Legalism and Professional Norms

Legalism is a refuted descriptive theory of judicial behavior. And here, the chapter could end. Even though some legal practitioners and scholars may still adhere to that romantic view, social scientists see clearly that judges do not perceive the facts and the law as they are, plug them into a logical formula, and deduct the one single correct outcome of the case. Even authors building their careers on refuting legalism admit that no one actually argues that law is all that determines judicial decision (Segal and Spaeth 1996, 974).

However, legalism is still very much alive as a normative ideal. Possibly, it has never been anything but. It is in this normative sense that Montesquieu (1758, book 11, chapter 6) used his famous metaphor that the judge is nothing but the mouth of the law – “inanimate”, much like a machine. The ideal of legalism may be approached to greater or lesser degrees. While the discipline of judicial behavior is done with showing that the descriptive model of legalism is false, in as far as it claims that law is the only factor determining judicial decisions, there is much to explore in how to move the judicial system closer to or further from the legalistic ideal. While the pure legalistic model is refuted it is also clear that law does have some effect. When a legislature allows adoption by same sex couples there will more such adoption. When it forbids it there will be less. Similarly, when the supreme court revokes Roe vs. Wade, it becomes more difficult for many people to have an abortion. We know that law is not the only factor influencing judges and know that law does have an effect. However, we know very little about how full or how empty the glass actually is. Neither do we know much about what fills it and what empties it. It remains largely unclear how to set up a working judiciary. However, only a judiciary sufficiently approaching the legalistic ideal through legal constraint will guarantee objectivity through law (Millon 1992, 3), democratic legitimacy of judicial decisions handed down by unelected judges (Scalia, 1176; Groß 2019), and can justify judicial independence by the legal bind that judges are subject to (Groß 2019). Furthermore the ideal itself may yield observable effects, depending on how individuals share, internalize, and cherish it. This empirical effect of the legalist ideal remains largely unexplored.

The following chapter will briefly set out how legalism in the strict sense was discarded as a descriptive theory, which theories took its place and how future descriptive research on judicial behavior may be improved by taking into account the ideal of legalism.

Legalism

The traditional legalistic account of judicial decision-making effectively turns judicial discretion into a taboo. It claims that judges decide cases, like plugging the facts into a formula coded in law, to “calculate” the correct legal result (Weinshall-Margel 2011). In that regard Legalism derives from (or builds on) the formalism of the 19th century, which demanded to formally deduce a case’s outcome from the facts and the law by means of syllogistic reasoning (Leiter 2010, 111, 114; R. A. Posner 1986, 181).

“The law” providing the major premise of the syllogism would consist of the texts of the laws, the lawmaker’s intent, precedent and doctrine (Weinshall-Margel 2011, 559). The weights of the respective legal sources typically depend on a country’s legal tradition. Up until today, some legal scholars testify to their belief in legalism by arguing that the judge is independence because it is not the judge taking the decision but the law. Consequently, the judge’s accountability does not have to be guaranteed by elections (Groß 2019), a view still popular in civil law countries.

Lawyers have traditionally claimed that judges do indeed approach this ideal in that they are motivated if not solely then at least strongly or even predominantly by the law. It is not easy however to find hard-core legalists in the literature. Amongst others Segal and Spaeth (1996, 974) count among the authors representing legalists views about judges at apex courts: Ackerman 1991; L. Epstein and Kobylka 1992; Ferejohn and Weingast 1992. XXX Rosenberg, 1994, 7; Gibons 1991; Howard 1981; Dworin1978; Ackerman 1991; Baum 1992, Epstein and Kobyala 1992; Ferejohn and Weingast 1992 and McNollgast 1994 XXX. Theoretical legal literature routinely assigns to judges a sense of duty and honor (R. Epstein 1990, 829), they are believed to altruistically do the right thing (Stout 2002) or simply to enjoy bringing the law to effect as it stands (Baum 2010, 22) so that ultimately they are guided by the law. As they are mainly motivated by the law, judges themselves tend to think that they are able to suppress or control
The death of legalism as a descriptive theory.

