



The Emergence of Customary Law



Addressing a Longstanding Doctrinal
Issue by Way of a Public Good
Experiment

joint with



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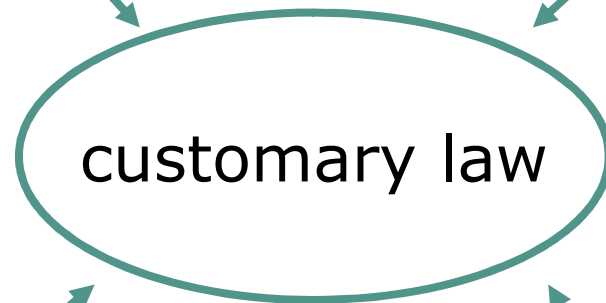
under attack



Goldsmith



Triepel



Posner



Kelsen

rational choice critique



Goldsmith



Posner

- customary law =
 - “epiphenomenal”
- state action
 - seemingly guided by customary law
 - actually exercise of self-interest

positivist critique



- custom = implicit treaty making
 - consent on specific rule
- force of custom
 - rests in meta-rule
 - consent at higher level



Triepel



Kelsen

critique of critique



- public international law fundamentally “informal”
- rules “emerge”
- customary law =
 - “expression of legitimate expectations of the international community”



Mendelson

two follow-up questions



- law > normativity?
- *opinio iuris*
 - necessary?
 - instrumental?

organisation



- I. introduction
- II. rational choice critique
- III. positivist critique
- IV. co-evolution of behaviour and normative expectations
- V. law vs. mere normativity
- VI. opinio iuris
- VII. conclusion

method



- (doctrine)
- (theory)
- empirics
 - experiments

procedure



- 8 treatments
 - 182 subjects
 - pool of ~ 3500
 - students, different majors
- Bonn EconLab 2010
- zTree (Fischbacher 2007)
- ORSEE (Greiner 2004)
- different comparisons address different claims

II. rational choice critique



Goldsmith



Posner

- dilemma

	C	D
C	2,2	0,3
D	3,0	1,1

- but
 - repeated
 - uncertain end
- compliance = equilibrium

prediction



- N matters

	1C	2C	3C	4C	5C	6C	7C	8C	9C	10 C
C	0	0	0	0	0	0	0	0	0	2
D	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3

- (targeted sanction impossible)

theoretical critique



- use better game theory
 - Chinen: nested game
 - reputation
 - Norman Trachtman: strategy choice
 - grim trigger
 - penance

empirical critique



- experimentally testing exactly the Goldsmith/Posner case
 - prisoner's dilemma
 - $N > 2$ players
 - repeated with defined end (30 rounds)
 - → unraveling

design



- payoff function

$$\pi_i = e - c_i + m \sum_{j=1}^N c_j$$

- endowment 20
- contribution
- marginal per capita rate .4
- payoffs
 - all cooperate: all have 32
 - all defect: all have 20
 - one defector: 24 / 44
 - one cooperator: 8 / 28
- feedback
 - at individual level

