attempt to answer the second question that he himself posed. Crombag gives good reasons why empirical sci-

5. It should be noted that these factual premises should include law-like generalisations, the precise status of which is not fully clear. This complication does not detract, however, from Crombag’s point that empirical sciences can contribute to the understanding and critical evaluation of existing or proposed norms.
ences can explain the existence of norms and can establish the truth or falsity of technical norms, but he did not even argue why these sciences provide reasons for the existence of unconditional norms, let alone for their binding nature.

In the subsequent sections, I will present a more detailed analysis of the naturalistic fallacy. From this analysis it follows that, in order to refute the naturalistic fallacy, Crombag should have shown that empirical sciences offer decisive reasons for the binding nature of unconditional norms. Therefore, my tentative conclusion is that Crombag did not even attempt to refute the naturalistic fallacy.

**What Does the Naturalistic Fallacy Amount to?**

At the beginning of this century, the Cambridge philosopher, G.E. Moore, introduced the ‘naturalistic fallacy’ into ethical theory. Moore’s own description of what this ‘fallacy’ amounted to was not very clear, but Frankena and Taylor improved on Moore’s work in this respect. The basic intuition behind the notion of the naturalistic fallacy is that purely factual sentences on the one hand, and purely evaluative or deontic sentences, on the other do not have any meaning components in common. As a result, it is:

- Impossible to express the meaning of evaluative and deontic sentences in terms of purely factual sentences;
- Impossible to deduce evaluative and deontic sentences from purely factual ones;
- and possible to agree on all purely factual sentences and nevertheless disagree rationally on some evaluative or deontic sentence.

I will illustrate this through the norm that one ought not kill human beings. Clearly, this ought-sentence does not mean any of the following:

- Nobody kills human beings.
- Persons who kill human beings are punished (or otherwise subjected to negative reinforcement).
- Killing a human being improves the chance of the killer to lose his life.
- Killing a human being diminishes the chance of the killer to procreate.
- Killing a human being improves the chance that the human race becomes extinct.
- God (or any other lawgiver) has forbidden the killing of human beings.
- There exists a norm to the effect that it is forbidden to kill human beings.

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Some may believe that one of the sentences a to g describes a sufficient reason why one ought not kill human beings, but that it is not the issue here. The issue is the meaning of these sentences, and not one of them means that one ought not kill human beings. In general, no set of purely descriptive sentences means that something ought or ought not be done. In fact, this immediately follows from the basic assumption behind the naturalistic fallacy that purely descriptive sentences and purely deontic sentences have no meaning components in common.

Deductively valid arguments are usually defined as arguments whose conclusions cannot be false, if their premises are all true. This definition does not make clear what is possible. In general, what is possible depends on the constraints that one takes into account. Physically it may be possible that someone is both a thief and not punishable, but under the law this may be impossible.

It is often assumed that the impossibility in issues concerning the validity of deductive arguments is based on language conventions. The most important, in this connection, are the conventions governing the meaning of the ‘logical’ words, such as ‘and’, ‘not’ and ‘or’. However, the meaning of such words as ‘ought’, ‘forbidden’, and ‘permitted’ may also be taken into account. On this assumption, a deductively valid argument can be characterized as one of which, given the meaning of the words that occur in its premises and its conclusion, it is impossible that all its premises are true, where its conclusion is false.

Since purely descriptive and deontic sentences are assumed ex hypothesi to share no meaning components, the constraints that follow from the meaning of the words in an argument cannot necessitate the truth of a deontic conclusion in an argument with purely descriptive premises. Given the characterisation of deductively valid arguments in terms of the meaning of the words used in these arguments, the second aspect of the naturalistic fallacy follows immediately from the underlying assumption of this fallacy.

Whether the third characteristic also follows, depends heavily on the way in which ones gives content to the notion of rationality. The underlying assumption is that rational disagreement is always possible, if one does not violate the inference rules of deductive logic as based on meaning conventions. Given this rather broad notion of rationality, it is possible to agree about all purely factual sentences and still to disagree.

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9. There may still be some dispute about sentence g, which some might take as logically equivalent to the sentence that one ought not kill human beings. However, I take this sentence to mean that the norm in question exists as a matter of social fact, which does not mean that one ought to do anything. Unless, of course, one takes the ought-sentence as describing a matter of social fact as well. This would be against the spirit of the naturalistic fallacy, which deals with ought sentences indicating what ought to be done, contrary to what is the case. I will return to this digression below.

10. I abstract from expectations to rules.
rationally about any deontic sentence. The question is, however, whether we should adopt such a broad notion of rationality.

Before addressing this question, we should look back at our analysis of the naturalistic fallacy and consider what it implies for attempts at refutation as the one launched by Crombag. When we do this, we find that the naturalistic fallacy, as analysed by Taylor, is a direct consequence of three assumptions. The first assumption is that purely descriptive sentences and deontic sentences have no meaning components in common. The second is that deductively valid arguments, given the truth of their premises, guarantee the truth of their conclusions, on the basis of conventions governing the meaning of the words employed in the argument. If these first two assumptions are taken for granted, the first two aspects of the naturalistic fallacy are beyond refutation. The third aspect can still be doubted, if one does not adopt the third assumption, which is the assumption that rationality is nothing else than logical consistency according to the standards of deductive logic as defined here.

Since it was Crombag’s concern to establish the relevancy of the empirical sciences for normative issues, the third aspect is the most important for him. For the purpose of refuting this aspect of the naturalistic fallacy, two ways are open. First, he can challenge the assumption that underlies all three aspects of the naturalistic fallacy; the assumption concerning the absence of meaning relations between purely descriptive and deontic sentences. And second, he can propagate a narrower notion of rationality, by arguing for constraints of rationality that go beyond those of deductive logic.

In theory there is a third option, namely to reject the assumption that, given the truth of their premises, deductively valid arguments guarantee the truth of their conclusions, on the basis of the meaning of the words employed in the argument. However, this assumption is probably best read as a stipulative definition of what a deductively valid argument is, and it is generally not useful to argue about stipulative definitions.

**Meaning Relations**

Are there any meaning relations between purely descriptive sentences and deontic sentences? In the preceding section, I have given a number of examples to show that there are none. However, the seventh example, in particular, may be less than convincing. I wrote that the sentence ‘one ought not kill human beings’ does not imply that there exists a norm to the effect that it is forbidden to kill human beings. But is that true?

In deontic logic, it is traditionally assumed that ‘forbidden’ means the same as ‘ought not’. So the question is reduced to whether the phrase ‘there exists a norm to the effect that one ought (not) do x’ means the same as ‘one ought (not) do x’. On this question, opinions differ, and the differences can be traced back to different interpretations of ‘there exists a norm to the effect that...’ and of ‘one ought to do...’.
The phrase ‘there exists a norm to the effect that...’ can be read both as stating something about social reality, and as a redundant phrase such as ‘it is true that...’. On a first reading, which is a purely factual one, the sentence ‘there exists a norm to the effect that one ought (not) do x’ obviously means something different than the sentence ‘one ought (not) do x’ interpreted in a normative way. It might mean the same as the latter sentence interpreted in a descriptive way, an interpretation that is to be discussed later in this section.

On a second reading, the redundant one, the sentence means approximately the same as the content of the norm. But on this reading, the sentence is deontic, and not purely descriptive. Therefore, on this reading, it does not provide a counter-example to the assumption underlying the naturalistic fallacy.

The sentence ‘one ought (not) do x’ can also be read in two ways. In the one reading, acceptance of the sentence as true implies at least the motivation to (not) do x. This is the deontic reading. The second, descriptive reading implies that according to some (the factual) set of norms, one ought (not) do x. It is possible to accept such a sentence as true, while remaining utterly unmoved by it as to whether one will do x. This descriptive reading means more or less the same as the social reading of the sentence stating that the norm exists. However, this second reading renders the sentence a non-deontic one, and the existing meaning relations provide no counter-example to the assumption underlying the naturalistic fallacy.

Summarising, we can say that both the sentence ‘there exists a norm to the effect that one ought (not) do x’ and the sentence ‘one ought (not) do x’ can be given both a descriptive and a deontic reading. Only if the one is given a descriptive reading and the other a deontic reading, may the two sentences provide a counter-example to the naturalistic fallacy. However – and not coincidentally – precisely then there are no meaning relations between them. If either are read either descriptively or deontically, there are meaning relations, but then they cannot provide a counter-example. Therefore, we may conclude that the assumption that underlies the naturalistic fallacy, namely that there are no common meaning components between purely descriptive and deontic sentences still stands. Crombag should aim his arrows at the other assumption, the broad notion of rationality.

Rationality

The broad notion of rationality, needed to arrive at the third aspect of the naturalistic fallacy, namely that it is possible to agree on all purely factual sentences and still dis-
agree rationally on some evaluative or deontic sentence, boils down to that it is only irrational to be inconsistent according to deductive logic based on meaning conventions. According to this notion, it is not irrational to believe that some person is more than twenty thousand years old, unless one also believes that humans cannot be older than a number of years (considerably) less than twenty thousand. Nor would it be irrational to believe that it is raining, while disbelieving that persons walking outside without umbrellas or something similar, will get wet.

The broad notion of rationality, outlined in the preceding section, will probably be too broad for most of us. There are more constraints on rational behaviour, including rational belief, than those imposed by meaning conventions. It would, for instance, be irrational to have beliefs that conflict with well-established laws of nature. Arguably, it would also be irrational to believe at the same time that there exists a legal rule to the effect that thieves are punishable, and that thieves are normally not punishable. Yet, it is not so easy to establish which other constraints there are on rational behaviour. Any choice of constraints that are to be taken into account open up the risk of being accused of partisanship.

A possible solution is to relativise the notion of rationality. Behaviour is either rational or irrational, not in itself, but in relation to a specific background of constraints. The backgrounds of the several variants of deductive logic are consequently the corresponding sets of meaning conventions that are taken into account.12 Broadening the set of constraints in the background correspondingly narrows the notion of rationality as relativised to that background.

Including the correct constraints in the background of some particular notion of rationality may make it irrational to believe both that a particular action diminishes the chance of survival of the human species and that this action is permitted or even right. Or, to take a more Benthamite example, inclusion of the correct constraint may render it irrational to believe that some action diminishes pleasure and increases pain and also that this action is right. The Skinnerian counterpart would make it irrational to believe that some action leads to negative reinforcement and also that this action is right, and so on.... Depending on one’s background assumptions, it may be irrational to agree on some set of facts, and to disagree nevertheless on what ought to be done.

An obvious objection is to be expected here. The objection is that the normative premise, necessary to make the step from the factual premises to the normative conclusion, is moved from the premises of an argument to the background of the rules of

12. For instance, propositional logic only takes the meanings of a set of logical operators into account, whereas predicate logic is also based on the meaning of quantifiers. Deontic logic, finally, also takes the meaning of the deontic operators into account.
16. The Naturalistic Fallacy

inference. Perhaps it is less visible there, but it is nevertheless present. Without this
normative premise, the transition from ‘is’ to ‘ought’ would lose its validity.\footnote{13}

This objection is only partly relevant. To make the step from ‘This action will be
positively reinforced’ to ‘This action ought to be performed’ a rational one, it is neces-
sary to include as background assumption that it is rational to do that which is posi-
tively reinforced. But this is not fully comparable to having hidden premises. Hidden
premises can change an argument from invalid in a particular system of logic to a valid
one. Completion of an argument by the addition of hidden premises presupposes a
particular system of logic, which in its turn presupposes a number of constraints that
determine which inferences are rational, or- in this connection coming down to the
same thing – logically valid. Changing background assumptions, on the contrary, is
rather like changing the logic, to render an argument that was invalid under the old
logic valid under the new one.

Let me give an example to illustrate this point. Suppose we have the argument:

\begin{quote}
It is forbidden to steal.
Therefore: It is not permitted to steal.
\end{quote}

This argument is invalid under predicate logic, because predicate logic does not take
meaning relations between the words ‘forbidden’ and ‘permitted’ into account. The
argument can be made valid \textit{under predicate logic} by adding the following premise:

If something is forbidden, then it is not permitted.

However, adding this premise changes the argument. The original argument made a
transition from only one premise to the conclusion. The new argument needs two
premises to reach the same conclusion. Given one and the same logic (predicate logic)
the first argument is invalid, whereas the second is valid.

It is also possible to leave the argument in tact and modify the logic. By adding the\textit{rule of inference} to the logic that actions that are forbidden are not permitted, the origi-
nal argument becomes a valid one \textit{under this new logic}. In fact this new logic that goes
under the name of deontic logic, is rather common.\footnote{14}

Analogous to this move from predicate logic to deontic logic we can make the
move from predicate logic to ‘behaviourist logic’. Behaviourist logic is characterised
by the background assumption that actions that are (on balance) positively reinforced
ought be performed and that actions that are (on balance) negatively reinforced ought
not be performed. This background assumption is translated into the rules of infer-
ence that, from the premise that some action is positively reinforced, one may con-

\footnote{13. I have moved here from the general to the ‘logical’ notion of validity. This move is justified
on the assumption, which I make here, that logic is the theory of rational reasoning, and as
such a special part of the general theory of rational action.}

\footnote{14. For logicians: it is the move from predicate logic to a form of deontic logic which uses the
definition that $F_{\text{action}} \equiv \neg P_{\text{action}}$.}
clude that this action ought to be performed and that from the premise that some action is negatively reinforced one may conclude that this action ought not be performed. Under this logic, the naturalistic fallacy, consisting of an argument derived from reinforcement to what ought to be done, is no longer fallacious.

It might seem that the move proposed here, replacing silent premises by corresponding rules of inference, has ‘all the advantages of theft over honest toil’. Apparently, it is possible to replace a silent premise by an inference rule, thereby making a previously invalid argument valid without adding to the premises. But, one may object, this does not make any change in the naturalistic fallacy, because the normative premise, necessary to validate the transition from ‘is’ to ‘ought’, must still be smuggled in, whether in the form of a premise or in the form of a new inference rule.

This objection misses the point, however. It assumes that there is a thing as the ‘genuine’ logic, which does no allow the inference from ‘is’ to ‘ought’ and that this genuine logic can be expanded into a treacherous logic that has inference rules that allow argument steps that are not ‘genuinely’ valid. The crucial point of the preceding argument is, however, that there is no such thing as genuine logic. There are many logics, each of which is based on a number of background assumptions as to what is rational to infer. There is no Archimedec set of background assumptions corresponding to the ‘genuine’ logic. Any premise can be made into a background assumption, and any background assumption can be made into a premise.15 What one considers to be a premise and what as part of the logic depends on what one wishes to make explicit. The logic is presupposed; the premises are explicit.

It should be noted, however, that the phrase wishes to make explicit’ is deceptive in that it suggests that in general it is a matter of choice what is considered a premise and what logic. One of the main points with regard to background is that one usually does not even realise that there is room for choice. Background is presupposed and therefore most of the times not consciously perceived.16

15. It is, however, not possible to change all background assumptions into premises, because in that case there would no logic be left to argue with the premises. This is the upshot of Lewis Carroll’s paper ‘What the Tortoise Said to Achilles’. See L. Carroll (1895) What the tortoise said to Achilles. *Mind, 4*, 278-280.

16. There is an interesting parallel with computers, here. Rules of inference and premises may both be considered as software involved in the computation of conclusions. However, where premises are real ‘soft’ software, rules of inference are like hard software, built into the chips that do the information processing. It is possible to have a chip set that can handle less instructions, but then the software must express the deleted functions in terms of the remaining ones. This is the equivalent of replacing rules of inference by premises. This metaphor also clarifies why not all rules of inference can be replaced by premises. There must remain a processor that processes the enhanced software. It also explains why the mind is not just software, but needs a physical basis. Cf. the, inadequately formulated, argument of Searle against ‘strong AI’. See J. Searle (1984) *Minds, brains and science*. Cambridge MA: Harvard University Press.
Having come this far, we can conclude that Crombag may be successful in attacking the third aspect of the naturalistic fallacy. Whether it is possible to agree on all relevant facts and nevertheless disagree rationally on normative conclusions, allegedly based on these facts, depends on the background assumptions one has concerning rational belief. For those to which it is obvious, for instance, that one ought to do what is positively reinforced, it is impossible to agree on the fact that action A is positively reinforced and nevertheless disagree rationally about whether this action ought to be performed. Considering the way in which Crombag writes about categorical imperatives, now to be interpreted as imperatives without background assumptions, it seems obvious that he makes background assumptions that are at least comparable to the one mentioned above.

