The War Within

Netta Barak-Corren[[1]](#footnote-2)\*

Recent years have seen the return of the culture wars in law and politics. From struggles over women’s reproduction to the treatment of LGBT persons in employment and business, religion and equality appear to be in collision. But despite its intuitive appeal, the “culture wars” paradigm is misleading. Religious groups are diverse and dynamic, and they struggle with the challenge of equality from within, not only from the outside. Inattentive to this reality, current debates on religion versus equality fail to acknowledge some of the major factors that determine the direction of the religious response to equality challenges—oppositional or tolerant. Bringing qualitative and experimental evidence from the U.S. and Israel, this paper identifies a systemic practice of “social impact regulation,” whereby religious decision-makers selectively apply and enforce religious norms based on the perceived social impact of sexual nonconformity. Social impact factors shape real-time decision-making in legal contexts and are highly consequential, significantly influencing decisions to dismiss sexual nonconformists and object to unfavorable judicial decisions. The implications of social impact regulation for the evolution and resolution of conflicts between law and religion are discussed.

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# Introduction

In an era characterized by increased social, cultural, and religious diversity, conflicts of norms proliferate. A particularly contentious arena is the tension between religious autonomy and sexual and gender equality. Changing norms and growing support of gender and sexual equality created a schism between conservative religion and many in the public. Between 2001 and 2017, American support for same-sex marriage rose from 35% to 62%.[[2]](#footnote-3) During these years, religious communities faced increasing tension between their traditional commitments and the changing social atmosphere.[[3]](#footnote-4) Part of the tension has been legal, as the change in societal norms bolstered legislation efforts, mobilized litigation groups, and encouraged women, LGBTs, and other groups to pursue social change through law.[[4]](#footnote-5) Serious objections from religious institutions and conservatives soon followed. A “culture war” was announced.[[5]](#footnote-6)

Two recent examples illustrate the conflict. In 2013, Marc Zmuda, a teacher and vice principal at Eastside Catholic High School in Seattle, was dismissed for marrying his same-sex partner. His termination added to a growing list of more than 15 cases in about two years in which Catholic and other Christian institutions across the U.S. terminated LGBT employees for wedding their partners or expressing support for same-sex weddings.[[6]](#footnote-7) That same year, an Israeli Labor Court decided a case involving the dismissal of a teacher from a Jewish Orthodox school for her unmarried pregnancy conceived through artificial insemination. The Catholic school in Seattle and the Orthodox school in Israel justified these terminations in very similar ways. Each argued that the respective teacher violated religious norms and values; that schools and teachers are entrusted with observing, preserving, and inculcating religious normativity; and that once teachers failed to conform, they could no longer serve as role models for their students. Both teachers filed suit under state nondiscrimination laws. In the state of Washington, the case was settled before judgment;[[7]](#footnote-8) in Israel, the teacher was awarded damages.[[8]](#footnote-9)

These two cases capture key aspects of the contemporary conflict between religion and antidiscrimination law in Israel and the United States. First, the conflict often revolves around gender and sexuality.[[9]](#footnote-10) Second, while conflicts can occur anywhere—from for-profit corporations to marriage registries—one of their central sites is religious schools, for reasons anchored in both religious and civil perspectives. Religious communities view schools as primarily normative institutions, which role extends beyond instruction and teaching to inculcating the next generation into the faith, instilling values and norms, and preparing children towards life as community members.[[10]](#footnote-11) Schools are perceived as non-state authorities[[11]](#footnote-12) and as strong claimants of religious autonomy. From a civic perspective, religious schools channel broader societal interests in education, employment, and welfare—broader than religious interests alone—that are magnified by the substantial share of the education market that religious schools control.[[12]](#footnote-13) Consequently, religious schools are often subject to overlapping and contrasting regulation from religion and state. Norm conflicts are a natural outcome.[[13]](#footnote-14)

Tensions between religion and equality were thoroughly analyzed by constitutional scholars but so far received scant empirical attention. This is unfortunate for several reasons. First, many influential analyses stem from a handful of high profile cases of religious objection.[[14]](#footnote-15) The focus on these dissents cultivated an implicit assumption that the religious response to antidiscrimination law is monolithically oppositional, and that this opposition is inevitable and unyielding.[[15]](#footnote-16) This is obviously not true. Religious groups are diverse and dynamic, they often have great latitude in the application of religious norms to particular cases, and their actions interact with social and legal forces in more than one way.[[16]](#footnote-17)

Second, analyzing cases as the main and often only method for studying the conflict is highly problematic, even if one studies the entire range of published opinions. Cases that get litigated are a highly selective pool of disputes. A comprehensive study by Professors Berrey, Nelson, and Nielsen estimated that only a tiny fraction of discrimination grievances become legal complaints and only 6% of court filings ever reach trial.[[17]](#footnote-18) These numbers might be even lower in religious disputes, as various forces keep disputes inside the community.[[18]](#footnote-19) In short, learning about the conflict between religion and equality from court cases obscures the actual reality of conflicts, including the challenges they present and the ways they get resolved. Empirical studies can uncover this reality and situate the analysis at a wider and more representative context. Empirical studies can also answer specific relevant questions. In particular, normative debates are often fraught with questions about consequences. For example, what is the magnitude of religious objection? How many people is it likely to influence? Will the conflict scale up or down following the adoption of a particular policy?[[19]](#footnote-20) These are empirical questions, but the answers they currently receive are mostly anecdotal and often speculative. Although empirical evidence cannot solve debates over principles, it can speak to the strength of arguments about facts, behaviors, and consequences. These arguments often play key roles in the normative debate.

This Article delves beyond the surface of litigation and religious objection to examine the underlying currents of conflicts between religion and equality. In a previous work, I found that religious communities vary substantially in their response to such conflicts. For example, across all levels of worship and denominations, American Christians were not of one mind regarding pregnancy out of wedlock; daily church attenders were more likely to terminate an unmarried pregnant teacher than weekly attenders, but more than half of them (55%) chose not to dismiss the teacher;[[20]](#footnote-21) the same was true for people who believed that unmarried pregnancy is sinful—nevertheless, 65% kept the teacher.[[21]](#footnote-22) In addition, many religious managers interviewed for that study believed that unmarried and same-sex relationships were sinful, yet some applied an inclusive, “kind heart” approach towards sexual nonconformity, whereas others applied an exclusive, “firm hand” approach.[[22]](#footnote-23) If, indeed, religion is not monolithic and not necessarily antithetical to equality, the culture wars paradigm entirely misses the point: the “war” between religion and equality is *within* culture as much it is *between* cultures. A central question then emerges: what determines whether religion takes an oppositional or a tolerant position towards equality challenges?

The answer necessarily involves many factors, as religious groups are as diverse as they are dynamic. In this Article I focus on one framework of factors that religious communities apply to equality challenges, which I call *social impact regulation*. Based on a multi-method study that consists of in-depth interviews with 41 religious educational leaders in the United States and in Israel (Roman Catholics and Orthodox Jews, respectively) and a decision-making experiment (N=559),[[23]](#footnote-24) I show that religious leaders and communities vary their responses to sexual nonconformity based on the perceived impact of nonconformity, as judged by the role of the nonconformist and the publicity of her act.[[24]](#footnote-25) The impact of these factors on conflicts between religion and equality was broad, systematic, and highly consequential.[[25]](#footnote-26) Notably, social impact regulation was not limited to strict responses to public violations of religious norms. Religious decision-makers also made substantial efforts to ignore and tolerate private violations of religious norms. For example, religious leaders often attempted to “discretize” sexual nonconformity rather than expose and condemn it, and they directed nonconformists to keep their nonconformity discreet from the community in order to refrain from punishing and excluding them.

Social impact regulation indicates that religion’s approach to gender and sexual equality is not monolithic, nor is it necessarily oppositional as the culture wars paradigm suggests. More specifically, religious leaders have substantial latitude in applying religious norms to particular cases, and they use it systematically to control their response to equality challenges. A large part of what determines the religious response to equality—oppositional or tolerant—is dependent on the perceived impact of sexual nonconformity on others in the community and on the status of the religious norm more generally. Social impact concerns shape the religious response to equality challenges and moderates the emergence of religious objection, therefore shaping the conflict itself.[[26]](#footnote-27)

On the normative level, the existence of social impact regulation should concern both sides of the debate on religion and equality, for several reasons. First, social impact regulation appears to have two simultaneous effects. On one hand, it narrows the freedom of sexual nonconformists in religious institutions because it confines them to private behavior. On the other hand, it moderates the enforcement of religious norms and increases tolerance of sexual nonconformity in religious institutions. A phenomenon that simultaneously disadvantages and advantages sexual nonconformity in religious societies merits substantial normative consideration. Such analysis is also necessary in order to guide courts, that recently began to encounter cases that allude to social impact regulation in their arguments or factual setting. In the final Part, I identify three preliminary normative directions to address social impact regulation in adjudication.

The article proceeds in five parts. Part I provides background. It begins with a review of the “culture wars” paradigm and the problems it generates and continues to more nuanced accounts of the conflict between religion and equality and the questions they generate for empirical examination. Part II provides a methodological overview and explains the focus and choice of sample. Part III presents qualitative findings revealing the centrality of social impact concerns, and particularly distinctions of role and sphere, to how religious institutions resolve equality challenges. Part IV draws specific hypotheses and tests them in the form of a randomized controlled experiment. Part V discusses three potential explanations to the emergence of social impact regulation and outlines its potential impact on the law and politics of conflicts between religion and equality.

# I. Understanding the Conflict Between Religion and Equality

## The Culture Wars Paradigm

The debate on religious liberty and sexual equality have largely focused on high profile cases of religious objection. The picture that emerges, to borrow from Professors Cochran and Helfand, “is not a pretty picture.” Relying on the analysis of sociologist James Hunter, Cochran and Helfand describe the conflict between law and religion as “culture wars,” in which “there is no common morality to which the competing sides may look; the sides have incommensurable values”.[[27]](#footnote-28) Professor Horwitz writes that the conflict between liberty and equality is “over irreconcilable values” and he decries that the debate “is so centered on a stark opposition between liberty and equality that any *tertium quid* is forgotten or ignored.”[[28]](#footnote-29) Professor Lupo describes a “collision course”.[[29]](#footnote-30)

The culture war paradigm is the common framework today to describe and analyze tensions between religious liberty and equality. It resonates with many in the public, it fits the dramatic preferences of the media, and it is amplified by the adversary nature of law and the polarized turn in American politics. Despite these appeals, the culture war paradigm is profoundly misleading. It generates an inaccurate understanding of the conflict as occurring between, rather than within, cultures. In addition, it presents religion as a firm objector to gender and sexual equality, whereas in fact, there is substantial *variation* even inside the most conservative communities,[[30]](#footnote-31) and substantial *dynamism* in the religious response to the conflict.[[31]](#footnote-32) To be clear, the problem is not that scholars positively argue that religious variation is inexistent, rather that they do not sufficiently consider the implications of its existence.

These perceptions are prevalent on both sides of the debate. For example, Professor Corbin criticizes religion’s employment practices, writing that “religious organizations can, and regularly do, deny women the influential position of minister, priest, rabbi, and imam on the grounds that religious doctrine requires such discrimination. Religious organizations whose beliefs do not require discrimination or even forbid it can also assert the ministerial exemption.”[[32]](#footnote-33) Corbin then criticizes religion for broadening the definition of “minister” to a range of positions and organizations far beyond the clergy, thus broadening discrimination.[[33]](#footnote-34) Note that Corbin acknowledges that not all religious organizations require discrimination, yet she remains concerned that they would assert it, simply because they can. Religious organizations emerge from this description as entities that assert their power to discriminate as widely as possible. A similar concern is brought by Professor NeJaime in his objection to allow religious individuals and entities to refuse to “treat as valid” same-sex marriages. NeJaime believes that the exemptions are overly broad and warns that religious individuals would take any advantage to express condemnation and disapproval of LGBT people.[[34]](#footnote-35) Professor Flynn also fears that religious exemptions will be frequently invoked.[[35]](#footnote-36) Mark Stern fears that if there is any religious accommodation, “inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation.”[[36]](#footnote-37) Professor Gallagher describes a view of religious objectors (that she does not share) “as hateful bigots.”[[37]](#footnote-38)

I take here no stand regarding the substantive arguments of these scholars.[[38]](#footnote-39) I only wish to surface the image of religion that collectively emerges from this writing: antithetical to equality and in danger of further escalation. Religion also emerges from these arguments as a monolithic entity in the sense that there is little if any discussion of religious responses other than objection to antidiscrimination law. Dynamic analyses refer mostly to the concern that religion will escalate and become *more* discriminatory.[[39]](#footnote-40) This image is surprisingly preserved in religious liberty arguments. For example, Professor Horwitz argues that refusals to accommodate religion may “push some religious individuals and communities to become more strongly attached to illiberal beliefs and practices,” and even reach martyrdom.[[40]](#footnote-41) Horwitz notes in passing that law “may [also] cause *some* groups, or some members of those groups, to alter their beliefs and conform their conduct to liberal norms of equality and nondiscrimination,”[[41]](#footnote-42) but he does not pursue this idea further. Horwitz’s argument is particularly interesting because it is sensitive to the problematic assumptions underlying the debate. Horwitz describes objections to accommodations as rooted in perceptions (which he describes as fears) that religious groups are deeply illiberal organizations that inflict substantial harms on their members and on others.[[42]](#footnote-43) Instead of complicating these perceptions, Horwitz cultivates the fear by warning liberals from furthering illiberalism and martyrdom by refusing accommodations.[[43]](#footnote-44)

## From a War Between Cultures to a War Within Culture

There are several important exceptions to the dominant culture war paradigm. Professor Sunder highlights the existence of “cultural dissent,” or “challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership.”[[44]](#footnote-45) Sunder criticizes the courts for their monolithic view of religion and argues that this approach risks ossifying culture in its traditional form. She argues that cultural challenges—many coming from devout women and LGBT individuals—should be acknowledged as claims of cultural and religious rights. Sunder elucidates the diversification of religion at the grassroots, but shares the dominant view of religion as rigid and anti-egalitarian at leadership.

In contrast, Professor Eskridge describes the gradual egalitarian shift in the attitudes of organized religion towards homosexuality and slavery and proposes that this shift contributed to the growth of antidiscrimination protections.[[45]](#footnote-46) Among other events, Eskridge describes an amicus brief against Texas’s Homosexual Conduct Law in *Lawrence v. Texas*,filed by “six denominations and twenty-three gay-affirming groups within other denominations”.[[46]](#footnote-47) Some of these groups considered homosexual sex a sin, yet believed that criminalizing homosexuality is un-Christian; others did not consider homosexuality a sin at all.[[47]](#footnote-48) Eskridge describes this event as part of a series of intense debates within and between churches on their attitudes towards LGBTs. Eskridge’s comparison between the religious response to homosexuality and to slavery demonstrates that dynamism is not only reserved to progressive denominations, instead it characterizes the most conservative denominations too.[[48]](#footnote-49) Conservative religion is not necessarily oppositional to equality.

Professor Wilson holds a unique position in this debate. At the descriptive level, she frequently affirms the culture wars paradigm as capturing the actual opposition between conservative religion and LGBT egalitarians. At the political and legal level, however, Wilson seeks to refute the paradigm as she believes that it is possible to “square faith and sexuality” through legislation that would offer a bargain between outlawing LGBT discrimination and including specific, well-tailored religious exemptions. Wilson focuses on achieving compromise between cultures, but significantly less on addressing the conflict within culture and its legal implications.