treatment



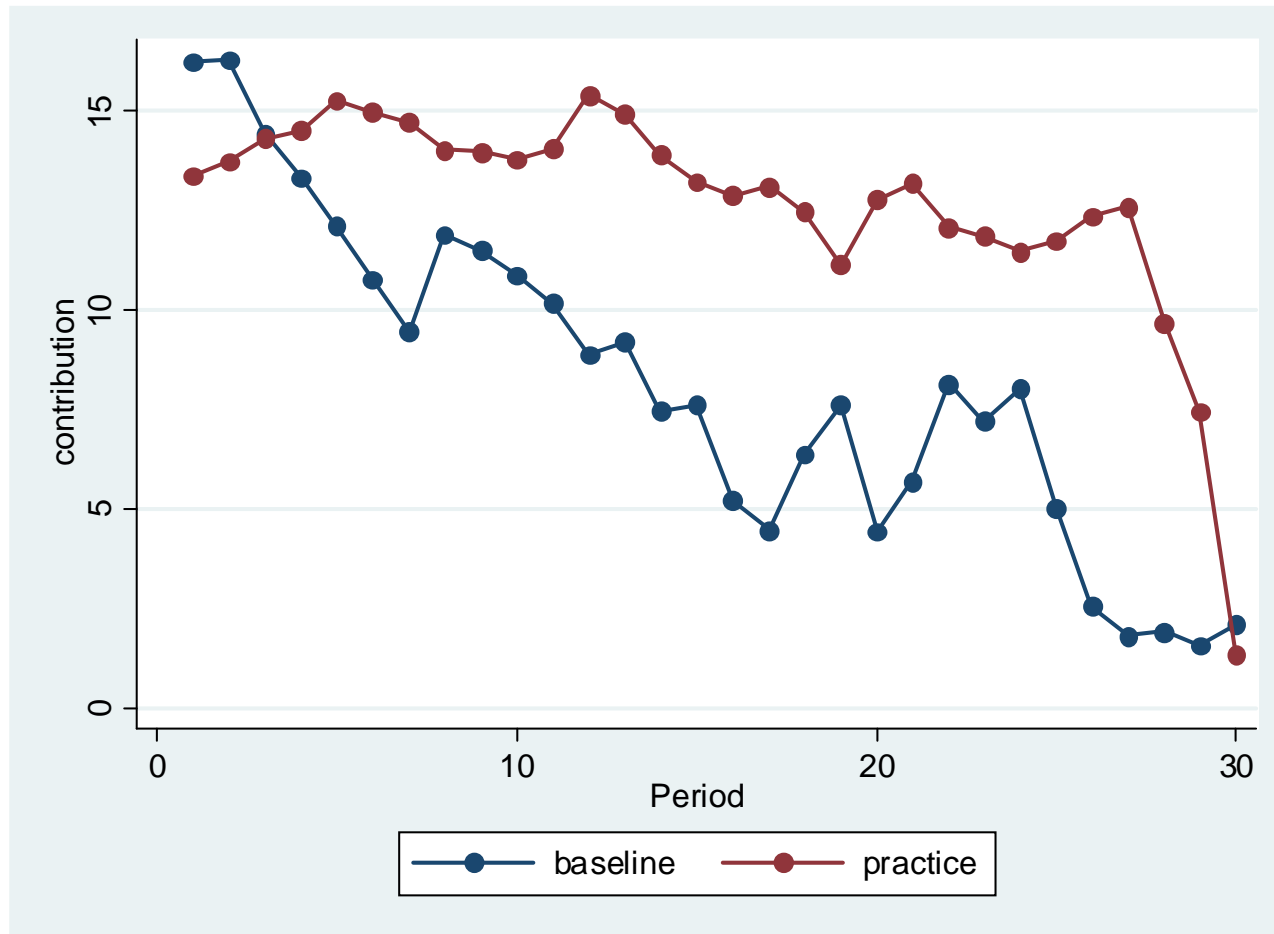
„Recht kann nicht nur vom Gesetzgeber erlassen oder von den Betroffenen durch ausdrücklichen Vertrag geschaffen werden. Gleichermäßen wirksam und bindend ist **Gewohnheitsrecht**. Gewohnheitsrecht entsteht, wenn sich die große Mehrheit der Betroffenen hinreichend lange hinreichend ähnlich verhält. Dass einzelne Personen sogar noch mehr für das gemeinschaftliche Projekt beitragen, steht der Entstehung einer Norm des Gewohnheitsrechts nicht entgegen. Eine gewohnheitsrechtliche Norm kann also einen **Mindeststandard** verbindlich machen. Gewohnheitsrecht kann auch hier im Labor entstehen.“

treatment



- 2 questions
 - after contributions
 - before feedback
 - answers are not made public
- wording
 - 1. Glauben Sie, dass es in Ihrer Gruppe eine allgemeine **Norm** über einen **angemessenen Mindestbeitrag** zum Projekt gibt? (Ja/Nein)
 - 2. Falls ja, wie hoch ist dieser allgemein zu erwartende Mindestbeitrag? (Zahl zwischen 0 und 20).

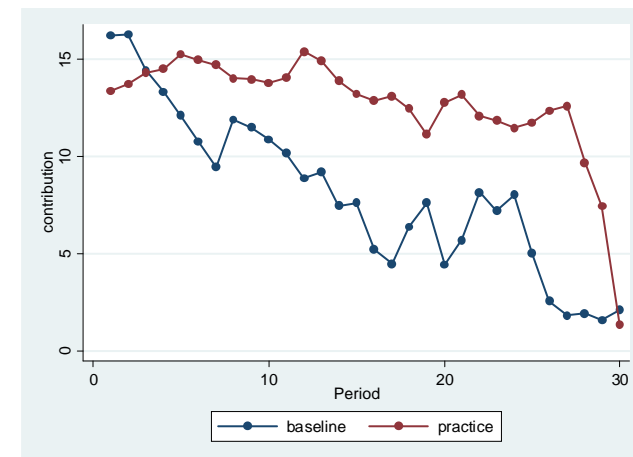
results



findings



- baseline
 - mean $\gg 0$
 - no unraveling
- treatment
 - customary law not “epiphenomenal”
 - contributions almost stable until per 27



statistics



- contr → indiv → group
- left and right censored
- random effects Tobit
- bootstrapped
 - random draws at group level

