Attitude Theories of the Law

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Abstract

In any legal field, numerous normative dilemmas and conflicts arise as to what the rule of law should be. Attitudes toward these conflicts shape legal policy and decision-making. Thus, studying legal attitudes is essential for predicting legal actors’ decisions and understanding the underlying reasons for existing legal doctrines and judgments. To date, many studies have focused on the links between political and cultural attitudes and judicial decision-making. However, only few scholars have attempted to provide a complete descriptive account for the basic conflicts that divide people over distinctively legal issues.

The main objective of this article is to introduce a method for studying the richness of people’s legal attitudes. Building on previous studies of attitudes and the law, and on...
methods developed in other spheres for constructing, testing, and applying attitude theories, this article advocates the development of attitude theories of the law, that would map the key-conflicts in any legal field. Specifically, it provides a description of what constitutes a legal attitude theory and how such theories could be utilized; sets the criteria for evaluating such theories; and proposes an empirical methodology for testing these theories and for assessing the legal attitudes of individuals.

1. Introduction

In any legal field, numerous normative dilemmas and conflicts arise as to what the rule of law should be. General dilemmas of such sort include the conflict between deterrence and just desert in criminal law, the tension between wealth redistribution and economic growth in tax law, and many others. Both jurists and laypersons have various attitudes about the proper way to address normative conflicts in any legal context. These *legal attitudes* (along with myriad other factors) shape policy and decision-making—be it by office-holders or by private individuals. Given the import of legal attitudes, studying them is essential for predicting legal actors’ decisions and understanding the underlying reasons for existing legal doctrines and judgments. But how should one go about studying the diversity in people’s legal attitudes?

To date, many studies have focused on the links between *political* and *cultural* attitudes and judicial decision-making. However, only few scholars have attempted to provide a *complete descriptive account* for the basic conflicts that divide people over distinctively *legal* issues. To clarify, suppose a researcher or a lawyer wishes to gauge the views of a given judge on contractual matters, to help predict the judge’s decision in a particular contractual dispute. Currently, there is no theoretical framework by which one may adequately define and measure a judge’s contractual legal attitudes. The same problem may arise when a legislator wishes to put forward legal reforms. Suppose that one is charged with nominating members for an expert committee that will propose revisions to contract legislation, and one wishes to appoint people with certain contractual attitudes—possibly those that are consistent with the prevailing attitudes of the public at large, or with one’s own. Selecting members solely on the basis of the political divide between liberals and conservatives will probably be too crude to account for the complexity of attitudes about contract issues.

One way to fill in this lacuna is to hypothesize several key conflicts that epitomize people’s contractual attitudes, using insights from existing positive and normative theories of contract law. These might include conflicts over the importance
of formalistic requirements in contracts; the role of cooperation and mutual consideration in contractual relationships; the goal of maximizing the contractual surplus; and the extent to which public law values, such as equality, should be integrated into contract law. Thus, to assess a person’s contractual attitude, we might measure her attitude toward each of these conflicts independently. However, it is far from self-evident that any set of conflicts adequately captures people’s actual contractual attitudes. To assess the adequacy of the set of conflicts, several questions must be addressed: How should one identify the fundamental conflicts in contract law?; What are the appropriate criteria for choosing between competing sets of possible conflicts?; What methodology can be used to identify the key conflicts and evaluate their adequacy?; and How can contractual attitudes be measured, or ranked, in order to compare the attitudes of different people?

This article calls to fill this gap in the legal literature. Its main objective is to introduce a framework for studying the richness of people’s legal attitudes, in a bid to develop attitude theories (ATs) of the law, that would map the key-conflicts in any legal field. This framework consists of three elements: a detailed description of what constitutes legal ATs and how they might be utilized; criteria for evaluating and comparing ATs; and an empirical methodology for evaluating each AT by these criteria, and for gauging the legal attitudes of individuals.

Several existing theories and analyses may be regarded as precursors for this project. These include the attitudinal model; cultural cognition theory; jurors’ attitudes; and form and substance in private law adjudication. While other theories may also deal with attitudes in legal contexts, discussing these four bodies of literature will provide the necessary background for constructing full-scale ATs and for comparing them with previous attempts in this area.

Three of the abovementioned theories focus on the effect attitudes have on decision-making. Thus, the attitudinal model (Segal & Spaeth 1993, 2002) uses observational methods to test the links between judges’ ideological positions and their decisions. Contrary to the attitudinal model, which mostly uses indirect proxies such as the appointing President or media editorials to identify judges’ attitudes, the cultural cognition theory (e.g., Kahan 2012) employs self-report surveys to study cultural attitudes, and to explore latent motivations in legal decision-making. According to this theory, attitudes may be plotted along two axes, or dimensions: hierarchy-egalitarianism (which deals with attitudes toward issues of equality and
discrimination), and individualism-communitarianism (which deals with attitudes toward authoritative organizations). A third line of research—the study of jurors’ attitudes (Boehm 1968; Kravitz et al. 1993; Couch & Sundre 2001)—uses surveys to gauge the attitudes of jurors, and to predict their decisions. Of these attitudes, the main one that has been measured in a bid to anticipate jurors’ resolutions in criminal cases is legal authoritarianism—namely, jurors’ views on obedience to authority in legal contexts.

While these theories contribute to the understanding of legal decision-making, they are not without limitations. First and foremost of these—from the perspective of this article—is that they do not identify normative conflicts in specific legal fields. The attitudinal model mostly maps judges’ attitudes through the unidimensional lens of the liberal-conservative divide. While this conflict may be useful in explaining high-profile political controversies, it is less useful in accounting for more mundane legal disputes. The same problem characterizes the cultural cognition theory, which focuses on cultural values, such as authority and equality—which are strongly correlated with political ideologies. Finally, the attitudes that are measured to predict jurors’ decisions are not legal attitudes per se: although they represent both normative attitudes and factual beliefs, they fail to differentiate between the two.

The fourth theory that deals with legal attitudes is Duncan Kennedy’s (1976) theory of form and substance in private law. In it, Kennedy sought to explain the key conflicts of private law and how they relate to each other. In his view, American court rulings, articles, and treatises on private law, all embody two key conflicts. One is the conflict between the use of clear and formal rules, and the use of broad standards that leave room for judicial discretion. The other is between the individualistic approach that promotes self-interest, and the altruistic approach that considers the interests of others, as well. He surmised that these two conflicts are inherently correlated, and reflect similar core values.

Kennedy’s theory is a good example of a legal AT as envisioned in this article—one that focuses on a specific legal field, strives to identify the basic conflicts that shape opinions about this field, and explains how these conflicts interact. However, Kennedy based his theory on theoretical conjectures. As I conceive them, however, ATs are descriptive theories (of normative convictions) that must be founded on empirical inquiry. To test whether Kennedy’s conflicts are an accurate reflection of people’s actual attitudes toward private law, and of how the conflicts relate to each other, one
must employ an empirical methodology, and construct the criteria by which these conflicts should be evaluated.

To that end, I posit that the initial stage of developing a legal AT is to examine—as Kennedy did—the existing normative issues in a given legal field, and identify the key conflicts that emerge within them. Once that is done, the AT should be evaluated by two criteria: (1) fit—meaning that an AT is superior, ceteris paribus, the more accurately it captures people’s opinions about various aspects of the legal field, and (2) parsimony—meaning that an AT is superior, ceteris paribus, the larger the legal field it covers and the smaller the number of key conflicts it uses.

These criteria can be empirically tested using the methodology of self-report surveys (or scales) developed by social psychologists. By asking individuals about their opinions on various legal issues, and analyzing their responses using statistical techniques such as Exploratory Factor Analysis (EFA) and Confirmatory Factor Analysis (CFA), shared elements in their responses (commonalities) can be identified, and clusters of conflicts can be formed. In other words, correlations between opinions on each legal issue may be examined to reveal the legal issues that tend to trigger similar responses, thus reflecting different aspects of the same fundamental issue. The resulting clusters or fundamental issues encapsulate the key conflicts that underpin the individuals’ responses—and this, in turn, may (at least in part) help to predict decisions and behaviors. Further analysis of the responses will provide information about the internal consistency of the conflicts; how they relate to each other; the marginal value of each conflict in explaining the responses; and the variance in attitudes toward the conflicts. Thus, for example, applying this methodology to Kennedy’s AT would allow us to test whether its two key conflicts reflect coherent descriptions of attitudes toward private law, and whether these attitudes correlate. Apart from their value in constructing the AT and assessing its quality, these scales would also allow us to gauge the legal attitudes of individuals, to single out demographic attributes that relate to these attitudes, and to explore the (conscious and possibly unconscious) impact of attitudes on decision-making.

1 Factor analyses (including EFA and CFA) are statistical techniques used to reduce variability among large number of variables into few latent factors. For example, applying factor analysis on a set of 4 variables—e.g., frequency of smiling; frequency of laughing; frequency of crying; and frequency of having bad thoughts—would probably generate two latent factors, which we might dub happiness (for the two former variables) and sadness (for the latter two). See generally Furr (2011, 25–35, 91–109).
The remainder of this article is structured as follows: Section 2 will explain what an AT is, by defining the concept of attitude, and describing possible structures of ATs. Section 3 will then discuss their importance and applications. Section 4 will follow this with a review of several existing studies of attitudes in the legal domain, highlighting their contributions and limitations, and describing the work that remains to be done to further develop full-scale ATs. To that end, Section 5 will introduce two criteria for the evaluation of ATs, and Section 6 will describe a methodology for developing ATs and for measuring attitudes, coupled with a discussion of methodological difficulties. Section 7 will summarize.

2. What is an Attitude Theory?

Ideological attitudes and personal values are an important part of human identity. They guide our behavior and affect our evaluations of people and events (Schwartz 1992, 1–3). The study of values and attitudes has been of great interest in a variety of fields that examine human behavior—including political science (Hamilton 1987; Knight 2006), psychology (Rokeach 1973; Jost 2006; Jost et al. 2009), sociology (Williams 1968; Spates 1983), and anthropology (Edel 2017). In this section, I establish what an AT is, by discussing the commonalities and differences between ATs of diverse fields. I begin by first defining what constitutes an attitude, followed by a review of possible structures of ATs.