If religion is diverse and dynamic all the way *down* (as Sunder argues) and all the way *up* (as Eskridge argues), the conventional “culture wars” paradigm entirely misses the point. The conflict is as much within cultures as it is between cultures. Sunder and Eskridge nuance our understanding of the position of religion vis-à-vis equality, but how are we to reconcile their different accounts? In other words, what determines the position that religion takes towards equality challenges—oppositional (as emphasized by Sunder) or tolerant (as emphasized by Eskridge)?

A useful starting point for trying to answer this question lies in Professor Minow’s description of contemporary Church-State equality conflicts.[[49]](#footnote-50) Minow describes two conflicts that are almost the reversed image of one another, from start to finish.[[50]](#footnote-51) The first conflict involves a dispute between the Catholic Church and the San Francisco government over health insurance to same-sex partners.[[51]](#footnote-52) The Church initially opposed the city’s intention to oblige contracting parties (including the Church) to provide health benefits to same-sex partners. But ultimately, the parties negotiated a solution which allowed each employee to designate *any* member of the household—regardless of the relationship—to receive health benefits. Justifying the solution, the Archbishop explained that “[w]e would know no more or no less about the employee’s relationship with that person than we typically know…. What we have done is to prohibit local government from forcing our Catholic agencies to… recognize domestic partnerships as a category equivalent to marriage.”[[52]](#footnote-53) In contrast to the compromise achieved in San Francisco, Minow describes the crisis that evolved in Boston once news broke that Catholic charities placed children with LGBT parents.[[53]](#footnote-54) An internal conflict erupted within the Catholic community; lay Catholics supported LGBT placements but the Catholic leadership objected and sought an exemption from antidiscrimination law. Ultimately, the Church withdrew from providing adoption services in Boston.

Minow notes the puzzle posed by these contrasting stories of toleration and opposition and suggests that “attitudes of respect, flexibility, and humility can help generate new answers beyond ‘exemption’ and ‘no exemption’ when religious principles and civil rights laws collide.”[[54]](#footnote-55) This is a wise suggestion, albeit very general. I believe that specific lessons can be drawn from this puzzle, which can help us progress towards a better understanding of the religious position towards equality challenges—oppositional or tolerant. It is particularly helpful to note these lessons here, because they set up the stage for explaining my empirical strategy and findings.

The first and obvious fact to note about the San Francisco and Boston cases is that religious doctrine did not dictate their outcome. In both cases, the official position of the Church was (and still is) against recognizing same-sex marriage and partnerships. Yet in one case, the Church was able to reconcile its position with equality for LGBT families and in the other case it failed to do so. This outcome was also not a function of legal doctrine—both cities prohibit LGBT discrimination with no religious exemptions—or the initial status quo. In Boston, the Church was already engaged—on its own initiative—in placing children with LGBT parents, yet it ultimately withdrew from this practice. In San Francisco, the Church initially refused to provide health benefits to same-sex partners, yet it ultimately provided it. The dynamic can go both ways. If it was not religious doctrine, legal doctrine, or the initial positions, what can explain the opposite outcomes of these two cases?

The factor that I propose here, and which I will develop in this Article, is the contrast between public and private action. Minow notes that “high profile publicity… contributed to the failure of accommodation over adoption policies.”[[55]](#footnote-56) Comparing the two cases suggests that publicity had a broader influence. Publicity not only failed the Boston Charities low-profile placement of children with LGBT parents; it was *privacy* that facilitated the provision of health benefits to LGBT partners. Constructing a legal framework that allowed the Church to “not know” about “the employee’s relationship with that person”[[56]](#footnote-57) satisfied the Church’s interest in avoiding recognition of same-sex relationships as equal to marriage. A rule that links benefits with marriage requires LGBT employees to go public and thus requires employers to “know” the identity of the partner. In contrast, a rule that breaks the link between benefits and marriage avoids the dilemma by obscuring the identity of the partner. The fact that a self-imposed privacy mechanism removed the Church’s objection to providing benefits to same-sex partners—among other designated persons—is telling. The Catholic church—as did fundamentalist churches in the civil rights era[[57]](#footnote-58)—acquiesce in LGBT equality.

I began this Part with the argument that we must complicate the dominant view of the conflict between religion and equality as a war between cultures, and replace it with the understanding that the conflict is *within* culture as much as it is *between* cultures. This understanding brings an important question to the center of the discussion: what determines whether religion takes an oppositional or a tolerant position towards equality challenges? The answer necessarily involves many factors, as religious groups are as diverse as they are dynamic. As I will show in the remaining parts, the public/private distinction is one crucial factor. Its impact on conflicts between religion and equality is broad, systematic, and highly consequential.[[58]](#footnote-59) I will also show that the public/private effect is part of a broader framework that religious communities employ to regulate cultural challenges, a framework that I call *social impact regulation*. Religion’s attitude to gender and sexual equality is not monolithic, nor is it necessarily oppositional as the culture wars paradigm posits. A large part of what determines the religious response to equality—oppositional or tolerant—depends on the perceived impact of sexual nonconformity on others in the community and on the status of the religious norm. To explain how social impact regulation shapes the religious response to equality challenges, I turn to describe the methodology of the study and its findings.[[59]](#footnote-60)

# II. Overview of Methodology

The contributions of this Article rest on several layers of data and analysis. To facilitate the reading, this Part outlines and explains the methods used to obtain the data. It first explains why the dominant focus on court cases and judicial opinions is insufficient to produce an accurate understanding of conflicts between religion and equality. It then proceeds to describe the alternative methodology of this Article, that focuses on the practices and decisions of religious decision-makers.

## Studying the Conflict from Cases: The limitations

A long line of work by law and society scholars established that social disputes are dynamic processes that evolve in phases. Professors Miller and Sarat offered the metaphor of the “Dispute Pyramid,”[[60]](#footnote-61) that captures the evolution of disputes from injuries, through claims and confrontations with the injuring party, to the involvement of lawyers and finally to adjudication.[[61]](#footnote-62) Miller and Sarat defined this process as a pyramid because many disputes are dropped at each phase, as claimants settle their claims or choose to withdraw them altogether. The cases that ultimately become lawsuits are a small fraction of all disputes, and the cases that result in a judicial decision are only a tiny fraction among those. Miller, Sarat and others criticized legal scholarship for overly focusing on adjudication and failing to grasp its limited role in the reality of disputes.[[62]](#footnote-63)

Focusing on court cases is particularly problematic in the context of equality claims, where it is likely to lead to biased evaluation of the characteristics of the conflict. In a seminal survey of employment antidiscrimination cases, Siegelman and Donohue[[63]](#footnote-64) discovered significant differences between published and unpublished cases. Published cases had thicker files and more plaintiffs, they were more likely to be class actions, to include allegations of continuous violations, to seek more forms of remedy, to yield larger monetary awards, and to be submitted faster than unpublished cases. Published cases were also less likely to include discrimination in firing and more likely to include retaliation.[[64]](#footnote-65) Siegelman and Donohue did not break their results by type of employers (e.g., religious v. non-religious) and bias is expected to be even higher in disputes involving religious institutions. Early sociological research on the relationship between religious communities and the law showed that orthodox religious communities turn away from litigation and prefer internal dispute settlement mechanisms.[[65]](#footnote-66) Communal norms and institutions often discourage members from turning to secular courts, and filing suit, or merely consulting a lawyer, can result in retaliation.[[66]](#footnote-67) Communities might also attempt to constitute religion through contract to prevent the application of state norms.[[67]](#footnote-68) Given recent the tiny fraction of discrimination grievances becoming cases[[68]](#footnote-69) and the additional suppression of conflict in religious communities, analyzing conflicts between religion and equality based on cases is unlikely to provide an accurate picture of the conflict.[[69]](#footnote-70)

## Studying the Conflict from Within: A Mixed-Methods Approach

Given the difficulty of relying on court cases and the scarcity of alternative data on conflicts between religion and equality, I rely on a multistage, mixed-methods methodology that I first presented elsewhere.[[70]](#footnote-71)

This approach examines the decision-making involved in the application of religious norms to equality challenges within the community, using two complementary methods: qualitative, in-depth interviews and a quantitative experimental survey.[[71]](#footnote-72) *In-depth interviews* provide a rich observation of the motivations and experience of religious decision-makers and allows for the generation of hypotheses through multiple, real-world observations. *The experiment* provides a controlled test of the hypotheses, captures real-time decisions, enables the determination of causality, and affords greater generalizability. While each method has its pitfalls, they complement and compensate for each other. The small-n and selection concerns that characterize interview-based research are mitigated by a large-n sample and the randomized controlled design of the experiment. Concerns about realism and “ecological validity”—namely whether experiments provide accurate simulation of real world decisions—are mitigated by designs drawing on real world situations (from the qualitative data) and by the qualitative evidence that documents real-world practices.[[72]](#footnote-73) Thus, the integration of qualitative and quantitative methods enhances the relevance, generality, and validity of the findings[[73]](#footnote-74) and constructs a round portrait of decision-making under normative conflicts between law and religion.

Qualitative data collection began with in-depth interviews of 41 educational leaders, 17 Roman Catholics in the U.S and 24 Orthodox Jews in Israel.[[74]](#footnote-75) Jewish and Catholic communities, despite their considerable ritual, theological, historic and organizational differences,[[75]](#footnote-76) have been involved in similar legal and social battles in recent years over their regulation and treatment of women, reproduction, and LGBT individuals.[[76]](#footnote-77) Catholic institutions have been involved in numerous conflicts over the dismissal of pregnant out-of-wedlock teachers[[77]](#footnote-78) and LGBT teachers and students.[[78]](#footnote-79) Orthodox communities in Israel sought the dismissal of pregnant out-of-wedlock teachers[[79]](#footnote-80) and an LGBT tutor[[80]](#footnote-81) and Orthodox rabbis have sparked public uproar following speeches that condemned homosexuality, LGBT people, and the feminist movement.[[81]](#footnote-82) Collecting data in both communities was not intended to be a comparative exercise, but an independent exploration of similar conflicts that occur in different terrains; yet, as data collection progressed, it became evident that these communities approach equality challenges and regulate sexual nonconformity in ways too similar to be analyzed in separate.[[82]](#footnote-83) Ultimately, having evidence from two religious groups that face similar cultural challenges in two different legal regimes and social contexts raise intriguing questions about the interplay between religion and society and contributes to the robustness and breadth of the findings.

The interview sample consisted of managers, administrators, and teachers in religious schools as well as informal educational institutions (see Table 1).[[83]](#footnote-84) The focus on educational institutions resulted from their central normative function in religious societies[[84]](#footnote-85) and, relatedly, the amount of conflict which they attract and generate.[[85]](#footnote-86) Interviewing the leaders of these institutions offered the possibility to learn from individuals who served as the regulators and enforcers of religious norms, many of whom were directly involved (as it turned out) in deciding conflicts similar to the *Zmuda* (the dismissed LGBT teacher) or *Plonit* (the dismissed pregnant out-of-wedlock teacher) cases. The interview instrument was developed to identify the key conflicts, considerations, and strategies used by the religious leaders to manage conflicts between law and religion in their field. In line with Austin, Sarat, and others,[[86]](#footnote-87) I define these conflicts broadly, to capture both instances that developed into legal cases (as in *Zmuda* and *Plonit*) and instances that developed differently.

Additional data was collected from documents issued by religious schools and from religious newspapers and websites published in the U.S. and in Israel during the period of the study. Notably, the qualitative fieldwork objective was not to generate findings that would be, in and of themselves, statistically representative or generalizable to other populations;[[87]](#footnote-88) rather, the goal was to offer a rich theoretical understanding of the phenomenon, generate hypotheses that could be quantitatively tested, and realistic research materials for the experiment. Appendix A contains a full description of the qualitative methods.

**Table 1. Summary Statistics of the Interview Samples**

|  |  |
| --- | --- |
| *Jewish Orthodox in Israel* |  |
| Women | 0.46 |
| Teaching experience | 21.7 y |
| Residence (national-orthodox)  Center area  Jerusalem  Judea & Samaria  Israeli North/South | 0.25  0.25  0.25  0.29 |
| Position  Teacher  Principal  Superintendent  Administrator  Rabbi  Multiple (overlap) | 0.42  0.29  0.13  0.17  0.25  0.29  N = 24 educators |
| *Roman Catholics in the United States* |  |
| Women | 0.47 |
| Teaching experience | 26.12 y |
| Residence |  |
| New England  Midwest  South  West Mountains | 0.29  0.41  0.18  0.12 |
| Position |  |
| Principal  Superintendent  Administrator  Clergy  Multiple (overlap) | 0.29  0.35  0.35  0.12  0.12 |
|  | N = 17 educators |
| *Notes:* Unless otherwise noted, the table presents proportion of sample participants in each category. The multiple (overlap) category stands for holding several concurrent positions. | |

Findings from the qualitative fieldwork grounded and focused the experimental phase of the research, in two ways. First, the qualitative data indicated that conflicts over gender and sexuality were among the primary tensions preoccupying religious educational leaders, and that the most concerning dilemmas involved unmarried pregnancy and same-sex relationships (see Table 2). Sixty-three percent of American leaders and 42% of Israeli leaders personally dealt with or were concerned about LGBT issues and 75% of Americans and 58% of Israelis dealt with or were concerned about unmarried pregnancy.[[88]](#footnote-89) In light of these findings, the materials used in the experiment were based on these dilemmas.

**Table 2. Types and frequencies of conflicts that concerned religious leaders in the United States and in Israel**

|  |  |  |
| --- | --- | --- |
| Dilemmas or conflicts regarding… | United States | Israel |
| LGBT | 0.63 | 0.42 |
| * LGBT teacher | 0.44 | 0.33 |
| * LGBT student | 0.19 | 0.29 |
| * LGBT parent | 0.13 | 0.13 |
| Pregnancy out of wedlock | 0.75 | 0.58 |
| * Of teacher | 0.56 | 0.54 |
| * Of student | 0.25 | 0.08 |
| * Of someone else | 0.13 | 0.17 |
| Other conflicts | | |
| * The contraceptives mandate | 0.31 | **-** |
| * Gender integration/separation | **-** | 0.21 in schools  0.13 in the military |
| * Illegal immigration of students | 0.06 | - |
| * Settlement evacuation | **-** |  |
| * Expelling/screening students in contravention of education law (not for sexual reasons) | **-** | 0.21 |
| *Note*: The table presents the share of interviewees in each sample that described a specific case or an example of a conflict related to the category. Only interviewees who raised the dilemmas independently of the interviewer and/or personally encountered these dilemmas were included.[[89]](#footnote-90) | | |

Second, the experiment was designed to test two primary hypotheses that emerged from the qualitative data about factors that might shape decisions to dismiss and exclude sexually nonconforming individuals, in tension with equality law. Specifically, the experiment tested whether religious decisions are shaped by social impact, as operationalized by sphere (whether nonconformity was public/private) and role (by students/teachers). Subjecting these hypotheses to a controlled and randomized design enabled a test of their impact on real-time decision-making and an evaluation of the potential magnitude of their effects. In addition, the experiment allowed for a test of more sophisticated questions, including whether sphere and role interact and whether the impact of social impact regulation is limited to the original dismissal decision or carries to compliance decisions following an unfavorable judicial decision. The analysis was also able to control for the impact of various demographics, therefore to examine the robustness of the effects. The experiment was conducted in Israel and recruited a large sample of Jewish Orthodox participants (N=559), including a substantial sub-sample of current or former teachers (a third of the sample). The hypotheses, sample, procedure, and results are described in Part IV and in Appendix B.