Practice	9.620*
period	-.530**
period 1	.010
period 30	-13.459*
cons	14.453***
N	1440
p model	<.001

III. positivist critique



- compliance = non-issue
 - internal view of law
 - compliance = duty
- is there law?
- → behavioural corollary
 - **if** there is law
 - **then** there should be more compliance



Triepel



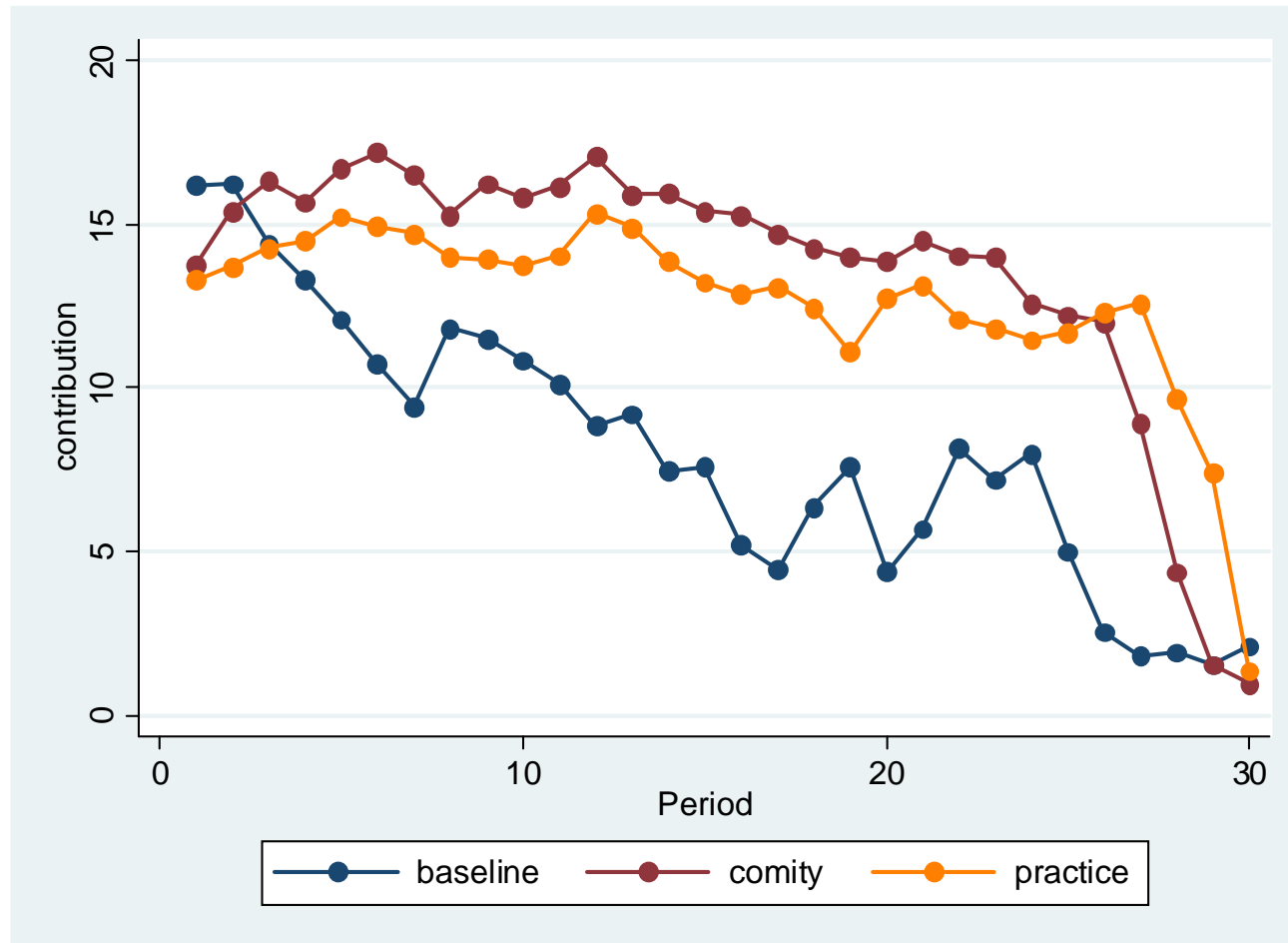
Kelsen

additional treatment



- *as Practice*
- but no appeal to (customary) law
- only same two questions
 - “1. Do you believe in your group exists a general norm regarding an adequate minimum contribution to the project (yes/no)?”
 - 2. If so, which is the generally expected minimum contribution (number from 0 to 20)?”
- *Comity*