**Conclusion**

In a sense, Crombag’s argument against the naturalistic fallacy misses the point. Given the almost axiomatic assumption that purely descriptive sentences and deontic sentences have no meaning components in common, and the traditional definition of deductive validity in terms of the meaning of the sentences and words involved in an argument, it is practically true by definition that deontic judgements are not definable in terms of non-deontic ones, and that they cannot be deduced from them either.

Crombag’s argument can be read at a different level, however. It can be read as the argument why certain assumptions about human behaviour are so obvious that they should be considered as background assumptions upon which our logic is to be based. Such a logic would validate more inferences than only those based on meaning conventions, and these additional arguments would make a utilitarian ethics, logically true. Whether Crombag has succeeded in his argument has to be left for future discussion. It is clear, however, that such an argument would not commit the naturalistic fallacy, because the naturalistic fallacy presupposes, rather than establishes, that Crombag’s argument would be wrong.
Law as a Way to Survive

A Place for Psychology and Law to Meet?

Nikolas H.M. Roos

Introduction

Recently I had the honour and pleasure of co-authoring the foreword of Hans Crombag’s latest book *De Man uit Susquehanna*. It contains a collection of selected essays written by him over the last twenty years on psychology, law and morals. At one point in that foreword, I could not resist making a comment instead of just presenting an overview of the book. The essay that made me lose control was *A Note on the Naturalistic Fallacy*. There, Crombag suggests a relationship between morality, law and human survival by which the ‘is-ought’-gap may be bridged. It prompted me to refer to H.L.A. Hart, who presented a theory of a *Minimum Content of Natural Law* (further: MCNL) in his famous *The Concept of Law*. The theory contains Hart’s reflections on the link between survival and the law. In fact, Crombag wrote a whole book on the subject, *Een Manier van Overleven* (A Way to Survive), but MCNL was not discussed in it. This is remarkable, because Hart is Crombag’s favourite legal philosopher. A reason could be that both Hart himself and his numerous followers and critics never attached any great importance to this part of his theory of the relationship between law and morality. I think, however, that law as a way to survive is the proper meeting place of (philosophy of) law and psychology, and in fact, the social-scientific study of the law in general.

I can think of no better opportunity than this *Liber Amicorum* to try and make a plausible case for this thesis, because Crombag has stimulated me more than anyone else to pursue the long-winding, many-branched track of LMS. Since I am still on the march, I hope I can count on some more of his patience and his on-going stimulation by showing what an important guide he has been to me. Sometimes, however, I have

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taken another road than he suggested. That and my most critical but, nevertheless, not unsympathetic reading of German philosophers such as Kant and Hegel, which he regards as idealists who lost almost all contact with the real, empirical world, may have suggested to him that the general direction of my explorations was quite different from his. In fact, when writing this contribution, I was surprised myself how little I have been able to deviate from the general view on law he suggested as early as 1983.

The Wrong Kind of Psychology of Law?

Elsewhere in this volume, John Griffiths, my mentor in the field of sociology of law, has criticised modern Dutch psychology of law, including Crombag, who is its Nestor, for being essentially a branch of applied psychology, mainly restricted, moreover, to forensic psychology. According to Griffiths, Dutch psychology of law did not sufficiently focus on what should be its central question: what are the psychological characteristics of human beings that determine on the one hand the characteristics of law and on the other hand how and when law can influence individual behaviour? When Griffiths talks about law he refers to his own sociological concept of law, which is law as the division of social control labour. Psychology of law deals with the same object, however in terms of psychological factors and states of individuals. Griffiths does not say so, but I think it is a pretty safe bet assuming that he expects his judgement not be very different for psychology of law in most other countries. As Griffiths admits, however, psychologists of law have made relevant contributions to what he regards as their discipline’s proper realm, for instance, in the form of the theories of attribution and equity, but in his opinion the bulk of their contributions is located elsewhere.

Although I tend to share Griffiths’ view, I would nevertheless like to make a number of reservations. Firstly, he did not ask why psychology of law has developed predominantly as applied psychology. In my view, Griffiths’ criticism also applies to most of the sociological study of the law. The reason why applied studies have dominated in both fields is that they are relatively young and had to try and find an institutional niche to get established. They have struggled and are still struggling to gain sufficient respect from the audience that is decisive for their survival: lawyers, bureaucrats and politicians. This audience is not much interested in theoretically orientated research, but in research of direct practical relevance. Since psychology of law started developing seriously some ten years later than sociology of law, it may be of a slightly more applied nature than sociology of law. However, I would not bank on it.

6. It is hardly known abroad and, in fact, not much known in the Netherlands, that the father of Dutch experimental psychology, Eduard Heymans, who was also an internationally renowned and systematic neo-Kantian philosopher. He also greatly influenced Dutch legal philosophy of the first half of the past century. However, as far as I know, he had no influence on the development of an empirical psychology of law, which started only in the seventies.
Secondly, in defence of applied psychology of law, and especially so in the case of Crombag’s work, it can be argued that it has been much closer to legal-theoretical concerns than anything I can think of in the field of sociology of law. In other words, it is not necessary to assume that psychology of law can be of theoretical relevance only if it accepts a social scientific definition of law. Almost all of Crombag’s empirical research, for instance, has been in the field of legal reasoning and evidence. It offers a fine example of how psychology of law can inspire legal theory and vice versa, something typical, according to Sally Lloyd-Bostock in her contribution to this volume, of a contemporary psychology of law that has outgrown its infancy of purely applied forms of research. Moreover, it seems to me that it is not an enormous step from this kind of psychological research to a reflection on its results within the framework of fundamental psychology of law as defined by Griffiths. The typical features and problems of legal in comparison to more informal forms of moral argumentation can readily be considered within a theoretical framework of increasing differentiation of and specialisation in social control labour.

Thirdly, in his assessment of Dutch psychology of law, Griffiths paid no attention to a book that Crombag published as early as 1983, *Een Manier van Overleven* (1983), to which I referred already. This omission is remarkable, because if anything would fit into the conceptual framework of law as the division of social control labour, it is the psychological foundations of law and morality in an evolutionary perspective. The reception of Crombag’s book at the time of it was published, is telling about the difficulties of purely theoretical work in a new sub-discipline of an academic branch as practically orientated as the law. It was more or less ignored or judged as irrelevant for practical purposes. It was more or less ignored or judged as irrelevant for practical purposes.7 No better proof of this than that even Griffiths not recalling the book when taking psychology of law to task.8

The reception of his book, of which Crombag was and is proud, must have been a disappointing experience for him and quite a spur to change his ways from fundamental to applied research in order to get psychology of law better accepted among lawyers. From this point of view, it was a wise decision indeed, as he has been most successful in these efforts. However, my contribution to this Liber Amicorum may also be read as a belated attempt to do some justice to *Een Manier van Overleven*, because it is, indeed, a place for law and psychology to meet.

7. Another reason why Crombag’s book may not have received the attention it deserved, was that biological approaches to law and morality were taboo at the time of its publication, at least in the Netherlands, where Crombag’s Leiden-colleague Buikhuisen, a prominent criminologist, was more or less forced to resign after his research plans on biological causes of serious crime caused a major public scandal. Some of Buikhuisen’s colleagues decried his plans as if he were some kind of Nazi-doctor. Griffiths, in contrast, both debunked these critics and the scientific basis of Buikhuisen’s plans. Now, almost twenty years later, the population at large has become aware of ADHD and accepts medical treatment of the potential hard criminal few.
8. If I remember correctly, Griffiths had a favourable opinion of Crombag’s book at the time of its publication.
Neo-Behaviourist Strain

Although Crombag’s book was done an injustice, the criticism that it was not directly relevant for practical purposes was not obviously mistaken. After all, a constructive link between bio-psychological evolution and legal thinking was not made in it. It mainly dealt with the problem of the relationship between biological evolution and altruistic behaviour and it tried to establish that a neo-behaviourist theory of learning can indeed explain that relationship. However, Crombag did not use that framework to explain the actual historical evolution of law; nor was it used to develop a normative theory of law.

The reason for these omissions is related, I think, to a strain in Crombag’s neo-behaviourist approach. On the one hand, he is very suspicious of what people say they do or why they do it. He is deeply convinced that man’s wisdom, if there is any, is not much of an intelligent kind, but the wisdom built into the human organism that learns more or less unconsciously. Admittedly, he has a whole lot of evidence to support this view. At the same time, however, his passionate debunking of our rationalist illusions about ourselves is clearly coupled to a belief that it will help to make man more intelligent and also more prudent.9 Somewhat ironically, such expectations are often set too high and can result in too pessimistic an attitude again, especially for the impact of the work by psychologists of law.10

I would like to try and relieve to some extent the tension caused by this strain. In fact, Crombag himself can help us here. The split between the sceptical scientist and the passionate messenger of Enlightenment in Crombag also shows in his ambivalent attitude towards his intellectual hero in psychology, B.F. Skinner. In Crombag’s essay De man van Susquehanna, a masterful biographical sketch, Skinner appears as having been quite aware that his Walden Two was a place for people without complaints, but also without any challenges or adventure. Crombag calls this the utopian paradox:11 people are no longer happy, because they cannot be unhappy. Notwithstanding a great amount of literary irony and calling the Walden Two-inhabitants “people from a different planet”, Skinner, according to Crombag, would have been dead serious about his utopia. Crombag infers this from Skinner’s Beyond Freedom and Dignity, which appeared more than twenty years after Walden Two.12 In Beyond Freedom and Dignity he argued for a scientific planning of culture to stop the destructive consequences of a world having freedom and dignity as its central, individualistic values.

9. It is this strain in Crombag’s thinking which suggested the general theme for this Liber Amicorum.
10. In his contribution to this volume together with Job Cohen, my co-editor Peter van Koppen argues why such pessimism is exaggerated.
Although Crombag agrees with Skinner’s critique of freedom and dignity as metaphysical illusions, he points out that freedom and dignity can also be interpreted as devices allowing individuals and society to learn from experience.\(^{13}\) The experimental psychologist in such a society is not that of a leader of what Crombag calls “an encompassing scientific Panopticon”, but rather an engineer who tries to improve society piecemeal, without any illusions about reaching utopia. It seems to me that although this is an important insight, it is not the main point. The latter is, I think, that legal concepts themselves can be expressions of evolutionary adaptability and therefore also of a certain degree of awareness of the socio-biological nature of man. In consequence, a neo-behaviourist psychological approach to law should not only supply behaviourism with a theory of operand learning, as Crombag did in *Een Manier van Overleven*.\(^{14}\) Its ambitions must be far greater. In order to reduce strain within the neo-behaviourist theory, meta-theories of learning must be developed at three consecutive levels:

A. A theory of the relationship between learning and its reflection in human social intelligence and, more in particular, in law;

B. A self-explanatory theory of evolution: what caused nature’s principles of evolution to become reflected in human social institutions and thus achieve a certain awareness of themselves?

C. A theory of the consequences of A- and B-level theories on the (possible) role of intelligence in society; does such self-awareness make any difference for the operation of evolutionary principles?\(^{15}\)

A-level theories focus on how learning processes are embodied in social institutions. B-level theories should try to explain in terms of natural and social evolution why it was only under particular historical conditions that social institutions were modelled after general principles of evolution and learning. In fact, the theory of evolution and learning is itself something that evolved, and, for consistency’s sake, one would like to see it explained in terms of itself. A possible explanation is that knowledge about evolution was useful for human survival itself, because it stimulated a more realistic study

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13. This insight can be connected with an alternative concept of happiness which explains Crombag’s thesis of an utopian paradox. An evolutionist view of happiness would suggest that it is related to a human being’s capacity to learn and act successfully in accordance with that learning. In fact, this is how happiness appears in the literature on ‘flow’, in which both control and challenge appear as crucial factors.

14. Crombag, 1983, op. cit., p. 75, where he made a distinction between unconditional and conditional stimuli, the first being direct biological factors furthering or threatening survival, the latter factors which have become associated with the first.

15. Just to tease Crombag, who loathes German idealist philosophers, I would like to point out that the three levels correspond to what these philosophers would have referred to as, respectively, the *an sich*, the *für sich*, and the *an und für sich* of evolution becoming aware of itself.
and planning of human behaviour. However, it may also have been a mere epiphenomenon of social evolution without any immediate function in evolutionary terms. Whatever the right answer to this question may be, now that evolution theory has been so well established, one would also like to know what possible impact it can have on evolution itself. C-level theory tries to draw consequences from the theory of evolution asking the critical question as to extent to which our social and political institutions are sufficiently adapted to learning and under what circumstances one may expect further adaptation.

**The Institutionalisation of Learning in Modern Society**

Most people will associate the institutionalisation of learning in modern society with educational institutions. A prominent role was played by Crombag in the psychological study of these institutions before he became, in 1986, a full-time psychologist of law. However, the domain of A-level theories is much larger because learning about learning is not only found in schools and universities, but in society in general. For instance, a view of freedom and dignity as an historical form of learning about economic learning is the essence of Friedrich Hayek’s theory of the market economy. According to him, the market economy and its implied values represent an evolutionary step in social epistemology. His analysis of the market boils down to an auto-regulative social system through which individuals can assess the economic meaning, via the medium of prices, of their own and other people’s needs as well as their value as labourers or investors of capital. However, not only the economy can be seen as an auto-regulative social system.\(^\text{16}\)

The more general social impact of the development of market-economies and the differentiation of auto-regulative functional social subsystems have been dominating themes of sociology: from status to contract (Maine), community versus society (Tonniës), organic versus mechanic solidarity (Durkheim), material versus formal rationality (Weber), and stratiform versus functional differentiation (Parsons, Luhmann). The theory of social evolution has acquired a reputation of disrepute. This is not the right place to discuss the problems of the theory of social evolution theory, which is rejected often as such because it is supposed to require a holistic social metaphysics. Although I am very critical of Luhmann’s social systems’ theory, I do not think that this criticism is justified in the case of his theory of social evolution, although it is indeed defective in other respects.

According to Luhmann, not only the economy, but also politics, science, the arts, education, families and the law became differentiated as auto-regulative systems in the

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course of the development of modernity. I can accept Luhmann’s view to the extent that all of these social systems are about competition, selection and adaptation and that they each use their own function-related criteria to do so. In other words, they all seem to represent transformations of the general evolutionary model, quasi by way of an attempt to pursue the advantages of social co-operation through the creation of conditions of competition which allocate resources and combinations of ambitions and talents of individuals as efficiently as possible over social subsystems and in social subsystems. Freedom and dignity, as the foundations of modern society, have often been attacked by both conservatives and socialists (nowadays often joined as ‘communitarians’) as expressing the ‘liberal-atomistic’ nature of modern society. In fact, however, individuals have never been so socialised in history before, be it that this form of socialisation is, indeed, of a very abstract kind. The typically modern intolerance of structural forms of social inequality indicates this very clearly. However, from a sociological perspective, the emphasis on personality as freedom and dignity is a quasi-religious smoke screen. It covers up the fact that persons as such matter relatively little nowadays, even though their rights may be better protected than ever before. Social status has become less and less a personal characteristic of general social relevance. Instead, the determination of social status to a large extent also has become a functional matter. One may be a good teacher and a lousy father at the same time, or vice versa.17

However, the political system and the law do not fit into this framework so easily.18 Although the competitive, selective and adaptive character of democratic political systems is too obvious to be overlooked, it is also a fact of life that the political system is not very function-specific. Its covering almost any subject matter of a more general societal interest implies that elections measure a very diffuse kind of support at best. Although the idea of a functionally differentiated form of political integration is debated and also in part realised within the European Union, the rationale behind such ideas is rarely applied to national states, which are treated as habitats of peoples. That, from an historical perspective, these entities have been pretty artificial constructs building strongly on quasi-tribal instinct is well-known, but does not seem to hinder

17. The concept of personal ‘honour’, so typical of stratiform society, means little or nothing nowadays, except in a functional sense.
18. In fact, this may also not be so obvious in the case of the family. The functional differentiation of the family from the economic activities of its members went concomitant with an institutionalisation of love as its medium, a reduction to the nuclear family. It became further dynamised, in our times, by the much greater freedom of divorce and the promotion of ‘the best interest of the child’ as the only relevant criterion for the allocation of children in case of divorce. The latest development in this direction has been the approximate legal equalisation of non-heterosexual forms of cohabitation with marriage. Modern family law may thus readily be interpreted as in line with the nature of modern society as a generalised system of competition, selection and adaptation aiming at maximising the social-economic potential of individuals and the gratification of their needs.
thinking and acting in terms of national interests as if nations were really homogenous communities indeed.