After presenting the methodology used to examine the decision-making involved in the application of religious norms to equality challenges, I turn to the findings, starting with the first phase that included qualitative, in-depth interviews with religious educational leaders.

# III. The Social Impact Regulation of Equality Challenges

This Part provides an initial answer to the question I set forth in Part I: what shapes the religious response to equality challenges, and particularly whether religion responds with opposition or tolerance to these challenges? The qualitative fieldwork yielded a set of important findings with respect to this question. In the U.S. and in Israel, the response of religious educational leaders to the challenges posed by sexual nonconformity systematically varied between opposition and tolerance based on social impact concerns. These concerns were predicated on a shared belief that normative deviations create a risk that others will follow suit and erode the religious norm. Accordingly, conditions that define the nonconformist’s scope of social impact—specifically, her role and sphere of action—guide the application of religious norms to particular conflicts. Social impact regulation is far from strict enforcement and as a result, it simultaneously increases tolerance and inclusion of sexual nonconformists *and* places limitations on their ability to express themselves within the community. The evidence traces a set of the contours of the religious response to equality challenges and fleshes out the discussion of “war” within culture. In what follows, I present the findings by distinctions (sphere and role) and by samples (Israel and the United States). I conclude this Part by outlining its limitations and the questions it presents for the second phase of the research.

## Sphere: Public is Out, Private is In

*Ms. Reuven: Severe violations… —those that the community normally views as extremely threatening—are less threatening when they are private. The community can live with that. And the community also bothers not to take interest. There is a sphere of personal sin that the public is not supposed to invade. It is a very important breathing space.*

*Mr. O’Malley: [W]e are not going on a hunt to try to find what people are doing right and wrong in their world and try to enforce these standards. But when they're made apparent to us, or they become public information, then it becomes our responsibility to say, “Wait a minute.” We also have to be public in our response… So we enforce the teachings of the church. That's why we exist.*[[90]](#footnote-91)

### Israel

Religious educational leaders divided the space into public and private spheres, each ruled by different standards. For the leaders, schools were the prototype of the public sphere: a public enterprise, a common space through which the religious public express and realize their faith. Rabbi Asher, a yeshiva head, emphasized the shared interests of the entire community in the school, where “the parents or the students, I take them together as one package, wish to educate their children according to their values.” Mr. Binyamin, head of a religious youth movement, described schools as “a reflection of the religious worldview.” This view of schools, as a public sphere aimed to serve and reflect the religious community, was tied to the belief that schools ought to be administered according to religious norms. Ms. Zvulon noted that schools are where individuals “cannot go against the spirit of Jewish law” or “cease holding the educational line of the religious school.”[[91]](#footnote-92)

In contrast to the high standards expected in the public sphere, Jewish educational leaders tended to tolerate nonconformity—sexual or otherwise—in the private sphere, as long as the nonconformist continued observing religious norms in the public eye. Ms. Zvulon—who insisted on full adherence to religious norms in public—asserted, “no one should enter the teachers’ bedrooms and tell them what to do in their own home.”

The distinction between behavior in school and at home was very common,[[92]](#footnote-93) yet it was more than a moral judgment between prohibited and permissible conduct. It was also a dynamic tool that leaders used to turn a prohibited conduct into a permissible conduct, or at least tolerable one. For example, religious leaders who considered unmarried pregnancy a problem suggested “not publicizing it” or putting “[the teacher] on a leave of absence during pregnancy, perhaps even pay[ing] her salary during that time.”[[93]](#footnote-94) These policies were noted as alternatives to dismissal—solutions that keep nonconformists in the system. Mr. Shimon, a rabbi and principal of a yeshiva high school, had also avoided dismissal by applying a private/public policy to homosexuals in his school:

“My solution to all of these issues, the one we formed in this school with respect to all of these conflicts—religious lifestyle, sexual identity—is a distinction between behavior in *tzina’a* [private] and in *parrhesia* [public]. … Thus, I will tell [a gay student] that I cannot allow him to open a gay club in school because we expect boys to abstain from sexual relations during high school, with neither boys nor girls. But if he’d want to discuss this privately we will readily do so, and he will be able to study here and be part of our community. ”

The policy enacted by Mr. Shimon distinguishes between public LGBT behavior, which is prohibited, and private expressions of LGBT identity, which are allowed. Mr. Shimon applied a similar policy to LGBT teachers:

“if he would be willing to keep this private, that is, assuming he has a partner that he would be willing not to walk the streets hugged with him and—[thinking]—not to discuss this with students… And not to get involved with students, then I will allow it here.”

Notably, this account differentiates between students and teachers, in that students are expected to be celibate regardless of their orientation and the expectations from teachers are more detailed, but the contours of the solution are essentially identical. In both cases, individuals may communicate about their nonconformity to leadership but are instructed to keep it private from peers and subordinates. The application of the public/private distinction is dynamic—it begins with the notion that the school is a public religious sphere, yet continues with the formation of islands of privacy within the public sphere, contained in private discussions between LGBT individuals and their supervisors.[[94]](#footnote-95) This policy thus resembles “don’t ask, don’t tell” (DADT), but it also relaxes the “don’t tell” prohibition by allowing and even encouraging individuals to open up to their supervisors*.*

In forming his policy, Mr. Shimon noted the Halakhic distinction between *tzin’aa* [private] and *parrhesia* [public], which has appeared in relation to several discussions of tensions between individual behavior and religious prohibitions throughout rabbinic canonical legal texts, most significantly in the influential Babylonian Talmud (Bavli).[[95]](#footnote-96) In Bavli, Kiddushin 40a, for instance, the distinction appears as an instruction to an individual tempted to sin: “if a man sees that his [evil] desire is conquering him, let him go to a place where he is unknown, don black and cover himself with black, and do as his heart desires, but let him not publicly profane God’s name.” The distinction was also discussed as a criterion for martyrdom. Bavli Sanhedrin 74a-75a instructs that “in public, one must be martyred even for a minor precept rather than violating it,” if ordered to do so under a “royal decree” aimed to abolish Judaism (situation known as *Shmad*). Notably, in this context, the public/private distinction is applied in response to the appearance of a foreign legal norm—the royal decree—that creates a conflict with and within religious norms.[[96]](#footnote-97) The distinction between private and public plays a vital role in these examples—as well as in numerous other contexts—in structuring the boundaries of the rabbinic society and the possibilities of tolerating deviant behavior.[[97]](#footnote-98) In some cases, including these examples, the distinction is related or justified on the basis of the broader influence the behavior would have on the community.

The interviews shed further light on the centrality of the private/pubic distinction in the leaders’ accounts of conflicts. Public/private policies were substantially motivated by social impact, or “contamination” concerns.[[98]](#footnote-99) Religious leaders repeatedly voiced concerns over what students might think and do if news of the nonconformity will spread or if schools failed to react and signal that the normative violation was unacceptable. Several educators cited a concern that female students would follow the pregnant teacher’s lead and have children outside of wedlock. Ms. Dan, a high school teacher, said: “When someone does such thing, as an educator, in a school, of young girls, one might influence their future choices in life. To exit the educational path that the *ulpana* is supposed to give them.”[[99]](#footnote-100) Another educator referred to a leave of absence as a way “to prevent embarrassment from the students and internal conflict while [the pregnancy] lasts.” Yet another said “the problem is less the specific case, and more that it will become the norm.”

Social impact concerns were related to the decision to strictly enforce religious norms *and* to the decisions to relax enforcement, tolerate nonconformity, and even actively assist it. Religious leaders derived these concerns and evaluated their intensity from the context within which sexual nonconformity occurred, primarily the private/public distinction. Based on these concerns, they created private/public policies that served both as a form of risk regulation and as a conditional means of inclusion. Furthermore, Jewish leaders often implicated themselves in the protection of nonconformity through “discretizing” or deliberately ignoring it. This practice in particular emphasizes the tension between the normative premise of the leaders—that sexuality norms are binding and that the school has a role in enforcing them—and the path of selective enforcement that they ultimately chose to apply. It is noteworthy that uses of the distinction varied. One leader, Rabbi Asher, acknowledged the distinction but rejected it (“I prefer deciding by principle and not by visibility considerations.”). Others thought that carving a discreet solution would be easier in the LGBT case than in the pregnancy case, “because everyone can see [pregnancy].”[[100]](#footnote-101) Overall, the findings map a systemic sphere-based variation in the religious response to and regulation of gender and sexual nonconformity that moderated the emergence and escalation of conflict.

### United States

Catholic educational leaders shared the view that religious schools ought to be administered according to the teachings of the Church, and in a way that is publicly observable. Yet, like their Jewish counterparts, they also recognized a legitimate space for private sin. As principal Peterson put it:

A teacher may never bring public scandal or publicly behave in a way that is contrary to the teachings of the church. […] And there have been teachers that I know are gay, that have lived very, to the best of my knowledge, celibate lives. They have been nothing but outstanding role models of professionalism and care to our students. I can tell you that, sadly, there have been instances where I have had to let a teacher go. Not because of sexual orientation, or because they were living with a fiancée or engaged in a relationship. *But that they made that public*. You know, I never went witch-hunting to find out how my teachers were living. But if they really made it a public issue, and it became publicly known, then *I had no choice*. (Emphasis added.)

The view that private nonconformity is tolerable but public nonconformity requires religious enforcement was widely shared. Mr. Jefferson, a superintendent of schools, emphasized that the decision to forego religious enforcement in the private sphere was deliberate:

We do not go unnecessarily prying into our teachers’ and administrators’ personal lives. We don't want to peek through bedroom windows, and living room windows. *We don't want to know too much*. And we're not going to act on something that we don't know, obviously.[[101]](#footnote-102) (Emphasis added.)

Peterson and Jefferson describe a common implication of the public/private distinction: refraining from knowing, or willful ignorance. In addition, and similar to their Jewish counterparts, Catholic leaders also created policies intended to *hide* religious nonconformity, thereby making it “private”. One principal described his policy with respect to same-sex marriage as, “let’s just make sure that an e-mail or an invitation [to the wedding] doesn’t go out to every faculty member… that the employee is respectful of the teachings of the church and is not bringing his partner to these events.”[[102]](#footnote-103) As applied to the case of unmarried pregnancy, one administrator explained, “You could put somebody on leave; they could take the person out of the classroom and put them in another position.”[[103]](#footnote-104) While efforts to “privatize”, discretize, and hide nonconformity were common, the limitations of the public/private distinction were recognized by Catholic leaders as they were by Jewish leaders. As one principal noted, “it's very hard to hide someone who's pregnant… I think if someone was gay it would be easier to hide than a pregnancy in the building.”[[104]](#footnote-105) This difference in “privatizability” differentiated between the LGBT and pregnancy cases, at least for some leaders.

The problem of social impact consisted of several overlapping concerns. One concern is about the influence of nonconformity on students. As one superintendent said: “To have an educator, somebody who's forming the moral beliefs of our young, engage in a public act, or speak in direct opposition of the church, is a problem.”[[105]](#footnote-106) The second concern was answering to parental expectations. As Mr. O’Malley said:

Certainly we exist as a private enterprise because people… would prefer the private enterprise compared to the public one. And when I choose to send my children to a Catholic school, then my expectations are that the employees there are going to teach the children the Catholic faith. And they're going to exemplify that in their public life. And when that is in conflict, we're in conflict.

Although Catholic leaders did not cite Canon law or doctrine, their use of the private/public distinction and their particular concern for social impact resonate with the Gospel and with contemporary discussions.[[106]](#footnote-107) A recent application of public/private distinctions to facilitate the inclusion of sinners in the community appears in the Buenos Aires and Rome guidelines regarding remarried and divorced couples. The Buenos Aires Bishops wrote that “It may be right for eventual access to sacraments to take place *privately*, especially where situations of conflict might arise. But at the same time, we have to accompany our communities in their growing understanding and welcome, without this implying *creating confusion about the teaching of the Church* on the indissoluble marriage.” (emphasis added).[[107]](#footnote-108) These guidelines were endorsed by the Pope, and the Rome diocese followed suit, allowing the communion to take place “in a discreet manner,” “but not however in the case in which, for example, [the couple’s] condition is shown off ostentatiously as if it were part of the Christian ideal, etc.”[[108]](#footnote-109) Notably, the public/private distinction is not articulated as a formal rule in these documents; nevertheless, it guides the development of the Catholic response to challenges of nonconformity and inclusion.

Overall, Catholic leaders faced similar conflicts as their Jewish counterparts and distinguished private from public for the same purposes and with the same social impact concerns in mind. The public/private distinction provided answers to equality challenges and allowed them to regulate and reduce conflict within their communities (and, transitively, with the law) by focusing enforcement on cases perceived as public challenges to religious normativity and withdrawing enforcement from private cases. This was apparent also in their consideration of the role of the nonconformist, to which I turn now.

## **Role: Heightened Positions, Less Tolerance**

*Interviewer: So where does this difference come from, between your position towards students and your position towards teachers?*

*Ms. Fordham: One's a role model, one's not.*

*Interviewer: So the students do not need to serve as role models for each other?*

*Ms. Fordham: Well we would hope [so]. And most do not become pregnant, so I think it's working, for the most part. But when they do, again, they're forgiven and it's not a livelihood. It's not like they're fully formed adults. So there needs to be different standards.”*

Equality challenges can be made by many constituents of the religious community. In recent years, teachers, coaches,[[109]](#footnote-110) cafeteria operators,[[110]](#footnote-111) and students[[111]](#footnote-112) argued that they were discriminated by religious (often Catholic) schools based on their sexual orientation. These cases suggest that being openly gay and particularly in a same-sex relationship mark the exit sign for LGBT individuals. The data suggest a more nuanced answer. In addition to the sphere of nonconformity, the *role* of the nonconformist was relevant to the application and enforcement of religious norms. Religious role-bearers were held to high standards and subject to stricter enforcement than “ordinary” people, who were held to lower standards and more relaxed enforcement. The common distinction in the data was between teachers and students. Clearly, there are many reasons to differentiate these populations. Firstly, students are young and may be perceived as fragile, and thus in greater need of aid and counsel.[[112]](#footnote-113) Secondly, leaders may perceive students as malleable and “not fully formed,” and thus better candidates for rehabilitation than adult teachers. Lenient treatment might be motivated by hopes to bring students into conformity.[[113]](#footnote-114) Students are also *expected* to deviate from the norms, as this is what students typically do.[[114]](#footnote-115) Finally, schools also depend on the business of students and parents, which may lead them to factor their interests and (perceived) preferences into the enforcement policy.[[115]](#footnote-116)

These are all plausible reasons for distinguishing students and teachers. Yet another dimension of the teacher-student distinction is the particular relationship between role and social impact. Specifically, religious leaders viewed (some) roles as more influential than others and more likely to shape community norms. Teachers in particular were considered as more influential than students, and under social impact regulation that meant stricter application of religious norms to teachers. It is noteworthy, however, that role was not exhausted in the teacher/student relationship. Some leaders, both in Israel and in the U.S., applied the heightened teacher status to every employee in the school apparatus, whether she was a teacher or a cafeteria employee, perceiving any formal role as a source of social impact. Others viewed parents as holding an intermediate normative role. Hence, role is probably a more flexible concept; for lack of space, I focus on the teacher/student distinction, which was most common, and leave the rest to future research.