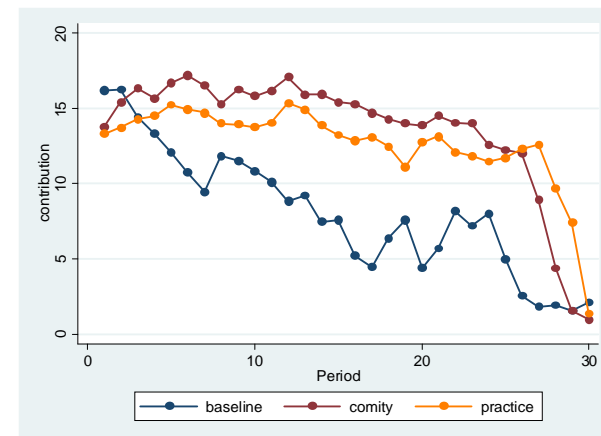
results



findings



- descriptively
 - *Comity*
 - even slightly higher contributions
- behaviourally, law
 - immaterial
 - if not counterproductive



statistics (*Comity vs. Practice*)



Practice	-3.120 (p = .258)	-8.157 ⁺ (p = .075)
period	-.434**	-.600***
Practice*period		.317 (p = .106)
period 1	-6.511*	-6.542*
period 30	-21.168***	-21.059***
cons	25.894***	28.576***
N	1440	1440
p model	<.001	<.001