In the earlier decades of the last century, legal realism and its sister currents in non-US countries dealt a blow to the legalist description of judicial decision-making from which it would not recover – at least not in the US and in social science circles. In arguing, both, that formalistic legal reason is neither possible nor even desirable, legal realists deprived legalism of its very foundations. From a theoretical point of view, legal realism argued that the judge is essentially unconstrained when deciding cases. Cases cannot be solved by pure syllogistic deduction (Holmes 1997, 1000), because logic is useless for finding a premise (R. A. Posner 1986, 182). Instead, premises are found by interpreting the law and interpretation is not logic (R. A. Posner 1986, 187). Legislative intent typically does not provide unequivocal guidance in hard cases as “the lawmaker” is a fiction, to start with. The “ratio legis”, abstractions from particular rules to derive general principles from which to draw conclusion in hard cases, is inconclusive because particular rules can rely on a multitude of possible principles (Kantorowicz 1906, 25). According to legal realism there is no “system” of law which could be amended in any coherent way (Kantorowicz 1906, 28) to fill “gaps”. The sole reason to place rules or precedent into a system is to make law easier to remember and teach (Holmes 1997, 992). Ultimately, blindly applying “the law” to cases results in absurd outcomes (Holmes 1997, 997; Kantorowicz 1906, 22) and in superfluous or even absurd doctrinal distinction (Holmes 1997, 995). All in all realist arguments result in the view that judges decide cases by personal preference and rationalize their decisions post-hoc using legal arguments to conceal any policy choice that would rather have been openly justified (Kantorowicz 1906, 16; Holmes 1997, 1000). The only role left for legal scholarship is to predict the outcomes of future cases (Holmes 1997, 992). Such predictions, however, will be more accurate if made with the help of social sciences rather than doctrine (Holmes 1997, 1002).

Legal realists and the proponents of its sister movements outside of the US did not deplore that the decisions of cases were not determined by law. Open realism would enable public democratic policy debate (Holmes 1997, 1000–1001). The “ends sought to be attained and the reasons for desiring them” could be studied scientifically (Holmes 1997, 1006). Legal realist felt that strict law adherence mainly serves to justify current conditions and hamper reform (Grechenig and Gelter 2008, 543).

Today that realist perspective is the dominant view in the US (Balganesh, 1844). In other countries the sister currents, like the Freirechtschule were less successful (Grechenig and Gelter 2008). There, instead of admitting the fictitious character of legalism, the latter was softened and survived in remodeled forms as a descriptive theory. The German “Wertungsjurisprudenz” is an example of such remodeled legalism: it claims that although the law does not determine the decision for every case, the judge may and will only base her decision on value judgements derived from the law (Grechenig and Gelter 2008, 554–56).

Their behavioralist turn lead political scientists to concur to the realistic view on judicial decision making (Clayton and May 1999, 235) providing empirical support for the realist argument that the law’s influence on judicial decision making is meagre. The “attitudinal model” argues that at least in as far as judges are not submitted to judicial review they are unconstrained by the law so that their decisions are direct expressions of their political attitudes and preferences (Segal and Spaeth 1996, 974). Judges’ policy preferences then exert the single most important influence on their decisions. That attitudes exert a significant influence on decisions has largely been vindicated with respect to the US Supreme Court (Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 1996, 2002; Solberg and Lindquist 2006) although the judges’ policy preferences have been shown not to be stable but to change over time (Martin and Quinn 2007; L. Epstein et al. 2007). At the Supreme Court of Israel, attitudes have been shown to influence decisions more strongly than legal considerations in freedom of religion cases (Weinshall-Margel 2011). At the supreme court of Canada, attitudinal decision making has been show, albeit to a lesser degree than in the US XXX (Ostberg and M. Wetstein 1998; M. E. Wetstein and Ostberg 1999; Ostberg, M. E. Wetstein, and Ducat 2002) XXX ??? Ostberg & Wetstein 2007, 2009 ???.

other motives XXX check citation at (L. Epstein and Waterbury 2020; Wistrich, Rachlinski, and Guthrie 2015, 862, 2015, 860) XXX.
Taking the place of legalism: institutionalism

The attitudinal model explains the variance of judicial decisions but is unable to explain why the law does affect the central tendency of their distribution (Weinshall-Margel 2011; Richards and Kritzer 2002). It also is at odds with the finding that judges do suppress their attitudes more than lay people (Kahan et al. 2016). And it leaves unexplained why judges can submit to an ideology but not to “the law” XXX Engel ? XXX. Attitudinalism was also criticized for over-emphasizing the politics of judicial decision making and ignoring the impact of the law (Clayton and May 1999, 236) and for becoming tautological. If attitudes are all that drives decisions and anything can be an attitude then attitudes are decision and cannot explain them (Richards and Kritzer 2002, 307). In return, as in political science more generally (Weinshall-Margel 2011, 558), interest in institutions guiding behavior increased among scholars of judicial behavior (Clayton and May 1999, 237). Through such institutions the law returned into the focus of researchers of judicial behavior.