### Israel

Jewish leaders perceived teaching as a position of social impact. Teachers were perceived as “role models” who must exemplify the ideal of religious life through good deeds and personal conduct.[[116]](#footnote-117) This power came with great responsibilities, because teacher nonconformity could inspire the same behavior in students. Discussing the pregnancy case, Mr. Levi, a national-orthodox vice principal, said:

In an institution that educates students to raise a family… outliers cannot teach, lest they become models of non-ideal alternatives. We educate students to follow the best possible alternative: according to the Jewish view, a family should look like this and that, and one should get married at this and that age. Whoever disrupts this model should not be present at this intersection, at this stage.

Notably, Jewish leaders were particularly concerned about voluntary unmarried pregnancy by women who decide to raise a child alone, typically via artificial insemination. Based on social impact concerns, many educational leaders believe that it is imperative to remove such teachers—even at the expense of going to court—to prevent students from wrongly assuming that deviating from the traditional family model is permissible. Mr. Cohen, a national-orthodox principal, stated:

[The case] will get to court if it must. I would not prefer that, I would have preferred to talk things over [and say] ‘I can understand your personal needs but, as the saying goes, not in our school.’ Indeed, notwithstanding my empathy towards her, I can certainly see myself terminating her, certainly if the matter will surface in student talk. After all, we are role models who make things legitimate or illegitimate.”[[117]](#footnote-118)

The same behaviors and conducts that have resulted in dismissal for teachers were tolerated to a greater extent when enacted by students.[[118]](#footnote-119) This was particularly evident in the LGBT dilemmas, as unmarried pregnancy among Jewish students was uncommon. While leaders were concerned, to some degree, about students’ negative influence on each other, they did not see the students’ impact as a concern sufficiently strong torequire expulsion. Students were not required to model the norm and therefore their nonconformity did not trigger the same social expectations. Hence, many educational leaders believed that students should stand corrected, but should not be removed or excluded.

### United States

Dismissals due to pregnancy out of wedlock are very common in the U.S. across all religious denominations. Catholicism in particular also forbids IVF procedures (also within marriage), and some recent dismissals involved such pregnancies.[[119]](#footnote-120) My Catholic interviewees, however, had more experience with “traditional” unmarried pregnancies. This presented an opportunity to examine potential role differences, because “traditional” cases were by no means a teacher-only phenomenon (unlike artificial insemination). How then did Catholic leaders treat unmarried pregnancies of teachers and students?

For teachers, pregnancy out of wedlock typically resulted in some regulation—with differing levels of tension with antidiscrimination law based on the specific policies. Teachers were dismissed, put on leave (with or without pay), moved to a back-office position for the duration of the pregnancy, or even encouraged to marry. Students, in contrast, were almost always kept in school and counseled through their pregnancy. LGBT students were treated similarly; all other things being equal, nonconforming students were more likely to be kept part of the school community whereas teachers were more likely to be excluded. Ms. Peterson, a retired superintendent and principal, illustrated this point. Referring to teen pregnancy among students, she said: “I had three girls that year that were pregnant. All three of them were permitted to remain in school […]. … And then, I also know that it was around that same time… that a student came out to our senior counselor, that she was gay. And our senior counselor worked with her throughout the year. And again, there was no talk of dismissing her.”

I then asked Ms. Peterson about a teacher in a similar condition, describing to her that, “Often, or at least so it seems, [these cases] are reported to have actually resolved in the school terminating the teachers.״

Ms. Peterson: Oh, absolutely!

Interviewer: Why?

Ms. Peterson: Because you know, you signed a contract; you sign a letter of agreement. And part of that agreement is that you understand that you are expected to not bring public scandal or to behave in a way that's contrary to the teachings of the faith."

Ms. Peterson’s entirely different reaction to sexually nonconforming teachers as compared with students was commonly shared among her peers. Most Catholic educational leaders, like their Jewish counterparts, traced the difference between the cases to teachers’ role and social impact. Ms. Fordham’s succinct opening quote—“one’s a role model, one isn’t”—captures the thrust of this approach. Superintendent O’Malley elaborated on the social impact concern that was particularly relevant to teachers:

It's very difficult to expect a student to learn from a person who says that abstinence is the only moral way we can live our lives, and yet they don't practice what they are teaching children..

The concern over teachers’ impact was a central motivation for dismissal. Ms. Fordham, for example, quoted bishops who said, “We don't want children to think there are no consequences for engaging in sin.”

I observed that the role-based distinction operated similarly, and for the same reasons, in sexual identity cases. Mr. Jefferson, a superintendent, justified the decision to dismiss the vice principal who married his boyfriend in the *Zmuda* case:

To have somebody who is working with young people, particularly in a leadership role, who signed a contract that clearly says that he was asked to support and live up to the teachings of the church. I can see why the archdiocese had to take that step [of dismissing him].

At the same time, Mr. Jefferson’s approach to students who come out as LGBT was careful and compassionate. He did not hold students to the same normative standards as teachers (“if you are gay, and even if you are in a homosexual relationship, […]you're not going to get expelled. There's probably going to be no formal punishment exacted against you.”). Notably, the role distinction often implied a ‘rehabilitative approach’ to students. This approach did not forsake the validity of religious norms, but it altered their application and enforcement. Instead of grounds for punishment and exclusion (as in the case of teachers) the same norms served as a source of guidance and counseling in the case of students. Social impact regulation, in its focus on role, reflects once again a systemic variation—and latitude—in the application of religious norms. A rule that “needs to be enforced” on one person is reinterpreted for another.

The application of role was also dynamic in scope and varied between leaders. On the expansive side of the role model argument we find leaders, including Mr. Cohen in Israel and Ms. Fordham and Peterson in the U.S., who did not distinguish between teachers of religious and secular subjects and expanded the role model category to virtually every school employee, arguing that whoever might be having a negative impact should be removed (Fordham: “I don't think there's a difference between teachers and other employees.… In the schools I’ve been associated with, if a teacher's assistant or a cafeteria worker became pregnant out of wedlock, she would be treated the same way as a teacher.”)[[120]](#footnote-121). These accounts did not distinguish, as legal doctrine often does, between employees who hold active religious roles (for example, leading students to prayer)[[121]](#footnote-122) and employees in back-office positions or teachers of secular subjects.[[122]](#footnote-123) Yet in both samples, educational leaders generally shared the idea that unmarried pregnancies and same-sex relationships, as well as other types of nonconformity, should not serve as grounds for dismissal in non-educational settings, where employees are not meant to serve as models of religious norms for others to follow.[[123]](#footnote-124)

One interesting difference between the U.S. and Israeli samples was that American educational leaders were more likely to speak about teachers’ responsibilities in contractual terms and to use legal jargon.[[124]](#footnote-125) However, the increased legalism in discourse did not seem to substantial differences in practice. The Catholic approach was incredibly similar to the Jewish approach (although they rarely talked about it, Orthodox schools in Israel also include religiosity clauses in their employment contracts, J11-2). Put simply, despite differences in legal doctrine and culture between Israel and the U.S., Jewish and Catholic leaders described their expectations, standards, and normative policies towards teachers and students in remarkably similar terms. Their shared understanding of the religious enterprise at large, rather than the particulars of their faith or their understanding of the law, appeared to define their approach. Notably, in both communities, the selective enforcement of religious norms did not seem to result simply of scarcity of resources or preferential treatment of a favored group, the typical examples discussed in the literature ([Smith and Visher, 1981](http://www.sciencedirect.com/science/article/pii/S1755309111000037" \l "b0180); Becker, 1968).

## Questions and Limitations

The qualitative data suggest that distinctions based on role and sphere operate on the basis of a shared assumption: that a normative deviation creates a risk that others might follow suit, and therefore the conditions that define the nonconformist’s scope of influence—her role and the sphere in which she acts—are relevant to the application and enforcement of religious norms in particular cases. While both sphere and role distinctions are founded on concerns that nonconformity might spread, they also allow it to persist. As a result, social impact regulation simultaneously narrows the expression and increases tolerance towards sexual nonconformity in religious institutions. These findings bolster the explanation I offered in Part II(B) to the puzzling difference between the San Francisco and Boston controversies over LGBT relationships and parenting.[[125]](#footnote-126) The findings also explain why publicity and privacy are important from a religious perspective and indicate that the reach and relevance of social impact regulation is broader than these two controversies. It appears in Judaism, in addition to Catholicism; in relation to unmarried relationships and pregnancies, in addition to LGBT issues; and in educational institutions, in addition to the church and its charities. Social impact regulation emerges as a set of factors that shapes the religious response to equality challenges along a broad range of situations.

Alongside these insights, the data also raise several questions and limitations. First, interview-based research has inherent limitations, including selective, non-random small-n samples and a potential interviewer effect. For example, it is possible that interviewees felt pressed to distinguish cases to appear forthcoming and compromising, or that the distinctions they made were triggered by the questions. These concerns can be addressed by several methodologies, one of them is conducting an impersonal, large-n study, such as an experiment. In an experiment, the intimacy that is both the strength and weakness of an interview setting is eliminated and any remaining demand effect can be controlled by design.

A second and more important limitation is that the interviews cannot discern whether sphere and role are the actual factors shaping the leaders’ decisions or only justifications formulated after the act. The significance of the findings depend in large part on the answer. If variations in sphere and role have causal impact on decision-making, it means that they can change the outcome—change the response to equality challenges. If, on the other hand, sphere and role only serve to explain decisions after they were already made under the impact of other factors, they cannot inform our research question. This limitation can be addressed through an experiment, which is the primary scientific tool to answer causal questions.

Third, it is difficult to conclude, based on the interviews, whether religious leaders sufficiently considered the legal aspects of the dilemmas they described. Lawyers were not involved in most of the conflicts described by religious leaders in both countries, and most leaders did not refer to law as an influence on their decisions and it was not clear that they are even familiar with what it dictates. Therefore, the concern is that sphere and role reflect internal modes of decision-making that would disappear when law is salient. The experiment therefore expands the examination and situates sphere and role in a legal context, in two ways. First, the decision-making dilemmas included in the experiment explicitly noted equality law. Second, the experiment examined changes in the relevance of sphere and role following a legal proceeding, by investigating whether their impact extends to compliance with unfavorable court decisions. Such investigation can also provide an estimate of the rate of religious objection and how it might vary based on social impact concerns.

Another question that the interviews do not answer relates to the relationship between role and sphere. More specifically, how do these distinctions relate to each other and what is their relative impact? One possible interaction could be mutual reinforcement. Consider Mr. Jefferson’s account:

[T]his was a case where a person in *leadership* went through a *public* ceremony, that I'm fairly confident he was sure contradicted the teachings of the church. (Emphasis added.)

The compounding of publicity and role, which appeared in several interviews, blurs the independent contribution of each distinction to the decision to exclude or tolerate the teacher and raises the question whether these distinctions are actually independent. An alternative form of interaction is moderation, which was salient in the discussion with Ms. Paul. This principal described a decision to “discretize” a student’s unmarried pregnancy by sending the student home during pregnancy and reinstating her afterwards. When asked whether the same would apply to a teacher, she said:

Ms. Paul: I don't think that would probably be an option for the teacher…. Probably because of the roles, they serve as a Catholic teacher in a Catholic school, [and need] to abide by Catholic teachings.

Interviewer: Role towards whom?

Ms. Paul: The role models they are to the children. Like leading by example.

Interviewer: Would that would make a solution of staying at home and then coming back impossible?

Ms. Paul: Not an option, not in my opinion.

Ms. Paul’s selective application of the sphere distinction indicates a belief that discreet solutions are conditional upon role and thus suggests that the application of sphere is moderated by role. More generally, these accounts stresses the need to examine the impact of role and sphere independently, to determine their relationship and relative contribution to social impact regulation. Such a test is rarely possible in real-world interactions, but an experiment can achieve this goal by design, as I will show below.

For all these reasons, I proceeded to conduct an experimental test of the theory, as explained in the next Part.

# IV. The Experiment

## Overview and hypotheses

The qualitative data suggests two important relationships that concerns the conditions under which the application of religious norms to equality challenges is likely. The first relationship is related to the sphere of nonconformity. The second relationship is related to the role of the nonconformist. This leads to the following hypotheses, that can be experimentally tested:

**Hypothesis 1a (sphere)**: Dismissal of sexual nonconformists will be higher when the nonconformity is public than when it is private.

**Hypothesis 2a (role)**: Dismissal of sexual nonconformists will be higher when the nonconformist holds a normative role.

These hypotheses provide a straightforward test of the primary qualitative insights. Yet distinguishing between these effects was important not only for the purposes of testing their causal impact, but also to clarify their relationship and their relative contribution—namely, *how much* impact each of them has—to social impact regulation. Notably, I made no specific prediction regarding the interaction between role and sphere, as no conclusive trend emerged from the interview data. However, I did examine interaction effects.

An important question then remains: what effect, if any, sphere and role have when conflicts escalate? For example, do these factors influence the willingness to obey unfavorable court decisions? Answering this question is important to understand the potential scope and limitations of social impact regulation. Such test could also clarify the reasons underlying social impact regulation. If social impact concerns are about the exposure of others to nonconformity, we would expect that once the dispute becomes public knowledge through the legal process, the gap between the private and the public conditions would close. Yet with respect to role, the interviews suggest that concerns regarding social impact stem from the normative authority of the nonconformist, an aspect that does not change in the legal process. Therefore, social impact regulation predicts that role would have a continued effect on compliance decisions, whereas the effect of sphere would decline. Note that tests of these hypotheses require accounting for participants’ dismissal decision, as compliance is only a dilemma for decision-makers who chose to dismiss the nonconformist. In formal terms:

**Hypothesis 1b (sphere-c)**: Compliance with an unfavorable court decision will vary between the public and private conditions to a lesser degree than in the original dismissal decision.[[126]](#footnote-127)

**Hypothesis 2b (role-c)**: Compliance with an unfavorable court decision will be lower when the nonconformist holds a normative role.

The experiment tested these hypotheses on the two dilemmas that most frequently concerned religious leaders in Israel and the U.S., namely the LGBT dilemma and an unmarried pregnancy dilemma. This design enabled a test of social impact regulation in different cases, and with respect to norms that vary in their religious stringency. In the interviews, Jewish leaders typically viewed the prohibition on same-sex relationships as more stringent than the prohibition on unmarried pregnancy because homosexual intercourse is literally prohibited in the Torah (Leviticus 18:22, 20:13; the parallel Christian prohibition appears in Romans 1:26-27). In contrast, the prohibition on unmarried pregnancy, at least the IVF variant that primarily concerned the leaders, was not literal but inferred, and some rabbis even permit it under certain conditions. Some leaders also believed that the positive value of child rearing mitigates the severity of nonconformity. This normative variation provided an opportunity to test the generalizability of the sphere effect across norms that vary in stringency.[[127]](#footnote-128) Finally, the design also allowed for an analysis of several potential moderators: gender, religious affiliation, age, etc.