As far as the law is concerned, its auto-regulative and functionally differentiated nature is not very clear. This follows from the fact that law is the major form of expression of contemporary political systems. On the other hand, with an increasing emphasis on fundamental rights and judicial control, the law is not simply a slave of the political system. The law is also intimately integrated in all other social sub-systems and it may thus also served as a bulwark against political capriciousness and a guarantee of freedom and dignity as fundamental values of modern society. However, seen in this perspective, the law cannot be regarded as just one social sub-system among others, but rather as the system which constitutes modern society protecting both individual rights and functional differentiation. A good teacher cannot be fired for being a bad father, for instance, but his wife can divorce him, although it may severely affect his performance as a teacher. It can therefore be the indirect cause of dismissal, because divorce is not accepted as a legal excuse for bad professional performance. If modern law constitutes modern society indeed, one would also expect it to be largely based on the very same principles of evolutionary learning which permeate all other social systems so much. Does it? Again, Crombag himself can help us further when looking for an A-level theory for law.

Learning and the Law

In his Leiden inaugural lecture, *Mens rea,*\(^{19}\) Crombag has tried to show that a relationship between learning and legal concepts actually exists in the case of criminal law.

Crombag started his lecture by criticising Hart’s view that the principles of criminal justice and the deterrent function of criminal law are not fully compatible. Hart had given two illustrations to support his view. One was the judicial practice of punishing more severely when crime rates are rising. That, Hart argued, can be easily understood from an instrumental point of view, but it is incompatible with the principle of equal punishment for equal crimes. His other argument, in contrast, was about how justice limits the instrumentality of criminal law. According to Hart, it might help prevent crime to punish the insane in order to prevent false but successful appeals to the insanity defence. However, this is not permitted because it is in conflict with the *Mens rea*-principle.

Crombag disagrees with Hart and argues that the principles of criminal justice are fully compatible with psychology of learning. The more serious the crime, the harsher the penalty must be to teach (potential) criminals how serious the crime and the sanctions on committing it are. However, in case of insanity, learning through punishment

\(^{19}\) Discussed and further developed in this book by Hessing and Elffers.
is impossible, according to Crombag.\(^\text{20}\) However, learning through treatment of the causes of insanity is not excluded, according to Crombag, even though, as he admits, it is often experienced by the ‘patient’ as a more negative sanction than punishment would have been.

In *On Crime and Time*,\(^\text{21}\) I have ventured to criticise both Hart’s and Crombag’s arguments. Certainly, punishing more severely when crime rates rise is understandable from the point of view of psychology of learning, but this cannot explain why it would be just. After all, the nature of the individual crime did not change or if it did, it should be judged as less serious from the point of view of justice. After all, crime rates will often rise when arrest rates go down, making it more understandable that a person commits a crime where he was less able to benefit from the general deterrent effect of criminal law. If so, it would seem that he ‘deserves’ less rather than more severe punishment. More generally speaking, there is no fixed relationship between the seriousness of a crime and the amount of punishment necessary to keep its deterrence at a certain level. For this reason, Hart would seem to be even more right than he thought he was. However, instead of accepting it as a fact life, Hart might also have been critical of the practice of punishing more severely when crime rates rise. Moreover, Hart’s argument concerning the insanity defence does not hold against Crombag’s argumentation since, indeed, there is no comprehensible relationship between act and punishment in the case of insanity and punishing nevertheless might threaten the whole instrumental rationale of criminal punishment. However, the insanity defence can be used to support another argument against Crombag’s view. In the case of partial insanity, the relationship between punishing and learning is only disturbed in part. However, effective learning would in that case often seem to require extra punishment instead of less.

A further reflection on these matters led me to a theory of criminal law that I have called ‘The Janus-face theory’. Criminal law, I argued, has two main social functions. One is to deter from crime, the other is to allow a criminal to pay for his crime by reinforcing the deterrent effect of criminal law that was damaged by his committing a crime. The underlying idea of this theory is that our criminal law should be seen within the framework of a *political* theory of justice. Each person has both an equal right to being protected against crime and a right to be equally and proportionally punished in case it has been proved that he or she committed a crime. After having

\(^{20}\) I find this a questionable thesis. Certainly, as long as the actor is insane, he cannot learn. I doubt, however, that he may not learn if he is no longer insane, because he may feel responsible for what he did for when insane, even though he has no reason to do so. And I also find it too rationalist an assumption that third parties would not learn from an insane person being punished, because it will not help prevent crime when insane.

paid the price of crime, however, he or she should be treated again, in principle at least, as a fully entitled citizen. Such a theory is compatible with the arguments against Hart and Crombag. It explains why it is wrong for a judge to punish more severely only because crime rates rise. In fact, punishing more severely is a pretty blunt way of doing something about the problem anyway. Political justice would rather seem to require increasing arrest rates, which is a more effective means of preventing crime. It also explains why it is unjust to punish those more severely whose insanity makes them less, but not completely inaccessible to the threat of punishment, because such a person is usually unaware of his defectiveness and can thus not gain from extra deterrence through the threat of extra punishment.

However, this criticism of both Hart and Crombag did not make me less interested in their theories of law and justice, quite to the contrary. The Janus-face theory of criminal law fits in smoothly with the truisms concerning the human condition on which Hart’s MCNL is based, and notably the truism that men’s strength of will is limited. Most people will commit crimes of greater or lesser severity in the course of their lives and whether or not they will be punished for it, is often a matter of chance. But also normal persons need the deterrent force of criminal law to contain their criminal inclinations, because to a large extent crimes are determined by circumstance. Therefore, society is really paid a service by those being caught and punished, because they allow the law to show its having claws indeed. Even criminal law represents a rational scheme of social co-operation, therefore, in which ideally the profits and losses are kept in balance.

As far as Crombag is concerned, my criticism does not imply a denial of the relevance of his neo-behaviourist theory of learning, but just that learning and justice are related in a much more complex and abstract way in the case of the law. However, there is no reason to assume that political justice has no behavioural basis. In Een Manier van Overleven Crombag makes this quite clear. Whereas social relationships among chimpanzees are normally based on a pure power-hierarchy, the situation is different when it comes to the division of the spoils of hunting. Without protest, Crombag tells his readers, the powerful share these with the less powerful who have participated in the hunt. Even the alpha-mail has been observed to have to beg for a share if he did not participate in the hunt. Obviously, the more powerful who were not smart enough to learn that they could not count on having helpers in the hunt, unless they would be willing to share the spoils, have not been capable to maintain themselves against those who were. Justice is not only an asset for the survival of the weak, but also a means of selection among the strong, depending on whether or not they are able to get the support of the weaker, as De Waal has demonstrated so impressively in his Chimpanzee Politics.22 The politics of co-operation were already very

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much in operation in pre-human society. However, for all the progress in ethology, it seems as if there is still an enormous gap between the notion of justice as manifested in behaviour in primates’ societies and the highly complex and contested systems of political justice in human society. Is it possible to bridge these somehow?

In *Een Manier van Overleven*, Crombag links some reflections on social contract theories to his observation concerning justice among chimpanzees. Social contract theories express, in his view, the collective power of the weak. However, they are ideology, because they do not take the empirical constraints of human society into account sufficiently. These constraints are such, according to Crombag, that society will always be a compromise between the collective powers of the weak and the power of the strong. Constitutional democracies represent the best that has been produced thus far on behalf of the weak. They allow control of the powerful to some extent via the ballot box, while the rule of law and checks and balances of a federative kind protect against oppression of individuals and minorities by a democratic majority. Democracies will thus operate somewhat like markets. According to Crombag, it cannot be denied that citizens’ chances of survival in a modern democracy have been better realised than ever before, be it that this chance is by far not equal for all nor guaranteed even minimally for each citizen.

I do not fundamentally disagree with Crombag’s view. However, it contains an implicit suggestion that democracy as we know it is something like an evolutionary *non plus ultra*, because given the empirical constraints of human behaviour, it represents an arrangement which is maximally co-operative and supportive of human survival. Whether or not this is so, is a matter requiring a closer view of the historical development of law and society more or less common to western democratic countries. The critical question to be asked is why it took so long for this stage of social evolution to establish itself. More particularly, one would have to look at the evolution of law in this connection, because Crombag’s claim, if true, should not only be reflected in the structure of political institutions, but also in the laws produced by it.

**Hart’s Minimum Content of Natural Law**

Crombag’s referral ‘empirical constraints’ raises the question, why he was not reminded of Hart’s theory of a *Minimum Content of Natural Law* (MCNL). The question is raised once more in view of Crombag’s analysis in *A Note on the Naturalistic Fallacy*, the article that prompted my editorial misbehaviour mentioned in the introduction. In that article Crombag suggested bridging the logical divide between ‘is’ and

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24. Crombag, 1983, op. cit., p. 117; an addition I do not understand if it were meant also to apply to European welfare states.
‘ought’ by considering that legal norms which prescribe behaviour that is in conflict with our biological drive for survival, cannot be valid because they cannot be effective. After all, had they been effective from the origin of man, he would not have been able to survive. True as this may be, there has been and there still is obviously a lot of law that has been effective in thwarting the drive for survival of individuals and groups. For this reason, one would like to know what law is just in the sense that it is in the interest of everybody’s desire for survival, and to which extent modern law meets that requirement.

Hart’s theory claims to be based on a number of truisms about human nature that are all related to the issue of human survival. I will first describe and discuss his theory now and try to answer the question as to why Hart apparently did not attach great importance to it as a theory explaining and criticising the law. I believe, on the other hand, that Hart’s truisms are a sufficient basis for a normative theory of Law as a Way to Survive, a theory which, because of its normative nature, I call Law as Morality of Survival (LMS). There is insufficient room here to allow me to demonstrate the full critical potential of this theory. I can only touch on it and show how it can help us to a better understanding of the evolution of modern law. Thus, I hope to fill in the missing historical link or the B-level theory in Crombag’s *A Way to Survive*, and also to consider the C-level question of law’s further evolutionary potential.

Hart understood MCNL as a rational consequence of the human desire for survival in combination with certain ‘simple truisms’ about man and the world. This, he expressly stated, is the only thing that men may universally agree on. These truisms are: human vulnerability, approximate equality, limited altruism, limited resources, and, finally, limited understanding and strength of will.

*Human vulnerability* refers to the fact that all humans are in need of protection against physical violence directed against their bodies and their lives.

*Approximate equality* refers to the fact that however strong or intelligent individuals may be in comparison to others, they will always depend on others and be in need of their voluntary co-operation, as they can not rely on their superior powers alone. “Even the strongest must sleep at times”, Hart wrote after Hobbes. Approximate equality necessitates “a system of mutual forbearance and compromises which is the base of both legal and moral obligation”, whereby one of the features contrasting law from morality is the regulation of the use of force where legal rules have been violated.

*Limited altruism* is a property Hart ascribes to men following Hume. Men are not, as Hobbes suggested, devils, nor are they angels. That is what makes a system of mutual forbearance both necessary and possible.

The reason why humans are not angels has everything to do with a fourth truism, which is the fact of *limited resources*.

Finally, the fifth truism is *limited understanding and strength of will*. It is this what makes the law necessary, notwithstanding the fact that most men can see the advantages of adhering to the rules and are usually willing to sacrifice their short-term interests to further their longer term interests. However, although some men are not particularly capable of doing so, almost all people are incapable of acting consistently in conformity with what they would reasonably agree with.

What all this boils down to is the fundamental fact of scarcity. The means that can help us survive are scarce and so are the means of protection against crime. In fact, we must also protect ourselves against giving in to criminal inclinations.

The question whether survival has moral value, was not answered by Hart. It is simply, Hart wrote, what almost all men fundamentally desire and what they can minimally agree upon. However, he did not deal with the question if anything may be inferred from this with regard to the legal institutions which a society should minimally provide. Moreover, if such a minimum can be determined, the question can be raised as to whether there are moral reasons why a political system might impose more duties on its citizens than is necessary from the perspective of survival. Hart did not suggest that there were such reasons. However, it may be that Hart did not develop MCNL further, because he deemed the minimal agreement not substantial enough to help decide the most important issues with regard to the question of an institutional transformation of MCNL.

Alternatively, he may have felt that it was not a strong enough basis to support the kind of society he, as a life-long member of the Labour Party, most preferred. This preference must have been a consequence of his utilitarian morality, no doubt, but MCNL represents a minimal morality indeed, whereas utilitarianism is a perfectionist kind of morality that involves making high demands on human solidarity.

From the point of view of a moral relativist, I can see no reason why anybody should agree to any more restrictions on his or her freedom than necessary from the point of view of LMS. These restrictions are to be determined by the collective conditions that make a legally and politically responsible life possible for each citizen. Above that level, however, each person should be allowed to enhance his personal chances of survival as well as he or she is able within the limits of the law. However, whereas rights in a MCNL-based society must be equal in a formal sense, justice demands that the financial burdens must be distributed in proportion to the material gains exceeding the MCNL-level of survival.

Given these rules of thumb, a first institutional demand is private property, although some collective property may be necessary to meet the requirements of LMS. Property must be private, as each individual has the right to take care of his own survival as best as he or she can, without being restricted by any other individual or by collective measures which are unnecessary from the aspect of collective survival.

A second institutional provision must be social security. The reason for this is that if a person’s survival is at risk, because he cannot provide for himself, there is a justification for taking what he needs to survive from those who have plenty. Since, how-
ever, it is to be preferred that people take care of themselves, it is also reasonable to
demand that society provides sufficient education for people who or whose family
cannot provide it themselves, especially as it is obviously cheaper to educate people
than to keep them alive as structurally unproductive persons. However, education,
as the third institutional requirement, cannot only be justified from the aspect of sur-
vival. It can also be supported, as a requirement, to facilitate citizens’ understanding of
law and other political matters.

A fourth institutional demand to be made from the point of view of a general inter-
est in survival is health protection. What the state should guarantee on is a level of
health protection up to the point an average person would spend all of his freely dis-
ensable income over the MCNL-level necessary for other purposes is increased by the
efficiency gains of having a healthier population. Health protection can also justify
making preventive requirements for industrial machinery, means of transport, zoning
and other measures of urban planning. Such justification can also support the protec-
tion of the natural environment, but also protection against natural disasters of a gen-
eral incidence one cannot protect oneself against individually, through insurance or
otherwise.

Another major requirement of LMS is that the law itself will not be the reason as to
why a person would not be able to survive. A fifth institutional provision that can be
justified in the light of this consideration is public space that allows everybody to
move and meet others. If unrestricted property rights in land were to be allowed, a
person might enter into a situation in which he cannot survive without trespassing on
other people’s property. This is why the law has always offered relief against encircle-
ment. Persons who are totally surrounded by land owned by others have a right of
trespass. In other words, the law must provide for public space and other channels of
public communication so as to allow people to come into contact with one another.
Moreover, such space should allow efficient exercise of the rights supporting survival.
Property would be of little use if efficient communication and transport were impos-
sible.

The sixth institutional requirement that may derived from the same consideration
the law is not a threat to survival itself, relates to Hart’s truism concerning limited un-
derstanding and strength of will. Everybody has an interest not to be declared an outcast
after having being convicted of having committed a crime. In other words, criminal
sanctions should be moderate to the extent that their function should be simply keep-

26. The question can be raised as to how society should deal with people who do not provide
for themselves, although they are capable of doing so. This question is especially relevant in
the case of people who claim to have moral reasons for not doing. Elsewhere (see footnote 28)
I have argued why, from a moral-relativist point of view, a basic income system can (only) be
justified as a pay-off to ensure that such people cannot claim that their eventual criminal acts
were a consequence of the need to survive, as moral objections did not allow them to provide
for themselves through work.
ing up the general deterrent of criminal law, and criminal law should allow re-
socialisation of criminal offenders after punishment.

The seventh institutional requirement is also concerned with this consideration re-
lated to the administration of justice. The rule of law and a properly functioning legal
system are obviously a necessary condition to keep authorities entrusted with imple-
menting and enforcing the law in check and to ensure they do not become a threat
instead of supporting human survival. A properly functioning legal system includes all
those measures that are justified as collective prevention of legal troubles of a general
incidence or reasons of cost-effectiveness. These can take the form of market regula-
tion, or allocating risk-restrictability for accidents, preventive measures against crime.

Finally, a state has to take care, of course, of its funding. I have already printed out
the main principle for a just taxation, the eighth institutional requirement. A ninth
institutional requirement is the protection of the state against foreign or domestic vio-
I lent threats. Finally, it must also provide for a system through which citizens can con-
rol the proper functioning of public institutions. However, discussing the theory of
political institutions would be here a digression. A few remarks on that topic will be
made later in connection with B- and C-level questions.