weakly sig. treatment effect when controlling for interaction with period

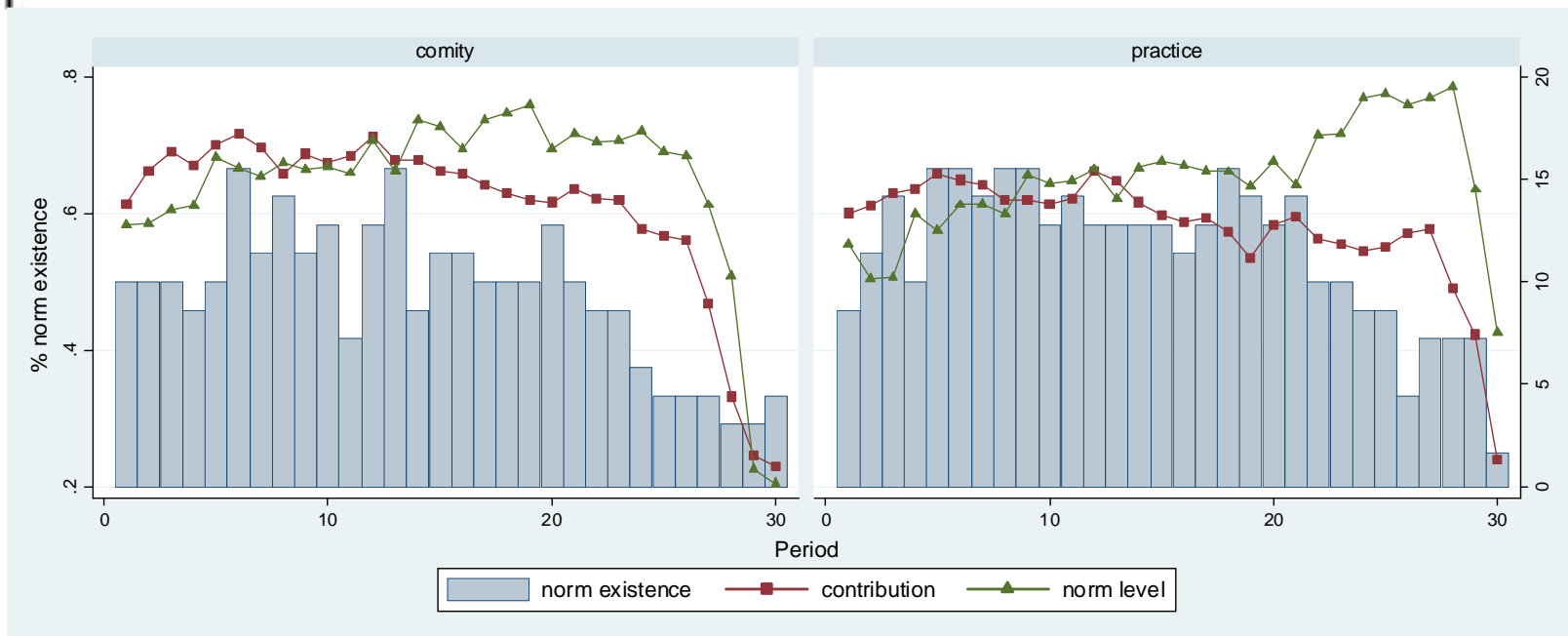
IV. Mendelson RdC 1998



- international relations „semi anarchic“
- international law „informal“
- customary law = process
- „expectations“ are critical
 - facts → norm
- → coevolution of
 - behaviour
 - normative expectations



results



coevolution
identification through panel?

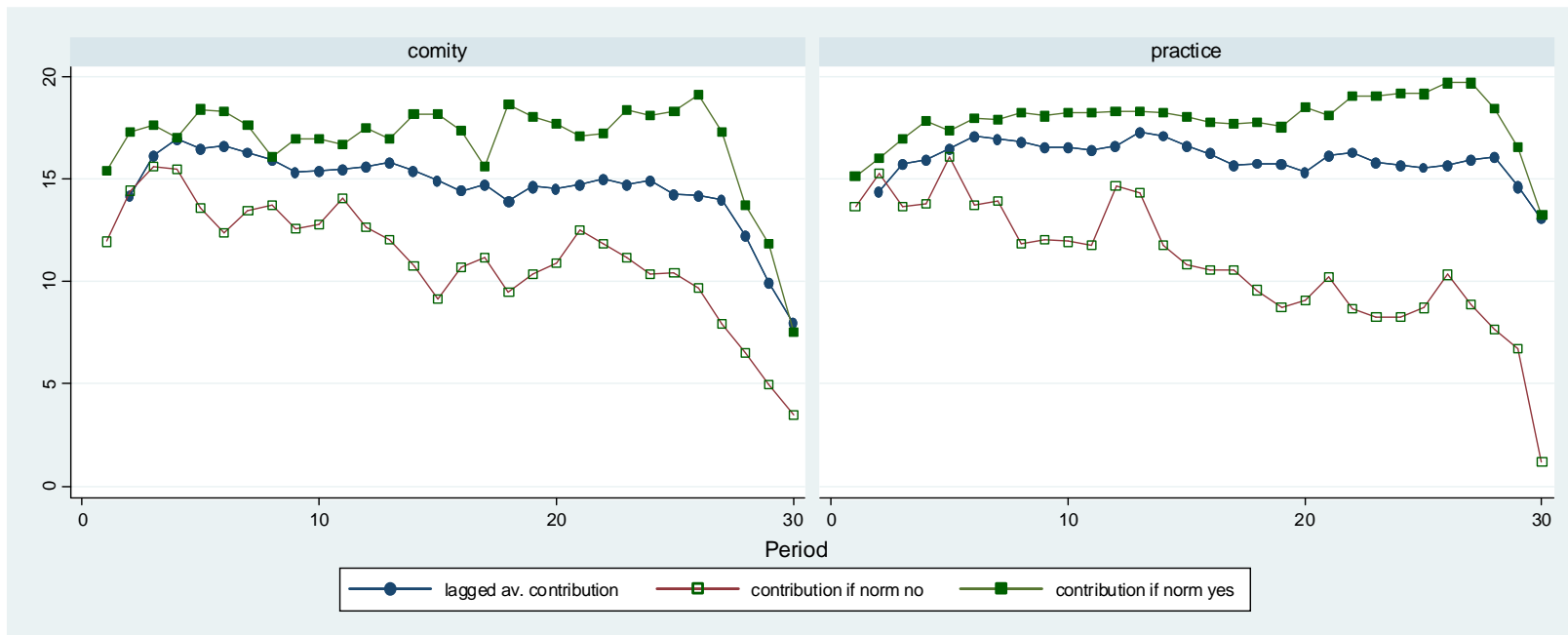
statistics



	contribution	contribution	statement of norm existence	statement of norm level
lagged statement of norm existence	6.089**			
lagged statement of norm level		1.582**		
lagged average contribution			.210***	1.125***
Practice	-3.499	-.950	.785	-1.072
period	-.381**	-.312	-.032**	.144***
period 30	-20.577***	-23.090	.463	-5.693
cons	22.035***	3.443	-2.695***	-2.710
N	1392	724	1392	715
p model	<.001	<.001	<.001	<.001

