

# Experience, Not Expertise

## Why law should start from what people undergo and not from the opinion of science

J. Konstapel, Leiden, 3 October 2026

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### 1. The occasion

On 3 October 2026 the Dutch financial daily *Het Financieele Dagblad* described how climate law "grew up, case by case". The figures come from the London School of Economics. In 2005 a handful of climate cases were started worldwide. In 2020 there were more than 270. In 2024, the record year, more than 500. Last year 250 were added.

The article names the building blocks.

- **Urgenda.** The Dutch courts ordered the state to cut greenhouse gas emissions by 25 percent before the end of 2020.
- **RWE.** A Peruvian farmer, supported by German organisations, claimed about €13,000 from the energy company. RWE was held responsible for 0.2 percent of world CO2 emissions. The claim failed: his house was not in direct danger.
- **Shell.** The district court ordered a 45 percent cut by 2030. The court of appeal kept the responsibility and struck the percentage. The case is in cassation. A second case asks that Shell open no new oil and gas fields.
- **TotalEnergies.** Eight people who lost relatives and homes to extreme weather filed a criminal complaint in France, with three organisations. The chain from emission to flood to death could not be proven.

Four statements in the article describe the method.

1. Courts build on each other's rulings.
2. Cases also build on science: a new study links extreme weather to climate change.
3. It is now settled that organisations represent an interest and may start such cases.
4. Dutch cases aim at the duty, not at the damage. The damage may not even be needed.

Together they describe a law that starts from expertise. This essay sets beside it a law that starts from experience.

### 2. What law sees

Most experiences of injustice never become a case. The distance between feeling wronged and filing a claim is large. The costs are financial, mental, emotional and relational. The legal system sees the tip of an iceberg.

What lies below the surface is the **pre-escalation zone**: felt injustice, a value that was violated, a conflict of norms that has no formal shape yet. Social cohesion is formed, strained and repaired

there. Courts cannot see it. Surveys do not measure it finely enough. Policy analysis runs months or years behind.

Felstiner, Abel and Sarat described in 1980 how a dispute comes into being. There are three steps.

- **Naming.** A person recognises an experience as an injury.
- **Blaming.** The person holds someone responsible.
- **Claiming.** The person asks that someone for a remedy.

Every step loses people. Law as it stands begins at the third step.

### 3. Experience Based Law

Experience Based Law (EBL) begins at the first step. It rests on one observation about what a legal code is.

A code is not a lookup table. The Roman jurists and the drafters of the Code Civil recorded a collective judgment about what people owe each other: what counts as a fair exchange, what power one person may hold over another, what dignity requires. Fuller called this the inner morality of law. Dworkin called law a practice of principle.

A citizen who asks whether a landlord may raise the rent by 25 percent overnight does not ask for an article number. The question is: is this fair, and what does this community say I am owed?

The architecture has three parts.

1. **A model of the code as a landscape of values.** Articles are linked to the principles they express. Article 7:247 of the Dutch Civil Code (rent protection) and article 6:248 (reasonableness and fairness) express the same principle by different routes: equal bargaining position. The code can then be walked by principle and not only by number.
2. **A conversation.** It does not open with "what does the law say?". It opens with: what is your position, what does it feel like, what is at stake for you? The person is guided to name the value in conflict. The result is a structured reflection: the principle, the provisions that express it, and the person's own situation.
3. **A Monitor.** The reflections are made anonymous and gathered. The Monitor shows which values are touched most often, where, and how that changes over time. It reports to municipalities, policy makers and civil organisations: maps of where cohesion is under pressure, before that pressure becomes a lawsuit.

The output invites and reflects. It does not command. That is the older function of law: a shared conversation about values, which codes and courts once made workable at large scale.

In EBL the material of law is the experience of a person at a place. That experience is a fact. It has a subject, a location and a date.

### 4. The climate case as the reverse

Read against these three steps, the climate case runs the other way.

**It begins with claiming.** The claimant is often an organisation that represents an interest. Nobody has to name an injury. The Dutch route makes this explicit: the duty is enough, the damage is not needed.

**Where there is naming, blaming fails.** The eight people in France named a real loss. They could not show that this company's emission was necessary for this flood. The Peruvian farmer named a real fear. The court asked whether his house was in direct danger. Both courts asked for an experience with an address.

**The fact is supplied by experts.** The campaign opens with the statement that science has been crystal clear for years. The percentage of 45 by 2030 is a model outcome. The court of appeal accepted a responsibility and refused the percentage. It drew the line itself.

**The remedy is an order from above.** A reduction order imposes coherence from outside. It is not a closure between parties who know each other.

Habermas wrote that legal norms are legitimate only when they stay connected to a conversation in which those affected take part. In the climate case those affected are spoken for. The lawyer in the article says it plainly: everyone emits and everyone is affected.

## 5. Two kinds of statement

Why does expertise not carry a ruling? There are two kinds of statement.

The first says: *this is true about the world*. It has no checkable form. Tarski showed in 1936 that a language rich enough to speak about itself cannot fix its own truth from within. Ordinary language also moves with time, place and speaker.

The second says: *this was recorded here, by this person, on this date*. It can be checked completely.

An experience reported by a person belongs to the second kind. So does a measurement with a site and a date. A scientific consensus belongs to the first kind.

The climate numbers show the difference.

In 1750 the air held 278 parts per million of CO<sub>2</sub>. Now it holds 429. That rise retains 2.33 watt per square metre. A warmer earth radiates more: 3.22 watt per square metre per degree.

- 2.33 divided by 3.22 is 0.72 degree.