2.1. The concept of attitude

Before embarking on the discussion of how to construct and evaluate ATs, a number of conceptual clarifications are in order. Researchers interchangeably use a range of related terms to describe normative preferences—such as ideology, values, beliefs, opinions, and attitudes. These have been given diverse definitions by various scholars. Jeffery A. Segal and Harold J. Spaeth (1993, 69), define attitudes as a “a set of interrelated beliefs about at least one object and the situation in which it encountered”. Shalom Schwartz (1992, 4), who developed a theory of basic human values that are recognized throughout many cultures, defines values as “concepts or beliefs, [that] pertain to desirable end states or behaviors, transcend specific situations, guide selection or evaluation of behavior and events, and are ordered by relative

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2 For a discussion on differentiating between the various terms, see Perloff (1993).
importance”. In his attempt to define ideology, John Gerring (1997, 958–959) surveys a handful of contemporary definitions for the term, including, for example: a “set of ideas by which men posit, explain and justify the ends and means of organized social action, irrespective of whether such action aims to preserve, amend, uproot or rebuild a given social order” (Seliger 1976, 14).

Each of these definitions highlights different aspects of the concepts of attitudes, values and ideology. For the purpose of this article, I will use the term attitude to denote (1) normative judgments regarding behaviors, decisions, and rules in (2) various and (3) interrelated situations. These may be understood as follows:

(1) *Normative judgments regarding behaviors, decisions and rules*. Attitudes reflect a person’s belief of what ought to be done, rather than their factual beliefs about empirical reality. Admittedly, it is often difficult to determine whether an opinion is founded on a factual belief or a normative attitude, and sometimes they are intertwined. For example, an empirical question—such as whether or not protestors at a political demonstration obstructed and threatened pedestrians—was found to be influenced by the respondents’ attitudes toward the purpose of the demonstration, which is a normative question (Kahan et al. 2012). Nonetheless, the attitude itself is a function of the normative component of people’s belief, even if it is influenced by beliefs about facts—or vice versa.

(2) *Various situations*. Attitudes differ from opinions about specific situations, in that they are more general and abstract (cf. Schwartz 1992, 4). An opinion about the appropriate punishment for a particular murder is not an attitude in the sense that we are discussing. However, a position about criminal punishment in general may be considered an attitude. The study of attitudes is therefore distinct from many studies of public opinion that examine normative judgments on specific issues, as opposed to clusters of issues (Pan & Xu 2017, 257). Generality is obviously a relative term: an attitude regarding the appropriate punishment for murders is more specific than one about the fitting punishment for violent crimes—and that, in turn, is more specific than an attitude regarding criminal punishment in general.

(3) *Interrelated situations*. An attitude that pertains to a variety of situations should result in corresponding opinions across all these situations. In other words, an

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3 It should be noted that this meaning is different from the meaning of “attitude” in social psychology, where, in addition to normative issues it may refer to products, people, abstract ideas, and other objects; and often connotes a dominant affective component (Maio et al. 2006; Albarracin & Shavitt 2018).
individual’s opinion about a given situation should reflect his views about other situations that bear upon the same attitude. These correlations are often established by rational reasoning: people who support harsher penalties for bank robbers are plausibly in favor of harsher penalties for kidnappers, as well. Nonetheless, rational reasoning does not necessarily entail correlation between opinions: people may even hold logically inconsistent opinions—especially if they do not give them much thought (Converse 1964, 5–6).

Psychological and social constraints can also link opinions together (Converse 1964, 7–10). For example, in the American political discourse, Pro-Choice attitudes toward abortion often go hand in hand with support for stricter gun control laws. Although one might draw a rational connection between these two attitudes, it seems reasonable to assume that this strong association is unique to American society and is a result, at least in part, of particular social and historical factors.

Occasionally, links are found in some contexts, but not in others. For example, as previously noted, opinions about punishment would probably correlate in relation to most crimes. However, it would not be surprising if we were to find a negative correlation between opinions about the punishment of sex offenders, versus the punishment of individuals who falsely accuse others of a sex crime.

Given this definition of attitude, the following sub-section details the attributes of ATs, briefly presents some examples, and discusses possible structures of ATs.

2.2 The Attributes of Attitude Theories

ATs provide a framework for describing the configuration and clustering of individuals' normative judgments. They consist of at least one key conflict or dimension (two terms that will be used interchangeably throughout the article). These dimensions are the axes by which people’s attitudes are measured.

ATs vary in their focus, their specificity, and the number of attitudes they deal with. Some ATs focus on moral conflicts and dilemmas. For example, Jonathan Haidt and Craig Joseph (2004—and see also: Graham et al. 2009, 1030–1031; Haidt et al. 2009, 111–112) have introduced the Moral Foundation Theory, that seeks to account for moral diversity by measuring attitudes regarding five moral virtues (harm/care;
fairness/reciprocity; ingroup/loyalty; authority/respect; purity/sanctity). In a more area-specific oriented study, Guy Kahane et al. (2017) developed a scale for dissociating two dimensions of utilitarian beliefs (Permissive attitude toward instrumental harm, and Impartial concern for the greater good). Other scholars have developed theories on the values that guide behavior. One prominent example of this branch is Shalom H. Schwartz’s (1992) theory of basic human values, which identifies eleven universal values that represent the underlying motivations for people’s behavior.⁵

Many political scientists have also engaged in the research of ATs, and have developed several theories to account for political attitudes (Jost et al. 2009, 310–315). One simple and very popular political unidimensional AT defines attitudes by means of a single dimension—liberal-conservative—whereby every individual may be placed somewhere along this axis (Knight 2006, 624; Maynard 2013, 310; Feldman & Johnston 2014; Ditto et al. 2018). A common account for this dimension defines a liberal as a person who espouses ideas such as “equality, aid to the disadvantaged, tolerance of dissenters, and social reform,” while a conservative is one who advocates “order, stability, the needs of business, differential economic rewards, and defense of the status quo” (McClosky & Zaller 1984, 189).⁶

The simplicity and parsimony of a unidimensional AT is also its weakness. People are complex, so the notion that one can understand and account for attitudinal diversity by means of a single axis is naïve, and overly simplistic. When an AT pertains to a limited variety of issues, a unidimensional theory might suffice. However, to account for a broader set of normative judgments, a multidimensional structure is called for. The liberal-conservative AT, for example, has been roundly criticized in the literature for its attempt to describe political ideology on a unidimensional scale (Maynard 2013, 314–315; Feldman & Johnston 2014, 338–339). In a recent study, Feldman and Johnston (2014) used the data from the American National Elections Studies (ANES) of the years 2000, 2004, and 2006, to compare a unidimensional model of ideology (liberal-conservative) with a two-dimensional one (social ideology and economic ideology—in which each is measured along a liberal-conservative spectrum).

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⁵ These are: self-direction, stimulation, hedonism, achievement, power, security, conformity, tradition, Spirituality, benevolence, and universalism. See also Rokeach (1973).

⁶ See also Jost et al. (2009, 310–11), which reviews the various characterizations of the left/right and liberal/conservative divisions.
Their analysis showed that the two-dimensional model more accurately reflects respondents’ domestic policy judgments, and that a unidimensional model obscures demographic correlates of ideology, and misrepresents the effects of psychological characteristics on ideology.

In multi-dimensional ATs, each conflict should represent a discrete attitudinal dimension. Ideally, in a multi-dimensional AT, attitudes toward different conflicts would be orthogonal to each other—i.e. a person’s attitude toward one conflict should not tell us anything regarding their attitude toward another conflict. However, with psychological concepts such as attitudes, there is rarely a completely orthogonal relationship, and even two distinct dimensions are linked together to some degree. Nonetheless, two dimensions can be distinct even if they correlate—it is only when this correlation is relatively high that we would deem them to be indistinguishable, or as such facets of a single, unified dimension. The following sections elaborate on how one can determine the number of dimensions that an AT should contain.\(^7\)

3. The Importance of Legal Attitude Theories

The task of developing a variety of ATs for different areas of the law, and measuring them, is ambitious and complex (as further demonstrated below). However, pursuing this endeavor will greatly enhance our understanding of the law, attitudinal diversity, and decision-making processes. Let us examine each of these goals in turn.

Enhancing understanding of the law. Many theories of law have attempted to describe and interpret the law (or a specific field within the law) by means of a single or a handful of general principles. The common purpose of these theories is “to enhance understanding of the law… by explaining why certain features of the law are important and unimportant and by identifying connections between these features—in other words, by revealing an intelligible order in the law, so far as such an order exists” (Smith 2004, 5).\(^8\)

Given that attitudes shape legal rules and their implementation, understanding the complexity of the law requires us to examine the underlying diversities in attitudes. A significant part of legal discourse is rooted in attitudinal controversies, and mapping

\(^7\) See infra Section 5.

\(^8\) See also Bix (2012, 147–152), which discusses the nature of general theories of contract law and their purpose—and cf. Kraus (2004, 694–696), who distinguishes between theorists who place greater emphasis on explanatory goals, and those who focus more on justifying the legal doctrine.
these conflicts is key to describing what happens in courts and at other legal institutions. Identifying the key conflicts in a specific legal field will also identify which of the issues are controversial in a given society, and which are comparatively consensual. In addition, in order to grasp the full implications of an argument, one must explore the counter-arguments. By establishing the relevant conflicts in a legal field, one can examine an argument through rival points of view. Constructing theories that arrange the law by its constituent conflicts could also affect how law is studied, and taught (Bix 2012, 100 note 11).