The strategic model

The strategic variant of this new institutional take on judicial behavior uses game theory to identify equilibria that serve as predictions of judicial behavior. It assumes that judges follow their attitudes but are constraint by other agents following their attitudes. More specifically, lower court judges pursue their policy goals constraint by the threat of reversal wielded by higher courts. It is assumed that judges are averse to reversal because reversal will spoil the judges’ policy goals (L. Epstein and Weinshall 2021, 17; Kastellec 2007; Randazzo 2008) and may also taint their reputation hurting promotion prospects (Salzberger and Fenn 1999; Choi, Gulati, and E. A. Posner 2012; Shepherd 2012). Some studies indeed confirmed the assumption of reversal aversion empirically (Choi, Gulati, and E. A. Posner 2012; Randazzo 2008; Smith 2006; Salzberger and Fenn 1999; Feess and Sarel 2018; see also overview at Shepherd 2012; critical against reversal aversion Kim 2011, 556–57).

For apex courts, strategic interaction arises from the fact that courts cannot by themselves force compliance with their decision XXX (Clayton and May 1999, 238; L. Epstein and Knight 1997) XXX. They can, however, use their public acceptance to discredit non-compliance (Petersen and Chatziathanasiou 2019, 529). The approach is institutionalist, in that “institutions” determine what combinations of actions result in what degree of goal attainment of agents (L. Epstein and Waterbury 2020).

The strategic model of judicial decision making has been called today’s “standard way of thinking about judicial behavior” (Baum 2010, 7) and it fared well empirically. It has been confirmed that indeed judges on apex courts in the US (Lindquist and Corley 2011), France (Franck 2009), Germany (Vanberg 2001) and the EU (Carrubba, Gabel, and Hankla 2008; criticized by Stone Sweet and Brunell 2012; see also Carrubba, Gabel, and Hankla 2012) respond to actions and preferences of other “players” in the political game. Lower courts seem to act strategically, too: In the US, they respect Supreme Court precedent less when justices supporting it retire (Benjamin and Vanberg 2016). Ultimately, however, it seems that strategic behavior by courts deprecates the very capital (apex) courts run their business on. A court that appears political tends to decline in public regard (Caldeira 1986; Nicholson and Hansford 2014; Gibson and Nelson 2017).

Placing institutions center stage: neo-institutionalism

While in the strategic account of judicial decision making institutions are exogenously given as the rules of the game, other scholars became interested in the emergence of such institutions. This neo-institutionalism defined institutions very broadly. No particular form was required. Instead the focus shifted on shared cognitive structures. “[I]nformal norms, myths, habits of thought, or background structures and patterns of meaning” could count as “institutions” (Clayton and May 1999, 240). Neo-institutionalists could agree with attitudinalists that attitudes shaped court decisions but they were interested in how institutions shape such attitudes (Weinshall-Margel 2011, 558). This opened a gate through which legalism could return to the focus of interest in a modified way (Richards and Kritzer 2002, 309–10). Law could be a mindset or at least shape such a mindset and through that mindset affect decisions (Weinshall-Margel 2011, 559).