This deduction of institutional requirements is not shocking where it would seem to
be largely to correspond to our institutions. However, this is the case only at a more
superficial level. LMS can help us solve even very subtle legal dogmatic questions, as I
have tried to demonstrate in the analysis of legal dogmatic problems of property law,27
criminal law28 and, in a much more critical vein, tax law and social security law.29 I
have not produced an analysis along these lines for family law, but its modernisation
over the past twenty years is very much in line with LMS.30 The reader will understand
that I cannot digress on these matters here and is referred elsewhere. However, a very
good claim can be made, in my view, that on the basis of LMS modern law can be
analysed fruitfully, reconstructed or criticised.

Assuming that modern law can indeed fruitfully be analysed as the embodiment of
principles of evolutionary learning, we can now proceed to B- and C-level questions
on law and learning.

30. See footnote 17.
Law and Survival from an Evolutionary Perspective

Is it possible to explain why it took so long before modern law became established? Can the history of its establishment be explained in evolutionary terms? Can the very insight into these questions be understood in its own terms? And finally, is it possible rationally to develop law further along evolutionary lines and if so, what are the chances of such projections becoming legal realities? These questions are important for assessing the relationship between intelligence and progress. Does it offer some relief to the strain in Crombag’s neo-behaviourist approach?

To tackle these questions, I would first like to return to Crombag’s analysis of socio-political evolution. In his view, it is seen as a long historical process of compromises between the strong and the weak, finally resulting in modern legal rule democracies. According to Crombag, these types of society are, from a global historical perspective, optimal from the perspective of the weak.

Terms like ‘strong’ and ‘weak’ are pretty clear when considering animal society, where they refer to physical power. However, they become rather unclear in human society precisely because the physical power of individuals is replaced by social powers. In fact, in primate society the position of the weak and the powerful were no longer independent factors. A person can be strong precisely because he is able to mobilise the support of many others who are, by themselves, weak, but very strong when joining forces. However, it makes sense to assume that strength and weakness in society remained dependent on the control of arms for a very long time and that they are still very much related to other factors determining social power.

A prevailing common interest in controlling the risk of take-overs is likely to exist in a group in control of arms, as long as little can be gained from trying to reduce membership of the group. The stability of the group that is in control is therefore dependent on a balance of power within that group. The powers of the weak depend on their capacity to shift loyalties and destabilise harmony within the ruling group. For this reason, the countervailing strategic principle of the stronger, which cannot control the weaker by force alone, is: divide et impera.

However, greater intelligence provided man also with another control device, which is mind control. The stronger could also be successful in impressing upon the weaker a belief that the supremacy is supported by supernatural forces of a religious or quasi-religious (nations, for instance) kind.

From this simple theory, one can deduce three major conditions favourable to the rise of a more egalitarian or the more just society. The first is the absence of the possibility of mind-control.

The second one is the absence of a great direct physical threat to society from outside, which makes a high degree of organisation and concentration of physical power a necessity within society. In fact, the political effects of the organisation of war can last much longer than wars itself, as Jettinghoff’s contribution to this Liber Amicorum demonstrates for the twentieth century.
The third condition is a degree of dependence of the holders of physical power on the voluntary co-operation of the weaker, which will render both physical threat and *divide et impera* pretty blunt instruments. This is the case when economy and society have become so complex that formal and informal powers of social control will have to be left to subgroups, which must be well-organised to do so. However, because of their organisation, they are also capable of great resistance against the politically powerful who accomplish little or nothing without their co-operation.

A situation in which all three conditions were fulfilled took very long to develop. That the combination of physical intimidation and mind-control can still be pretty effective, has been proven by the role of totalitarianism in the twentieth century. However, the downfall of communism has also demonstrated that there are limits to such control. In complex and dynamic economies, it has become more difficult for totalitarian regimes to mobilise the productive efforts of a population in the long run than for societies based on voluntary co-operation and lacking mind-control. Together with the increasingly technological character of modern warfare, this explains why totalitarian states also tend to become less successful in international competition.

Power relations should, however, not only be considered at the macro-level. Even if a society is already highly developed and functionally differentiated, pockets of domination based on power-relations can still be effective for reasons of survival. The most obvious example in this respect are power relations between the sexes, which are only becoming more fair in our time since several factors have brought about a drastic change in the traditional division of labour between the sexes.

Western society would seem to be the only one to have succeeded in meeting most of the basic conditions of replacing power relations by a system based on voluntary co-operation. This has been the result of a number of historical co-incidents which have occurred over hundreds of years. They have often reinforced one another without, however, producing a uniform or straightforward pattern of socio-economic and political evolution. The most important factors have been:

- Lack of concentration of and within spiritual and political power that allowed a purely functional conception of political power;

- Religion becoming a private matter, on the one hand, but all the more a force of rationalisation, on the other, as God’s rational nature was maintained as an article of faith of most Christians and as a rational-moral lifestyle was seen as a precondition of redemption (survival post-mortem); later, when utopian ideas were projected on earth itself, religious hope for salvation was transformed into a belief in the historical progression of mankind.

- Competition between states which, after it had first led to an increase in political power of an absolutist kind in the seventeenth and eighteenth century, in combination with increasing industrialisation led to an ever greater mobilisation of the productive forces of the population through education, health care and, in any case, elementary social security. The in-
creasing dependency of the powerful on the weaker added to the potential for resistance of the latter, of course, and explains why political democratisation became an evolutionary inevitability.

- Development of market economies as flywheels of economic development; the origins of that development were the free cities, which became rich and powerful enough to join hands with central powers which were interested in them as a source of tax revenue, supporting them against external and internal enemies.

- The development of science and a relatively independent intelligentsia as devices for criticising traditional ideas, rules and norms; again, it was the free cities that were willing, mainly for economic reasons, to allow self-government to universities, whereas central powers were interested in them for the purposes of recruitment.

The place of the law in these developments towards secularisation and rationalisation was determined by factors that fit well into an evolution-theoretical explanation. First of all, the rationalisation of property law which started in the Middle Ages, met the needs of the upcoming towns and their commercial interests.

The second major achievement was the development of purely secular theories of government and public law in the seventeenth and eighteenth century. They had been very much prepared by Canonist legal thinkers from the twelfth century onwards, who strove for a rational bureaucratic administration in and by the Church, built upon the remnants of imperial Roman administration. In fact, the modernisation of criminal law in the eighteenth century was just one aspect of the development of an administrative science aimed at socio-economic welfare as the material and moral basis of rivaling states.

With conscript armies and industrialisation, state involvement in society grew even larger in the nineteenth and twentieth century. The development towards democracy and the beginnings of a largely state-controlled educational and social security system can also be explained as functional necessities instead of as concessions to more or less revolutionary ideological forces.

Finally, in our times we have witnessed the radical individualisation of family law and the legal emancipation of women. Again, such developments are adaptations to the need for a skilled and mobile labour force, made possible by the mechanisation and automation of households.


33. As Crombag argued in the article referred to in the preceding footnote.
The pattern of development shows that modernisation of the law has been a very long historical process. Its explanation confirms the Marxist thesis that ideas are effective only if strong material interests back them up. In fact, even the development of Darwin’s theory of evolution can be explained in this context as an epiphenomenon of socio-economic development, since it was much inspired by economic theory, in particular Malthusian economic theory.

However, the relationship between theory and reality should not be seen as purely mechanical. I already referred to my view that social security and tax law, as well as the present structure of democracy, do not meet the demands to be made from the LMS perspective. As I see LMS, public social security ought to take the form of a basic income system and taxation in the form of VAT, while democracy should finally do away with the model of the modern state. Assuming that such reforms would really improve society in terms of the fundamental value of LMS, the question will be raised as to whether they have any chance of becoming reality.

Although VAT has become more and more important as a source of taxation, it still does not even account for a third of all tax-money raised in European countries. Furthermore, even though some of the greatest economists support the idea of a negative income tax, and there have been some developments into that direction, it is regarded as a pretty utopian idea by most people, whatever calculations have been made to prove that it is financially feasible. Finally, the idea of functional, overlapping, competitive jurisdictions or ‘FOCJ’ (pronounced as ‘foci’), as proposed by the well-known Swiss economist Bruno Frey, as a change from state monopoly to public government guided by quasi-market incentives, is even further removed from what we are familiar with.

The major reason why such drastic simplifications of tax law and social security law – as well as a regeneration of democracy – are not more often seen as attractive, is that massive interests are at stake in the present structure of the state. A drastic simplification of social security and taxation, as suggested here, would considerably downsize the role of professional politicians and bureaucrats. And so would Frey’s proposal, because a functionally differentiated form of democracy would allow for a much greater participation of part-time politicians, whose career will not depend exclusively on the political system as is the case with career politicians. Moreover, as far as the basic-income proposal is concerned as a political idea, it is almost a paradox. If the economy is bad, the argument will be that there is no money for such a reform, if it is doing well, the argument will be that it is not necessary, because there is plenty of work. However, the real point I would like to make here, is not of a political kind. That -final- point concerns the strain in Crombag’s neo-behaviourism.

I have tried to show that the principles of evolutionary learning have been incorporated into the social institutions of modern Western society. This is also true of the law, be it not always in a consistent way and not in the more recently, historically speaking, strongly developed branches of the law, such as taxation, social security, and the democratic political system. At A-level, there is no major reason therefore to be terribly sceptical about the rationality of the law. Just being critical is quite sufficient. However, a B-level view on the actual evolution of the law shows that rationality as such has only played a very secondary role in determining the historical pace of rationalisation of positive law, which continued to be dependent on the strength of political and socio-economic groups interested in such rationalisation.

Therefore, a C-level perspective on legal evolution warrants no great expectations as to the further rationalisation of the law. To that extent, Crombag’s neo-behaviourist strain is just a reflection of reality. Progress in law requires reason, but is not driven by it. And alas, the last statement is not self-defeating. The fact it is referring to, will not be changed by it one bit. An academic who is a passionate sceptic can be advised also to be sufficiently stoic, lest he will not disappointed and have his intellectual peace of mind disturbed when trying to serve the public cause, as much as Crombag has done and still does. But I am confident that his intellectual legacy to us is still far from complete and that he will continue to inspire his colleagues as much as he has in the past.
‘The Right to Everything’

Hobbes and Human Rights

Frank van Dun

In one of his ventures into the philosophy of law Hans Crombag casually comments on the present fascination with human rights. He finds human rights “sympathetic but naïve.” Crombag also interprets the doctrine of human rights as a legacy of the classical theory of natural law. I disagree with him on both points. I have little sympathy for the human rights doctrine as it has been consecrated in the Universal Declaration of Human Rights. One reason is that it is largely superfluous: the good it can do could be done equally well under the aegis of the classical theories of rights. Another and much more weighty reason is that it has generated a hyperinflation of rights that can only destroy their value. Moreover, the doctrine of human rights is neither naïve nor a legacy of classical natural law theory. As I shall undertake to show here, it is a legacy of the sophisticated political philosophy of Thomas Hobbes and as such a repudiation of everything classical natural law stood for. I shall draw my arguments from a logical analysis of the doctrine of human rights as we find it in the Universal Declaration, and of Hobbes’ theory of the natural right of man. I shall oppose both to the very different logic of the classical theories of natural law and natural rights in support of the claim that they are not and cannot be the prototypes of modern human rights.

1. Faculty of Law, Maastricht University.
3. However, I do not intend to add to or comment on the long debate (going back at least to Leo Strauss’ classic Natural Rights and History and the works of Michel Villey) on the relationship between the classical theories of natural law (in the tradition of Aristotle and Saint Thomas) and natural rights (the Lockean tradition). The thesis by Strauss and Villey that natural rights are a radical ‘modern’ departure from the classical Aristotelian-Thomist theory of natural law, has been criticised e.g. in F.D. Miller (1995) Nature, justice and rights in Aristotle’s politics. Oxford: Clarendon Press, and B. Tierney (1997) The idea of natural rights. Atlanta: Scholars Press.
The Universal Declaration of Human Rights (henceforth UD) was introduced in Paris on December 10th, 1948, in the aftermath of the Second World War and the long period of economic depression and political turmoil that had preceded it. Although the UD was generally praised, it did not have an immediate impact on the legal profession. For example, as a law student, from 1965 to 1970, I did not hear or see anything about it, apart from a brief mention in a course on international law. I did read the document, however, in 1968, when the media drew attention to its twentieth anniversary. I confess that I was shocked. My first impression was that it was adapted from the charter of some society for the protection of animals, with human beings in the role of the animals and governments in the role of their keepers. I was twenty-one at the time, legally an adult and expecting to be treated as such. One can imagine the distaste with which I read the UD’s turgid message that my fundamental rights were none other than to be treated without cruelty and to be taken good care of by the powers that be. To me human rights were rights of human beings as such, not mere reflections of the duties of some omnipotent but supposedly benign government – which is exactly what the UD makes human rights sound like. Apparently, my thinking about rights, undeveloped as it then was, took inspiration from sources other than the UD. It was not until later that I discovered how different those sources were.

I. Human Rights in the Universal Declaration

A Dilemma

In a superficial reading the UD seems to contain a lot of elements that should be acceptable without further comment. They are sometimes likened to the rights of man that figured so prominently in older documents, such as the French Declaration of the Rights of Man and Citizen (1789) or the American Bill of Rights, or influential books in the tradition of natural rights, such as Locke’s Second Treatise. Articles 3, 4, 5, 9, 10, 11, 12, 13, 16, 17 of the UD are in this category. Other elements of a different nature are also reminiscent of such precedents. However, they do not concern the rights of man as such, but rather the rights of the citizen, i.e. the rights of members of ‘political associations’ or states. Examples are to be found in articles 6, 7, 8, 15 and 21. It is noteworthy that, unlike its predecessors, the UD does not explicitly distinguish between human rights and citizen rights. The Declaration of the Rights of Man and Citizen, for example, had made it very clear that that they are not to be confused. The rights of man were identified as natural rights. A contrario, the rights of the citizen could only be artificial constructs. Indeed, in its article 2 the French Declaration had stated unambiguously that the protection of the natural rights of man is the raison
of every political association. Consequently, the rights of the citizen were presented as mere tools designed to further this end. It was probably no mere oversight that the authors of the UD did not make that distinction. As we shall see, it is a distinction that does not make sense within the basic philosophy of rights that appears to underlie the whole document.

Of course, the distinctive elements of the UD are the ‘economic, social and cultural rights’, which can be found in articles 22 to 28. Without these, there would have been no reason at all to make a big issue of the Declaration, since all the other elements had already been stated much more clearly and elegantly elsewhere. The tone is set in article 22: “Everyone, as a member of society, has the right to social security and is entitled to the realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Among the rights listed we note rights for every person to work; free choice of employment; just and favourable remuneration and conditions of work; and rest and leisure, including periodic holidays with pay. In addition there is “a right to an adequate standard of living” (art. 25), which includes food, clothing, housing, medical care and all sorts of social security.

Article 26 mentions “a right to education”, that turns out to be primarily a right to schooling, which should in some cases be at once free, compulsory and according to the choice of the parents. It should always be directed “to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms” and promote “understanding, tolerance and friendship among all nations, racial or religious groups, and the activities of the United Nations for the maintenance of peace.” According to article 27, “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Finally, article 28 declares that “everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.” Apparently, the “right to the United Nations” is a human right as well.

The UD presents the economic, social and cultural rights simply as human rights, as if they are of the same nature and on the same level as the other rights with their seemingly respectable ancestry. Anyone who is familiar with the classical doctrine of natural rights will immediately see – and has been said many times – that the UD’s dis-

tinctive ‘rights’ are incompatible with this doctrine. Enforcement of one person’s economic, social and cultural rights necessarily involves forcing others to give up their property or to use it in the way prescribed by the enforcers. It would constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by anybody else. It would also deny a person the right to improve his condition by accepting work for what he (but perhaps no one else) takes to be an adequate wage.

We have a dilemma here: either the rights in the first set of UD are indeed the natural rights of the tradition and then the whole document must be interpreted as inconsistent propaganda; or that set is not inconsistent with the rest of the document, but then it cannot be assimilated to the tradition of natural rights and natural law.\(^5\)

To mitigate the inevitable ‘conflicts of rights’ implied by the first hypothesis, lawyers and legal theorists often propose to rank various human rights as being more or less important than others.\(^6\) By ranking rights in some hierarchical order, they hope to provide guidelines for weighing rights. However, this strategy is no more than a pragmatic evasion of the problem of inconsistency. Even so it only works where there is a genuine consensus on the relative importance of conflicting rights – a condition that is not likely to be fulfilled in the real world of politics.