To demonstrate how ATs can provide a new way of thinking about the law, we may use contract law (again) as an example. Contract law can be examined from three general perspectives. First, we might review the various legal doctrines one by one, explain each of them separately, and discuss their justifications. A second approach (which is commonly employed by theorists of contract law) is to start by tracing the general principles behind the legal doctrines—such as enhancing efficiency, promoting autonomy and preventing harm. Having done so, the doctrines and their justifications may be discussed through the lens of the general principle that they serve. The third perspective, which I offer in this article, is to describe legal doctrines in terms of the conflicts that they address. To take two examples: the conflicts over issues such as the importance of formalistic requirements, and the duty to act in solidarity with one another. This perspective will direct us to discuss formalistic aspects of many contractual doctrines under a unified framework, and to address solidarity aspects of the same doctrines under a different one.

**Enhancing our understanding of attitudinal diversity.** The second goal of developing legal ATs is to enable the construction of valid scales that can gauge the attitudes of legal actors—and of the public at large—toward various legal issues.

Gauging legal attitudes is of great value. First, to discern the underlying reasons of existing legal doctrines and judgments, it is important to understand the normative attitudes of policymakers and judges. Second, gaining insight into prevailing attitudes in society should arguably affect legal policymaking. As a matter of principle, even if deviations from citizens’ attitudes are justified when those preferences are misinformed, incoherent, or trumped by more important principles of justice (such as the protection of minority rights), “the presumption of democracy is that there be a close correspondence between the laws of a nation and the preferences of citizens who are
ruled by them” (Rehfeld 2009, 214). ⁹ At a purely pragmatic level, research has shown that increasing the law’s moral credibility can also enhance compliance (P. H. Robinson & Darley 1996)—so to achieve legitimacy and compliance, the law should reflect prevailing moral intuitions. Third, assessing attitudes can reveal the associations between gender, political affiliation, legal education, religiosity, and culture, on the one hand, and specific legal attitudes on the other.

**Predicting legal decision-making.** The third goal of ATs is to understand the attitudinal factor in legal decision-making. Decision-making in the legal sphere, by legislators, judges, litigants and the general public is governed by many factors—including the law, the institutional environment, individual interests, biases, and so forth (Alarie & Green 2017, 31–47; Zamir & Teichman 2018, 495–565). One of these factors is normative attitudes. Thus, gauging attitudes can help us predict how individuals will act in legal contexts.

Naturally, the question as to whether or not a legislator will support a given policy depends, among other things, on her opinion regarding that policy. Even cynics who believe that decisions in the political world are made primarily based on narrow political interests will admit that some policies, at least, are partly affected by the policy-maker’s normative belief system (Mansbridge 1990; Ginsburg 2002, 1153–56).

The public’s behavior is also influenced by moral attitudes. Many people refrain from engaging in criminal activity simply because it violates their moral beliefs. Indeed, moral attitudes govern people’s behavior also in their economic lives—even when a certain immoral behavior might be financially more lucrative (Feldman 2018, 100, note 27).

Attitudes are also a prominent factor in judicial decision-making. Although in the past scholars believed in the formalistic nature of the law, whereby judicial decisions are derived from a scientific-like process of interpreting legal rules (Cross 1997, 255–265), today it is broadly accepted that this concept of legal objectivity is naïve and does not reflect actual practice. Reviews of court rulings in research studies by many political scientists have found a significant association between attitudes and judicial decisions. ¹⁰ This may be the product of two main factors.

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⁹ While even this modest statement is not uncontroversial, delving into the issues of authority and legitimacy in a democracy exceeds the scope of the present study.

¹⁰ See infra Section 4.1.
First, legal doctrines often provide judicial decision-makers with considerable discretion. When legal rules generate interpretative ambiguity, a legitimate—and perhaps inevitable—application of the law to a given case requires judges to draw on their own interpretation (Easterbrook 1983, 544; Posner 1983, 818).11

Second, many have argued that judges may have a desired outcome in mind, and adjust their arguments accordingly. Arguably, such bending of facts or of the law to produce a favorable outcome may be a conscious process. In some cases, the justification that a judge uses in a given ruling is not a reflection of her actual reasons, but rather is designed to persuade others, or for the sake of appearances, or for public relations (Altman 1990; Shapiro 1994; Idleman 1995).12 However, it may also be the product of an unconscious process (Klein 2002, 21: “judges cannot be expected to understand their own motivations perfectly or to report them, with undiluted candor”)—commonly dubbed motivated reasoning, or motivated cognition (Kunda 1990; Sood 2013; Zamir & Teichman 2018, 58–61). Studies have shown that evaluating evidence and determining beliefs are often post-hoc processes designed to justify an initial decision. Decisions are frequently shaped by latent motivations, rather than by the quest for accurate conclusions. This motivated reasoning seeks to maintain an “illusion of objectivity,” whereby the decision-maker believes that her biased decision is the product of an objective process (Kunda 1990, 483). Latent motivations can distort reasoning through various mechanisms, such as: (1) changing how one evaluates evidence (Alicke 1992; Sood & Darley 2012) or interprets relevant rules (Braman 2006; Furgeson et al. 2008); (2) selectively adopting moral beliefs and norms (Uhlmann et al. 2009), or evidentiary standards (Ditto & Lopez 1992); (3) ignoring or downplaying the relevance and weight of certain information (Koriat et al. 1980); (4) and even shaping decision-makers’ memory (Pizarro et al. 2006; Shu et al. 2011), and their visual perception (Balcetis & Dunning 2006).

People’s motivations also vary. In our context, the relevant motivation is to reason in a manner that fits one’s normative attitudes, given the legal constraints. Various studies have demonstrated that people interpret legal rules or evaluate evidence

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11 For a review of the debates on judicial interpretation, see also Pojanowski (2015).
12 See also Wald (1995, 1386): “When an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a ‘story’ that will convince the reader it has come out right.”
in accordance with their own political affiliation (Furgeson et al. 2008; Kahan et al. 2017) or moral values (Sood & Darley 2012, 1336–42).

Other scholars have suggested that decision-making is often a complex process that involves both rational and motivated reasoning. In a nutshell, experimental findings demonstrate a coherence-based reasoning, where the cognitive system imposes coherence throughout the decision-making process, and gradually steers the relevant considerations toward a specific decision. In other words, the decision process is bidirectional, and the strength of an initial piece of evidence or legal argument that has been rationally assessed may indirectly influence the reliability and persuasiveness of other pieces of evidence and arguments, in an effort to maintain coherence (Simon 2004, Zamir & Teichman 2018, 528–532). In that sense, attitudes may lead decision-makers to rationally adopt an argument, but may also induce them to accept evidence to avoid dissonance between their attitudes and decisions.

Be that as it may, attitudes are a key element in legal decisions. Thus, if we want to understand the process of decision-making, it is imperative that we study their internal structure, and develop ways of assessing them. Gauging attitudes directly will also allow us to use experimental design to distinguish between the desirable influences of attitudes and unwarranted ones, and to reveal when decision-makers are aware of the impact of their attitudes on their decisions, and when they are not (cf. Kahan et al. 2017, 357–359).

4. Existing Research of Attitudes and the Law

Although a comprehensive study of legal attitudes has rarely been carried out in the legal literature, some scholars have studied attitudes using certain methods and for various purposes. These studies are, in fact, the precursors of the systematic approach of developing legal ATs that I am proposing in this article.

Many studies have examined specific attitudes toward legal debates. For example, in criminal law, surveys have been used to explore attitudes toward Blackstone’s formulation (“It is better that ten guilty persons escape than that one innocent suffer”) (Xiong et al. 2017). In private law, scholars have studied attitudes toward the efficient breach doctrine (i.e. contractual obligations should be performed

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13 See also Robinson & Darley (1996) reporting empirical studies on views regarding various areas of criminal law.
only when the net cost of performance to the promisor is less than its net benefit to the promisee) (Haran 2013; Lewinsohn-Zamir 2013; Wilkinson-Ryan & Baron 2009).

An exhaustive survey of the legal research of normative attitudes is beyond the scope of this article. Moreover, it would not be useful for our purpose, since most of those studies addressed a particular legal issue, rather than attempted to capture broad legal attitudes. Thus, in this section I discuss only theories that are aimed at conceptualizing attitudes that are relevant to entire legal spheres—or, at least, broad arrays of legal issues—and explain the similarities and differences between those theories and AT of the law, as proposed in this article.

In particular, it is fruitful to discuss four predecessor theories of legal ATs: (1) The attitudinal model, which is associated with political-science perspectives on adjudication, and explores the link between judges’ ideology and their judicial decisions; (2) The cultural cognition theory, which uses a social psychology survey methodology to study attitudes toward authoritative organizations and equality, in a bid to predict legal decision-making; (3) The study of jurors’ attitudes, which uses survey methodology to predict jurors’ decisions in criminal cases; and lastly, (4) Duncan Kennedy’s form and substance in private law adjudication, which harnesses two basic conflicts to explain the attitudinal structure of private law.

These four theories vary in terms of their goals; empirical foundations; measurement techniques (if any); predictive power; and the type of attitudes that they examine. Studying the merits and limitations of these theories would pave the way for the development of sophisticated, empirically validated legal ATs, which could be used to improve our understanding of how normative attitudes shape and influence the law and legal actors.

4.1 The Attitudinal Model

The first example of legal research of attitudes that naturally comes to mind is the attitudinal model, which states that judicial decisions are largely determined by judges’ personal ideologies and attitudes. To test this argument, researchers mainly analyze courts’ decisions, in the search for correlations between judges’ ideology and their votes. Two renowned scholars in this genre are Jeffery Segal and Harold Spaeth.

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14 See also Wrightsman et al. (2003), which brings together various scales that measure attitudes relevant to the legal system.
In a series of empirical studies of U.S. Supreme Court decisions, they showed how considering justices’ political affiliations can significantly improve outcome prediction (Segal & Spaeth 1993, 2002).  