Such a mindset is, however, hard to conceptualize. Kritzer and Richards tried to solve the problem by operationalizing the mindset by its effects. If law as a mindset were to be interesting, it needed to determine the weights by which certain independent factors influenced the outcome of cases – somewhat like in a regression model (Richards and Kritzer 2002, 305–8). Many factors, legal or not, could affect judicial decision-making but they did so through the legal mindset Richards and Kritzer called
“jurisprudential regime” (Richards and Kritzer 2002, 308). Kritzer and Richards connected their work to the strategic model of judicial making by attributing to their jurisprudential regimes the role of coordination devices in the strategic interaction of judges amongst each other and with the world outside the court (Richards and Kritzer 2002, 308). This line of thought cautiously opened the research on judicial decision making, which had largely followed the route of methodological individualism, to elements of more collectivist approaches. Others stressed that it was not the from but the conventions of the legal community that provided objectivity and predictability through “professional grammar” according to which each individual wants to do law as others do it (Millon 1992). It was shown that legal regimes influence judicial decision-making by the US (Richards and Kritzer 2002) and the Israeli (Weinshall-Margel 2011) Supreme Courts, for instance. However, the approach was criticized for the vagueness of its concepts and that under more galvanized operationalizations, empirical evidence seemed to fade (Lax and Rader 2010).

Professional Norms

Neo-institutionalism has shifted researchers’ interest to specific professional norms which judges may feel bound by. These are in particular the rule of unanimity, stare decisis and the constraint exercised by doctrine

Norm of consensus

Depending on the situation at the court, judges may feel bound by a norm of consensus. Thinking of the legalist ideal, one may interpret judicial dissent as indication that at least some judges were “wrong”, undermining the legitimacy of the decision. If courts are trying to achieve compliance with their rulings by maximizing legitimacy, dissent is something to avoid. The desire of judges to maximize legitimacy of the court’s decision may result in the mutual expectation to strive for unanimity. This mutual expectation may be called an institution or “the norm of consensus” (Wittig 2016, 74). Such a rule of consensus has been shown to exist – albeit with declining importance over time – at the US Supreme Court as well as at the US Courts of Appeal XXX (L. Epstein, Segal, and Spaeth 2001; Caldeira and Zorn 1998; T. G. Walker, L. Epstein, and Dixon 1988; Atkins and Green 1976) XXX as well as at the Spanish constitutional court XXX (Garoupa, Nuno, Gomez-Pomar, Fernando and Grembi 2013) XXX, and – weakly so – at the Australian Supreme Court XXX (Narayan and Smyth 2005)XXX. Wittig (2016) provides elegant, albeit indirect, evidence for a norm of consensus at the German Constitutional Court. She observes that judges dissent more often the closer their departure from the legal profession. She explains this observation by the assumption that judges leaving the profession identify less with the norm of consensus leaving them more leeway to follow their idiosyncratic attitudes in dissenting opinions.

Stare decisis

Another important professional norm is the one of stare decisis. It, too, can be rationalized on the basis of the strategic model. A court’s rulings will only be adhered to, if they are accepted. Following precedent may be what the public expects so that following precedent may increase acceptance for the court’s rulings (Knight and L. Epstein 1996, 1022–23). Segal and Spaeth (1996) have famously claimed to have shown empirically that stare decisis is without any effect on US Supreme Court Justices. However, their test can be criticized as overly strict in that they only checked whether dissenters later fall in line with the precedent they originally disagreed with. Of these originally dissenting justices 90.8 % dissent in the progeny cases to the original precedent, too. Only 9.2 % fall in line with the majority from the original precedent. Bailey and Matzman (2008) have shown that stare decisis influences judges more compared to other political actors not bound by the law. The setup of their study appears superior to that by Segal and Spaeth in that it measures judicial behavior at a clear non-judicial baseline. Their finding is evidence in favor of the existence of a norm of stare decisis.

Knight and Epstein (1996) find that precedent is the most cited type of authority in internal deliberations in courts. Assuming that in internal deliberations judges only cite what they expect to convince their colleagues, this finding provides evidence in favor of an effective rule of stare decisis. Knight and Epstein conclude that precedent actually constrains judicial decision making.
Legalism can still improve individualistic research on judicial behavior

By far most of the evidence reported above concerned apex court judges. The judicial behavior of lower courts is far less studied. The most studied court of all is the US Supreme Court. Clearly apex courts are fascinating. They appear unconstrained and are still called upon to follow the law. In apex courts researchers find a vivid representation of the ancient question: “Quis custodiet ipsos custodes?” (who guards the guardians). In contrast, what should lower courts do but to follow the higher ones, when, if they don’t, they face reversal. Possibly it appeared simply too self-evident that lower courts follow the commands of higher ones to let study of lower courts seem worth the while.