models 1,2,4: random effects Tobit, bootstrapped at group level
 model 3: mixed effects logit, obs nested in individual, nested in group

compliance difference

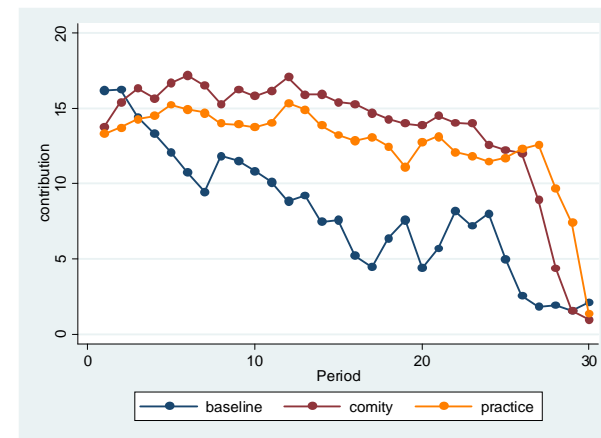


for those who say (not) there is a norm

V. just normativity?



- *Comity* at least no worse
- behavioural effect of (customary) law = behavioural effect of normativity?



design

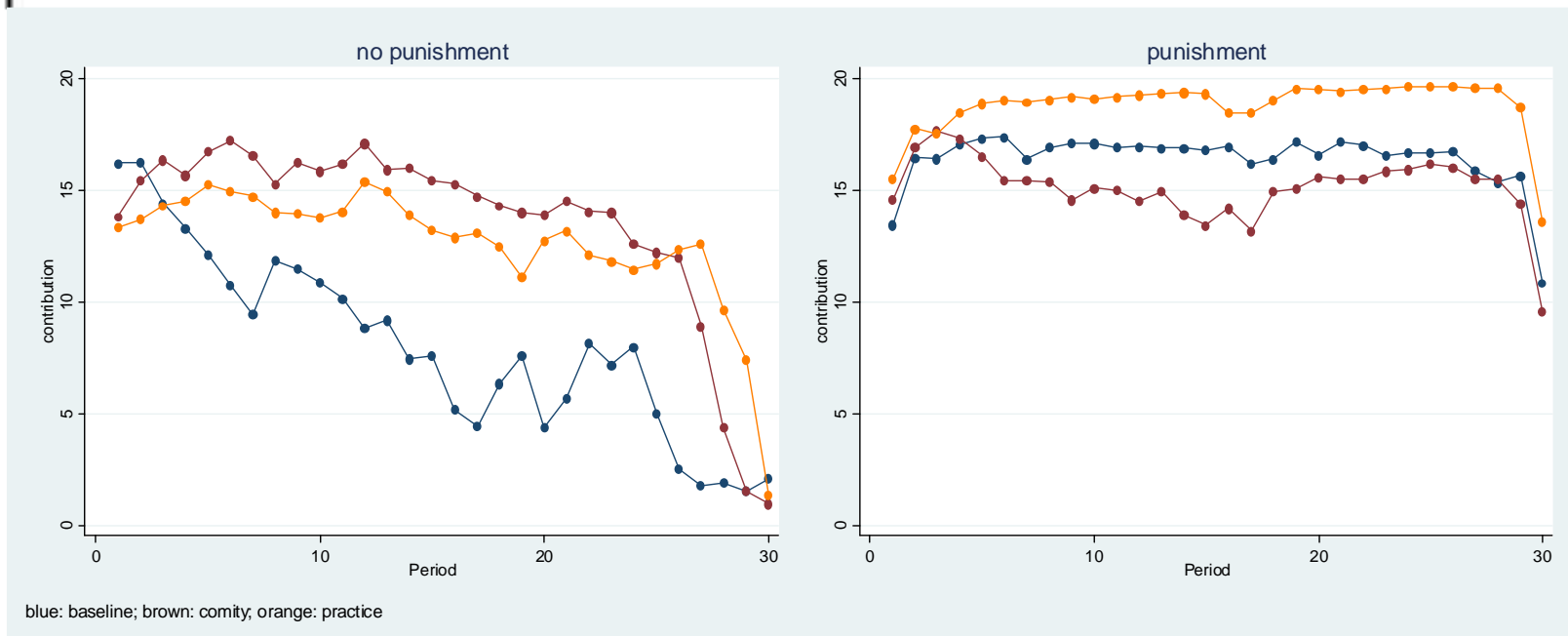


- adding sanctions

$$\pi = \pi_1 - \sum_{j \neq i}^N s_{ij} - \sum_{j \neq i}^N s_{ji}$$

- fine to fee ratio 1:1
- for all three treatments
- in the spirit of customary international law
 - obligation *erga omnes*
 - no central enforcement
 - reprisal