The primary interest of the attitudinal model is the effect of attitudes on judicial decision-making. To empirically test this effect, researchers had to ideologically encode courts’ judgments, and to develop various measurements to capture justices’ attitudes. The following measures have been used for this purpose: (1) the political party of the appointing president (George & Epstein 1992, 326; George 1997, 1651; Segal & Spaeth 2002, 125–164); (2) content analysis of newspapers’ editorials prior to judges’ confirmation by the Senate (Segal & Cover 1989); (3) an analysis of judges’ voting patterns, and their interrelationships, using advanced statistical methods (Martin & Quinn 2002; Bailey 2013; Weinshall et al. 2018); (4) text analyses of judgments (Lauderdale & Clark 2014); (5) judges’ federal campaign contributions (Bonica et al. 2016); and (6) text analyses of judicial evaluations, conducted by the Almanac of the Federal Judiciary (Cope & Feldman 2018).  

To develop ideological scales and to code judicial attitudes and judgments, one must rely (at least implicitly) on an AT that clarifies the ideological context. The underlying theory that attitudinal model literature commonly uses for this purpose is the popular political liberal-conservative AT. Most researchers use a unidimensional AT of the liberal-conservative spectrum, but some use more complex versions that involve more than one dimension.  

Thus, judges’ attitudes and judgments are being evaluated and scored along a liberal-conservative spectrum, so the extent of which attitudes can predict judgments is measured.  

Many studies have discussed the methodological limitations and difficulties of these measurements (Cross 1997, 279–311; Edwards & Livermore 2009, 1907–1950; Cope & Feldman 2018, 6–10). Indeed, this line of research appears to provide a fairly crude tool for investigating legal attitudes and their structure. First, most of the pertinent...
studies have not measured legal attitudes directly. Rather, they have used proxies to assess judicial attitudes, which threaten the accuracy of the attitudinal assessment (Edwards & Livermore 2009, 1918–1922). Indicators such as the appointing U.S. president, newspapers editorials, and political contribution patterns, cannot precisely account for the judges’ attitudes—so the links between these measurements and justices’ decisions do not necessarily reflect the true associations between the judges’ normative attitudes and their judgments.

More importantly, unlike other studies that differentiate between licit legal attitudes and agenda and illicit political bias using experimental designs, observational methods employed by the attitudinal model do not. In fact, given the political-science origins of these theories, their main objective is to explore how political agenda illicitly influences judges’ decisions. Therefore, they do not engage in the debate between competing “jurisprudential” orientations, or different legal opinions internal to the law—unlike external political debates, that exert an illegitimate influence upon decisions (Kahan et al. 2017, 360–363).

Moreover, the attitudinal model provides a surprisingly limited theoretical discussion as to the dimensions it uses and measures, and employs rough assumptions as to what the labels “liberals” and “conservatives”, for example, represent (Robinson & Swedlow 2018, 263–268). The scope of the applicability of the attitudinal model is also rather limited, since it focuses primarily on politically controversial issues—which may not be a representative sample of legal attitudinal diversity (Cross 1997, 285).

Another inherent weakness of the observational judgment analysis in general, as used by the attitudinal model, is that each judge expresses opinions on only a limited number of issues (depending on the cases adjudicated before them). Thus, a reliable and comprehensive correlation matrix of judicial opinions on various issues cannot be obtained—which is essential for understanding the attitudinal structure.

Collectively, these limitations suggest that, although the attitudinal model helps us understand how political attitudes affect judges (which is its primary goal), it fails to provide an adequate framework for understanding and explaining the attitudinal richness of any legal field.

4.2 The Cultural Cognition Theory

A different methodology to measure attitudes in legal context has been used in Dan Kahan’s work (2012) on cultural cognition worldview scales (CCWS). The CCWS
aim to operationalize the “cultural theory of risk” put forward by Mary Douglas and Aaron Wildavsky (1982) and empirically measure cultural worldviews. To that end, it plots attitudes relevant to how society or other collective enterprises should be organized, along two dimensions: individualism-communitarianism and hierarchy-egalitarianism. The former reflects the extent to which people believe that the government should be involved in individuals’ lives, and the latter reflects attitudes toward minority rights, discrimination, and the distribution of wealth.

To measure attitudes along the individualism-communitarianism dimension, people have been asked to state how strongly they agree or disagree with statements such as: “The government interferes far too much in our everyday lives” and “Sometimes government needs to make laws that keep people from hurting themselves.”

To measure attitudes in the hierarchy-egalitarianism dimension, respondents were asked to state how strongly they agree, or disagree, with statements such as: “We have gone too far in pushing equal rights in this country;” and “We need to dramatically reduce inequalities between the rich and the poor, whites and people of color, and men and women.”

In a series of studies, Dan Kahan et al. have used various versions of the CCWS to examine the effect of attitudes on legal decision-making. In one study, Kahan and Braman (2008) demonstrated how factual ambiguities regarding self-defense cases are influenced by cultural attitudes. They found that Egalitarians and Communitarians were significantly more disposed than Hierarchs and Individualists to convict in a case where a beleaguered commuter had shot a panhandling minority teen. In addition, Egalitarians were significantly more disposed than Hierarchs to acquit in a case involving a battered woman who killed her abuser in his sleep (id., 34–35). In another study, Kahan (2010) found that a Hierarchical worldview is more likely than an Egalitarian one to lead people to determine that the defendant in a rape trial had reasonably believed the complainant had consented to sex, despite her repeated verbal objections. Kahan et al. (2008) also found that cultural attitudes influence decisions regarding a police officer who deliberately rammed his car into that of a fleeing motorist who refused to pull over for speeding and sought to evade him in a high-speed chase. In that case, Hierarchs and Individualists were more inclined than Egalitarians and Communitarians to side with the police officer.

In the same vein, Kahan et al. (2017) presented respondents with statutory interpretation problems, and manipulated the identity of the party involved in the case.
to motivate subjects who held different cultural attitudes in opposite directions. They found that, with lay and law-student subjects, the manipulation affected their decisions in accordance with their cultural attitudinal inclinations. In contrast, lawyers’ and judges’ decisions did not display this bias, and their decisions were unaffected by their cultural views.18

CCWS are one of the most comprehensive accounts of normative attitudes produced to date in relation to legal issues. The studies using CCWS in legal contexts have demonstrated that the theory of cultural cognition may be a relevant predictor for legal decisions.19 However, notwithstanding the CCWS’ impressive account of cultural attitudes and their predictive power in relation to decision-making, further work must still be done with regard to identifying attitudes specific to legal fields.

First, despite their relevance to legal decision-making, CCWS neither engage directly with legal debates, nor systematically map legal conflicts, but rather deal with more general cultural and political conflicts. Consequently, the studies that have implemented the CCWS have used politically controversial issues to demonstrate its predictive power. Unsurprisingly, some of the findings suggest that political affiliation on its own may serve as an equally effective predictor of decisions in some cases (Kahan et al. 2008, 868–869; Kahan & Braman 2008, 34; Kahan 2010, 776). In addition, in all these studies, the “attitudinal effect” was triggered by manipulations that, in and of themselves, have no apparent analytical bearing on how the factual and statutory ambiguity should be resolved. Therefore, differences in decisions between culturally diverse decision-makers are most likely the result of a biased motivated reasoning, rather than a deliberate one. While this is useful, a theory that gauges attitudes and decision-making should preferably, it seems, encompass conscious and legitimate courses of legal reasoning, as well. As I see it, while AT can and should be used to reveal unconscious biases, it should primarily aim at illustrating and predicting legitimate heuristics, and deliberate decision-making. Finally, Kahan’s findings in the statutory interpretation study failed to demonstrate that the attitudes measured by the CCWS do in fact bias lawyers’ and judges’ decisions (Kahan et al. 2017, 394–398). This suggests that these decisions might be sensitive to ATs in other domains, and it

18 For another relevant study, see supra p. 9.
19 See also Robinson & Swedlow (2018) who use cultural theory to analyze decisions in First Amendment cases, and find that cultural attitudes provide a better account of judicial decisions than attitudes along a simple liberal-conservative spectrum.
would be interesting see if other attitudes do manage to influence the decisions of judges and lawyers.

4.3 Jurors’ Attitudes Scales

One line of research that specifically addresses the issue of measuring legal attitudes is the study of jurors’ attitudes. A large and growing body of literature has attempted to assess such attitudes in a bid to predict jurors’ decision-making outcomes. One prominent attitude that has been considered as a predictor of jurors’ verdicts is authoritarianism—which, in social psychology, denotes a person’s preference for a social system with strong leaders, clear rules, social order, and conservative norms (Adorno et al. 1950). Preliminary work on legal authoritarianism has been undertaken by Virginia Boehm (1968), whose Legal Attitudes Questionnaire (LAQ) measures authoritarianism in legal contexts, and was designed specifically to predict jurors’ decisions. Although the LAQ has been criticized for its complex structure and questionable psychometric quality (Devine 2012, 68; Ross & Morera 2016), it has paved the way for over two dozen studies that have examined the issue of juror legal authoritarianism through various measures (Devine 2012, 68)—including a revised form of the original LAQ (Revised LAQ, or RLAQ) (Kravitz et al. 1993). A more sophisticated version of the authoritarianism scale has since used the RLAQ to measure three discrete attitudinal dimensions that reflect different aspects of legal authoritarianism (dubbed libertarianism, authoritarianism, and perceptions of police) (Couch & Sundre 2001).

Many studies have investigated the extent to which these attitudes predict juror verdicts. A meta-analysis of twenty studies showed a correlation between legal authoritarianism and jurors’ verdicts (Narby et al. 1993): jurors who scored high on legal authoritarianism were more likely to rate criminal defendants as culpable. Other, more recent, studies have shown an association of authoritarianism with the inclination to impose the death penalty (Barnett et al. 2004), and—in capital trials—with higher 20

An overlapping personality trait is dogmatism—which is essentially similar to authoritarianism, but without the conservative political elements, and has a very similar effect on jury decision-making. See Devine (2012, 68).