I shall consider only the second horn of the dilemma – that is to say, I shall take the UD seriously and not dismiss it (as lawyers used to do for a long time) as a politically powerful blast of hot air with no immediate relevance for questions of law and justice.

In truth, it cannot be denied that the UD was a political compromise. Consequently it may well be the product of inputs from different parties with mutually incompatible beliefs and ideologies. However, most people now seem to think that human rights are the human rights of the UD, or perhaps any ‘rights’ of the kind this document so prodigiously attributes to us. Even among lawyers, the idea that the UD’s human rights are fundamental rights, is now quite common (at least in the Western world). Whatever the actual history of its drafting, it is clear that the whole document has come to be seen as a statement of a coherent doctrine of human rights. Moreover, the Preamble

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5. There are a few clauses in the UD that do identify aspects of some genuine natural rights as well as some traditional ‘rights of the citizen’. Interestingly, however, they are not presented in the form of rights, but in the form of absolute prohibitions imposed on every in general or political authorities in particular. Examples can be found in article 4 (“No one shall be held in slavery or servitude”), article 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”), and in articles 9, 11, 12, 15 and 17. They are clear examples of ‘negative rights’, meaning that they can be respected by anybody merely by not doing something to a person without his consent.

refers to Franklin D. Roosevelt’s ‘four freedoms’ as having been “proclaimed as the highest aspirations of the common people.” This suggests that those who wrote the Preamble did not intend the UD to be interpreted in terms of the classical theory of natural law, natural rights and its associated political ideal of a constitutional state committed to the rule of law and substantive due process. It suggests, rather, that they intended the UD to be read as an original manifesto of the philosophy of the welfare state – at least of the two versions that victoriously had emerged from the war: the corporatist version of the parliamentary democracies in the West and the planned economies of the so-called people’s democracies of the Soviet bloc. One way to summarise the UD is by saying that people have a right to live in a welfare state without having scruples about its unprecedented peacetime powers of social control and mobilisation.7

**Contradictions and Practical Problems**

In one sense of the word, Crombag’s assessment of the UD’s human rights as “naive” is understandable. Not only is their enumeration chaotic, it seems to be full of contradictions of a logical or practical nature. For example, what the UD tells us about education and working defies common sense. How can we reconcile free choice of employment or education with the idea that labour should receive just and favourable remuneration or that education should be free (i.e. 100% subsidised)? What are we to make of article 28 and its right “to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised”, given that the full realisation of almost any of the ‘rights’ in the UD impedes the implementation of so many others? Almost all of the human rights mentioned in the UD are exposed to the risk of a ‘conflict of rights’. Most of them are indeed ‘rights’ to resources that are in

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7. From the first day of his Presidency, ten years before the USA joined the fray of WW-II, Roosevelt saw himself as war leader. He exploited the sense of crisis (and, with his long ‘banking holiday’ of 1933, possibly provoked a real financial emergency) in order to push a request through Congress a request for “broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe” (from his Inaugural Address). He even based his authority for closing the banks on the Trading with the Enemy Act of 1917 (when the US entered WW I) “The crisis justified the casting aside of precedent, the nationalistic mobilization of society, and the removal of traditional restraints on the power of the state […]” (J. Garraty (1973) The New Deal, national socialism, and the great depression. American Historical Review, 78, p.932). We should not forget the fascination with war, strong leadership, national planning, technocratic management and the like, that characterised the intellectual and political elites of the first half of the century. See e.g., R. Higgs (1987) Crisis and Leviathan. New York: Oxford University Press, p. 169. It is as apparent in the UD as it is in “the welfare state [which] is an offspring of the total warfare of the industrial age” (B. Porter (1994) War and the rise of the state. New York: The Free Press, p.192).
short supply relative to the quantities needed to satisfy the desire for them. Should we conclude that a human being’s fundamental ‘right’ is what can only be possible in Utopia, that Nowhereland where there is enough of everything for everyone and where there are consequently no choices to be made, no costs to be borne, and where frustration is not to be feared?

Even in the richest states budgetary limitations lead to often sharp confrontations between pressure groups and vested interests in the various domains of social, economic and cultural life. That one prefers to call ones interests human rights does not change that fact. It merely creates the risk of an escalation of political rhetoric and passion, now that the flag of the human rights flies over almost the whole arena of government policy. Each policy option can be interpreted at one and the same time as a measure to further some human right and as an indication of the neglect or even the violation of any number of other human rights. There is therefore at all times unlimited room for weighing various ‘rights’ and for setting and revising priorities. The political and administrative bodies to which this weighing of rights has been entrusted or which have succeeded in monopolising it, have ample opportunity for expanding their power and influence.

Nothing remains of the old idea that a right is an absolute, worthy of respect in all circumstances except perhaps the most extreme emergency. The human rights of the UD are not and cannot be absolute, even in the most normal of circumstances – unless, of course, anything short of Utopia should count as an emergency. By their very nature they are all susceptible to continuous weighing, negotiation and qualification. They are a politician’s delight, for every human right translates into ‘a right to more government intervention on its behalf.’

This is no less true for the ghosts of the natural rights that linger on in the first half of the UD than it is for the economic, social and cultural ‘rights’ in the rest of it. Of course we should not confuse the ghost and the real thing. For example, article 2 of the French Declaration of the Rights of Man and Citizen, clearly states what a person’s natural rights are: liberty, property, freedom from arbitrary arrest and resistance to oppression. In the UD, on the other hand, a person is not informed that his life, liberty, security of person, and property are his fundamental rights. He is told only that

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8. Scarcity in connection with desire is crucial here. The economic concept of scarcity in connection with ‘effective demand’ is not relevant, because I do not mean to say that we have rights only to such things as we are willing and able to produce or pay for.
9. Cf. Hobbes’ expansive definition of war (and correspondingly strict definition of peace, *Leviathan*, chapter 14) making the war of all against all the normal condition except in a strong absolutist state.
10. See the text in note 4 above. “Freedom from arbitrary arrest” (sûreté) and “resistance to oppression” are arguably not genuine natural rights. They are reflections of the duty of any legitimate government to respect natural rights.
he has the right to life, liberty, security of person (art. 3) and property (art. 17). He should not expect more. For it is obviously inconsistent to claim that everyone is entitled to the full realisation of the economic, social and cultural ‘rights’ and at the same time to claim that any person’s fundamental rights are his life, liberty and property. The administration of the former requires the concentration of massive coercive powers of taxation and regulation in the hands of the state and so must presuppose that a person’s life, liberty and property are not his rights. However, the inconsistency evaporates once we realise that the UD’s ‘right to life, liberty, property’ does not specify to whose life, liberty or property a person has a right. It does rule out that he has an exclusive right to his own life, liberty or property. It does not rule out that some or all others have an equal, or perhaps more pressing, claim on those things in order to enable them, say, to enjoy the arts or a paid holiday.

Thus, a person’s life, liberty and property are thrown upon the enormous heap of desirable scarce resources to which all people are said to have a right. As such they too end up in the scales with which political authorities, administrators and experts are supposed to weigh the ingredients for their favoured policy-mix. Here we catch a first glimpse of the shadow of Hobbes behind the contemporary notion of human rights: The person who believes he has ‘a right to everything’ is likely to find out that there is no thing that is his right.

**A Hobbesian Predicament**

The following thought-experiment will bring out the Hobbesian character of the UD’s human rights. Imagine two people, the only survivors of a shipwreck, who find refuge on a small deserted island. They have with them nothing but their human rights, in particular their ‘right to work’ and all that it entails according to articles 23, 24 and 25 of the UD. One can imagine what will happen to them if they just sit there insisting on their ‘right’ of being employed by the other at a just and favourable wage, or else to unemployment compensation high enough to allow them an existence worthy of their dignity. One can also imagine what will happen to them if, instead of just sitting there, they start attempting to enforce their human rights against one another. That would be their version of Hobbes’ war of all against all. Finally, one can easily imagine what would happen if one of them won that war. Then Hobbes’ solution for the incompatibility of their ‘rights’ would emerge. In their case, this would be a situation in which the winner arranges for himself nice unemployment compensation (also known as a tax on another’s labour) to match his new-found dignity as a ruler, and keeps the other man quiet by leaving him as much as is consistent with ‘the organisation and the resources of their state’.

11. The relegation of ‘the right to property’ to article 17, i.e. its separation from the rights to life, liberty and security of person, with which it had been linked traditionally, is certainly worthy of note.
Starvation, universal war and the Leviathan state are indeed the only possible outcomes under a regime of human rights – and only the latter outcome is compatible with survival. Imagining a two-person-situation makes this conclusion as clear as daylight, but its validity does not depend on the numbers. Large numbers only serve to obscure the logic of the situation. They may, for example, induce the illusion that the ruler is simply ‘out there’, at no extra charge, protecting the human rights of his subjects – when he is fact continuously testing their ability to pay and endure in order to keep the burdens of taxation and regulation below the threshold of revolt.

Of course, the two men need not be so foolish as to insist in any way on their human rights. They may have enough sense to understand the natural laws of living together and settle for their natural rights, respect each other and each other’s work (property) and try to agree on mutually advantageous deals. Indeed, they might be satisfied with the claim that for each of them his life, liberty and property are his only fundamental rights and that the only thing they have a right to is respect for their natural rights.

II. Rights in the Classical Tradition

Claims and Rights

The connection between the notion of human rights and the political philosophy of Hobbes is far from fanciful. It rests on formal and material similarities that show both of them to be instances of the same concept of ‘rights’ – one that is incompatible with the concept of rights in the classical natural law tradition. As to their form, the UD’s human rights (with few exceptions\(^\text{12}\)) are ‘rights to’. As to their material content, they are ‘rights to desirable things’ – that is to say, to things that most people desire. They seem to be specific forms of some generic right to the satisfaction of desire. As the UD does not attempt to identify a foundation for its validity, we have to presume that ‘the right to the satisfaction of desire’ is itself the fundamental human right. A human being’s right is what he desires. That, in a nutshell, seems to be the philosophy of the UD’s human rights. It is also the kernel of Hobbes’ purported emendation of the classical theory of natural rights, but it is no part of the classical natural law tradition.

Neither in the classical tradition nor in the normal business of law, can ‘rights to’ count as fundamental rights. They are claims rather than rights. In fact, to be ‘rights to’, they must be lawful claims, which logically presupposes some right as the ground for their validity. If you sell me your car, you have a right to payment of the price we agreed on. The reason is not that you have some generic ‘right to money’ or a ‘right to payment’. The reason is that, once you have met your obligations under the contract,

\(^\text{12}\) See note 5 above.
you have acquired ownership of the specified sum of what until then was my money. Consequently, if I refuse or neglect to pay, you have a lawful claim to it, because it is yours. Similarly, the victim of theft has a ‘right to’ the stolen goods, or to adequate compensation, because they are his goods – not because he has some generic ‘right to goods’.

As a general proposition, we may say that a person has a lawful claim (‘right to’) to respect for his rights. Rights to specific performances or things are particular forms of the lawful claim to respect for one’s rights. Thus, according to the classical theory of natural rights, I can say that I have a right to [respect for] my life, my liberty and my property, because those things are my rights – not because I have some generic right to life, liberty and property. Lawyers and judges spend a lot of time establishing the rights of the parties to determine which of them has a lawful claim against the other. They normally do this by looking at the facts and the history of the events leading up to the institution of proceedings, i.e. by a careful and objective distinction of the parties, their personal identity, words, works, actions, possessions and relations. Of course, when the normal business of the law is corrupted by legislative interference, the facts that in the absence of such interference would be relevant to determine the rights of the parties are often set aside. Claims are then accepted merely because they have a basis in what the legislative authority says the various parties have a ‘right to’. However, in that case, lawyers and judges are no longer preoccupied with questions of law and justice, but with trying to figure out on whose side the authorities are.

**Human Dignity and Human Nature**

The UD presents human rights as ‘rights to’, i.e. as lawful claims, but does not say anything about the rights that serve as the foundation of their validity. We have to make do with the references to ‘human nature’ and ‘human dignity’ in article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The text suggests that human dignity is something that all human beings possess, but this only serves as a reminder that the word ‘dignity’ is to be understood here in a special sense. It is obviously not true that all human beings have dignity in the ordinary sense of the word. There is daily proof of this in any newspaper, newscast, or, for those who find that sort of evidence too depressing, in almost any airing of the Jerry Springer Show.

The reference to ‘human dignity’ is a commonplace of the philosophy of law, but there the term does have a special technical meaning. It refers to the fact that people as such have rights that they are lawfully obliged to respect regardless of their opinions

of eachother’s personal dignity. However, the term does not specify those rights and it
does not specify why people as such have them. Without an unambiguous reference to
an objective foundation for fundamental rights, ‘human dignity’ is an empty shell.

The classical foundation, of course, was the fact that a human being is an animal rationis capax, a physical living being, distinguished from other forms of life by the size
of his brain and his rational faculties. Because of his rational faculties, a human being
is not just a physical agent but a ‘moral agent’, capable of acting on the basis of rea-
sons and of criticising and evaluating reasons for acting in the light of various goals
and values. As such, a human being is a natural person, a free agent with a modicum of
rational control over his own body, its actions and their outcomes – his life, liberty
and property. These are his natural rights, i.e. the things that by nature are under the
control of his rational faculties.14 To this observation the classical theory of natural
rights adds that one human person is just as much a human person as any other.
There is no natural hierarchy of natural persons. In consequence, there is no natural
hierarchy among one person’s natural rights and those of another. As Locke wrote in
his Second Treatise of Civil Government, Chapter II (§4):

There being nothing more evident, than that Creatures of the same species and
rank promiscuously born to all the same advantages of Nature, and the use of
the same faculties, should also be equal one amongst another without Subordina-
tion or Subjection […].

Hence it follows, “that being all equal and independent, no one ought to harm another
in his Life, Health, Liberty, or Possessions” (Ibid. §6). Every person is to respect every
other person and his natural rights: No person has ‘a right to another’. Thus, according
to the classical theory, one person’s natural rights are limited and constrained by the
natural rights of every other person. It is only because of this structural feature of the
classical theory that natural rights can be seen as constituting a natural order or natural
law of the human world.15 It is an order or law of distinct and separate persons of the

14. Rights, from the Latin recta, controlled things (from the verb regere: to lead, steer, manage,
control).
15. ‘Law’ should not, in this connection, be understood in its now dominant sense of a com-
mand, directive or rule (Latin: lex, which originally had primarily military connotations, cf. di-
lectus, the raising of an army, legio, legion). It is to be understood in its much more profound
sense of order (Scandinavian lög, lag, order, bond), especially the social order or social bond
which has its natural foundation in the plurality and diversity of distinct and separate persons.
Thus ‘law’ is semantically related to the Latin ius (pl. iura), which refers to a bond arising from
solemn speech (iurare, to make a personal commitment to or covenant with another). Such a
bond obviously presupposes respect for the separateness and independence of persons. There-
fore, the order of human relations which derives from such respect is also called ius (no plural
form in this meaning). In this sense, ‘law’ stands in opposition to the old-English orlaeg (cf. the
Dutch ‘oorlog’), fate, the inevitable disappearance of order as in war (Germanic werra, confu-
sion, disorder, as in the Dutch ‘war’). There is social disorder when the natural separateness
of persons is no longer respected and the distinctions between one person and another, or one
same species – or, to use the standard formula, a law of freedom and equality. Respect for this law is justice. There can be no doubt that Locke felt he was simply restating the foundations of law and justice as they had been accepted by a long tradition. He did so in the face of an attack by the proponents of an absolutist state who had begun to invoke either a divine right of kings (Filmer) or an unconditional covenant of submission (Hobbes).