results



punishment very effective
~ **differentially** effective
poor for *Comity*
very good for *Practice*

statistics



	non-parametric bootstrap	wild bootstrap
punishment option	20.117 ⁺	20.117***
Comity	3.221	3.221
Comity* punishment option	-14.506	-14.506**
period	-.281*	-.281***
period 1	-7.216*	-7.216***
period 30	-19.978***	-19.978***
cons	20.463***	20.463***
N	2880	2880
p model	<.001	<.001

Tobit, bootstrap clustered at group level

effect of punishment



lagged received punishment	.659***
Comity	-.161
lagged received punishment* Comity	-.217**
period	-.008
period 30	-5.418***
cons	-.026
N	1392
p model	<.001

depvar first differences of contributions
mixed model, obs nested in indiv nested in group

VI. *opinio iuris*



- most public international law scholars ask for two elements
 - practice
 - *opinio iuris*
- justifications
 - voluntarists: (implicit) consent
 - objectivists: expression of conviction that binding
 - pragmatists: telling relevant from irrelevant state action

↔ Mendelson



- should be dropped
- conceptually unsound
- ? also behaviourally counterproductive



design



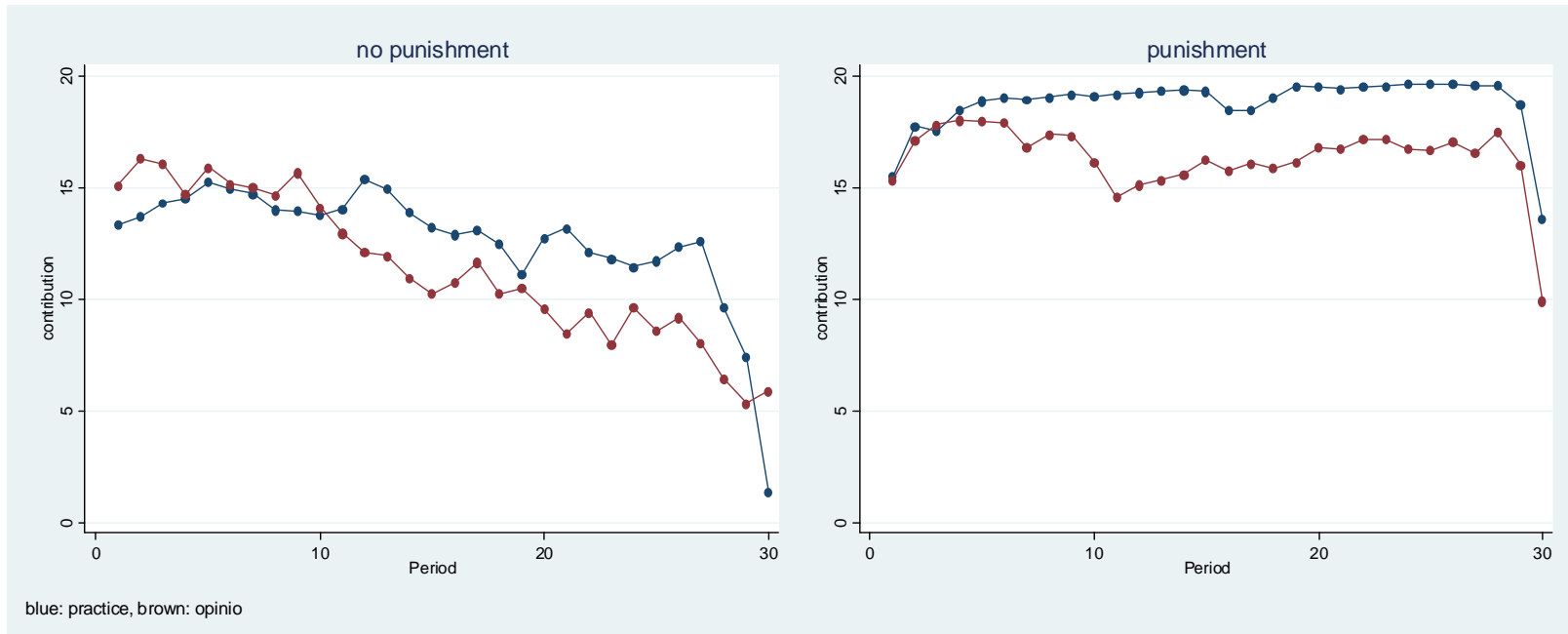
- 2 more treatments
 - no pun
 - pun
- same as *Practice*
- additional sentence in instructions
- participants receive information about statement of other group members
 - is there a norm?
 - if so: how demanding is it?