† The researchers applied a factor analysis on the responses to the RLAQ, and identified three independent dimensions. However, they did not engage in a detailed theoretical discussion with a view to defining these aspects of legal authoritarianism. Moreover, the psychometric value of these dimensions is at least questionable given their low internal consistency ($\alpha_{libertarianism} = 0.61$, $\alpha_{authoritarianism} = 0.57$, $\alpha_{police} = 0.51$). See also Ross and Morera (2016) who compared the original LAQ factor structure with the RLAQ and Couch and Sundre’s three-factor model, using structural equation modeling.

Although, the magnitude of the connection was comparatively small ($r=0.19$) (Narby et al. 1993, 39).
endorsements of aggravating circumstances, and fewer endorsements of mitigating circumstances (Butler & Moran 2007). However, authoritarianism has not proven to be a sound predictor in civil trials (Devine 2012, 69).

Notwithstanding their relative success in predicting jurors’ decisions, juror attitudes scales have made only a limited contribution to the understanding of legal controversies, even in criminal law. All authoritarianism measurements include many items relating to factual statements—such as (from the RLAQ) “All too often minority group members do not get fair trials,” and “Upstanding citizens have nothing to fear from the police.” Possibly, this is because jurors’ normative attitudes have only limited bearing (relative to their personality traits and tendencies) on their decisions on factual questions. However, these questionnaires fall short of providing insight into individuals’ attitudes toward fundamental debates in criminal law—such as the one about the purpose of punishment (Grupp 1971; Bageric 2001), which is not explicitly addressed by any of these measures. A mixed construct of normative attitudes and factual beliefs can only obscure our understanding of the normative elements in decisions, rather than clarify them, especially given their unconscious influence on one another. Therefore, to identify the main normative conflicts that exist in legal cases and their interrelations, a more normative-based AT must be developed.

4.4 Duncan Kennedy’s Form and Substance in Private Law Adjudication

In his seminal essay, Form and Substance in Private Law Adjudication, Duncan Kennedy (1976), put forward a theory that aimed to explain two key conflicts within private law. Its main contention was that there is a link between substantive and formal attitudinal dimensions toward the law. To that end, he had to extensively

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23 For a review of the connections between authoritarianism and related attitudes to jurors’ decision-making, see Devine (2012, 68–71).
24 Another, related measurement used to predict jury’s verdicts is the Juror Bias Scale (JBS) proposed by Saul Kassin and Lawrence Wrightsman (1983). This measurement consists of two dimensions: the probability of commission (the degree to which jurors believe it is likely that criminal defendants committed the crime they have been accused of), and the reasonable doubt (the jurors’ assessment of the level of confidence needed to convict defendants). A more complex structure of six-dimensional juror bias was introduced by Lecci & Myers (2008).
25 See supra pp. 17–19.
26 In addition, Kennedy argues that the opposed dimensions reflect a deeper level of contradiction where “we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future” (Kennedy 1976, 1685). Kennedy did not specifically define these two dimensions as attitudinal dimensions, but rather as “rhetoric modes for dealing with substantive issues... [and] modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast” (id., 1685). Therefore, when
conceptualize those two dimensions, and then develop an AT. Although he did not use AT terminology, nor tried to validate his theory with empirical tools, his theory is essentially an AT, so it merits close examination.

The first attitudinal dimension in Kennedy’s theory is the jurisprudence of rules (or the question of legal form)—which consists of three components (id., 1687–1694):

(a) Formal realizability. This denotes the conflict between those who support the use of specific rules, and those who prefer vague standards. Rules are well defined directives with a clear meaning that can be easily interpreted—such as a fixed speed limit of 55 mph. Conversely, standards refer to broad principles that a judge is required to apply and interpret, in light of the circumstances of the specific case before him. Examples of common standards include good faith, unconscionability, and reasonableness (id., 1687–1689).

(b) Generality. The form of legal norms also varies in terms of their level of generality: rules (or standards) can be general (for example, setting the age of legal majority at 21), or specific (e.g., a rule setting the age of capacity for contracts only) (id., 1689–1690).

(c) Formalities vs. rules that are designed to deter wrongful behavior. In this component, Kennedy contrasts two types of legal institutions: those whose purpose is to prevent people from engaging in undesirable activities (such as failing to act in good faith in performance of a contract), versus those designed to ensure that the parties are aware of the nature of their legal relationship, and that this is clearly conveyed to the judge. For example, the requirement of an offer and acceptance in contracts is a formality that is designed to clarify when (and whether) the contract has been entered into. The question of the substantive desirability of the contract is (most likely) irrelevant to implementation of the offer and acceptance doctrine (id., 1690–1694).

As Kennedy points out, these three components are logically independent of each other. However, he argues, in practice they are related (id., 1689–1690). Although he appears to believe that the three components are correlated, he does not clarify the exact nature of this correlation.

(Continued on next page)
The substantive dimension of Kennedy’s theory refers to the struggle between individualism and altruism. It states that the essence of individualism is that one is entitled to promote one’s own interests, as long as one respects the rules that allow others to do the same. The individualist acts self-reliantly, insisting on achieving her goals without asking others to make any sacrifices—while at the same time opposing any obligation to make sacrifices for others, or to behave in a communal fashion (id., 1713–1716). Conversely, an altruistic approach is “the belief that one ought not to indulge a sharp preference for one’s own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful” (id., 1717). Thus, the altruist cherishes values such as sharing, solidarity, and communal involvement; and argues that there is a social duty to follow these values (id., 1717–1718).

Kennedy demonstrated how individualistic and altruistic attitudes are reflected in moral, economic and political discourses, and invoked in legal rhetoric. He then argued that the two dimensions—form and substance—are inherently linked to those discourses: altruistic views are associated with a pro-standard approach, while individualistic views adhere to rigid rules that are strictly applied (id., 1737–1766).27

Kennedy’s conceptualization of legal attitudes in respect to both form and substance is illuminating. However, his arguments about the structure of the attitudinal dimensions, and how they relate to each other (and within themselves), are founded purely on theoretical (and to some extent historical) conjectures. While his theoretical analysis is quite compelling, it should be complemented by empirical research that tests its descriptive quality, since the theory purports to describe actual attitudes.28 Some of the empirical questions about attitudinal reality that one might ask are: What are the relationships between the components of the formalistic dimension?; Do the formalistic and substantive dimensions actually correlate with one another—and if so, to what extent?; How can a researcher measure and place judges and legal experts along the spectrum between the two proposed dimensions?; To what extent do attitudes toward these dimensions predict judicial decision-making in practice? And so forth.

27 See also Altman (1993), which discusses Kennedy’s argument about the link between the two dimensions.
28 Kennedy was aware of the need to validate his theory, but believed that it cannot be done empirically: “…it is impossible to ‘prove’ or ‘disprove’ the validity of the two constructs. They are neither falsifiable empirical statements about a determinate mass of data, nor logically pure ‘models’ totally abstracted from reality” (id., 1722–1723).
In this section I reviewed the research into various aspects of the associations between attitudes and the law. Most of this research sought to explain how attitudes affect judgments—however, none of these studies have measured specific legal attitudes, and their impact on decision-making. Although Kennedy did introduce a descriptive account for the structure of legal attitudes in private law, he did not offer any empirical foundation for his theory. Before suggesting methodological guidelines for developing empirically grounded attitude theories of the law, the following section proposes two criteria for evaluating the quality of legal ATs, and for comparing them with one another.

5. Evaluation Criteria of ATs

The previous sections set out the attributes of attitude theories of the law, demonstrated their importance in the legal discourse, and described various theories about normative attitudes in the legal context. These discussions highlighted the need for a systematic typology of legal attitudes, and the lacuna in the current research. This section suggests two criteria for evaluation of the quality of ATs: fit; and parsimony.

5.1 Fit

According to the fit criterion, a legal theory should correspond to the data that it is trying to explain. When assessing normative or positive theories of the law, the data mostly consists of legal rules and doctrines (cf. Smith 2004, 7–11). However, with regard to ATs, the relevant data is the actual legal attitudes of individuals. To adequately describe these in all their diversity, an AT’s dimensions must account for existing legal controversies, reflect attitudinal diversity, and consistently forge normative opinions. This may be illustrated in a detailed description of three elements:

(a) Accounting for existing legal controversies. An AT should explain the controversial issues that arise in the legal field that it is seeking to explain. For example, one of the major debates in the United States over criminal sanctions pertains to capital punishment (Bohm 2016, 446). Therefore, different opinions regarding the issue of capital punishment must be covered at least by one dimension of an AT of punishment. This is not to say that an AT of punishment must have a distinct dimension that deals solely with the issue of capital punishment—in theory, various ATs of punishment could cover that. For example, an AT might include an attitudinal dimension such as
toughness on crime, that seeks to explain inter-correlated issues regarding punishment policies—such as capital punishment, mandatory sentencing, and punishment severity (see Figure 1a). Alternatively, an AT might posit that attitudes to capital punishment, mandatory sentencing, and punishment severity involve not one, but two separate attitudinal dimensions—such as the legitimacy of using punishment to deter potential criminals, and toward the morality of retribution (see Figure 1b). Whether one argues for a unidimensional AT of punishment or a multidimensional one, an AT of punishment must account for the capital punishment debate if it is to score highly on this element of the fit criterion.

![Figure 1a: Toughness on crime](image)

![Figure 1b: Indirect Deterrence and Retributive Justice](image)

To examine if an AT’s dimensions sufficiently address all the relevant issues, one must examine whether ranking individuals’ attitudes along those dimensions can improve our predictions of actual legal decision-making.29 If an AT effectively predicts decision-making on a wide range of relevant issues, it probably also accounts for variance in individual opinions about those issues. It is important to emphasize, however, that the failure of an AT to predict decision-making in certain cases is not, in and of itself, conclusive evidence against it. As previously noted, normative attitudes are not the only factor that explains variance in decision-making. Legal decisions are also influenced by a host of other factors—such as the interpretation of the law and the facts of the case; self-interests; institutional pressures; cognitive biases; and prejudices. The fact that an AT is unsuccessful at predicting decisions in a specific context does not necessarily mean that it fails to address the relevant normative debates; it may also be that those decisions are governed not by normative agenda, but by other factors.