## Participants

The experiment recruited 559 religious individuals in Israel to participate online, constructing a large and diverse sample of the Jewish Orthodox community (*datiim*). Table 3 summarizes the sample. Recruitment is detailed in Appendix B.

**Table 3. The Experiment: Summary Statistics of the Sample**

|  |  |
| --- | --- |
| *General Sample* |  |
| Women | 0.74 |
| Age | 28.8 (12.5) |
| Religious subgroup  Non-religious  Traditional (“*Masorti”*)  Lightly religious (*“light”*)  Religious Liberal  Religious  Orthodox liberal (*“Torani liberali”*)  Orthodox conservative (“*Dati* *Torani”*)  Ultra-Orthodox (“*Haredi”*) | 0.02  0.03  0.03  0.11  0.24  0.19  0.35  0.03 |
| Residence  Center area  Jerusalem  Judea & Samaria  Israeli North/South | 0.41  0.25  0.23  0.11 |
| Participation in religious services  Three times a day  Daily  Weekly  Less than weekly  Never | 0.22  0.29  0.24  0.17  0.08 |
| Worldview | 3.75 (1.6) |
| Supports Talmudic studies for women | 0.66 |
| Supports sex separation in school from k1 or earlier | 0.73 |
| Ever received legal training  Ever involved in a Lawsuit | 0.06  0.11 |
| Ever served as a schoolteacher | 0.33 |
|  | N = 559 participants |
| *Teachers sub-sample (33%)* |  |
| Women | 0.77 |
| Age | 34.4 (13.3) |
| Religious subgroup  Non-religious  Traditional (“*Masorti”*)  Lightly religious (*“light”*)  Religious Liberal  Religious  Orthodox liberal (*“Torani liberali”*)  Orthodox conservative (“*Dati* *Torani”*)  Ultra-Orthodox (“*Haredi”*) | 0.01  0.02  0.02  0.10  0.18  0.21  0.43  0.03 |
| Residence  Center area  Jerusalem  Judea & Samaria  Israeli North/South | 0.39  0.24  0.26  0.11 |
| Participation in religious services  Three times a day  Daily  Weekly  Less than weekly  Never | 0.17  0.33  0.24  0.21  0.05 |
| Worldview | 3.64 (1.6) |
| Supports Talmudic studies for women | 0.63 |
| Supports sex separation in school from k1 or earlier | 0.79 |
| Ever received legal training  Ever involved in a Lawsuit | 0.06  0.12 |
|  | N = 163 teachers |
| *Note:* Unless otherwise noted, the table presents the proportion of sample participants in each category. Worldview was measured on a 1-7 Likert scale from conservative to liberal with 4 as midscale point. | |

## Materials

The experiment adapted the same-sex and unmarried pregnancy cases to decision-making scenarios and tested dismissal intentions with respect to both. Notably, the cases were chosen for their relevance and ecological validity, because the qualitative data suggested that these are the most concerning conflicts faced by religious community. The vignettes describing the cases were designed based on the religious educators’ detailed descriptions, producing realistic and culturally precise scenarios. The pregnancy case focused on an individual who underwent artificial insemination to become pregnant out of wedlock.[[128]](#footnote-129) The same-sex case focused on an individual who engaged in a homosexual relationship. In both cases, the teacher tells the principal of her/his situation and the principal becomes concerned that this situation may not conform to the school’s religious values. The participants further read that the principal knows that dismissal would be inconsistent with generally applicable antidiscrimination laws (as is the state of the law in Israel; see Appendix B) and deliberates about what to do.

## Procedure

The experiment employed a 2 (public/private) x 2 (students/teacher) between-subjects design with a within-subject component, as in each cell, participants decided *both* the pregnancy and LBGT scenarios.

Sphere (public/private) and role (students/teacher) were randomized *between* *participants*. For example, in the public condition, the scenarios described both the LGBT and pregnant individuals as acting in public (and participants were not exposed to the private version of these scenarios). This design allowed for a stringent test of the sphere effect, avoiding direct within-subject comparison between public and private settings. The randomization of Role between subjects was applied to the LGBT scenario, such that the individual described in that scenario was either a teacher in a same-sex relationship or students in a same-sex relationship.

In each experimental cell, following consent and basic demographics, the two scenarios were presented in random order. In each scenario, participants were first asked what they would do if they were the principal of the school. They answered using a scale ranging from 1 (should definitely not dismiss) to 9 (ought to dismiss the individual), with 5 as scale midpoint (may decide either way). They were also allowed to offer alternatives or comments in an open-text box. In each case, participants then proceeded to read that the principal decided to dismiss the individual, the individual filed suit, and the court decided that dismissal was unlawful and that the individual should be reinstated. Participants were then asked what they would do at that point and responded on a scale that ranged from 1 (would definitely disobey) to 9 (ought to comply) with 5 (may decide either way) as scale midpoint. (Reversed for analysis). Here too, participants were allowed to offer comments or alternatives. Participants beliefs regarding unmarried pregnancy and same-sex relationships, as well as additional demographics, were collected at the end.

## Experimental findings

### The impact of Sphere

#### Adherence to Antidiscrimination Law

In order to test the hypothesis that the sphere of deviance from religious norms—public or private—influences dismissal decisions, I submitted the data to a repeated measures analysis (GLM) with sphere (public/private) as a between-subjects factor and case (LGBT/pregnancy) as a within-subject factor. For this analysis I focus on the teacher data to allow a clean comparison between the LGBT and the pregnancy cases.

Table 3 reports the mean intention to dismiss LGBT and unmarried pregnant individuals by case and condition. As expected following H1a, the results reveal a causal and highly significant relationship between the publicity of the deviance from religious norms and the dismissal of LGBT and unmarried pregnant individuals, F(1,279) = 8.88, *p* = .003.

**Table 4. The impact of the sphere distinction on the mean intention to terminate the employment of unmarried pregnant and LGBT teachers**

|  |  |  |
| --- | --- | --- |
|  | **Sphere** | **Intention to terminate employment** |
| Pregnancy | Private | 3.09 (2.39) |
|  | Public | 3.39 (2.44) |
| LGBT | Private | 5.04 (2.75) |
|  | Public | 6.31 (2.57) |
| *Note*: The table provides means and standard deviations (in brackets). Intentions were measured on a scale of 1 (should definitely not dismiss) to 9 (ought to dismiss) with 5 as scale mid-point (might decide either way). Sphere’s main effect was F(1,279) = 8.88, *p* = .003 (N = 281), and the interaction between sphere and type of case was F(1,279) = 10.59, *p =* .001. | | |

To examine potential differences in norm stringency (H3), I first analyzed whether such differences existed in the sample. Participants were asked to rate at the end of the experiment whether they believed that each of the two conducts is religiously permissible, more permissible than forbidden, more forbidden than permissible, or religiously forbidden. The results confirmed the existence of substantial differences in norm stringency perceptions. Whereas 43% of participants believed that unmarried pregnancy is somewhat or entirely forbidden, 93% believed the same regarding same-sex relationships. These differences persisted in participants’ second-order perceptions regarding the permissibility of *employing* a LGBT/unmarried pregnant person (Table 4). I thus refer to the cases as low stringency (pregnancy) and high stringency (LGBT).

**Table 5. Beliefs regarding the Normative Severity of Unmarried IVF Pregnancy and Same-Sex Homosexual Relationships**

|  |  |  |
| --- | --- | --- |
| *Conduct* | | *%* *Believed* *conduct is*  *religiously forbidden* |
| Unmarried pregnancy (IVF) | | 0.43 |
| - Employing an unmarried pregnant teacher | | 0.34 |
| Same-Sex Relationship | | 0.93 |
| - Employing a LGBT teacher | | 0.62 |
| *Note:* The table presents proportion of sample in each category. Beliefs were measured on a four point scale with the following options: permissible,more permissible than not, more forbidden than not, forbidden. Responses were dichotomized into permissible/forbidden. | |

As expected under H3, the average intention to dismiss in the LGBT (high stringency) case across conditions was substantially higher than in the pregnancy (low stringency) case (within-subject F = 261.36, *p* = .000). In addition, the impact of publicity was statistically greater in the LGBT case (Mpublic = 6.31, SD = 2.57 vs. Mprivate = 5.04, SD = 2.75; higher means indicate higher intention to dismiss) than in the pregnancy case (Mpublic = 3.40, SD = 2.44 vs. Mprivate = 3.09, SD = 2.39), and this interaction was highly significant (F = 10.59, *p =* .001). Figure 1 presents a summary of these results with dismissal intentions dichotomized into dismiss/keep based on the scale mid-point.

The data showed no order effects (in other words, it did not matter which case—LGBT or Pregnancy—was presented first).

**Figure 1. The impact of the public/private distinction on the intention to dismiss unmarried pregnant teachers and** LGBT **teachers**

### **The impact of Sphere and Role**

#### Adherence to antidiscrimination law

In order to test the hypothesis that the role of the nonconformist—teacher or student—influences dismissal decisions, and to examine whether role interacts with sphere, I submitted the data to an analysis of variance (ANOVA) with role (teacher/student) and sphere (public/private) as between-subject factors. For this analysis I focus on the LGBT dilemma data where role varied between conditions.

Table 5 reports the mean intention to oust (by dismissal or expulsion) LGBT individuals as a function of their role (teacher or student) and the publicity of their sexual identity (public or private). As expected under H1a and H2a, the results suggest that both publicity and role significantly shape the decision to dismiss/expel LGBT individuals. Religious participants were more likely to oust LGBT individuals when their sexual identity was public than when it was private (F(1,528) = 9.568, *p* = .002), and when the individuals were teachers rather than students (F(1,528) = 30.971, *p* = .000).

**Table 6.** **The impact of role and publicity on the intention to terminate LGBT individuals**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Sphere** | **Mean (SD)** | **N** |
| LGBT students | Private | 3.38 (2.49) | 119 |
|  | Public | 4.16 (2.76) | 131 |
| LGBT teacher | Private | 5.04 (2.75) | 138 |
|  | Public | 6.31 (2.57) | 143 |
| *Note*: See Table 3 for scale interpretation. Sphere’s main between-subjects effect was F(1,528) = 9.568, *p* = .002, and role’s main between-subjects effect was F(1,528) = 30.971, *p* = .000. | | | |

Figure II shows the significance of these results: when the individuals were students acting in private, 28% of the religious decision-makers decided to expel them; when the individual was a teacher acting in private, 44% decided to dismiss him. When homosexuality was public, 43% decided to expel the students and 65% decided to dismiss the teacher. There was no significant interaction between publicity and role —although the sphere effect appeared stronger in the teacher’s case than in the student’s case—and there were no order effects.

Notably, dismissal intentions in the pregnancy case did not vary as a function of role context. Participants judged the pregnancy dilemma virtually identically regardless of whether it was judged after a LGBT teacher / LGBT students case. In fact, norm stringency showed a greater effect than role. In the comparison between the LGBT students and the pregnant teacher, participants showed higher dismissal intentions towards the students than towards the teacher (Private: Mpregnancy = 3.08, SD = 2.42, MLGBT = 3.38, SD = 2.49; Public: Mpregnancy = 3.21, SD = 2.45, MLGBT = 4.16, SD = 2.76, F(1,248) = 70.5, *p = .*000). Indeed, the correlation between norm stringency and dismissal intentions was very high (for unmarried pregnancy *r* = .729, for same-sex relationships *r =* .856).

**Figure 2. The impact of role and sphere on the intention to dismiss LGBT** **individuals**

#### II. Obedience to the Court

To analyze the effect of sphere and role on obedience to the court we carried several converging tests. Under H1b, we hypothesized that the effect of sphere would diminish after the event becomes a public dispute, because the legal processes erodes the differences in publicity that existed in the original dismissal decision. In order to avoid testing the null hypothesis, two complementary analyses were performed. First, the data was submitted to a GLM with two within-subject factors: Case (pregnancy/same-sex) and Court (Pre-Court/Post-Court) with Sphere as a between-subjects factor. This analysis allowed us to test whether the Sphere effect diminished from the original dismissal decision to the post-court obedience decision. As expected, a highly significant interaction emerged between Court and Sphere (F(1,283) = 7.05, *p* = .008): The difference between the public and private conditions was significantly smaller in obedience decisions than in dismissal decisions.

The second test focused directly on obedience decisions, while accounting for whether participants dismissed/kept the nonconformist (Dismissed, dichotomized based on the scale mid-point). For this analysis we focus on the same-sex data to simultaneously test the effects of Sphere and Role on obedience decisions (H1b and H2b). Across conditions, people who dismissed LGBT persons showed higher inclination to disobey the court (M=5.63, SD=2.66) than people who kept them (M=2.59, SD=2.13). An ANOVA with Sphere, Role, and Dismissed was conducted with disobedience intentions as the dependent variable. As expected following H1b, we found no effect of Sphere on disobedience intentions (*p*=.975). In contrast, and in line with H2b, Role had a significant effect on disobedience intentions (F(1,551)=4.29, *p*=.039). None of the interactions was significant, albeit the effect of role was slightly larger on dismissers (Role \* Dismissed: F(1,551) = 2.67, *p=*.1). These results are consistent with social impact regulation, because the social impact potential of teachers has not changed due to court exposure (and thus, remains a concern that guides behavior) whereas the potential of privacy to minimize social impact has been eroded by court exposure (thus, sphere is no longer a concern that guides behavior).

**Figure 3. The impact of role and sphere on the intention of dismissers to disobey the court**

### **Examining Moderators of Sphere**

One remaining question concerns the smaller public/private difference in the pregnancy case as compared to the LGBT case. Sphere had a significant effect in both cases, yet the interaction between case and publicity was highly significant, F(1,279)=10.59, *p*=.001.[[129]](#footnote-130) Several potential explanations were analyzed, including differences in norm stringency (NS),[[130]](#footnote-131) gender, religious sub-group affiliation,[[131]](#footnote-132) past teaching experience, and age. Table 6 shows that most of these mechanisms (all but gender and age) significantly correlated with dismissal decisions, yet the Sphere effect remained robust in all models. The interaction between sphere and case became insignificant in two models. First, when differences in NS were large—namely, when participants differentiated substantially in their normative evaluations of the LGBT and pregnancy cases (NS differences were 1 SD above the mean)—the impact of Sphere on pregnancy dismissals diminished. In contrast, when differences in norm stringency were small—namely, when participants did not differentiate between the cases and viewed both as relatively forbidden (NS differences were 1 SD below the mean, a difference nominally close to zero)—the impact of Sphere on pregnancy dismissals was large. Notably, this effect was not driven by the order in which cases were presented. Sphere and Order had no significant effect on normative stringency judgments and including Order in the model did not change the results. These results suggest that the significant interaction results from participants who did not view unmarried pregnancy as particularly problematic, and hence did not attribute importance to its social impact.

Interestingly, age also moderated the impact of sphere in the two cases. In the LGBT case, all age groups, young and old, were similarly influenced by the sphere effect. But in the unmarried pregnancy case, the youngest cohort (15-24) was indifferent to private/public differences.[[132]](#footnote-133) This finding could indicate the beginning of a normative change towards unmarried pregnancy in the Jewish Orthodox society.

Notably, individual differences in residency, conservativeness, strength of religious identity, and frequency of prayer, did not explain the interaction and are not reported below.