The judiciary of beliefs

Nonetheless I think researchers should pay way more attention to why and how lower courts follow “the law” or to what higher courts seem to demand. That question has recently been posed by Basu (2015) in a different context in a most radical way. Like traditional law and economics, the now mainstream strategic account of judicial decision making largely takes the rules of the game it analyses as given. In the traditional account of law and economics, changes in “the law” change payoffs of players and thereby change the equilibrium of the game. The law is only words written on paper. It has to be turned into payoffs by people. Now, why do officials and fellow citizens play their role in changing payoffs in line with the law? Ultimately all law has to be self-enforcing. The rules of the global game of law are given by nature. The written law can only induce shifts from one equilibrium to another. Basu asks the question why and how that works. He shifts the focus to shared beliefs which are understood in traditional law and economics. Judicial decision making has been ahead of traditional law and economics in this respect. The neo-institutionalists’ study of regimes and shared cognitive structures has investigated how norms emerge and decline and it has tried to form a concept of law that takes into account its collective nature as well as its nature as coordination device.

However I think the field can make much more mileage in this direction. The strategic approach could go the strategic path all the way down and acknowledge that law lets players shift from one equilibrium to another by coordinating beliefs. The theory of jurisdictional regimes has tried to do that, however, to convince its critics the study of regimes and cognitive structures needs to shape its concepts more precisely. The most promising route to achieve that is game theory. Although modelling the global game of law to make all equilibria visible and track the shifts between them induced by law is hopeless. However, the precisely defined concepts of game theory can fruitfully guide research. Beliefs are expectations on behavior of others. They are probabilities and nothing more. They are easier to measure than “jurisprudential regimes” or cognitive structures and they are therefore easier to correlate with case outcomes. The field could strengthen the focus on lower courts. Rather than observing the beliefs of eight justices and inferring a belief structure the field can investigate the many judges out there in the system and really find structured coordinated beliefs communicated through doctrine.

Social norms

Social science literature inspired by game theory has made some progress in explaining cooperation by means of methodological individualism. Some of the concepts underpinning this research could foster fruitful research on judicial decision making, too. In particular, I think research on social norms could provide structure where today judicial decision making research is creating its own concepts – like regime or cognitive structure. Social norms are well established in all the social sciences. If they can capture what “regime” is meant to express, why not connect research on judicial behavior to other fields of the social sciences by referring to the common concepts.

A social norm is defined as a predominant pattern of behavior in a group sustained by that behavior being widely expected and deemed appropriate (Bicchieri 2006; Nyborg et al. 2016; Ostrom 2000). The notion of a social norm stems from sociology and by the early 2000s had reached economics, social psychology, and philosophy (see Bicchieri, Muldoon, and Sontuoso 2021 for an overview). During its migration through the disciplines, the concept has differentiated into several distinct notions which are not necessarily congruent. Describing social norms as a predominant pattern of behavior in a group sustained by it being widely expected and deemed appropriate can accommodate many of these concepts one of which will be considered in more detail the following. Two more will be discussed in the subsequent section on psychological game theory. All three share the feature of tying well into game theoretic thinking.
Social norms can emerge by mere game theoretic coordination (Basu 2015; Nyborg et al. 2016). An example would be the following: In the army it is a crime not to report crimes. Reporting clearly is costly. Assume that crimes are only detected by reporting. If all cadets believe that crimes will be reported, then they will report too (not to be punished) resulting in universal reporting. If, however, they believe that others will ignore the obligation to report, then they will not report either (because non-reporting is unlikely to be discovered) resulting in universal non-reporting (example inspired by Akerlof and Kranton 2010). Either equilibrium would be characterized by standardized behavior that could be called a “norm”.

The ideas of game theoretic coordination can be expected to yield rich insight in the realm of judicial decision making. While much thought on the judicial behavior of apex courts remains in the logic of backward induction and thus varies the question of quis custodiet ipso custodes, infinite repetition of strategic interaction turns all games into coordination games. A game is already infinite in that sense when its end is unforeseeable so that on any round there could follow another. The interaction of supreme court justices are infinite in that sense as normally death, the occurrence of which is unforeseeable, sets an end to a justice’s tenure. Similarly the interaction of the supreme court with other players in the political arena is infinitely repeated in that sense. The same is true for the interaction of the Court with the public – both the court and the public “live” eternally.