29 See infra pp. 50-51 (discussing construct validity of attitudinal scales).
(b) *Reflecting attitudinal diversity*. Each dimension in an AT should reflect a conflict in which individuals’ attitudes vary. Legal scholars sometimes hotly debate normative conflicts, when in fact there is a broad consensus about them—even among jurists, outside the academic discourse. These conflicts cannot play a meaningful role in an AT. For example, although the debate about the legitimacy of mandatory regulation in contractual transactions has attracted considerable attention in the legal literature (see e.g. Cohen 1933, 585–592; Schwartz & Wilde 1979; Fried 1981, 92–111; Zamir 1998, 237–254, 267–275), preliminary findings suggest that there is a relatively broad consensus among laypersons and law students that mandatory interventions in contracts are justifiable (Zamir & Katz 2019). The higher the variance in attitudes toward a given AT conflict, the higher the AT’s score in this regard.

(c) *Consistency of normative opinions*. For an attitudinal dimension to fit actual attitudes, it must represent a consistent *bundle of positions*—that is, there should be a positive correlation between people’s positions on issues related to the same dimension. For example, a conflict over “the extent to which one is obligated to help others in need” meets this criterion if people are consistent about how much they believe that one should help others in diverse contexts.\(^{30}\) If, however, attitudes toward the duty to help fellow in-group members are independent of attitudes toward the duty to help out-group strangers, then this conflict involves two orthogonal attitudinal dimensions. Another possibility is that attitudes toward helping in-group members are highly but negatively correlated with attitudes toward helping out-group members. In that case, the attitudes would still involve only one dimension—except that it would not be dubbed *Helping others in need*, but rather *In-group favoritism*, or something similar. The extent of which different issues relating to a similar conflict correlate with each other determines how the AT would score in terms of consistency.

5.2 Parsimony

The second criterion for evaluating an AT is *parsimony* or *simplicity*. One well-known philosophical premise is that parsimony is a theoretical virtue (Baker 2016). For example, Aristotle posited that “one demonstration be better than another if, other things being equal, it depends on fewer postulates or suppositions or propositions”

\(^{30}\)Even if people’s positions on helping others are not similar in different contexts, a conflict is considered consistent if the positions correlate.
(Aristotle, tran. 1944, Book III Ch. 25). Newton cited this principle as one of his *Rules of Reasoning in Philosophy*: “We are to admit no more causes of natural things than such as are both true and sufficient to explain their appearances” (Newton, trans. 1846, Book III). In the context of ATs this criterion entails two elements: *generality*, and *number of dimensions*:

(a) **Generality.** An AT should be applicable to as wide a range of issues as possible. All things being equal, a theory with a broad incidence—that is, one that accounts for many legal issues—is superior to one whose incidence is narrow, i.e., accounts for only a handful of issues. This element is part of the *parsimony* criterion—because the more ATs are required to explain attitudinal diversity across different fields, the less parsimonious is the theory. Thus, for example, a theory that explains differences in attitudes toward remedies only in relation to breach of contracts is inferior to one that accounts for attitudes about contract law in general.

(b) **Number of attitudinal dimensions.** A good AT will explain attitudinal diversity with the least number of dimensions. As previously demonstrated, there are occasions when a single dimension cannot adequately explain attitudinal variance, and further dimensions must be added. However, *ceteris paribus*, the fewer the dimensions, the better. Thus, to score high on the *parsimony criterion*, an AT must account for most of the variance in legal attitudes (*the first element*), with few fundamental conflicts (*the second element*).

Importantly, a parsimonious AT is better not because it is possibly superior from an epistemic point of view, but mostly because it is more useful and efficient in describing the attitudinal variance.31 If one were to generate a raft of theories that consist of numerous dimensions to explain attitudinal diversity, they would be of little use, since they would not enhance our understanding of the links between the various legal issues. Moreover, if in order to predict an individual’s decision, one has to know her precise views about the context in question, the theory does not provide much aid. In other words, an attitude theory derives its practical and explanatory value from its

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31 For a discussion of the distinction between the epistemic *simplicity principle* (“if theory $T$ is simpler than theory $T^*$, then it is rational (other things being equal) to believe $T$ rather than $T^*$”), and its methodological counterpart (“if $T$ is simpler than $T^*$, then it is rational to adopt $T$ as one’s working theory for scientific purposes”), and the various justifications of these principles, see Baker (2016).
ability to account for variance with only a few variables. To be of value, an AT must account for diverse debates with a small number of basic conflicts.

There is an unavoidable tradeoff between parsimony and the first aspect of the fit criterion—namely, accounting for existing legal controversies (Bix 2012, 159–160). By definition, using more variables to explain variance in attitudes would generate a more accurate theory that is more successful at fitting the data. To completely account for the variance related to, say, twenty concrete issues, one would probably need to use twenty dimensions (cf. Lauderdale & Clark 2014, 761–67). But such an AT would score very poorly in terms of parsimony. Conversely, using few dimensions to explain a broad field can also be problematic. For example, there are some connections between attitudes toward various issues in private law—such as contracts, torts and property law—so it is reasonable to develop an AT of private law as a whole (as Kennedy did).

All else being equal, a theory that describes the conflicts that emerge in all private-law fields will be superior to one that describes only contractual conflicts. However, it is safe to assume that all else is not equal: while conflicts that are unique to contract law may be related to tort-law conflicts and those of property law, they are nevertheless distinct. Thus, a theory that addresses conflicts specifically related to contracts will bear a better fit to contractual attitudinal diversity. This does not necessarily mean that a contractual AT is superior to a private-law AT—merely that it strikes a different balance in the tradeoff between fit and parsimony.

To further illustrate, consider attitudes toward ethnic or sexual orientation discrimination in private transactions. While it may be reasonable to assume that attitudes toward these two types of discrimination are correlated, it is also possible that they are distinct. Do we need two separate dimensions to explain judgments of these two types of discrimination? The answer depends on two primary considerations. First, we must examine the degree to which these two attitudes diverge—i.e., how strongly they are correlated, and to what extent adding a second dimension would improve our understanding of the attitudinal diversity. Second, the decision as to whether or not to

32 There is a link between the correlation of two dimensions and the degree to which applying both of them accounts for more variance of the attitudinal diversity. Nonetheless, this link is not bidirectional: when two dimensions are strongly correlated, most of the attitudinal diversity may be explained using one general dimension. However, even if two dimensions are not correlated at all, it is possible that the second attitude explains only a small portion of attitudinal variance. For example, in theory, attitudes toward discrimination on grounds of hair color may be entirely unrelated to attitudes toward discrimination in general. However, a dimension that addresses this inclination would be relatively insignificant.
split the attitudes toward discrimination into two dimensions depends on the practical purpose of the theory. While using two dimensions in an AT whose purpose is specifically to understand attitudes toward discrimination may be beneficial (even if they are strongly correlated), using the same two dimensions for an AT of contract law may be an unnecessary complication.

6. Methodology

In the previous section, two criteria for evaluating ATs were put forward. In this section, we introduce a methodology for constructing ATs and testing them by those two criteria.

The first step in constructing a legal AT is to conduct a theoretical inquiry, with a view to identifying the relevant normative debates and controversies, thereby extracting the key conflicts underlying the field in question. This inquiry is similar to the one Kennedy conducted in constructing his AT of private law. However, this theoretical AT should then be reassessed using empirical tools, to see how well it passes the AT evaluation criteria. An empirical inquiry that explores how different attitudes are clustered in practice can serve both an exploratory and as a confirmatory function. When a theory is still in its early stages, and its key conflicts have yet to be well defined, statistical tools can uncover the underlying structure of attitudes, and identify the key conflicts and their precise substance. Once the theory is sufficiently mature and its conflicts are clear, an empirical investigation can test whether these conflicts adequately explain the variance in attitudes about the relevant issues. At that point, an empirical study can be conducted to measure decision-makers’ attitudes to the identified key conflicts.

To this end, I will begin by explaining how to design a scale—which is the key instrument of the suggested methodology—and how such a scale then serves the goals of the empirical inquiry. This will be followed by a discussion of the limitations of the methodology.

6.1 Designing Attitudinal Scales

The common empirical method for identifying the underlying structure of attitudes is to use direct self-report attitude surveys (often called attitude scales or

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33 See supra Section 4.4.
attitude questionnaires) (Krosnick et al. 2005, 31–50). These instruments are widely used by social and personality psychologists to measure constructs such as attitudes, traits, beliefs, motivations and goals (Furr 2011, 1). Self-report surveys have also been used by legal scholars seeking to assess attitudes in an effort to predict legal decision-making.\textsuperscript{34} In theory, one may use observational studies—such as analyzing actual rulings—to explore the structure of legal attitudes.\textsuperscript{35} However, since most judges arguably do not address most of the relevant issues in all their rulings, the empirical support for an AT would be limited. In addition, actual rulings are influenced by many factors besides normative attitudes, and identifying the attitudinal component may be difficult. In contrast, when an attitudes scale that has been designed specifically for examining the various aspects of an AT’s dimensions is used, a more complete and more coherent picture of the attitudinal structure emerges.

Much has been written on how to design scales (see, e.g., Furr 2011), and a full discussion of the relevant methodological literature lies beyond the scope of this study. Nonetheless, to understand the general principles of scale construction, the basic requirements for a valid scale, and how scales help to form and evaluate the AT itself (as opposed to merely assessing individuals’ attitudes), an explanation of the main features of the methodology is in order. The following is a brief explanation of how a scale is formed, including some of the key terms and psychometric attributes involving scale construction.

\textbf{What is an attitudinal scale?} A typical attitudes’ survey consists of several items (or statements) that attempt to tap into people’s attitudes. For example, an AT of contract law might posit that one of the key conflicts in this area is between \textit{textualists} and \textit{contextualists}—i.e. over the degree to which the law should adhere to written contracts to the letter. To measure attitudes toward this conflict, participants might be asked to indicate the degree to which they agree with statements such as \textit{“When interpreting a written contract, the focus should be on the written word, rather than the parties’ presumed intentions,”} or \textit{“The court should interpret contracts so as to fulfill the parties’ intentions—even if these intentions deviate from the literal meaning of the contract.”} As explained below, a multidimensional AT should consist of several items for each dimension, to enhance its reliability.