This direct effect has been observed in the field, at two sites, over ten years (Feldman, 2015).

The earth was 1.44 degree warmer in 2025 than around 1850. That is twice 0.72. The difference is water: vapour, clouds, and ice and snow. The UN climate panel assesses these terms per degree. Of the 3.22 watt, 1.30 returns through vapour, 0.42 through clouds and 0.35 through ice and snow. The earth loses about 1.16 watt per degree net.

For a doubling of CO<sub>2</sub>:

- CO<sub>2</sub> itself: 3.71 divided by 3.22 is 1.15 degree.
- The whole: 3.71 divided by 1.16 is 3.2 degree.
- Share of CO<sub>2</sub> itself: 1.15 divided by 3.2 is 36 percent.

The other 64 percent is water. For clouds the assessment runs from slightly cooling to strongly warming.

One part is observed. The larger part is assessed across models. Both come from science. A ruling that rests on "the science" rests mostly on the second part.

## 6. Experience is a failed expectation

EBL treats law as a learning system. The unit of learning is the failure.

Schank described it in 1982. People and institutions live by scripts: if I do this, that follows. When the world breaks the expectation, there is a choice. Revise the script, or defend it. Learning needs the first. Experience is what remains of a broken expectation.

A text of 2007 on the legal system shows what happens without that learning. It asks one question over and over: *what went wrong?* A rule fails. An exception is invented. The invention of exceptions is called jurisprudence. Experts are needed to read it. One error is compensated with another.

The climate case follows this course. Courts build on each other's rulings: exception on exception. The court of appeal breaks an expectation by striking the percentage. The answer is cassation and a second case. The script is defended.

The same 2007 text names a second trap. Thinking projects trouble into the future and acts now as if it were real. A ban on fields that have not been opened is a ruling on a failure that has not occurred. Nobody has experienced it.

## 7. EBL in the living environment

What would the three parts of EBL do here?

**The conversation.** A farmer near Zegveld sees his land sink 7 millimetres a year. His stable floor cracks. A village on the Hungarian sand ridge saw its groundwater fall from 6.5 to 8 metres in one year. A family in a drained polder lives with summer heat that the neighbouring wet meadow does not have. Each can name what is undergone and what is at stake: the home, the harvest, the well.

**The landscape of values.** Water law, environmental law and the law of neighbours express principles that people already understand: care for what is shared, no harm to the neighbour, a fair division of burdens.

**The Monitor.** The reflections are gathered by place. The map shows where the pressure is, per polder and per stream basin, years before a summons.

The experiences match readings that can be taken on the spot.

1. The groundwater level, in centimetres below the surface.
2. The height of the land, in millimetres per year.
3. The summer temperature of a plot beside that of the neighbour.
4. The carbon in the top 30 centimetres.

These readings respond within one to five years. They belong to the people who live there.

The numbers show why this scale carries weight.

- One millimetre of evaporation per day carries off 28.4 watt per square metre. The whole CO<sub>2</sub> term is 2.33. On the spot that is a factor of twelve.
- Since 1700, 3.4 million square kilometres of wetland have been drained, a fifth of the total.
- A drained peat meadow emits 20 tonnes of CO<sub>2</sub> per hectare per year, and sinks about 7 millimetres per year. It is one number in two units.
- Every 10 centimetres of higher groundwater saves at least 3 tonnes per hectare per year.

The Dutch target for peat is 1 million tonnes less by 2030. In water level: 20 centimetres up on 167,000 hectares. 167,000 times 2 times 3 is about 1,000,000 tonnes.

That is a ditch level, a polder, a water board.

In the image of the Vacuum.Net theory this is a mesh in a fishing net under tension. Where a winding returns in phase, the mesh closes and holds what circulates in it. An open mesh holds nothing. The CO2 figure counts the carbon that sits in no closed mesh. Temperature is a second reading of the same state. In the Antarctic ice the two move together and neither leads (Parrenin, 2013). A mesh has an address. The world figure has none.

## 8. What remains for the court

A court remains. It rules on what went wrong between parties who can be named.

A community ledger now running in the Netherlands shows the form of such a fact. It records deeds as sentences: *Hans helped Lea with the roof, Tuesday*. Who did what for whom, where and when. The receiver confirms with one tap. Hohfeld wrote in 1913 that a claim and a duty are one relation, read from two sides. An obligation is owed by someone to someone.

Who lowered which water level, and when, is such a deed. A court can establish it. A duty owed to all and to none is of another kind.

A proposal of March 2026 reduces the basic law to one subject: the way agreements are made and kept. With EBL before the court and deeds in front of it, little else is needed.

## 9. Experience and expertise

Collective judgment has its own standing. Aggregated independent judgments often do better than expert opinion (Surowiecki, 2004). Groups show a measurable collective intelligence that depends on social sensitivity and on taking turns in conversation (Woolley, 2010). Ostrom showed that rules work when they fit the practice and the shared values of those who use them.

The Monitor is built on these findings. It does not replace measurement. It tells where to measure and what is at stake there.

Expertise keeps its place as a reading. It is not a party and not a judge. A state that adopts one world view as fact has left the arena it is meant to guard.

## 10. Closing

Climate law has grown at the top of the iceberg. It builds ruling on ruling and study on study. Its claimants speak for an interest. Its facts are assessments.

Experience Based Law grows from below. Its material is what people undergo, where they live. Its method is a conversation that finds the value at stake. Its instrument is a map that shows the pressure before the fight.

A balance is restored where the people who live on it can read it themselves.

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