The strategic breed of neo-institutionalism is half way there. It has defined a currency providing utility to judges (closeness to a personal policy goal). It has found a resource judges can invest in to move closer to their goals (Legitimacy) and it has made clear that judges can neither produce the resource nor acquire that currency by themselves. It has meticulously spelled out the tradeoff individual judges face between their policy goals and legitimacy. Now it needs to turn to the structure of the game, explore which equilibria are plausible and investigate how law, of all devices, helps judges to coordinate on the on a certain equilibrium and not on others.

Psychological game theory
Humans are different from other species in that they can flexibly cooperate on an immense and anonymous scale unseen in any other animal. Our cognition brings many predisposition to enable us to engage in this wonder. It seems natural to assume that processes in human cognition underpin the coordinated beliefs we call law. More specifically, many findings from cognitive and social psychology as well as from behavioral economics may facilitate coordination (Basu 2015). They too may be at the root of law as a coordination device. The role of shared cognitive processes has not gone unnoticed in research on judicial behavior. The “cognitive structures” and possibly also “jurisprudential regimes” neo-institutionalists called institutions may describe or rely on some of these cognitive processes. However, again, it may make sense to take over well-developed concepts from other disciplines rather than create concepts idiosyncratic to judicial behavior.

Psychologists and behavioral economists have shown that norms motivate behavior. Such normative motivation was conceptualized by Cristina Bicchieri (2006) as a conditional preference for a certain behavior which is triggered by beliefs. According to this model of individual behavior, an agent will feel bound by a social norm to act in a certain way if he expects others in his place to act in that way (first-order empirical belief) and if he expects others to think the relevant behavior is appropriate (second-order normative belief). If the cadet believes that others in her place would report, and that others would deem reporting right, then she will feel disutility not reporting and thus be inclined to report. This model makes very similar predictions as models of social norms by coordination or signaling but assumes that the norm is internalized so that game theoretic coordination loses its relevance. People do not seek the best response given their belief structure over the actions of others. Rather they jump immediately from beliefs to action. A complementary model to Bicchieri’s – which rarely goes by the name of “social norm” – is identity economics by Akerlof & Kranton (2010). Their model is inspired by in-group ideals which, too, exert normative motivation. They take social norms as a given to be observed in reality and write them into the utility function as an ideal to predict individual behavior under certain norms: The further the behavior of the agent is from the ideal the greater the disutility form identity. By such a social norm the cadet may self-categorize as one of the crime-reporting cadets and
will feel disutility if she does otherwise, leading her to report. The model stresses that she needs a reason to identify as reporting cadet to do so. The two models are complementary in that they each have a blind spot that the other fills. The model by Akerlof & Kranton does not make the impact of expectations explicit but stresses the relevance of shared social identity. The inverse is true for the model by Bicchieri. It makes the relevance of expectations for utility explicit but is mute as to whose expectations are relevant. Experimental research suggests how the two are linked. The more integrated people are by a shared social identity, the stronger the impact of higher order beliefs on behavior (Morell 2019). There is ample empirical evidence supporting both of the latter concepts of social norms. It has been shown that indeed both empirical beliefs (Bicchieri and Xiao 2009; Danilov, Khalmetski, and Sliwka 2021; Fabbri and Carbonara 2017; Gächter, Gerhards, and Nosenzo 2017; Krupka and R. A. Weber 2009) and normative beliefs (Bicchieri and Chavez 2010; Hauge 2016; Human and Capraro 2020; Raihani and McAuliffe 2014) affect behavior in the way predicted by Bicchieri’s model (for the case that the two types of beliefs conflict see Bicchieri and Xiao 2009; Raihani and McAuliffe 2014). Also, the in-group model which Akerlof & Kranton base their theory on, has been empirically corroborated (Hogg and Abrams 1988). There is evidence that common pro-social behavior can be better explained under a unifying theory of social norms (Kimbrough and Vostroknutov 2016, 2018) than by introducing myriad ideas of social preferences in the utility function. It has been found that people are motivated by appeals to morals or norms leading them to act more pro-socially (Capraro and Rand 2018; E. Dal Bo and P. Dal Bo 2014). The fact that experimental participants exploit moral wiggle room to their own advantage (Dana, R. A. Weber, and Kuang 2007), also speaks in favor of the motivational effect of internalized norms. If there was no such effect, people would not need the wiggle room to act self-serveingly in anonymous experiments. It was also found that punishment and social norms are complements. Punishment stabilizes social norms and social norms make punishment more effective and less wasteful (Bicchieri, Dimant, and Xiao 2021; E. Dal Bo and P. Dal Bo 2014; Fehr and Williams 2018; Li, Moll, and van Dolder 2021; Toribio-Flórez 2021). An experiment with lay people found that assuming the role of a neutral “judge” changes participants’ altruistic punishment behavior to be fairer and more effective (Engel and Zhurakhovska 2017). This is in line with the predictions that being assigned a role that comes with an ideal expectation motivates people to act accordingly.