\textsuperscript{34} For example, Kahan’s work on CCWS, and the study of jury’s attitudes (see above Sections 4.2 and 4.3 respectively).

\textsuperscript{35} Cf. Section 4.1.
Content validity. To ensure that a scale is useful in assessing how well the AT scores on the evaluation criteria (fit and parsimony), the content of the items must match that of the legal area that the AT seeks to cover—what is commonly known as content validity (DeVellis 2017, 84–91). When the AT’s dimensions are theoretically defined, one must first examine whether the dimensions suggested by the theory are in fact a credible representation of the various aspects of the legal field, and then verify that the scale’s items adequately represent the AT’s dimensions. In cases where the exact attitudinal structure is still obscure, the scale must consist of items that reflect all the relevant issues of the field in question.

Ensuring content validity is an essential part of scale construction. By definition, if the AT’s dimensions are not represented in the scale’s items, any findings that the scale may produce cannot be a valid reflection of the AT. That is, the scale cannot account for issues that are not represented in its items.

A scale’s content validity can be undermined by inclusion of irrelevant items (i.e. items that are unrelated to the conflict they are supposed to represent), or by under-representation of relevant items (i.e. the items present in the scale fail to measure all facets of the legal issue at hand). For example, one might say that a key facet of the conflict between textualists and contextualists in contracts is the relevance of the clarity of the wording. In that case, a scale that includes only the two sample statements cited above, for example, would lack content validity.

Testing content validity is first and foremost a theoretical effort, and can be carried out by analyzing the content of the scale and of the AT before distributing the scale to actual subjects. The prevailing method of ensuring content validity is to consult independent experts with a solid understanding of the field (Furr 2011, 54–55). Another way is to systematically analyze judicial decisions, with a view to identifying the range of relevant issues, and then ensuring that these are reflected in the scale.

The theoretical nature of the content validity testing highlights one important limitation of the methodology: an empirical assessment of the AT is based on the theoretical work that has been done beforehand. Thus, any empirical investigation using the scale cannot rule out an alternative AT that might provide a better typology of attitudes, and can be tested by a more adequate scale.36

36 A related term to content validity is face validity—namely, the degree to which the scale’s items represent the attitudinal dimension in the eyes of the subject of the scale—even though he or she might
**Item reliability (or internal consistency).** Even if each of the scale’s items reflects the substance of the attitudinal dimensions, no single item on its own can capture an individual’s attitude—for several reasons. First, a self-report scale is prone to measurement errors (e.g., misunderstanding of the statement by some respondents)—which are magnified when only a single item is used. More importantly, even in the absence of measurement errors, each item is affected both by the individual’s attitude that we are seeking to measure (the signal), and by opinions that uniquely affect the answer to the item in question (the noise). Since we are only interested in measuring the attitude, a scale must consist of several items, whose common denominator will cancel out the noise and isolate the attitudes signal. Thus, if all items are affected by the same attitude, they can serve as a consistent measure of that attitude, even if each item is also affected by factors that are unique to its specific content. If, however, each item is influenced by a different attitude, the scale is not deemed to be consistent (Furr 2011, 35–51).37

More technically, the internal consistency of a scale is determined by two factors: (1) *The items’ average correlation:* the average correlation between the items signifies the degree to which they are measuring the same thing—namely, the desired signal; (2) *The number of items:* even when items capture a great deal of noise, as long as this is randomly distributed between the items, the use of more items places greater weight on the signal than on the noise. The popular estimator, *Cronbach’s alpha,* uses these two factors to form a combined estimate of reliability.38

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37 The term *reliability* in general refers to the degree to which a measurement produces similar results under different conditions. On the meaning and measuring of *reliability* in scale construction, see generally DeVellis (2017, 40–82).

38 Cronbach alpha is based on standardized items, and is equal to: \[
\frac{k \cdot \bar{r}}{1 + (k-1) \cdot \bar{r}}
\]
where \(k\) denotes the number of items, and \(\bar{r}\) denotes the average correlation between them. Figure n1 illustrates the size of alpha as a function of the number of items given different correlation averages (0.2; 0.4; 0.6). To better understand the meaning of different values of alpha, DeVellis (2017, 145) suggests the following as rules of thumb: 0.6 = unacceptable; 0.6–0.65 = undesirable; 0.65–0.7 = minimally acceptable; 0.7–0.8 = respectable; 0.8–0.9, very good; and considerably above 0.9 = one should consider shortening the scale.
In the context of evaluating ATs, when a scale adequately reflects multifaceted attitudes, item reliability can assess ATs in terms of the third element of the fit criterion—that of consistency of attitude facets. An inconsistent scale, or the need to use too many items to reach adequate internal consistency, may be indicative that the hypothesized key conflict is also inconsistent (namely, that people do not find the various issues which the conflict stands for, as related).

**Dimensionality (or internal structure).** A scale that reflects the various facets of the legal field in question facilitates the understanding of the structure of attitudes in that field, and makes it possible to test whether the hypothesized dimensions of the AT truly describe actual attitudes (Furr 2011, 25–35, 91–109). By analyzing participants’ responses, the researcher can identify comparatively coherent dimensions among the items—i.e., to group correlating items into clusters. By way of illustration, let us assume a scale with 10 items, where items 1–5 deal with social ideologies, and items 6–10 with economic ideologies. If these are indeed two distinct and orthogonal dimensions, answers to items 1–5 should correlate with one another, and so should answers to items 6–10. But, the items from the first set and those from the second set should not correlate with each other, since they reflect distinct dimensions. This analysis should also reveal how much each item relates to (or “loads on”) its dimension: an item that does not load distinctly on any dimension is not useful for measuring the relevant dimensions (i.e., social or economic ideologies). When a single item from one hypothesized dimension in fact relates to another dimension, it may imply that the opinion represented by that item is not part of the hypothesized dimension.

39 Exploratory Factor Analysis (EFA) is considered the appropriate method and common practice in the early stages of building new scales (Hurley et al. 1997; Yong & Pearce 2013); to confirm the structure of a scale, researchers should follow the EFA with a Confirmatory Factor Analysis (CFA) (Worthington & Whittaker 2006; Cabrera-Nguyen 2010).
Statistical methods can also help to determine the number of dimensions that a theory should comprise. For example, we can calculate the correlations between the dimensions, or measure the degree to which the addition of another dimension would further our understanding of the explanation of various responses. In addition, complex statistical methods enable the researcher to compare different structures (e.g. unidimensional versus two-dimensional ATs), to see which of them better fits the data (Kline 2015, 286–90). However, these statistical methods cannot replace the theoretical deliberation of how to adequately balance parsimony and fit, while taking into account the legal field in question.

To further demonstrate the concept of dimensionality and the uses of a scale, I will use Kahan’s aforementioned cultural cognition worldview scales (CCWS), which gauge cultural attitudes along the two dimensions of hierarchy-egalitarianism and individualism-communitarianism. While these two dimensions are seemingly related, one must measure how much they are related to determine if they are both necessary to capture attitudinal diversity.

At the outset, it should be noted that the design of the CCWS are not ideal for an independent test of its hypothesized dimensional structure. CCWS contain two parts, each of which begins by briefly explaining one of the dimensions, and then presents its corresponding items. For example, the part related to the individualism-communitarianism dimension begins with the statement “People in our society often disagree about how far to let individuals go in making decisions for themselves,” and then presents the items related to that dimension. Arguably, this design encourages subjects to answer each item in a manner that echoes the key conflicts that they were told the items relate to. A design that presents all the items of both dimensions in random order, without explicitly describing the tested conflicts, is a more reliable means of verifying the AT. Nonetheless, the CCWS can be used to illustrate the general concept of dimensionality.

In a previous study (Katz 2019), I measured attitudes on these two dimensions using the short version of Kahan’s CCWS, with a small sample of 115 participants. Given the correlation between the two dimensions, I employed a maximum-likelihood EFA with promax rotation using SPSS, and found that the scales’ items were in fact related to the two dimensions, as expected (the average of the pattern matrix loadings were 0.82 for hierarchy-egalitarianism and 0.78 for individualism-communitarianism). In addition, the correlation between the two attitudinal dimensions was relatively large.
(r = 0.42; see Figure 2a for a scatter plot of participants’ scores on each dimension). Theoretically, if the two dimensions were strongly correlated (e.g. r = 0.98—see hypothetical scatter plot in Figure 2b) it would be more efficient to use a unidimensional AT to describe the relevant attitudes. In contrast, if they were not correlated at all (e.g. r = 0.02—see hypothetical scatter plot in Figure 2c) they would definitely be considered two discrete dimensions. The problem arises when they are partially correlated, as in this case.

The EFA also reveals the extent to which each dimension can explain the divergent responses of the participants—i.e. the portion of the variance in responses that we can attribute to the score of each of the dimensions. The analysis shows that while one dimension explains 47.86% of the variance in responses, two dimensions together explain 68.68% of the variance, suggesting that the second dimension accounts for a substantial portion of the variance in responses.

However, ultimately, the question of whether a two-dimensional AT is needed here, given the psychometric properties of the scale, depends on the theoretical need to use two distinct dimensions. For example, one might ask whether using two dimensions reveals associations between attitudes and decision-making (such as those described in section 4.2) that would not have been found using a unidimensional scale. If the answer is yes, that would be a strong argument in favor of using two dimensions. Conversely, if the answer is no, one would have to find another justification for deviating from a more parsimonious theory. When the statistical analysis of the scale demonstrates a clear two-dimensional structure, it is more likely that such justification will be eventually found.