**Table 7. Testing potential moderators of the sphere effect**

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | df | (1) | | (2) | | (3) | | (4) | | (5) | | |
| Public | 1 | 9.7 \*\* | | 8.84\*\* | | 3.76\* | | 8.37\*\* | | 7.16\*\* | | |
| Case (LGBT/P) | 1 | 27.9\*\* | | 162.16\*\* | | 75.19\*\* | | 232.51\*\* | | 48.3\*\* | | |
| Public x Case | 1 | .66 | | 7.75\*\* | | 6.24\*\* | | 9.27\*\* | | 1.38 | | |
| Public x NS | 1 | 1.57 | | - | | - | | - | | - | | |
| Public x G | 1 | - | .38 | | - | | - | | - | |
| Public x R | 7 | - | - | | .74 | | - | | - | |
| Public x T | 1 | - | - | | - | | .33 | | - | |
| Public x A | 5 | - | - | | - | | - | | .87 | |
| Case x NS | 3 | 46.2\*\* | - | | - | | - | | - | |
| Case x G | 1 | - | 1.34 | | - | | - | | - | |
| Case x R | 7 | - | - | | 1.85+ | | - | | - | |
| Case x T | 1 | - | - | | - | | .167 | | - | |
| Case x A | 5 | - | - | | - | | - | | 1.1 | |
| Public x C x NS | 3 | 1.0 | - | | - | | - | | - | |
| Public x C x G | 1 | - | .23 | | - | | - | | - | |
| Public x C x R | 7 | - | - | | 1.29 | | - | | - | |
| Public x C x T | 1 | - | - | | - | | .00 | | - | |
| Public x C x A | 5 | - | - | | - | | - | | .33 | |
| NS | 3 | 12.1\*\* | - | | - | | - | | - | |
| Gender (G) | 1 | - | .05 | | - | | - | | - | |
| Rel. Affil. (R) | 7 | - | - | | 22.61\*\* | | - | | - | |
| Teaching (T) | 1 | - | - | | - | | 6.46\*\* | | - | |
| Age (A) | 5 | - | - | | - | | - | | .7 | |
| N |  | 281 | 281 | | 281 | | 281 | | 273 | |
| *Notes:* The table reports F values and degrees of freedom for each effect, focusing on the teacher data. + Significant at the 10 percent level; \* Significant at the 5 percent level; \*\* Significant at the 1 percent level. | | | | | | | | | | | |

### **Textual analysis**

As noted in the description of the experimental procedure, participants could offer alternatives for action in each case, in writing, both before and after the court decision. Two-hundred and seventy-eight participants provided textual responses (about 50% of the sample).[[133]](#footnote-134) Two research assistants independently coded the responses, masked from any other information including condition assignment and the dependent variables. Coding was conducted based on an elaborate coding scheme. The first scheme was developed by the PI in light of the questions and themes that emerged from the data. It was then iteratively developed through team discussions along the coding process. After the coding scheme was finalized, the RAs independently coded all of the data. The agreement rate (inter-rater reliability) ranged 93-99%, depending on the specific code.[[134]](#footnote-135) The textual analysis was particularly geared to discern additional motivations and behaviors that were not captured in the dependent measures. As it turned out, participates used the free space for presenting alternative actions or for explaining the reason for their decisions.

#### Reasons for action

*Social impact.* The most prevalent reason or goal for action noted by participants was social impact (typically in the form of a concern that students will be influenced or a goal of preventing or controlling such influence) In the pregnancy dilemma, social impact was noted 54 times in the public condition and 29 times in the private condition. In the same-sex dilemma, social impact was noted 47 times in the public condition and 29 times in the private condition. Overall, social impact was noted 159 times (in 57% of the responses) and was explicitly rejected only once, on factual, not normative, grounds (“students will not be influenced”).

Most participants who expressed social impact concerns, did so prior to the court decision, in both conditions. Yet a greater share of the mentions in the private condition appeared *after* the court decision, consistent with the hypothesis that the legal proceeding increased publicity.[[135]](#footnote-136)

Social impact concerns were expressed in the two role conditions, but, as expected, they were expressed less frequently in the students condition (34 mentions) than in the teacher condition (42 mentions).

*Religious Law.* A substantially smaller number of participants, 81 in total, justified their decision on the Halakhah (21 of them argued that the LGBT/pregnant person behaved according to the Halakhah). Participants were more likely to find a violation of Halakha in the public condition (27 positive, 11 unsure) than in the private condition (19 positive, 2 unsure).

*Moral status.* One potential concern was whether the sphere distinction is related to social impact or to the low moral status of a public, outspoken sinner. Therefore, mentions of low moral status (“the person is a sinner”) were coded. Such reasoning was substantially less frequent than social impact (18 vs. 159 total mentions) and did not differ between sphere conditions (9 in private and 9 in public).

Another open question related to the perception of students as young, vulnerable, needy of protection. To explore this option we coded empathy towards nonconformists. Empathy was mentioned substantially less frequently (39 times) than social impact (159 times) or the Halakha (81 times), yet it was mentioned almost exclusively with respect to students. The data suggests a trade-off between social impact and empathy such that in the private condition, there were 18 expressions of empathy towards private students and 14 social impact concerns, and in the public condition, there were 11 expressions of empathy towards public students and 20 social impact concerns. In summary, empathy appears to be directly linked to role and also influenced by sphere.

**Behaviors**

Note that participants were given space to provide comments, thoughts, or alternatives for action (other than keeping or dismissing the nonconformist). This content was entirely voluntarily and involved no additional prompt except for the original scenario. Hence, it is particularly interesting what modes of negotiating and resolving the dilemma participants considered.

Many alternatives were directly related to social impact, as in preventing negative impact or countering negative influence with positive influence. In particular, three impact-motivated alternatives were observed: privatization, counter-impact, and role transfer.

*Privatization*. One popular alternative was privatization. In addition to direct mentions of social impact, 50 participants (27 in the public condition and 23 in the private condition) attempted to “privatize” the conduct of the agents, suggesting for example that the pregnant teacher would be instructed to wear a head cover (a mark of marriage in Orthodox Judaism), or even lie to her students that she is married. LGBT persons were instructed to keep their relationship discrete. Privatization occurred both in the private condition—as an attempt to ensure privacy (“should make sure that others do not know”)—and in the public condition, as an alternative to dismissal. Privatization was suggested 14 times in the pregnancy dilemma and 37 times in the same-sex dilemma, where it was most frequently suggested in the public students condition (14 times).

*Counter impact.* A second popular alternative was to take measures to counter the impact of nonconformity, typically in the form of initiating a community discussion to convey the religious position and control the message. In the public condition, we counted 26 clear cases of counter-impact (e.g., "should talk to all the students to clarify that this is against religious law") and 41 plausible cases of counter-impact (e.g., "should talk to all students"). In contrast, in the private condition, there were 11 clear cases of counter-impact and 18 plausible cases of counter-impact. Overall, counter-impact was suggested 29 times in the private condition and 67 times in the public condition.

*Role transfer* was a third impact-motivated alternative. Overall, 27 participants suggested that the nonconformist be transferred to a different, non-normative role, including some suggestions to help her find a job in a non-religious school. In both dilemmas, role transfers were more common in the private condition (9 v. 6, 12 v. 3 respectively).

Overall, the substantial use of the three impact-based alternatives—173 total suggestions to employ either privatization, counter-impact, or role transfer[[136]](#footnote-137)—strengthens the conclusion that social impact is not a static judgment regarding the morality of private versus public behavior, but a dynamic strategy that people creatively employ to minimize conflict. Two of these alternatives were more common at the original decision point (privatization and counter-impact)[[137]](#footnote-138) whereas role transfer was more common after the court decision.[[138]](#footnote-139) This pattern suggests an interaction between the alternative and the phase of the dispute.

Among the alternatives raised by participants we also note that a substantial number of participants who made explicit suggestions to evade the law or object the court.

*Evading the law*. We define evasion as attempts to persuade nonconformists to leave “voluntarily” (instead of actively dismissing them) or suggestions to dismiss nonconformist based on fictitious and non-problematic reasons (since no such reason was provided in our scenario, evading participants typically suggested to find another cause).[[139]](#footnote-140) Overall, 60 participants indicated evasion, 34 in the private condition and 26 in the public condition. Evasion occurred both before (14 in same-sex, 12 in pregnancy) and after the court decision (23 in same-sex, 11 in pregnancy).

*Objecting to the court*. Thirty-nine participants indicated an intention to resist the legal decision, either legally (“keep appealing”, “resign”) or possibly illegally (“go to jail”, “don't give the job back”). With the caveat of small numbers in mind, 16 participants intended to resist legally in the public condition compared with 8 in the private condition. There was no difference in illegal resistance between conditions (8 v. 7).

Considering evasion and objection together as two complementary forms of noncompliance, the rate of noncompliance is roughly the same in public (26+24) and in private (34+15).

*Conversion therapy*. Finally, some participants suggested that the gay individual should undergo therapy– 23 in total, 13 in public and 10 in private. Conversion was almost exclusively suggested in the students condition.

## **Discussion**

The results of the experiment support the theory of social impact regulation and specifically the hypotheses that sphere and role impact, independently and in real-time, the religious response to equality challenges and the regulation of sexual nonconformity. Publicity and role had substantial and independent effects, each increasing the dismissal of sexual nonconformists in 21-22%. These results point to the independent and large contribution of each of these factors to social impact regulation, and to the religious response to equality challenges. Notably, religious educators (%33 of the sample) responded like the rest of the sample to variations in sphere and role, yet were also more inclined to dismiss the sexual nonconformists than non-educators. This finding suggests that actual dismissal rates could be higher than in the experiment.

The experiment also provides an elegant test of the interaction between legal proceedings and social impact regulation, finding that the publicity inherent to litigation erodes the sphere effect but not the role effect. This finding clarifies the connection between the sphere effect and social impact concerns, as illustrated in some of the free-text explanations provided by participants in the *private* condition after they learnt about the court decision. For example, participant #33 wrote, post-court, that “if this had become known to students, this is a different story and maybe he [the LGBT teacher] should not be reinstated.” Participant #347 similarly writes, post-court, “this is a problem because now it has been revealed to students and this can be problematic”. Another participant (#75) writes: “In his actions, the principal brought about the very publicity that he had probably dreaded.” In contrast to sphere, role continued to guide decision-making following the legal process, supporting the hypothesis that the specific social impact concerns associated with role stem from perceptions regarding the influence *inherent* to certain positions (which does not change as a result of an external process). The absence of a sphere effect following the legal process further suggests that social impact concerns are less about the character of the public nonconformist, her moral status, or the expressive function of publicly deviating from the norms. If these perceptions were the underlying mechanisms driving the effect, sphere should have influenced obedience decisions similarly to role, because these features are tied to the original nonconformity and are not influenced by the legal process.

Finally, the results of the experiment clarify the relationship between the sphere effect and several moderators. Sphere has a significant effect on religious decision-making across different dilemmas, despite their normative differences. Differences in the perceived stringency of the underlying norm moderated this effect. People who viewed both cases as strictly forbidden were more influenced by the sphere of unmarried pregnancy than people who viewed unmarried pregnancy as more permissible. These results indicate that social impact regulation is applied to norms that the pertinent decision-makers believe in and abide by and is not driven by disregard for the norm or lack of normative clarity. On the contrary, social impact regulation is most likely to be applied to clear cases of forbidden conduct, as perceived by the decision-maker.

# V. Social Impact Regulation: Empirical and Normative Questions

After establishing social impact regulation as a central influence on the religious response to equality challenges, we can to turn to evaluate this phenomenon in relation to the raging debate on religion and equality. I will address two questions in particular. First, what explains social impact regulation and why is it adopted by religious communities? Second, how can social impact regulation inform legal and political debates on religion and equality?

## What Explains Social Impact Regulation?

Social impact regulation is remarkable for several reasons. The general practice of selective enforcement is common in law enforcement, [[140]](#footnote-141) and therefore, should not strike as a particular surprise when it appears in religious communities (as it might appear anywhere). Yet, social impact regulation departs from previous models as the choice to selectively enforce the norm was not founded only on a sense of justice and compassion, [[141]](#footnote-142) efficiency considerations,[[142]](#footnote-143) scarcity of resources,[[143]](#footnote-144) or preferential treatment of a favored group of gender or race.[[144]](#footnote-145) Rather, it was operated on distinctions ofsphereand role. In addition, selective enforcement is a surprising choice for decision-makers who view themselves as responsible to *uphold* the very norms that they selectively enforce (“We enforce the teachings of the church. That's why we exist.”[[145]](#footnote-146)) and typically considered sexual nonconformity as a sin. They also perceived sexual nonconformity as a risk, fearing that nonconformity might spread to others and that this might erode religious order. Social impact discrimination is also not consistent with a social deterrence model, that predicts that enforcement bodies would supplant actual sanctions for threats and cultivate fears of sanctions to deter noncompliance.[[146]](#footnote-147) While I cannot attest to the likely possibility that nonconformists in religious communities fear sanctions, religious leaders did not show signs of intentionally cultivating such fears and they actively *assisted* nonconformists to hide their situation to escape sanctions.[[147]](#footnote-148)

Why, then, religious communities enact social impact regulation? I consider three potential explanations or causes. Each explanation provides different meaning for the phenomenon's normative weight and importance.

### Social Impact Regulation as a Compromise

One reason to tolerate risk to religious normativity is if the costs of conflict—both interpersonal and legal—are greater than the costs of tolerance. If this is the case, educational leaders might compromise religious normativity to reduce and avoid the price of conflict. The leaders’ narratives support the possibility that the conflict is at least personally costly, as reflected in its description as “agonizing” (J32), “painful” (J27), “really, really tough” (C9), and a “PR nightmare” (C13). Their accounts often disclose emotional competition between moral principles and empathy to the nonconformist (“I see her tears and feel her pain,” said J2). Such empathy can also be reasoned in religious terms—as compassion, love, forgiveness[[148]](#footnote-149)—creating an internal conflict between competing religious values. The San Francisco healthcare agreement is a classic example of social impact regulation as compromise. The agreement was enabled by a sophisticated imposition of privacy on the relational identity of healthcare beneficiaries and was justified to “local Catholic critics” as a compromise, needed “to prohibit local government from forcing our Catholic agencies” to recognize domestic partnerships.[[149]](#footnote-150) An identical policy was adopted by the Catholic Church in Michigan in 2016 and was also presented as a compromise “due to recent changes in Federal law…The inclusion of the LDA (Legally Domiciled Adults) benefit allows for the MCC health plan to be both legally compliant and consistent with Church teaching.”[[150]](#footnote-151)

Prior research indicates that when people experience conflicts between competing cognitive states they are motivated to resolve them in various ways (Festinger 1962; Shultz, Léveillé, and Lepper 1999). Distinctions of sphere and role can emerge as a solution because they provide a middle way. On one hand, they preserve religious order at the institutional and formal level. On the other hand, they preserve nonconformists as part of the community. The distinctions thus offer to sustain both community *norms* and community *members*. If this gain is substantial—what could be related to demographic and social status considerations—it can encourage religious communities to relinquish strict enforcement of their norms and focus their efforts on reducing the social impact of nonconformity.

It is notable that social impact regulation appear from the data as a personal compromise—each decision-maker adopted it seemingly independently, without relying on precedents or the shared experience of other leaders—yet what emerges from the collective is a systemic form of regulation that is enacted across the country and even across countries and religions. These findings bolster the significance of social impact regulation as a tool for viable compromises. Its broad application—from changes in healthcare benefits to education and employment policy—calls for greater attention from legal scholars and policy makers.