**Having Rights and Being a Person**

As we have seen, there is an echo of the classical foundation of rights in the second sentence of article 1 of the UD. It does make the obligatory reference to human rational and moral capacities. However, most of the human rights in the UD, and all of the human rights that are specific for the UD and its progeny of similar charters, have no particular relation to the rational nature of man – to the ‘dignity’ of the human species as one among many other animal or other living species. They can be, and indeed have been, applied, with no more than a slightly different wording here and there, to animals, ‘ecosystems’ and other things. My first impression over thirty years ago, that the UD was little more than an adaptation from some charter for the well-being of animals, has not been dissipated by numerous subsequent readings of the document. The UD never goes further than the ‘right to a decent treatment’ that would be the central message of such a charter.16

Today it is apparently acceptable to talk about ‘animal rights’, and not just about some sort of perfectionist moral duty of kindness and care on the part of human beings in their dealings with animals. Would not the reason be that the current harvest of human rights no more presupposes that human beings are natural persons than that ‘animal rights’ presuppose that animals are persons? If, as the text of the UD suggests, ‘the satisfaction of desire’ is itself the fundamental human right, should we then not discard the reference to rationality and instead accept man’s covetousness as the essence of his ‘dignity’? But then ‘human dignity’ can no longer be distinguished from ‘animal dignity’. After all, there is nothing particularly human about either desire or its satisfaction.

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16. The only specifically human bias of the UD is in its affirmation of the right not to be prevented from taking part in political elections or applying for a job in the public sector.
Like human beings, animals may feel pleasure and pain, satisfaction of desire and frustration. However, animals are not persons. It does not make sense to hold them morally responsible, inquire about the justice or injustice of their actions, insist on their good faith in contractual relations, or anything of the kind. Not being persons, they cannot have rights, except perhaps in some derivative or metaphorical sense.¹⁷

People who invoke ‘animal rights’ are really claiming the right to forcibly impose their own norms for dealing with animals on other human beings. The ‘animals rights’ are merely reflections of the moral duties implied in some perfectionist view of human morality held by these people. However, by calling these reflections ‘rights’, one does as if they were objective principles, independent of any perfectionist morality or ideology. Such is the rhetorical force of the word ‘right’. The advocates of ‘animal rights’ make an adroit use of it in claiming that legal enforcement of their moral views is justified on the basis of a lawful obligation owed by all humans to the animals themselves.

Human rights policies too are presented as if they were lawful obligations owed by all governments to all human beings, independent of any morality or ideology of government. However, human rights make sense only as reflections of a particular ideology of government, one that holds that governments relate to their subjects as zookeepers to the animals under their care. They certainly do not reflect the duties of a constitutionally limited government committed to the rule of law and substantive due process.¹⁸ That its subjects are natural persons and as such have a lawful claim to respect for their life, liberty and property, is of no relevance in the worldview of the UD. In this document, human beings typically appear as passive holders of ‘rights to’ various things. However, these things are not theirs until the proper authorities have decided on the appropriate distribution. Indeed, the UD implies that governments, although elected by and from the human population, are on a higher level than their subjects. Consequently, the UD does not need to countenance natural rights if they stand in the way of the ‘moral perfection’ of government.¹⁹

Once the connection between ‘having rights’ and ‘being a person’ has been severed, almost anything may be said to have rights. Not surprisingly, the so-called rights revolution gathered steam from the 1960s onwards, has led to a cancer-like growth of ‘rights’ not only of human beings and animals, but also of plants, landscapes, lakes,

¹⁸. An example would be the Constitution of the United States as it was interpreted before Roosevelt’s onslaught, say by President Grover Cleveland in 1887 as quoted in R. Higgs (1987) Crisis and Leviathan. New York: Oxford University Press, p.84.
oceans, even the earth itself, historical monuments and other cultural artefacts. Moreover, in the field of specifically human rights, the ‘rights’ of individual human beings as such are now difficult to discern among the ‘rights’ of an ever-increasing number of abstract ‘aspect-persons’. Thus, the woman, the child, the homosexual, the labourer, the immigrant, the student, the patient, the consumer, the elderly, the handicapped, the victim, or any minority whatsoever, is said to have ‘special rights’, in particular the ‘right to positive discrimination’, which is the ‘right to privileged treatment’. Indeed, the common characteristic of all of these ‘rights’ is that they are supposedly of sufficient weight to override or trump anyone’s truly non-discriminatory natural rights as a person. Compared to the dignity of the woman, the child, the worker and so on, the dignity of the human being as such ranks near the bottom of the scale.

**Human Rights, Moral Perfectionism and Natural Law**

The reference in the previous section to perfectionist theories of morality may, perhaps, be understood as a support for Crombag’s thesis that human rights are a legacy (not, to be sure, of the classical theory of natural rights, but) of the classical theory of natural law. Much of what goes under the name of ‘natural law’ is indeed more concerned with the ethical idea of moral perfection than with the problem of order in the human world. No doubt, the Aristotelian-Thomistic ‘natural law theory’ belongs rather to moral philosophy (‘ethics’) than to the philosophy of law. However, it does not imply that it is right for governments to enforce moral perfection. As Thomas Aquinas put it:

[Because] law regards the common welfare […] there is no virtue whose practice the law may not prescribe. [However,] human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concerned. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid. These are the vices that do harm to others, the vices that would destroy human society if they were not prohibited: murder, theft, and other vices of this kind, which the human law prohibits.\(^\text{20}\)

The vices that destroy human society are actions of the kind that would be defined as violations of natural rights. Not contaminated by the modern intellectual vice of utopianism, classical natural law theory made a pragmatic distinction between moral and political life. The former is devoted to the perfection of virtue; the latter to the perfection of the *lex humana*, the purpose of which is to safeguard society even for those who are not likely to give much attention to the higher virtues. If the Thomist theory

\(^{20}\) Thomas Aquinas, *Summa Theologiae*, IaIIae, Qu. 96, Artt. 3 and 2.
assumes, without justification, that there is some good that is the good of all,\textsuperscript{21} it also expressed grave doubts about the possibility of making men virtuous by means of politics and legislation.\textsuperscript{22}

In making the distinction, the classical theory of natural law was probably not anticipating the basic assumption of today’s neo-Aristotelian proponents of natural rights,\textsuperscript{23} namely that the forms of human flourishing or of living ‘a good life’ are as diverse and manifold as the individual men and women themselves. On the basis of this assumption, the neo-Aristotelians conclude that only natural rights are suitable objects of legal enforcement, because enforcement by a few of a particular perfectionist morality is bound to sacrifice on the altar of moral arrogance the value of life for many.

The neo-Aristotelians would therefore not subscribe to the view that in principle there is no virtue whose practice the law may not prescribe. On the contrary, they insist that the difference between morality and politics is not, as Thomas would have it, merely a pragmatic matter, but is itself a matter of principle. Nevertheless, if given a choice, they would no doubt prefer the theologian’s pragmatic distinction over the modern belief that those who want only the best for mankind should therefore be entitled to enforce their ‘ideals’ with all the powers that today’s governments have at their disposal.

If all that Crombag is saying is that the modern preoccupation with human rights is drenched in the rhetoric of moral perfectionism, I would be the last to disagree. There is, however, no reason to take that fact as proof of his claim that human rights are a legacy of the classical theory of either natural law or natural rights. If anything, it is proof that human rights are derived from some perfectionist theory of the duties of a virtually omnipotent government, not from some idea of the moral perfection of human beings as such.

\begin{itemize}
\item \textsuperscript{21} However, it still implied that the good is to be realised in the actual life of a person. It did not commit the statistical fallacy that is evident in utilitarianism, with its ad hoc constructions of the ‘greatest good’ based on de-personalised, anonymous data about wants – thus making the ‘greatest good’ into something completely extrinsic to every person.
\item \textsuperscript{22} Aristotle’s comments on this in the final section of his \textit{Ethics}. See also R. George (1993) \textit{Making men moral}. Oxford: Clarendon Press.
\end{itemize}
III. Hobbes and Human Rights

**Hobbes’ Apostasy**

Hobbes’ apostasy from traditional philosophy of law consisted in his rejection of man’s rational nature as the foundation of a person’s natural right. Instead of the things that are by nature under the control of rational faculties, Hobbes identified as a man’s rights those things over which he exerts controlling power of whatever kind and regardless of whether those things are other persons or not. In order to have a chance of getting away with this radically subversive move, Hobbes had to redefine almost all of the terms pertaining to law and justice. It would take more than two centuries before his legalistic revisions, suitable as they were for legitimising the expansion of state power, became the norm. By the time the UD was drafted, the Hobbesian concept of right had virtually obliterated its classical predecessor as evidenced by the form and content of its human rights.

There is no need to go into the details of Hobbes’ theory except to recall his definition of man’s natural right as the liberty to do everything he can – and Hobbes does mean *everything* – if he believes it to be useful for his self-preservation. As Hobbes himself pointed out, this natural right implies the “Right to every thing; even to one anothers body” (*Leviathan*, XIV). It is the ‘right’ to rule the world for one’s own benefit, even by killing, maiming, robbing, subjugating or controlling others by whatever means available. In plain language, it is the ‘right’ to commit any injustice if it appears to further one’s own interests – or, as Thomas Aquinas might have said, a ‘right’ to destroy society.

It is no mystery why Hobbes chose to build his theory on that paradoxical ‘right’. He needed to do so to justify his intended conclusion that political absolutism is the only possible way out of the war of all against all. War would inevitably ensue if everybody took that ‘right’ seriously and tried to set himself up as the ruler of the world. From this Hobbes concluded that peace is only possible in a situation in which there is a ruler with sufficient power to make all resistance to his commands futile.

If, as Hobbes wanted us to believe, there is no objective difference between justice and injustice, then reason is of no avail in choosing either one. The fundamental

24. In referring to ‘*ius naturale*’ Hobbes was playing a trick on Grotius’ rather unfortunate definition of ‘*ius*’ as a moral faculty or moral power (in his *De iure belli ac pacis*, 1625). According to Hobbes’ conventionalist ideas, a ‘*ius naturale*’ could then only be a faculty or power that was not constrained by anything except another natural power (or ‘externall impediment’ as he called it) – as if adding the qualifier ‘*naturale*’ to ‘*ius*’ was the same as removing the qualifier ‘*moral*’ from ‘*moral power*’. However, a ‘*ius*’ is not a faculty or power. It is a bond specified by the terms of agreement among persons as to where they will draw the boundaries among themselves, as to how they will separate the ‘mine’ from the ‘thine’. As such, it is a moral constraint on what they can do. Likewise, a ‘*ius naturale*’ is a moral constraint be it one specified by the natural boundaries between any two persons. See note 15.
choice for man is not between just and unjust acts. It is rather a choice between unorganised or competitive injustice and organised or monopolised injustice – between a life that is ‘brutish, nasty and short’ under the unorganised satisfaction of wants by competing powers and a condition of ‘commodious living’ when the satisfaction of wants is organised or controlled by a monopoly of power. Hobbes was confident that every sensible person would agree that ‘the right to everything’ should be monopolised by a strong ruler or regime. He was also confident everybody would agree that to submit to such a regime was a dictate of reason.

Thus, political absolutism is justified as if by contract was in accordance with reason. Under this hypothetical contract, the subjects are to fully identify with the regime, presumed whatever it does in executing their will. The state can, therefore, never be a source of injustice, because “Whatsoever is done to a man, conformable to his own will signified to the doer, is not injury to him” (Leviathan, XV). The state is just by definition. However, it is also a fictitious legal person – but so are its subjects, now called ‘citizens’, who, having surrendered their natural independence, have become integral parts of the state and therefore unconditionally belong to it. A further consequence is that whatever belongs to any citizen as ‘property’ to any citizen, ultimately belongs to the state, because without the power and protection of the state there would be no property. In any case, considerations of justice in the state have to be based exclusively on its legal system, not on any natural law or the natural rights of natural persons.

The philosophical basis for this remarkable theory is, of course, Hobbes’ view of man. This was not the traditional view of man as a natural person, a physical, finite rational being with objective boundaries (defining his natural rights in the traditional understanding of the term). In Hobbes’ view, that physical or natural aspect of man was not relevant for the definition of his natural rights. What was relevant was the alleged fact that man has unlimited desires, especially an unlimited desire for power “that ceaseth only in Death.” In short, man is not what he is and does, but what he desires to be and denies to do. His ‘right’ is not his life, liberty or property, but the satisfaction of his desires.

This interpretation of the ‘natural right’ of human beings is the fundamental subversive element in Hobbes’ theory. It would not show its full effects until a couple of centuries after Hobbes wrote his Leviathan. Nevertheless, it should be clear that from the beginning it implied an eminently ‘economic’ interpreta-

25. Thomas Hobbes, Leviathan (1651), Part I, chapter 16
26. Leviathan, Part II, chapter 29: “Every man has indeed a Propriety that excludes he Right of every other Subject; And he has it onely from the Soveraign Power […]”
27. Ibid. Part I, chapter 10.
tion of the state as the essential organisation for the satisfaction of human wants and desires.29

**A Hobbesian Legacy**

Until the end of the nineteenth century, Hobbes theory remained little more than a curiosity in the history of ideas. However, at that time it resurfaced as a ‘rational foundation’ for the omnipotent state which many intellectuals then praised as an instrument of progress. Moreover, the celebration of war in all its forms – between classes, races, nations, religions, ideologies, cultures, new and old elites, and so on – moved Hobbes’ metaphor of universal war again to the core of political thought. At the same time, the republican notion of popular sovereignty, with its stress on ‘the will of the people’ (as manifested by the majority), began to displace the old idea of the rule of law. Even in the United States, many were beginning to point to the Prussian interventionist ‘police state’, rather than to limited constitutional government, as the proper instrument for progressive politics.30

 Already in the late nineteenth century, Rudolph von Ihering promoted a utilitarian conception of the state that owed as much to Hobbes as to Bentham, as the basis for a new socio-political approach to jurisprudence.31 In the United States, Roscoe Pound did the same thing. The sociological dimension originated in the idea that social conflicts are rooted in subjective factors (desires, needs, wants, interests) and have to be resolved at the level of those factors, rather than at the level of interpersonal relations as defined by objective natural rights. Pound concluded that there was a need for a sociological jurisprudence. It would have to focus on a new conception of justice. It would no longer refer to the skill of safeguarding the social order of free and equal persons by means of rules of law. Instead, it would stand for the skill of political legislators and administrators to produce a condition of ‘social justice’ by means of ‘social engineering’. The condition of ‘social justice’ would be characterised by ‘the satisfaction of everybody’s wants so far as they are not outweighed by the wants of others’.32

29. *Leviathan*, Part II, chapter 30: “And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for [...] by the Lawes of the Commonwealth [...] But for such as have strong bodies [...] they are to be forced to work; and to avoid the excuse of not finding employment, there ought to be such Lawes, as may encourage [...] Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour.” A premonition of the ‘active welfare state’?


Pound was well aware of the incompatibility of ‘social justice’ and justice as such. The former, he noted, “is repugnant to the spirit of the common law.” It would require a return to a regime of status, in which “rights belong and duties attach to a person of full age and natural capacity because of the position he occupies in society or the occupation in which he is engaged”:

When the standard is equality of freedom of action, all classes [...] are repugnant to the idea of justice. When the standard is equality in the satisfaction of wants, such classification and such return in part to the idea of status are inevitable.33

Pound may not have predicted the present explosion of ‘special rights’ for all sorts of classes, groups and categories, he would not have been overly surprised by it either. As he well knew, social justice and human rights are about little else than classification, grouping and categorisation.

Pound’s view was only a partial conversion to Hobbesian subjectivism. To him, the common law remained within the domain of justice. However, this domain was now narrowed down to what was left untouched by ‘social legislation’, aiming at a “socially acceptable economy of the satisfaction of everybody’s wants.” Where they were legally recognised, wants, desires and interests would supersede natural rights – which is to say that they themselves had to become ‘rights’ with a higher legal standing than natural rights.

The legal realists, who did not accept Pound’s separation of the domain of law and the arena of political legislation, were far more radical converts. In their view, judges too should be social engineers, using whatever power at their disposal to enforce social justice. Judges should not be intimidated by ‘the ideology of property’ or by ‘traditional justice’. They should not shy away from intervening as rulers in the affairs of businesses, institutions, associations, and families.

In his discussion of monopoly grants (to railroads and other utilities), the American jurist, Brooks Adams, announced a principle that legal realists would apply subsequently to the institution of private ownership and to all rights of property and contract attached to it:

When the law confers upon any man or class of men an exclusive privilege to fix upon some object which is a matter of necessity or even of desire to others, it [...] subjects the purchaser to a servitude.34

Arguing that the rights of ownership and property are ‘exclusive’ rights, the realists concluded in Hobbesian fashion that they were all monopolies granted by the political power of the state. There is no such thing as ‘natural property’; property is always a

33. Ibid., at p. 615.
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creature of legislation. The realists also accepted Adams’ statement that servitude is a condition of unsatisfied or frustrated need or desire. They used it to indict private property as the single most important threat to ‘social justice’. To claim, as property for oneself, what another needed or desired was the height of injustice, because in doing so one violated the other’s fundamental right to full satisfaction, his right to be free from want and frustration.