Judges, I would expect, are fundamentally driven by their beliefs about the expectations of their peers (Zajc and Kovac 2011). This influence is different from instrumental concerns for reputation (R. A. Posner 1993; Graham 2001). Mechanisms determining self-selection into courts may, if calibrated right, may guarantee that the judiciary contains an unusually high share of normatively-motivated agents who are particularly responsive to the expectations of their peers. I expect that judges share explicit expectations about whether judges can keep their dockets “afloat” or whether failing to do so garners disapproval. Also, I would expect that there are shared social norms among judges which explain their degree of aversion to reversals. Violations of both norms may be informally punished by ridicule, gossip and – in severe cases – ostracism. With and without sanctions, judges respond to social norms to a larger degree on average than would the average of a random sample of law graduates. Take the judges’ aversion to being reversed as an example. That judges try to avoid reversal because the judge wants to see her view of the law carry the day (which a reversal undermines) explains little more than saying that judges dislike being reversed for the sake of it. Others explained reversal aversion by the reversals’ effect of tainting the judge’s reputation, which is possibly relevant for future promotions. Then all judges who have dropped out of the promotion tournament should not display any reversal aversion, which is likely the bulk of judges active in the judiciary. A model of social norms in the judiciary would predict that even judges who have dropped out of the promotion tournament are motivated to avoid reversals. Reversals are perfectly set up to appeal to normative motivations. Through reveals a judge gets the feedback not to have adhered to ingroup ideals and the expectations of peers. The empirically convenient thing about the belief centered perspective of social norms is that it follows the methodologically individualistic approach but provides a measure distinct from the acting individual. Attitudes have lost appeal as authors gained the impression that the explanation they provide is tautological. They ultimately conflate with decision themselves (revealed preferences have seen a similar problem). Social norms, in contrast can be measured as beliefs about other people and thus stay distinct from the actions of the individual holding those believes. Its explanations therefore run less of a risk of being epistemically vacuous.

All in all I hope to have illustrated that the theory of social norms provides many interesting non-obvious observable implication. This is what a good model should do.
Conclusion
I do not dispute that the attitudes of judges impact their decisions or that judges act strategically. From their inclination to follow social norms, however, judges may derive motivation to control their attitudes and tone down their strategic ambitions. Social norms rely on human cognition that underpins anonymous mass cooperation. Social norms may cause judges not only to face formal review from appeals courts but also informal review by their peers. This renders social norms a resource that may ultimately guarantee the rule of law. Judges motivated by other judges’ expectations follow the law because they believe other judges would do the same and would find it appropriate. They are motivated to suppress policy preferences to a greater degree than lay people (Kahan et al. 2016) or non-jurisdictional political actors (Bailey and Maltzman 2008) because judges know that judges expect each other to be neutral while lay people do not hold such mutual expectations. When judges appear not guided by the law that might be explained by the degree to which they have ceased to believe that other judges live up to the ideal of purely legalistic motivation. Judges of lower courts who have long dropped out of the promotion tournament still self-categorize as judges. Accordingly, they exert effort and apply the law as judges expect from one another.

Legalism may have been refuted as descriptive theory of judicial behavior. Judges do not take the facts and the law and deduce by means of formal syllogism the only possible outcome of a case. However, legalism remains a powerful ideal – a social norm – rather than a descriptive account of what judges do. That can explain why, at times, legal scholars appear as “loyal supporters rather than the neutral observers” or courts (Dyevre 2010): With their description of reality (the legalistic model) they are defending a social norm that may effectively bind judges to the law.

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