instructions



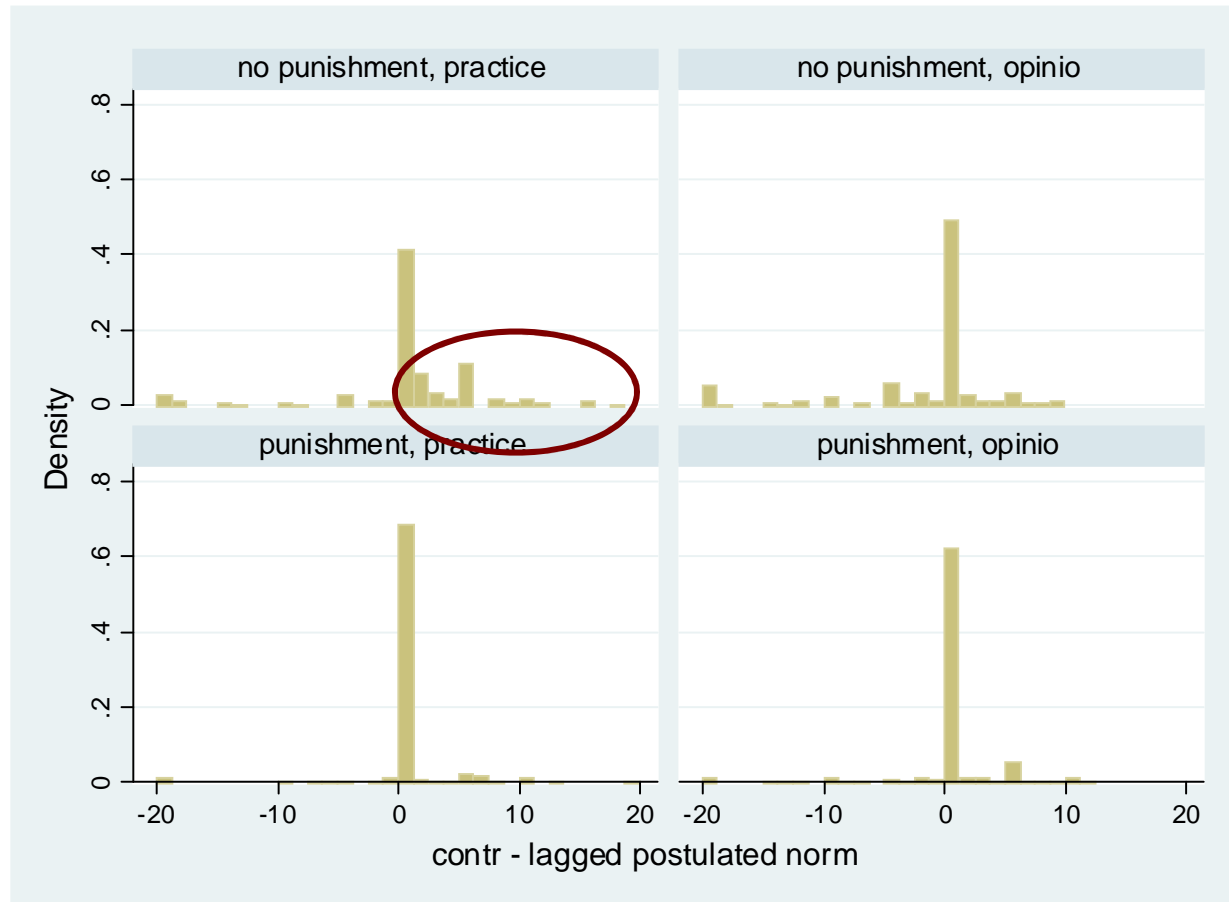
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results



descriptively, higher contributions in *Practice*
yet difference insignificant

norm entrepreneurship



statistics



Practice	4.582***
punishment option	2.649**
Practice* punishment option	-4.960***
period	-.103***
Practice*period	-.115***
Practice* punishment option* period	.167***
period 30	-5.828***
cons	-.587
N	1769
p model	<.001

- depvar
 - contr – lagged stated norm level
 - from those who say there is a norm
- no overcommitment in *opinio* (absent punishment)
- even with punishment, in *Practice*, there is an advantage in later periods, through the three way interaction

The end