The sociological turn in jurisprudence, beginning in the late nineteenth century and culminating in the period between the two world wars, was, in fact, a return to Hobbes’ subjectivist redefinition of ‘the natural right of man’. Hobbes had laid the foundations for the revolution in thinking about law and politics that finally erupted in an age of rampant authoritarianism and Big Government. One cannot begin to understand the human rights of the UD, if one fails to take this revolution into account.

As we have seen in the thought experiment mentioned earlier, that people should act on their own initiative in trying to secure their right to the satisfaction of their wants can only lead to one of the familiar Hobbesian outcomes: universal war or the concentration of political power. The logic of this argument is clearly visible in the structure of the UD. In order to keep human rights from becoming a recipe for universal war, one should ‘socialise’ and transform them into mere reflections of the duty of government. The state should run the administration of human rights in accordance with the organisation and resources of the country. This requires a continuous weighing of interests and desires. It also requires a vast apparatus of politicians, bureaucrats, experts and agents to gather data, concoct and interpret the statistics which are the essential tools of policy-making, and implement the policies decided on. All of this is inevitable, because the things which the human rights are ‘rights to’, are inevitably scarce. Unlike a person’s natural rights, which recognise his standing as a producer or guardian of scarce resources, his human rights are claims to whatever might serve to satisfy his ‘dignity’, i.e. his covetousness. In the final analysis, they all translate into a right to the labour and productive services of the great multitude of nameless others who happen to find themselves under the same government. Each person’s human right is a ‘right’ to tax and regulate others, that must be taken away from him and administered by a powerful central authority to deprive it of its lethal character. Social justice – that is to say, taking human rights seriously – means statistics and political resource management. It implies that a ‘right’ can have no more than a rhetorical significance until it is made into a legal privilege by effective policy:

35. Statistical criteria of social justice have been skilfully used by a number of feminists complaining about the ‘under-representation’ of women in politics and other high-profile occupations. Spokespersons for a few other groups have followed their example.
Benefits in the form of a service have this [...] characteristic that the rights of the citizen cannot be precisely defined. The qualitative element is too great [...]. It follows that individual rights must be subordinated to national plans.36

Politics trumps rights. Coming from T.H. Marshall, these words were not meant to criticise the concepts of social justice and human rights. They merely illustrate how wholeheartedly their advocates have swallowed the political hook together with the subjectivist bait of the Hobbesian philosophy of ‘right’.

Concluding Remarks

Unlike Crombag, I do not think human rights are ‘sympathetic, but naïve’. They are a sophisticated elaboration of the peculiar Hobbesian view of man. According to that view, a human being is not some definite, finite, physical ‘moral agent’, but merely an indefinite bundle of desires seeking satisfaction by all means available. Thus, a human being’s fundamental or natural right is not the physical integrity of his own being and works, but the satisfaction of his desires. Unfortunately, if human beings were to attend to satisfy their desires through individual initiative by all means available, the result would be war and destruction. For this reason – so the theory implies – they should choose to relinquish control over their own lives in order that their desires might be satisfied for them according to the priorities, policies and ‘national plans’ of a single authority. In this way, their desires can be satisfied more efficiently supposedly by all means available. Of course, the desires to be satisfied are then no longer their own desires, but only those that have been transformed by means of statistics into suitable policy goals. None of this is without cost. If an army, as Robert Heinlein wrote, is “a permanent organisation for the destruction of life and property”, the modern state, with its myriad of privileged public and private institutions, is a permanent organisation for separating persons from their own lives and property. The human beings themselves, to the extent that they are not members of the policy-making elite, must be treated as ‘national resources’ in order for the state to realise their human rights. As such, they are to be managed in endeavour to equalise the satisfaction of wants in accordance with the organisation and resources of each state.

It is indeed a sophisticated and, in its own way, fascinating view of human beings and their rights, but I have no sympathy for it. I cannot get myself to believe that covetousness, not the rational nature of man, is the distinguishing mark of ‘human dignity’. To believe that is to accept that one’s rights are as unlimited as one’s desires, and as such primary sources of conflict and disorder. No such belief is to be found anywhere in the classical tradition of law and rights. Consequently, I can only dissent

from Crombag’s suggestion that human rights are a legacy of the tradition’s representative theories of, say, Thomas Aquinas or John Locke. I hope I have shown that the UD’s human rights are at odds with any view that takes human beings and not just their desires seriously. Social justice is not a species of justice. It is as from justice as equalising the satisfaction of wants is different from ordering interpersonal relations in accordance with freedom and equality.
Total War and Twentieth-Century Legal Change

Alex Jettinghoff

“When barriers which in fact consisted only in ignorance of what was possible are broken down, it is not easy to build them up again” (C. von Clausewitz).

Introduction

Sometimes the work of Crombag reveals a social engineering approach when reflecting on things legal. At such occasions, the argument appears to be that, when it can be scientifically established that particular institutions do their ‘job’ better than others, this constitutes an argument – preferably a sufficient one – replacing the less effective institutions by more successful ones. Thus politicians would do the right thing.

An example of this attitude can be found in his work on ‘procedural justice’. There, the work of Thibaut and Kelley is supplemented by his own research to sustain the conclusion that a more adversarial model of legal procedure is more capable to deliver the satisfaction of the litigants with the eventual decision. These results should be sufficient reason for the governments of countries with different and less effective institutions to change them.²

This approach shows Crombag – although not without reservation – as a man of his age.³ The 20th Century has been marked by instrumental rationalism (or the more evocative ‘social engineering’, ‘planning’ and ‘reconstruction’) extending to more aspects of social life than ever before. This spirit of activism has also deeply penetrated the legal domain. The major part of the 20th Century has seen this mentality decidedly overcome the inhibitions against regulating society, inherent in the liberal legal order of the 19th Century, and this has considerably affected legal institutions and professional attitudes.

The sociologist Elias, master of detached analysis, has questioned this upsurge of ‘social planning’ in the Western world, more in particular the unplanned conditions

1. Faculty of Law, Maastricht University.
3. He knows that political decision-making does not necessarily work that way, as can be inferred from the occasional remark that “politicians will probably never learn.” In: H. F. M. Crombag (1989) Why (legal) rules often fail to control human behavior. Methodology and Science, 22, 138-18, p. 148.
for this change, and also its contribution to long-term societal development.\textsuperscript{4} It is interesting to consider legal engineering from this angle, because the instrumentalist conception of law (as regulation) has come to be almost self-evident, especially after the Second World War. Here we will tentatively explore one set of these conditions, although probably not belonging to the conditions that Elias had in mind. While he wrote about these conditions as ‘structural transformations of human societies’, we will discuss something that is more appropriately characterised as a ‘social mechanism’: total war.

This contribution explores the advance of policy regulation in the context of total war. First the characteristics of the phenomenon of total war and its relevance for legal change are stated. Next, the intimate relationship between economic regulation and total war is traced to the First World War. And finally, the focus is on the vicissitudes of social security regulation during the Second World War.

**Legal Change and 20\textsuperscript{th} Century Crises**

It would be incorrect to say that the great wars of the past century have been neglected in the study of law. Especially the Second World War has been an important negative point of reference, a dark time of fearful institutions and practices, also in the legal realm: statutory racism, genocide, dictatorship, state terror, show trials, jurists professing allegiance to party ideology and many more. After the war these experiences have been enshrined in a historical gallery of horrors, as a permanent warning for new generations and the black backdrop against which parliamentary democracy and constitutional rights could shine again, at least in the larger part of Western Europe.

But on the other hand, both wars tend to be neglected as regards their impact on legal institutions. In this respect the world wars seem to be regarded as unfortunate incidents, after which normal practices were resumed at the point where they had been interrupted by war. This neglect, whatever its reason, is a serious disadvantage when one wants to appreciate the dynamics of turning away from ‘liberal’ restraint towards purposive ‘realism’ in legal theory and practice. In this perspective it seems worthwhile to trace some of the effects of these crises on Western legal order, even through there is always the risk of overestimating the effects of total war.\textsuperscript{5}

Of course, there have been more forces pushing and pulling social engineering by regulation (resulting in the famous ‘societalization’ of law): mass-party politics in parliamentary democracy, professional entrepreneurs (in the parties, the bureaucracy, in


industry and at universities) and supportive ideology, spring to mind as prominent among them. But these forces have been considerably invigorated by the dynamics and opportunity of total war, and under these circumstances have produced inroads into the constitutional arrangements of the liberal state which in all likelihood, would have not developed so extensively and so quickly.

Total war is understood here as a form of war which requires the mobilization of all available supplies, machinery and human resources of an industrialized nation under a central command in an effort to fight a prolonged war. In 1914 this was not so much a preconceived notion, but rather a condition the participants gradually stumbled on during the Great War. Of course it has also been the object of reflection and justification. Among the first to write about this topic was someone with first-hand experience in conducting such a war: the German chief organizer and strategist during the second half of the First World War, General Ludendorff. As any self-respecting general, he consigned his perception of the war to paper and published a book on the relation between the conduct of war and politics. In this book he attributed to war (as had various military illuminaries before him) the status of a fact of nature. Struggle is natural between humans as well as nations. He considered war the only decisive means in this never-ending struggle of nations, where only the strong survived, whether noble or not. From this he drew the conclusion that Clausewitz’s definition of war as a means of politics (continuation of politics by other means) had to be revised in the sense that politics had to be regarded as a means of war. In his view in times of war, the military leadership was justified to demand of the nation any sacrifice, necessary to win the war. And it was especially the task of the body politic to ensure that these sacrifices were made without hesitation, or even better (as befitting the appropriate Volksgeist): with joy. Similar notions of social Darwinism have also been influential in the German preparation for and conduct of World War II.

The Logic of Total War

When the Great War started in August 1914, all participants expected it to be short. At the time it was inconceivable that it would last longer than a few months. Warfare was believed to have changed in two respects. First, technological innovations had made the frontal attack on defensive positions very destructive to the party attacking. For that reason swift encirclement of these positions was considered necessary. This made the logistics of transporting troops and supplies a crucial factor (and therefore the first sector of the economy to be nationalised immediately after the outbreak of hostilities). And second, war had become a war of nations. Basically it was believed

that the army that had command over the greatest resources of manpower and having the ability to transport such manpower in a swift encirclement would have the best chances to be successful in this type of war. Consequently, mobilization was expected to be massive. But with all available manpower at the front, agricultural and industrial production – necessary to support the war effort and the nation at home as well – would come to a grinding halt. So war had to be over by Christmas. Existing stockpiles of supplies were thought to last for several months and no plans were made for a longer war.

But when the mobile phase of the hostilities stagnated and the war at the Western front turned into trench war, and at the Eastern front - after initial German successes - into investment, it could not be brought to a quick and decisive end. The initial general enthusiasm for the war, combined with the devastating losses and enormous costs of the 1914 campaign, prevented a negotiated peace. The peace-option was not particularly appealing: the military and political leadership would have to admit failure, and win over Parliaments and public opinion to accept minor or no gains at all in exchange for enormous sacrifices.

As a consequence, the logic of total war gradually unfolded as follows. The appetite of the battlefields for munitions and soldiers reached gargantuan proportions. And the participant governments struggled desperately to satisfy it. One cluster of problems concerned the mobilization of the necessary industrial means, another the financial consequences involved. The war effort demanded huge financial sacrifices. Taxation levels rose considerably, but that was not enough to pay for the war. Most of the money to pay for the war had to be borrowed. But even with enough money, it soon became clear that the market could not supply what was needed. Direct access to resources was the remaining alternative.

As the demands of war escalated, a succession of state interventions followed, that were not planned but can be seen as more or less inescapable for all participants, as long as participation in the hostilities continued. The pre-existing institutional context, however, within which the decision-makers had to work and the specific war-related circumstances they had manoeuvred themselves and each other into, were important

10. Apparently time was not ripe for the notion of failure. At the time, the German High Command was united in its conviction that the war could still be won, although the Schlieffen-plan did not work out as intended. There was a fierce dispute, however, about the best way to win it. Popular enthusiasm for the war was also still considerable. See: R. B. Asprey (1991) *The German High Command at war: Hindenburg an Ludendorff conduct World War I*. New York: Quill William Morrow, p. 129 ff.
sources of variation in this respect. Together, these elements help to explain why in most of the countries on both sides similar measures were taken, although not always at the same time, in the same way or to the same extent.

The expansion of state intervention in economic processes was due to a chain of interlocking emergencies that had to be addressed. The first problem that presented itself after a few months was the shortage of munitions. During the Battle of the Marne (September 1914) alone, while considered one of the lesser battles of the war, more munitions were used than during the entire Franco-German war. This kind of battle caused munitions crises, that elicited a scramble for higher levels of production. And so production levels were raised step by step, eventually many times more than was envisaged before the outbreak of the war. In the process governments became involved – if they were not already – in the production of munitions, e.g. in the form of state-run factories or in public-private arrangements. Special administrative taskforces and soon complete ministerial departments were established, solely for the purpose of resolving this problem.

Consequently, these efforts made the control of raw materials almost inevitable, especially under conditions of a blockade (Germany) and the occupation of mining areas (France). Resourceful organisers, such as Lloyd George and Rathenau, headed growing governmental bureaucracies that orchestrated (in close ‘co-operation’ with the larger companies in the various branches) the import, production and rationed distribution of a rapidly expanding list of raw materials. Distribution had to be balanced between the needs of the population and the demands of the war effort. The ensuing scarcity and price explosions invoked price controls. Germany was the first to act in October 1914, followed by France in 1915 and Great Britain in 1917 only. Eventually the rationing of numerous consumer goods became a last resort.

11. For instance: the territory occupied by the Germans on the Western front deprived the French of almost a fifth of their industrial production capacity and labour force. German production efforts were hampered by an Allied blockade considerably reducing the import of crucial raw materials. See: G. J. DeGroot (1991) The First World War as Total War. In M. Pugh (Ed.), _A companion to modern European history 1871-1945_ (pp. 262-281). Oxford: Blackwell, p. 267.
13. These production efforts enabled the British in 1917 to fire 4.2 million shells to ‘soften’ the German positions before the Passchendaele offensive. Beckett, 1989, _op. cit._, p. 32.
16. Countries such as Germany, Austria-Hungary and Russia had been more or less self-sufficient food producers before the war, but suffered dramatic shortages during it. The United Kingdom, however, which to a large extent depended on imports to feed itself, was saved by her navy and only experienced shortages during the unrestricted German submarine offensive in 1917. Cf. DeGroot, 1991, _op. cit._, p. 274.
The housing sector also experienced shortages, due to a lack of personnel for the construction industry and a rising demand in industrial areas. Rent controls were also introduced. In France, dislocations directly resulting from the hostilities elicited administrative efforts for government-funded housing projects.

Another evident hot issue of total warfare was manpower. The killing fields devoured more and more soldiers. The scale of military mobilization was unprecedented. The first mobilization concerned already more than 10 million soldiers. And for the duration of the war a grand total of 58 million men were mobilized. Approximately 8.5 million of those were killed and around 20 million were seriously wounded. These losses soon made their negative effect felt on the availability of skilled labour needed to keep up production. As a result, various war-time governments tried to get a grip on the market. During 1915 and 1916 massive recruitment programs were set up in the United Kingdom, France and Germany. Regulatory measures were also taken to restrict market mobility. The most extreme measures were taken in Germany, where in 1916 virtually the whole male population was legally conscripted into government service, either the army or the war industry. Considerable numbers of women entered the workforce as well, not at the front but in the factories, especially in Great Britain and Germany.

In their mobilization efforts governments gradually came to rely on the cooperation of patriotic unions. Unions were found to be instrumental in preventing strikes, motivating workers and selecting the craftsmen necessary for the war industry. But all this at a price of course; regularly strikes were used to enforce payment from reluctant political leaders. More or less overnight the unions developed into serious negotiating partners for all governments concerned, an experience that introduced the unions decidedly into the arena of national politics as important – be it not always cooperative – players after both wars, especially when the institutional forums for economic planning and the welfare state were being developed after World War II.