### Social impact regulation as a distinction between wrongs

A second potential explanation for the religious willingness to tolerate sexual nonconformity is rooted in the distinction between two types of wrongs: malum prohibitum—wrong as prohibited—and malum in se—wrong in and of itself.[[151]](#footnote-153)

Same-sex relations and out-of-wedlock child bearing were clearly considered wrong by Jewish and Catholic leaders. But what kinds of wrong? One possibility is that these wrongs are *mala in se*, because they deviate from the righteous model (“the regular healthy normal family model consists of father, mother, and children,” said Mr. Cohen) and damage children and society (“This is an out of this world nightmare for the child,” said Ms. Zvulon on unmarried pregnancy. Moving on to lesbian families, she said: “I talked to psychologists about this… Children in these new families have severe behavioral disorders… there are all kinds of psychological consequences that society has to deal with later.”) But if same-sex relationships and out-of-wedlock pregnancies were perceived as mala in se, sphere and role should not have mattered.[[152]](#footnote-154) Consider incest as the counterfactual. Most people perceive incest as *malum in se*; the belief that incest is wrong is so deeply rooted that people condemn even consensual victimless adult incest.[[153]](#footnote-155) It is hard to imagine anyone, including the religious leaders, defending private incest. Tolerating incest in private would seem repulsive to most people, perhaps even more repulsive than condemning incest across the board.[[154]](#footnote-156) It therefore seems unlikely that same-sex and unmarried relationships are a wrong of the same type of incest. Social impact regulation appears to suggest that leaders evaluate these nonconformities, even implicitly, as wrongs more similar to *mala prohibita.* I do not suggest that the leaders believed that religious teachings refer to these conducts as something other than intrinsically wrong, but rather, that the leaders were not necessarily committed to the idea that unmarried pregnancy and same-sex relationships are intrinsically wrong. The scripture still guided the educational leaders’ judgments, but through its legal authority and not necessarily its moral persuasion.[[155]](#footnote-158) Consequently, the leaders’ choice of regulatory framework was more similar to how people think of traffic laws (the classic *mala prohibita*): crossing the street in red is not intrinsically wrong but should nevertheless be prohibited because societal arrangements are needed to ensure safety. Accordingly, and analogous to the public/private distinction, most people would consider red-light crossing significantly less harmful when it occurs at midnight on an empty street—when no one sees or could be harmed by the act. At the same time, and analogous to the role distinction, while many would excuse ordinary folks in such circumstances, fewer would absolve policemen in the same way. Rather, people typically believe that policemen must always obey the law, even if the street is empty—not because violating traffic laws is intrinsically wrong, but because the very person entrusted with enforcing the law is expected to model compliance and not break it. Note how different our moral intuitions are in incest versus traffic wrongs, and how the latter lend themselves to sphere and role distinctions much more easily. These analogies suggest that the religious response to equality challenges could be founded on normative evaluations of sexual nonconformity as more mala prohibita than mala in se. This explanation poses interesting questions for future research. Comparing the regulation of cases invoking different moral evaluations can shed light on the religious determinants of social impact regulation, as well as its broader application to non-religious contexts.

### Social impact regulation as a bridge to liberalism

A third possible explanation for social impact regulation is that this is an intermediate phase between the past ban and future acceptance of a community’s presently condemned conduct. This point can be illustrated through the transformation of attitudes to homosexuality in the last century. Since the revolutionary war, homosexual service-members were considered a risk to the American military and were disqualified, hunted, prosecuted, and discharged.[[156]](#footnote-159) In 1993, a “don’t ask, don’t tell” policy—in effect, a public/private distinction—was introduced as a compromise between activists and traditionalists.[[157]](#footnote-160) In 2011, DADT made way to full inclusion of publicly open LGBT individuals in the military. During this long period, transitions occurred also outside the military. What began as a felony—homosexual conduct was prohibited under the Penal Codes of many American states—became protected and de-criminalized under conditions of privacy in the landmark *Lawrence v. Texas* decision.[[158]](#footnote-161) States and local governments began enacting antidiscrimination protections for LGBT individuals and recognizing same-sex marriage; in 2016, same-sex marriage became the law of the land.[[159]](#footnote-162)

Justice Scalia famously argued in *Lawrence* that invalidating the criminal prohibition on homosexual conduct and extending the right to privacy to homosexuals would be a slippery slope to legalizing same-sex marriage.[[160]](#footnote-163) If this historical process has any relevance to social impact regulation, it suggests that it may be a phase that precedes a broader acceptance of sexual nonconformists. However, it is important to note that liberalization is not a necessary consequence of social impact regulation. Jewish communities applied the sphere distinction to desecrators of the Sabbath for centuries, without resulting in public normalization of desecration (however, the meaning of observance and the activities allowed in Sabbath have changed throughout the years). Whether social impact regulation is one phase in a dynamic process or a static equilibrium by way of compromise is an open question. Some religious leaders noted that their communities were changing, while others were more skeptical that formal change is likely to occur (“I don't think the doctrine of organized religion is going to change. Not in my lifetime,” said one Catholic leader). Yet even if social impact regulation does not predict a nearing change, it may still be the case that any such change requires first a limited form of acceptance to emerge.

The three potential explanations to social impact regulation are not necessarily mutually exclusive—for example, compromise could be a phase to something else and normative distinctions can emerge in response to either cognitive dissonance or social change. Whichever proves a better explanation is yet to be revealed. Yet each and every one of these explanations unsettles the ‘ugly picture’ of the culture wars paradigm, which is filled with fears of escalation, incommensurable moralities, irreconcilable values, and collision courses.[[161]](#footnote-164) Yet social impact regulation reflects a picture of compromise, or nuanced distinctions, or liberalization, or all of the above. Even if social impact regulation is restricted to specific religions or sects, which this Article cannot rule out, it still indicates that religion is not moving on a single course. Indeed, more and more religions are moving on progressive course in recent years.[[162]](#footnote-165)

## How Social Impact Regulation Informs Law and Politics

### The adjudication of religious objection

Armed with a new understanding the conflict between religion and equality, it is time for legal scholars to begin to consider the normative implications for cases that raise conflict between religious liberty and equality. While a full normative analysis of social impact regulation is beyond the scope of this article, I will briefly outline three potential legal approaches towards social impact regulation in these cases.

For the purposes of the discussion, let us assume the typical case in which a court is asked to evaluate a claim alleging discrimination against a religious organization that argues to be acting based on religious reasons. There are at least three ways in which sphere and role could be part of the legal analysis. The first one is brought by the European Court of Human Rights in *Schuth v. Germany*.[[163]](#footnote-166) Mr. Schuth was head musician at a Catholic parish in Germany who was dismissed for an extramarital relationship. In fact, Mr. Schuth had publicly separated from his wife several years before but the couple did not divorce. The dismissal occurred after Schuth’s children had told people at their kindergarten that their father was going to have another child. The ECHR accepted Mr. Schuth’s application, considering the fact that he kept his nonconformity private, did not publicly challenge the stances of the Catholic Church, and that the case did not receive media coverage. The ECHR implies that the Church could have tolerated Schuth’s nonconformity, yet chose not to. *Schuth* presents a model that scrutinizes the necessity of religious opposition to equality challenges and examines whether exclusion could have been avoided using social impact regulation.

The second model is almost exactly opposite. Under this model, a church that selectively enforces its norms is indicating inconsistency, which could either counts as religious insincerity or as plain discrimination. This approach assumes that the very presence of selective enforcement severely detracts from the viability of the religious argument. Several judicial decisions seem to adopt this view. In [robin’s example], the school successfully defended against a discrimination charge after showing that its enforcement regime was so strict that the principal conducted active investigations into the private lives of all employees and did not differentiate based on the visibility of out-of-marriage relationships.[[164]](#footnote-167) Note that this approach is exactly opposite from *Schuth*: instead of requiring religion to find more inclusive solutions and tolerate private nonconformists, the institution is motivated to make every nonconformity public and enforce religious norms without selection in order to secure a legal exemption. In a related example, a teacher won a lawsuit alleging pregnancy and sex discrimination after showing that three male employees who were thrown out of a strip club after harassing one of the performers were reprimanded but not fired.[[165]](#footnote-168) Although the outcomes of these two cases are opposite, their logic is identical— a religious entity needs to show consistency in the application of its norms to refute discrimination claims. Absent such consistency, the religious defense is rejected.

Consistency is certainly important and has a normative and evidentiary value, yet it is also a confusing concept. Similar to equality, which only applies if two people are similarly situated, consistency should only be evaluated if two decisions are similarly situated. Such judgment requires a normative analysis, as some selection criteria justify different decisions. An alternative model can be considered, a model that would not automatically penalize religious inconsistency. Such model could take into account previous record in handling equality challenges and examine whether the record indicates a pattern of discrimination (for example, only women lose their job for unmarried relationships) or a pattern of regulation that attempts to tolerate and accommodate nonconforming individuals in effective ways (some forms of social impact regulation could fit into this category). Importantly, the third model would attribute positive—not negative—value to selective enforcement if it reflects a sincere attempt to self-accommodate the tension between religion and equality, rather than externalizing the costs of faith on third parties. Selective enforcement does not have to be interpreted as inconsistency. Instead, selective enforcement could be interpreted as taking a nuanced position towards the conflict, and nuance is often an advantage in law. Making distinctions and avoiding absolutism is particularly important when seeking solutions to value conflicts. A recent high profile example of such position belongs to *Craig Masterpiece Bakeshop*, a baker who offered to sell an off-the-shelf cake or cookies to a same-sex couple but refused to create a custom made cake for their wedding.[[166]](#footnote-169) This distinction is different from the social impact distinction, but it demonstrates a similar attempt to find nuance, reconcile faith and equality, and show tolerance and respect. A SCOTUS decision in support of Craig Masterpiece based on these reasons would not provide a definitive solution to the wide range of conflicts resulting from business service refusal or LGBT dismissals, but would bolster the third model.

I presented three optional models to address social impact regulation in the adjudication of conflicts. Two of these models received some support from the courts and the third model is novel and exploratory. Notably, I do not attempt to select among the models or make any determination as to which model is preferable; other models are also an option. This Article can only attest to the importance of examining these models in light of the findings concerning the impact and implications of social impact regulation as a component of the conflict between liberty and equality. The theory and evidence provided in this Article offer necessary food for thought and debate for litigators and scholars investigating these conflicts. They also invite further empirical investigations—both with respect to the various effects of social impact regulation and with respect to its interaction with law. One such question is whether legal recognition or rejection of social impact regulation as a valid basis for action under one model or the other would extend conflict or mitigate it. Not less importantly, future empirical studies should also attempt to study how sexual nonconformists respond to social impact regulation. We can hypothesize that their responses will be mixed, but how, and to what extent, requires an independent study.

### The negotiation of solutions and accommodations

To negotiate acceptable solutions to conflicts, particularly conflicts between norms, values, and ideals, negotiators should understand the conflict that they are negotiating. Unfortunately, current debates on the conflict between religion and equality are mostly captured in the culture wars paradigm, which is partial and misleading. As a result, the discussion of religion and equality suffers from serious omissions and has religious variation, latitude, and dynamism at its blindspot. One of the outcomes of these blindspots is disproportionate discussions of religious exemptions from otherwise universally applicable laws and a false implicit assumption that there is no point in discussing a potential movement to solution from the religious side of the conflict. For example, Koppelman's (2006) argument in favor of exemptions rests on the assumption that “homosexuality is one of those issues about which we are likely to remain profoundly divided for some time to come.” What the present research reveals, however, is that the stringency of belief that homosexuality is a sin (which is, indeed, high) does not infer that there is no latitude in applying this norm. Examining how people *apply* this norm reveals that the religious response to equality challenges varies systematically based on conditions that are independent from the norm, yet substantially intensify and moderate the conflict. The failure to acknowledge the religious latitude has resulted, thus far, in an inaccurate account of the conflict and a failure to systematically consider avenues that have the potential to mitigate the conflict. This Article begins to remedy this failure and hopefully charts the way for additional normative and empirical analyses of the war within culture and its implications for conflicts between liberty and equality.

# Conclusion

The main aim of this Article was to complicate the dominant view of the conflict between religion and equality as a war between cultures, and replace it with an elaborate understanding that the conflict is *within* culture as much as it is *between* cultures. Following this approach, I investigated the conditions under which religion takes an oppositional or tolerant position towards equality challenges and pointed at one set of factors—social impact regulation—that has a broad, systematic, and highly consequential effect on the religious response to the challenge. I showed that religion’s attitude to gender and sexual equality is far from monolithic and is not necessarily oppositional, even among individuals who believe that the underlying conduct is sinful. The results of the fieldwork in Jewish and Catholic communities in Israel and the U.S. provides initial indication that social impact regulation could be employed by different religious societies in different cultural and legal regimes.

Religion brews from within, it responds to changes in social norms, it compromises, and it participates in legal change. Consequently, the debate must change. Religion and equality are incommensurable cultural opposites. Instead, they are social processes that constantly interact and, at times, converge. More research should be dedicated to explore their interaction and convergence.

# **Appendix A: Qualitative methods**

**1 Sampling**

Interviewing religious individuals about conflict between religion and secular law required overcoming barriers of access and trust, even more so because I sought to interview educational leaders who actually experienced such conflicts and for whom these issues were particularly sensitive. The people I interviewed, by virtue of their managerial positions, were also a-priori less accessible due to their rank and busy schedules. To overcome these barriers, the initial recruitment in each sample was made through several independent referents and chain-referral was used to build up the sample (Biernacki & Waldorf 1981; Penrod et al. 2003). To reduce the potential for bias embedded in chain-referral sampling, recruitment in each country was made through several distinct chains (snowballs) and informants were asked to provide references to individuals who are likely to present a broad range of experiences and opinions, including views different than their own.

The resulting samples were diverse in several relevant aspects. In Israel, the interviews were conducted with women and men in a broad range of positions (teachers, principals, rabbis, superintendents, administrators), regions (center, Jerusalem, Judea and Samaria, North and South), and schools (all-girls, all-boys, secondary, and higher education). The American sample was also diverse in gender, position (principals, superintendents, administrators, clergy), and regions (New England, the Midwest, the South, and the West Mountain regions). In both countries, administratorship and superintendentship typically followed principalship, and principalship always followed teaching. Hence most interviewees served throughout their career in more than one position. While the Catholic sample was smaller, its fit with the research questions was particularly high, as all of the educational leaders were senior managers with ample experience and direct involvement in handling legal conflicts. Table 1 summarizes the characteristics of the two samples.

**2 Procedure**

The interviews were semi-structured and lasted between 45 minutes and two and a half hours. The interview instrument was developed to identify the key conflicts, considerations, and strategies used by the educational leaders to cope with and manage conflicts between law and religion in their field. Each interview began with asking the interviewee to recall an instance when they faced a conflict between their faith and the law. From there, the interview proceeded to explore the interviewee’s personal experiences of conflict and then progressed to a real-time deliberation of a case involving unmarried pregnancy and/or sexual identity. Typically, an unmarried pregnancy case was used for this part of the interview, except for when the interviewee already raised a similar case herself, earlier in the interview (usually as a personal example of conflict). Sexual orientation and same-sex relationship also deeply preoccupied educational leaders in both countries and were frequently raised by the leaders either as an example of personal conflict or in comparison to the pregnancy dilemma. When interviewees brought up sexual orientation first, the order of the discussion typically reversed and unmarried pregnancy was discussed second. The design had the same structure in both countries, with some adaptation necessary to account for local variation. In general, most interviewees recalled and described instances of conflict with ease. As reported in table 2, many interviewees independently brought up variants of the pregnancy and LGBT cases that occurred in their institutions or referred to these cases as contemporary examples of the conflict.