**Attitudinal variance.** Another way a scale can validate an AT is by measuring the variance of an attitude across people. Even if the structure of an AT is sound, and its dimensions are reliable, to test the second element of the fit criterion (reflection of
the attitudinal diversity), one must test how people’s attitudes are distributed along the proposed attitudinal dimensions (DeVellis 2017, 142–43). Obviously, in the limit, when all respondents have the same attitudinal position, variation in the attitude cannot explain variation in other phenomenon, because there is no variation in the attitude. Thus, statistical considerations dictate that scales with larger between-respondents variance are preferred to those with smaller variances. For example, Figure 3 portrays the histograms of scores on the CCWS from the study mentioned above. The blue bars represent the distribution of participants’ scores on the Individualism-Communitarianism dimension—where 1 signifies an extremely communitarian attitude and 6 an extremely individualistic approach. The orange bars represent the distribution of participants’ scores on the Hierarchy-Egalitarianism dimension, where 1 signifies an extremely egalitarian attitude, and 6 an extremely hierarchical one. In the aforementioned sample, it appears that the individualism-communitarianism dimension is in fact conflictual, and attitudes toward it are broadly distributed from 1 to 6. Conversely, attitudes toward the hierarchy-egalitarianism dimension are skewed toward egalitarianism. This implies that either people in my sample are mostly egalitarian, or that the scales’ items do not adequately reflect a broadly controversial issue in society.

![Figure 3: Histograms of Scores on the CCWS (N=115)](image)

**Construct validity.** *Construct validity* refers to the degree in which a scale measures the construct (or dimension) it seeks to measure. In the present context, it refers to the extent to which the scale measures the attitudinal dimensions of the AT it
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represents (DeVellis 2017, 95–100).\textsuperscript{40} In some sense, construct validity “begins” with content validity. However, content validity is established by examining the items to see whether they reflect the dimension, while construct validity involves empirically testing the associations of the scale with other measurements (preferably, measurements that have already been established). A valid scale should be associated with related measurements (convergent validity), and not associated with unrelated measurements (discriminant validity).

For example, to test the construct validity of a newly constructed scale that measures attitudes toward affirmative action, one might use two established scales: political affiliation and racial discrimination, and see whether the correlation between the new scale and the old scales make sense. If, for example, this reveals a strong positive correlation between conservative attitudes and a pro-affirmative action approach, this would cast doubt on the construct validity of the scale.

Since, to date, there have been few attempts at creating scales for legal attitude theories, the task of finding relevant valid measurements is a challenging one. However, as this field develops, it will become easier to validate legal ATs.\textsuperscript{41}

6.2 Methodological Limitations and Difficulties

Several limitations and difficulties should be noted about the method of using self-report scales and analyses of participants’ responses: the complex task of selecting items; measurement errors; the lack of “isolated” items; and the consistency of attitudinal structure.

The complex task of selecting items. One chief limitation of self-report scales lies in their dependence on content validity—which is ultimately assessed by non-empirical means. The empirical analysis of using a scale can only be as good as the

\textsuperscript{40}Researchers use the term construct validity in a manner that sometimes subsumes all types of validity—see e.g. Furr (2011, 52–66). Here, I it to denote the association of the scale with other variables (also known as associative validity), Id., at 57–60. See also Cronbach & Meehl (1955), who first coined the term of construct validity.

\textsuperscript{41}A quite similar type of validity is criterion validity (often referred to as predictive validity), which concerns the degree to which attitudes we measure are associated with certain criteria (e.g., the degree to which legal attitudes are associated with judicial decision-making). Both types of validity explore the correlations between supposedly related scores—the differences between them mostly depends on the researcher theory and intention. When testing criterion validity, researchers are interested in the predictive power of the scale, while in testing construct validity they are interested in assessing the quality of the scale in measuring what it is supposed to measure (see DeVellis 2017, 92–97). Due its resemblance to construct validity, I chose not to discuss criterion validity separately in the body of this article.
items it consists of. The richness of the normative debates about legal issues makes it difficult to address and map the entire terrain of legal attitudes, even when exploring well-defined fields. If a scale is not comprehensive enough, it will not capture the entire attitudinal diversity. Conversely, if a scale over-represents a given issue, it may falsely imply that that issue forms a distinct dimension, when in fact it is marginally important to understanding the attitudinal diversity in that field. Thus, one must not accept empirical support for an AT blindly, but rather review the items of the scale in question in a bid to understand what can, and cannot, be inferred from them. For example, a scale that gauges individuals’ attitudes toward contractual conflicts, but neglects to address the aspect of inequality in the parties’ respective bargaining power, is arguably flawed—even if the psychometric properties of the scale are flawless.

**Measurement errors.** Every empirical study is prone to measurement errors, and this is especially true in the case of self-report surveys. The more prevalent those errors are, the noisier the scale, and the more its reliability (and consequently validity) is compromised. Indeed, measurement errors are particularly prone to occur when one tries to capture an individual’s attitude toward legal issues. People who lack legal training, or who do not deal with legal issues on a regular basis, may be unable to report their legal attitudes when asked about them in the abstract (if they have any at all). Even when presented with a concrete legal dilemma, people may find it difficult to produce a reliable answer when they encounter it in a survey that provides only a short description of the dilemma, as opposed to a real-life decision-making situation. This is particularly true of laypeople, but may also apply to legal experts who do not encounter such an issue on a regular basis. The way to mitigate this problem is to use several items, and to ensure that they are clear, and concrete (Furr 2011, 16–24).

**Lack of “isolated” items.** One possible way to reduce the impact of measurement errors in complex legal contexts, is to use concrete rather than abstract items. However, this means that formulating items that measure only a single attitude without measuring others is fairly challenging. Specific legal questions often encompass more than one (or even contradictory) legal attitudes. For example, as Kennedy has pointed out, a specific legal question that is affected by attitudes toward

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42 Cf. Schwartz (1992, 2–3): “If the value set is not comprehensive, studies of the correlates of value priorities will be compromised: Influential values that might counterbalance or outweigh the values that were measured would necessarily be overlooked, so the assessed priorities would be distorted.”
formalism may also be affected by attitudes toward altruism—even though these are clearly distinct dimensions. Thus, even if two different attitudinal dimensions exist in theory, it may be difficult to distinguish between them if the items are loaded on two or more dimensions to similar extent.

**The consistency of attitudinal structure.** A multi-dimensional theory assumes consistency in people’s answers—at least to some extent. Items that are part of the same dimension should be correlated for the individuals in the research sample. If two items are correlated for only half of the participants, the statistical analysis does not necessarily indicate that they constitute the same dimension. Alas, some legal issues raise complex dilemmas that people may have inconsistent views on. Thus, even if some participants believe that two given statements are positively correlated, the answers of the sample as a whole would not necessarily correlate with one another if other participants believe those statements are negatively correlated. It is important to note that differences in attitudes, in and of themselves, do not compromise the validity of a scale—rather, it is the different relations between attitudes that can bias empirical results. Like measurement errors, this problem is of special concern with regard to laypersons who may have never faced such dilemmas—and in some cases, even legally trained people, as well (cf. Converse 1964, 5–6; Jost 2006, 651). Inconsistency of an attitudinal structure can also be a problem when people’s attitudinal structure changes over time (Martin & Quinn 2002, 136).

People’s culture or legal expertise can also affect their attitudinal structure. In other words, if for lawyers (or Americans) Item A correlates with Item B, and for laypersons (or Europeans) Item A does not correlate with Item B, the same scale cannot be used with both populations. While, for the former group, Item A and Item B should be computed into a combined estimate of the attitude, in the case of the latter group Item A and Item B should be assessed separately (or one of them omitted altogether). To address this problem, the scale should be validated within each population, and adjust the theory (and scale) accordingly.

7. **Concluding Remarks**

To date, legal scholars have engaged with normative theories of law, but no comprehensively descriptive account of normative legal conflicts in society has been

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43 See *supra* Section 4.2.
produced. Although there have been several attempts in this regard, a full-scale empirically-based AT has yet to be put forward.

The main aim of this article was to point out the research gap in the study of attitudes and the law, and to encourage researchers to investigate legal attitudes in a more exhaustive and systematic fashion. Using insights from the research on attitudes in other disciplines and from current theories of legal attitudes, this article introduced a comprehensive framework for the conceptualization of attitude theories in various areas of the law. It introduced the concept of legal attitude theories, proposed evaluation criteria for assessing such theories, and described the methodology that might be used to test such theories empirically, and to plot attitudes along the AT dimensions. Developing legal ATs will further our understanding of the law, the legal conflicts in society, and the process of decision-making, by legal office holders and laypersons alike.

A thorough study of legal attitudes can contribute to bridging the gap between critical accounts of the law and traditional legal models. Studies of attitudes in the legal sphere are often associated with legal realism, and reflect a criticism of the inherent bias in the implementation of the law. Some believe that attitudes govern the desired outcome for decision makers, thereby biasing their reasoning. Others posit that this is a bidirectional process, whereby decision-making is influenced by rational and motivational factors alike (Simon 2004). Nonetheless, most empirical studies of attitudes focus on the motivational effect, and neglect the discussion about the impact of attitudes within the bounds of legal discretion. Attitudes are an inherent part of legal decision-making when judges are faced with legal ambiguity (which occurs quite often). Failing to differentiate between licit and illicit attitudinal influences can result in decision-makers ignoring their attitudes even when they should take them into account, or concealing the reasons underpinning their decision, and reducing transparency (even if, on occasion, this is called for).

Experimental methods using attitudinal scales can be conducted to examine the arguably legitimate influences of attitudes on judicial rulings. By accurately identifying and measuring legal attitudes, we can gain a better understanding of when and how attitudes shape the law, and thereby differentiate more effectively between doctrinal and attitudinal factors in actual judgments. This, along with normative analysis, will help us determine which attitudinal influences are legitimate aspects of legal discretion, and which reflect a biased application of the law that should preferably be kept in check.
Further research should use this framework to construct legal ATs and study legal controversies in various parts of the law. I hope that this article will serve as a first step toward a range of studies with a view to developing legal ATs.

References