Together, these massive interventions had profound effects on the volume of state organisation and funding. First, all the interventions mentioned required administrative staffing to implement and enforce them. In Great Britain and Germany public employment doubled between 1910 and 1920, and in France it increased 50 percent. Second, public expenditure skyrocketed. It is estimated that military expenditures for the participants rose from little over 4 percent of the GNP before the war to between

25 and 33 percent during the war. \(^ {20}\) To cover these costs, the level of taxation was raised to four times the pre-war level. This was achieved by raising existing taxes as well as by introducing new taxes. \(^ {21}\) But this money could only cover a third (United Kingdom) or less (France and Germany) of what was required to sustain the war effort. The rest of the funds were raised by massive borrowing. \(^ {22}\) The decline of international free trade and the massive borrowing to fund the war had a devastating effect on the financial markets, as a result of which state control of financial instruments was introduced. The international currency stabilizing mechanism, the gold standard, was dropped and never really recovered from the blow. \(^ {23}\) It practically ended British hegemony of the financial markets, resulting in the replacement of ‘the City’ by ‘Wall Street’ as the financial centre of the world.

Socio-legal tradition requires that this picture of regulatory expansion be complemented by some remarks on the effectiveness of these projects. Germany offers interesting contrasts between official impression management and ‘street-level’ practices. All the colossal mobilization efforts of human and material resources, especially those that Ludendorff required and orchestrated in 1916 for the offensives that could bring German victory (the so-called Hindenburg Program), were depicted by propaganda as huge successes. According to Schulze: “both Lenin and Hitler were unstinted in their admiration of Ludendorff’s organizational achievements.” \(^ {24}\)

Indeed, the initial mobilization after 1914 of facilities for the production of military equipment had been rather successful, largely due to the fact that it had been effected within a relatively small and tightly knit network of state-bureaucratic, industrial and military organizations. \(^ {25}\) The mobilization of the supply of foodstuffs, however, involved a multitude of producers, processors and consumers which could hardly be controlled by price regulations and rationing. Price regulations were evaded and after rationing was introduced, the market went largely underground. At the end of the war the German black market supplied a full third of all food bought. In addition, meas-

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21. In the United Kingdom income tax was raised several times and after fruitless efforts since 1871 and still against considerable opposition it was introduced in France. In Germany a turnover tax was introduced. Cf. Porter, 1994, *op. cit.*, p. 162.
ures were introduced rashly, to produce considerable perverse effects.26 The measures, taken to achieve the over-ambitious production goals for military equipment of the Hindenburg Program in 1916, were not the success they were claimed to be. By one account the plan represented: “the triumph not of imagination, but of fantasy.”27

A Land Fit for Heroes

Thus I have dwelled specifically on the Great War, because it illuminates so well the dynamics of total war. A second reason is that the regulatory measures that were created and implemented during its course in close cooperation with private business and the unions, projected a long shadow into the future. These measures constituted an experience with an orchestrated economy that was not easily forgotten. In 1915 Rathenau, the managing director of AEG and planner of German raw materials production, reflected on war-time economic policy and its future:

“I would like to give an account of our economic warfare policy, which is without historical precedent, which will have great influence on the course and successful outcome of the war, and which will, as far as we can see, affect us all for a long time to come. It is an episode in our economic history which approximates very closely to the methods of Socialism and Communism.”28

The subsequent crises of the 1930s and 1940s rendered his words prophetic. Although many war-time economic regulations and institutions were abolished after World War I and *laisser-faire* policies were revived in the 1920s, the emergencies of the Depression and World War II reinstated various institutions of ‘state socialism’ on a more permanent footing. War-time experience had given politicians and civil servants confidence in the capacities of central economic planning.29 In Great Britain a new faith in planning was observed:

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26. One example concerns the enormous ‘pig massacre’ (involving 9 million pigs) in 1915, designed to relieve the grain shortage by eliminating these ‘co-eaters’. Not only was the desired result not reached, but also the ecological balance of agrarian regions was significantly damaged; Chickering, 1998, *op. cit.*, p. 42.
29. The development of this confidence was of course facilitated by the fact that in a war economy mistakes in planning were considered prejudicial to state security; cf. J. Foreman-Peck (1989) The privatization of industry in historical perspective. *Journal of Law and Society, 16*, 129-148, at p. 138.
“A firm conviction arose [...] that this time the land ‘fit for heroes’ would not be so wantonly set aside as it was felt to have been in the years after 1918.”

The main characteristic of this ‘land fit for heroes’ many hoped for was: employment. There were high hopes among voters, desperate for better times after years of job insecurity, scarcity and thrift. From the war experience the lesson was derived that, in a relatively closed economy, central planning could produce full employment. So why not try the same after the war?

One of the problems was that complete autarkic central economic planning did not fit American plans for the development of international free trade. But domestic interests demanded that important planning elements were carried over to the post-war period. One of the most striking elements was the nationalization of industry. Nationalized industry was not a new concept. It existed before the Great War on a moderate scale, but during and after World War II it became ‘big business’. In Great Britain approximately two million workers were added to the public sector during the period 1940 and 1951.

Mining, transport, electricity, gas and steel were later joined by the shipbuilding, aerospace and car industry. More or less the same happened in France, where the Resistance adopted Vichy activist policies and organizational methods. Only the ‘Thatcher Revolution’ of the 1980’s started to reverse the nationalisation process. In Germany the situation was somewhat different (although of equal importance for employment), because there war-time production had largely relied on cartels of giant industrial companies. This productive infrastructure was retained and restored, chiefly as a result of Allied interference, for geopolitical reasons having to do with the Soviet Bloc. Next to nationalization, a host of regulatory instruments remained or were introduced for the purpose of economic reconstruction. Wages, prices and the labour market remained under some form of control.

Full employment and economic growth dominated the profile of the society taking shape during World War II, later to be known as the ‘Welfare State’. It was perfected with the promise of what today is seen as the dominant element in the European welfare states: social security programs. These social security arrangements are the second part of our story of the development of social engineering by regulation.

The introduction of social insurance provisions in Western Europe has been a multi-staged project. The first wave started in the second half of the 19th Century. The

character of these programs varied considerably. In Great Britain the liberal political (and legal) order allowed only private and voluntary arrangements, of which the ‘friendly societies’ became popular among members of the lower middle class and the relatively well-paid sections of the working class.\textsuperscript{35} The provisions of the \textit{National Insurance Act} 1911 were primarily intended to pacify the \textit{Lumpenproletariat} and to improve their condition as potential soldiers. All these social security arrangements were or became administered by private insurance companies, without the participation of the industrial employees. In Germany, the Paris Commune of 1871 scared Bismarck and his government into the design and introduction in the 1880s of statutory health, accident and pension insurance, aimed at the well-off sections of the \textit{Arbeiter} and the lower sections of the \textit{Angestellte}, and were intended from the very beginning to prevent socialist uprisings. There however, self-government was eventually successful and proved an important factor in strengthening corporatist developments.

The Great War gave a new impetus to social policy. In Great Britain and France there were initiatives concerning maternal and infant care, health and unemployment. Germany kept to its existing framework, the envy of the entire world. According to Porter, during the interbellum these developments stagnated in Europe and were weakened and watered down as a result of the Depression.\textsuperscript{36} For this reason, we will turn to the Second World War for an analysis of the connection between total war and the growth of social provisions, not in the least because these provisions transformed into the post-war European saga of the \textit{Welfare State}. The central focus will be on Great Britain, because the most influential initiatives originated there, and Germany, because it was also involved in total war, although on the losing side. The rest of occupied Europe had to bide its time.

A very condensed version of the history of the British plans for social security during World War II runs as follows.\textsuperscript{37} The initial players involved firstly the unions, who in early 1941 complained about the complicated diversity of social security provisions, and secondly the Government which pressed for (preferably small) concessions to the unions. A committee was proposed with a very strict mission to recommend rearrangements that would not be too expensive. Initially, a harmless chairman was proposed, until Earnest Bevin (Minister of Labour) jumped at the suggestion to make William Beveridge the chairman. He was glad to get rid of this pushy civil servant. With this decision, the stage was set for a surprise, because Beveridge had considerable experience in the field, had outspoken and very progressive ideas on social policy.


\textsuperscript{36} Porter, 1994, \textit{op. cit.}, p. 180 ff.

and by all accounts was an autocratic personality. He leaked his most important ideas to the press, thus preventing Churchill – who thought the changes premature (and probably too costly) – from halting the publication of the final report. Beveridge negotiated with Keynes, since 1942 installed in the Treasury, about the costs of the scheme. Keynes turned out to be a supporter, suggesting some cuts that would enhance the feasibility of his plan. And so the Beveridge Report was published in December 1942 and received with great public enthusiasm. Half a million copies were sold, which was exceptional for a government paper. Beveridge became an instant media celebrity and a folk hero.

What made the proposals so appealing in popular opinion? The Report apparently responded to a number of existential worries of a large portion of households, which had suffered the consequences of the Depression and subsequently the hazards of (a second) modern industrial war. The Report proposed to make full employment the responsibility of the government and promised family allowances for all children after a first and comprehensive health care for the whole population. These elements were considered the foundation (the so-called ‘assumptions’) of a system of social security. This system consisted of a combination of a comprehensive universal scheme of social insurance run by the state and a safety net of a likewise national scheme of social assistance. This system aspired to satisfy several demands: the establishment of a national minimum at a subsistence level; a citizenship basis for entitlement to benefit; and benefits without a means test. These proposals, especially the universality of the benefits, were revolutionary and glamorous by any contemporary standard, and help to understand elated popular reaction.

After the Report had been published, the Government initially declined, however, to commit itself to any legislation to implement the proposals. But to its bewilderment and frustration, it was confronted with formidable resistance in Parliament, which threatened to break up the coalition Cabinet, in the middle of conducting a total war. Quickly, the Government reversed its position and Churchill broadcast his acceptance of the proposals. After considerable (cost-cutting) revision, the proposals, as put forward by the government, were accepted in Parliament with little opposition in 1944. The actual implementation of the schemes became the task of the Labour Government that was elected with a landslide after the war.

39. This annoyed the members of the Cabinet immensely. Churchill was “reported to have taken strong exception to the Report, to have refused to see its author and forbidden any government department to allow him inside its doors.” Abel-Smith, 1994, op. cit., p. 19.
40. One of the critics was the indomitable Beveridge himself, who in the mean time had evolved into an MP for the Liberal Party.
How does the development of social security fit into the dynamics of total war? Here we are not so much dealing with a set of institutions that became an integral part of the machinery of industrial warfare, as in the case of economic regulation. The advance of these social security proposals seems more subject to contingency and to a lesser extent a constituent of total warfare. If another, less ambitious chairman of the commission had been selected, or if the War Cabinet had been able to shelve the Report, probably no grand plans would have surfaced. And maybe more importantly, an admired and inspiring model for comprehensive social security would have been absent in the post-war reconstruction efforts on the Continent.

However, the public reaction to the plan seems more directly related to the experience of war (added to the experience of depression), although the influence of the mass media seems to have been crucial in its amplification and colouring. Beveridge had tapped into a strong sentiment and its expression seems to have been decisive for the successful outcome of his plans; not only in Great Britain, but especially also in their reception on the Continent. It is important to recognise the perspective of opportunity here. Politicians and administrators of various countries in occupied Europe (especially those in exile in Great Britain) must have been impressed by the vision of the Report, but maybe even more so by its public reception. Considering that it is fair to assume the existence at the time of similar sentiments on the Continent, one can be sure that these reactions were duly noted by people with political and administrative ambitions in this direction after the war.\textsuperscript{41}

In conclusion, as an illustration of the circumstances and contingencies that can beset and doom plans for social security during wartime, and yet also as an indication that the morale-boosting potential of successful plans was recognised at the time, I present the story of the proposals by Robert Ley in Nazi Germany during the war.\textsuperscript{42} In December 1942, while the German military offensives were running into decisive difficulties in the Russian snow and the African desert, the \textit{Völkischer Beobachter} published three front-page articles on the \textit{Beveridge Report}, denouncing it as a ‘fraud’, and ‘not feasible’. This extensive propaganda attention given to the Report indicates that this news was considered impossible to suppress, constituting a propaganda hazard. This is confirmed by a later find in the Hitler bunker in Berlin, where a secret file was discovered, describing the plan as “a consistent system [...] of remarkable simplicity [...] superior to the current German social insurance in almost all points”.\textsuperscript{43} The file also included an order to avoid further publicity.

\textsuperscript{41} Examples are the early and industrious efforts of e.g. Möller (Sweden), Van Rhijn (The Netherlands) and Laroque (France) to adapt the Beveridge Report to domestic tastes.


\textsuperscript{43} Ibid., p. 139.
The publication of the Report was a traumatic event for the man who was more or less Beveridge’s counterpart, Robert Ley, leader of the German Labour Front (DAF), the party organization that had replaced the unions. Since 1934 Ley had been involved in a long bureau-political struggle with the Ministry of Labour (RAM). Forces in the Ministry tried to preserve the old framework of social insurance, whereas Ley had completely different intentions. His plans concerned benefits for old age, disability and family, to be financed by a social tax, integrated in the income tax. The really novel element of his plan was that benefits were not legal entitlements but rewards for duties done to the national community. These rewards could be lost in case of ‘hostility to the nation’, at the discretion of the Party. Initially, Ley was officially backed by Göring and Hitler in the development of his plans. But Ley was effectively opposed by the RAM and its institutional clients (especially the medical profession and public health officials), and all his relentless efforts to break the opposition came to nothing. In January 1942 Hitler officially withdrew his support, to bring this bureaucratic commotion – at a critical moment in the war – to an end. Adding to the frustration this decision caused Ley, was the blow – a few months later – of an enemy plan that harvested praise all over the world. And this, while his own drafts presumably pre-dated those of Beveridge. He remained obsessed with his plans and Beveridge for the (few) remaining years of his life.  

It can be concluded from these accounts that social security programs were not essentially tied to the logic of war. From the perspective of the war-time leadership, they had some value to appease the unions or as an instrument of psychological mobilization or propaganda. But they should not divert attention from the conduct of war. This made the success of these projects largely dependent on effective manoeuvring by bureaucratic entrepreneurs such as Beveridge. This tentative conclusion suggests that, in order to understand the industrious construction of social security programs after the end of the war, it might also be useful to turn to the people within the network of organizations that had run the war. Apart from career-politicians, and the leadership of unions, industry and the financial institutions, civil servants in particular had been of crucial importance. Total war had caused the exponential expansion of bureaucracy, and these civil servants had worked with new ideas and innovative methods, having at their disposal budgets and jurisdictions of unprecedented proportions. When the war was over, this potent machinery, that had worked wonders in concerting the resources of the whole nation to win the war, could be used to build the promised ‘land for heroes’, to which even the heroes themselves seemed to be eagerly looking forward. Now it was time to win the ‘war of peace’, to tame capitalism, so discredited in the Depression and impotent in times of war. And it was widely believed that

44. In 1945, when Ley was in prison, his interrogators reported: “his emotions [...] manifested themselves in tears [...] when he referred to social security plans of his drafting which may never come to fruition and by the side of which ‘Beveridge’ is very small beer”. Ibid., p. 142.
economic and social policy, conceived – not only by Beveridge – as an integrated whole, could do just that. The execution of these intentions, however, and their degree of success, cannot be entirely understood without taking the subsequent geopolitical framework into account: the Cold War. But that is another story.

**Conclusion**

Regrettably there is little attention in socio-legal studies for such international ramifications of national legal development as related here. This is a considerable deficiency, since many legal developments cannot be entirely understood in terms of domestic concerns. Indigenous forces were often informed in various ways by what happened on the geopolitical stage. Comparative studies remain sterile and national studies myopic, if these dynamics within the international states-system are not taken into account.

The processes described above are considered crucial to the advance of the technocratic perspective and its institutional expressions (such as economic and social regulation) and are not only relevant for the warring nations. The occupied and the neutral countries in Europe were also affected by these developments. These countries could draw on the institutional legacies of the war, not only those bred in Great Britain. In the Netherlands, one of the occupied countries, the Germans introduced regulatory innovations, some of which were still in operation long after the occupation was over. And De Gaulle did not hesitate to quietly recruit technocrats of the Vichy regime during the Fifth Republic to participate in the ‘renewal’ of France.

One wonders why the importance of war for the advance of regulatory governance is so seldom recognized. Maybe Porter has a point when he explains it thus:

"Conservatives cannot believe that war, and the martial life that they so often venerate, can possibly be the source of the collectivism and socialism that they so much abhor. European socialists and social democrats, as well as American liberals, likewise cannot accept that the welfare institutions which they regard as hallmarks of human progress could possibly have derived in part from anything so horrendous as war."

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Publications by Hans Crombag

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Crombag, H.F.M. (1990). De volte-face van een onderwijsonderzoeker. In J. van An德尔 & M. van Vonderen (red.), *Facetten van de sociale psychologie : liber amicorum*


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