**3 Data and analysis**

Most interviews were recorded and transcribed following participant approval. In the event that an interviewee opted not to be recorded, their responses were transcribed in real time. I supplemented the interview data by collecting documents and publications issued by religious schools and their administrations, and by closely following religious newspapers and websites in Israel and the United States during the period of the study, taking notes on relevant cases and discussions.

I used grounded theory to code the data in the process of analyzing the interview transcripts (Charmaz 2006; Glaser & Strauss 1967). This inductive method has been widely used in similar studies (Ewick & Silbey 1998; Ewick & Silbey 2003; Hartman-Halbertal 2002). Through iterative reading of a subset of the interviews in each sample, I developed a code list that captured patterns and themes in the educational leaders’ discussion of conflict and tracked the avenues they pursued in tackling it. I coded all transcripts into a complete list of codes, which I continued to refine through iterative readings. The code list was developed and administered separately for the Israeli and American samples. Subsequently, I compared the emerging themes in both samples and further examined similarities and differences.

# Appendix B: Experimental methods

**1 Design**

The experiment described in this paper deployed a 2x2 between-subjects design with a within-subject component to examine the intention to dismiss and exclude sexually nonconforming individuals from religious schools. The first dimension tested whether the *sphere* of the deviation from religious norms—public or private—impacts participants’ intentions to exclude the individual. To this end, the experiment consisted of short, realistic news stories describing individuals who either kept their nonconformity private or made it public. The stories were drafted based on the interviews to capture vividly and reliably the key aspects of the real-world dilemmas that preoccupied religious communities. Participants were asked to decide whether to dismiss the individuals or not. The second dimension tested whether the *role* of the individual in the story—being a teacher or a student—influenced the participants’ exclusion decisions.

Each participant read and responded to two stories (within-subject component), mirroring the two central dilemmas that were raised by the interviewees in. The first story focused on an individual who underwent artificial insemination to become pregnant out of wedlock. The second story focused on a homosexual individual who engaged in a same-sex relationship. The dilemmas were presented in a random counterbalanced order. To ensure cultural appropriateness and to maximize external validity, the experiment was reviewed by multiple religious individuals and piloted beforehand.

**2 Participants**

The experiment was conducted in Israel with 559 religious individuals (all of whom Jewish) who volunteered to participate in the experiment, creating a broad and diverse sample (Table 3 in the paper presents summary statistics). Israel provided a simple and clear setting to test the research hypotheses for several reasons. First, Israeli Antidiscrimination law prohibits discrimination based on sex, pregnancy, and sexual orientation in employment and in public accommodations, including in education, uniformly and clearly using the same laws and the same wording to prohibit all bases of discrimination. In contrast, in the U.S. at the time of the experiment (2015), only discrimination based on sex and pregnancy was uniformly prohibited across the nation in Title VII of the Civil Rights Act, while sexual orientation discrimination was not federally prohibited (a proposed law to this effect, EDNA, is currently pending). In addition, only about half the states at the time of the experiment had specific laws prohibiting sexual orientation discrimination. The lack of statutory uniformity in the U.S. problematized the option of running a study that asks religious participants to decide a conflict between religion and law, since in many states, there is no clear conflict.

Religious participants were recruited in various online forums, email lists, and Facebook groups serving a wide variety of national-religious communities in Israel, including university-level communities, city-level communities (i.e. “religious people in Jerusalem”), groups serving members and alumni of religious youth movements, popular humoristic groups, discussion forums hosted by national-orthodox news sites, and email lists serving a range of settlements, synagogue communities, yeshivas and schools. No screening was used and dropouts were recorded to track potential response bias. None was found.[[167]](#footnote-170)

**3 Procedure**

Following consent, participants were asked to provide basic demographic information. They then read two news stories presented in a counterbalanced order. One, the Pregnancy case, unfolded the story of an unmarried 41-year-old highly regarded teacher, who conceived through artificial insemination (the IVF scenario emerged from the interviews as the more common type of unmarried pregnancy dilemma in Israel). The second story, the LGBT case, described a teacher engaged in a homosexual relationship. In both cases, the teacher tells the principal of her/his situation and the principal becomes concerned that this situation may not conform to the school’s religious values. The participants further read that, knowing that the dismissal would be inconsistent with generally applicable antidiscrimination laws, the principal deliberates about what to do. (Israeli law prohibits discrimination on the basis of pregnancy and sexual orientation in employment and education and there is no specific religious exemption.) The cases were kept identical in all respects except the difference in the type of sexual behavior (hence the teacher’s age, competence, the state of the law, and the religious concerns were identically worded in both dilemmas). Following each story, participants were asked what they would do if they were the principal of the school. They answered using a scale ranging from 1 (definitely dismiss the teacher) to 9 (definitely not dismiss the teacher), with 5 as scale midpoint (may act either way).

After deciding whether to dismiss the teacher or not, participants proceeded to read the dilemma’s sequel: the principal decided to dismiss the teacher, the teacher filed suit, and the court decided that the dismissal was unlawful and that the teacher should be reinstated. Participants were then asked what they would do now (still as the principal), providing their responses on a scale ranging from 1 (definitely not comply with the decision) to 9 (definitely comply with the decision), with 5 as the scale midpoint (may act either way). They were also given the option to enter any alternative course of action they saw fit in their own words.

**4 Materials**

**Public/Private***.* To examine the effect of the sphere of conduct on the decision, each participant was randomized to read the two cases in either a private or a public condition (publicity was randomized between subjects; hence for each participant, the cases were *both* private or public). In the private condition, participants read that the LGBT teacher kept his relationship private and the pregnant teacher intended to take unpaid leave of absence before her pregnancy shows. In thepublic condition the teacher did not hide his same-sex relationship and the pregnant teacher intended to continue teaching without hiding her pregnancy.

Each story was accompanied by an illustrative photo, as common in news articles. The photo aligned with the condition type in order to enhance its effect. For the LGBT case, the private condition simply showed a kippa-wearing man with his back to the camera; the public condition showed the profile of a kippa-wearing man holding the LGBT flag (in the context of the Israeli society, this gesture amount to public endorsement of the LGBT identity). For the pregnancy case, the private condition showed a modestly dressed woman writing on a chalkboard with her back to the camera, such that her belly does not show; the public condition showed the profile of a modestly dressed woman writing on a chalkboard, whose pregnancy bump is saliently showing.

In the follow-up section of the scenario, participants read that the principal decided to dismiss the individual, claiming that a religious school should be autonomous to act according to its beliefs. The individual filed a lawsuit arguing that pregnancy/sexual orientation does not constitute a valid reason for the dismissal but an illegal discrimination. After hearing the parties, the court decided that the dismissal was against the law and that it violated the individuals’ right to equality without a justified cause, as it was possible to find alternatives to dismissal. The court ruled that the school must reinstate the teacher.

**Role***.* To examine the impact of role, the second cohort of participants in the study was randomized to read a student version of the LGBT dilemma. The student version described a pair of excellent students in a homosexual relationship and, like the teacher dilemma, it was randomly presented in either public or private form. To maximize comparability between role conditions, the student design was identical to the teacher design, the only change being the transformation of the LGBT teacher’s case into a students’ case. The unmarried pregnancy case was not modified. First, it was implausible to describe a young student deciding to undergo artificial insemination. Second, keeping the pregnancy case constant across role conditions created a highly controlled setting to compare decisions in the LGBT teacher and student cases while having the side benefit of examining whether different role contexts influence decisions in the pregnancy case.

**Additional issues.** Previous studies documented the effect of perceived choice on discrimination towards LGBT individuals and mothers (Kricheli-Katz 2012, 2013). These studies suggest that in cultures that perceive sexual orientation and motherhood as a matter of choice, individuals are more likely to incur discrimination. In Jewish doctrine, choice and agency are often used to assign responsibility for an act. In the interviews, Jewish and Catholic leaders sometimes distinguished between sexual orientation and sexual practice, arguing that only the practice violates religious teachingsbecause only then the person *decides* to act on his orientation (see also Yip 2007:213). To study the impact of sphere and role excluding the effect of choice, the nonconforming individuals in all condition groups were described as active agents, such that choice was held constant across experimental conditions. The unmarried pregnancy dilemma described that the pregnant individual underwent an elective procedure—artificial insemination—signaling her deliberate choice to become pregnant. The same-sex relationship dilemma described that the LGBT individuals resolved their orientation and decided against therapy, again signaling agency and choice. The therapy information was also aimed at removing factual ambiguities regarding the relevance of conversion therapy from the scenario after the pre-test showed that participants might decide not to dismiss the sexual nonconformist because they assume they could force a conversion therapy. Removing therapy from the menu of imagined/assumed choices focused participants on the question of tolerating LGBT identity as it is and improved the interpretability of the responses.

1. \* Assistant Professor of Law, Hebrew University of Jerusalem. This article greatly benefited from the thoughts and comments of Lisa Bernstein, Rick Garnett, Talia Gillis, David Hoffman, Paul Horwitz, Meirav Furth-Matzkin, Adi Leibovich, David Leiser, Hanan Mazeh, Omer Michaelis, Martha Minow, Kineret Sadeh, Ariel Seri-Levi, Susan Silbey, Daniel Statman, Cass Sunstein, Crystal Yang, Asaf Zussman, and audiences at Harvard, the Hebrew University of Jerusalem, Tel Aviv University, Bar Ilan University, the Annual Roundtable of Law and Religion, the Israeli Law and Economics Association, and the Israeli Democracy Institute. Idit Eitan, Massat Cohen, Hanna Aloush, Amit Haim, Roni Gal On, Chagit Blass and Tamir Berkman provided superb research assistance. Generous financial assistance was provided by the Program on the Legal Profession and the Program on Negotiation, Harvard Law School, the Sinclair Kennedy Fund, Harvard University, and the Barak Center for Interdisciplinary Legal Research at the Hebrew University. [↑](#footnote-ref-2)
2. Changing Attitudes on Gay Marriage: Public opinion on same-sex marriage, Pew Research Center (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ (last visited Apr 9, 2018). [↑](#footnote-ref-3)
3. Support in same-sex marriage among most organized religions lags behind the unaffiliated (85% support) with Catholics and Mainline Protestants at 67% and 68% support, Black Protestants at 44% and White Evangelicals at 35%. See, also, Darren E. Sherkat et al., *Religion, politics, and support for same-sex marriage in the United States, 1988–2008*, 40 Soc. Sci. Res. 167 (2011). (describing strong religious and conservative opposition to same-sex marriage during those years). Although virtually all religions have become more supportive of same-sex marriage, the official religious position in many denominations remained opposed to same-sex relationships. For example, Pope Francis would not support same-sex marriage, notwithstanding the tolerant approach he advocates towards LGBTs, Carol Glatz, *Pope says marriage can only be between a man and a woman and “we cannot change it,”* Catholic Herald, 2017, http://www.catholicherald.co.uk/news/2017/09/03/pope-says-marriage-can-only-be-between-a-man-and-a-woman-and-we-cannot-change-it/. [↑](#footnote-ref-4)
4. Antidiscrimination law has long been used to transform culture. *See*, Robert Post, *Law and Cultural Conflict Symposium: Law and Cultural Conflict*, 78 Chic.-Kent Law Rev. 485, 488–89 (2003). (Discussing the transformative role of the Civil Rights Act of 1964). [↑](#footnote-ref-5)
5. [↑](#footnote-ref-6)
6. Lornet Turnbull & John Higgins, *Eastside Catholic students rally around ousted vice principal*, The Seattle Times, December 19, 2013, http://www.seattletimes.com/seattle-news/eastside-catholic-students-rally-around-ousted-vice-principal/. [↑](#footnote-ref-7)
7. Complaint at 2– 5, Zmuda v. Corp. of the Catholic Archbishop of Seattle (Wash. Super. Ct. Mar. 6, 2014) (No. 14-2- 07007-1), 2014 WL 1377720. MIHS associate principal settles lawsuit with Eastside Catholic, Mercer Island Reporter (2014), http://www.mi-reporter.com/news/mihs-associate-principal-settles-lawsuit-with-eastside-catholic/ (last visited Apr 9, 2018). [↑](#footnote-ref-8)
8. RLC 12137/09 (Tel Aviv) Plonit v. Almonit [2013] Nevo (Hebrew). [↑](#footnote-ref-9)
9. The primary case studies of this Article are unmarried pregnancy and same-sex relationships. Related examples include artificial insemination, which Catholicism prohibits due to its process of egg selection (*see* Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F.Supp.3d 1168 (N.D. Ind. 2014) (providing dismissal for undergoing IVF treatment may proceed to trial); the contraceptives health coverage (*see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that the federal government should have accommodated the religious objections of closely-held for-profit corporations to providing employee contraceptive coverage); Zubik v. Burwell, 136 S. Ct. 1557 (2016) (vacating and remanding for the parties “to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans ‘receive full and equal health coverage, including contraceptive coverage.’”); and abortions and related medical procedures (*see* Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996) (holding that dismissing a woman for considering an abortion to protect religious sensibilities of her co-workers is illegal discrimination under Title VII); Curay-Cramer v. Ursuline Acad., 450 F.3d 130, 132 (3d Cir. 2006) (dismissing a Title VII claim of a Catholic school teacher who was fired after adding her name to a pro-choice advertisement in a local newspaper); *see also* Caudill Steven B. & Mixon Franklin G., *Anti‐Abortion Activities and the Market for Abortion Services: Protest as a Disincentive*, 59 Am. J. Econ. Sociol. 463 (2003). (estimating the effects of anti-abortion activity on the demand and supply of abortion services). [↑](#footnote-ref-10)
10. Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 33 (1983) (analyzing the of Bob Jones University as a normative community that regulates the public and private conduct of its students); Caroline Mala Corbin, *Expanding the Bob Jones Compromise*, *in* Legal Responses to Religious Practices in the United States: Accomodation and its Limits 123 (Austin Sarat ed., 2012). (arguing that the Bob Jones holding with respect to religious educational institutions should expand to invidious sex discrimination). *See* *also* sources cited under footnote 12. [↑](#footnote-ref-11)
11. Richard W. Garnett, *Can There Really Be Free Speech in Public Schools*, 12 Lewis Clark Law Rev. 45, 59 (2008). (arguing that school should be permitted to govern themselves without government interference in order to protect the freedom of speech). [↑](#footnote-ref-12)
12. According to the Digest of Education Statistics 2013, 120-21 (2015), Table 205.60, Catholic and other religious schools enrolled in 2011-12 about 3,497,000 students and employed 478,790 full-time teachers. [↑](#footnote-ref-13)
13. *See* Cover, *supra* note 9; Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools Observation*, 60 Tex. Law Rev. 259 (1981). (analyzing the tension between religious schools and antidiscrimination tax policy). Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514 (1979). Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 Soc. Res. 491, 493 (1994). (discussing the conflict of Ultra-Orthodox education in Israel with liberal legislation). [↑](#footnote-ref-14)
14. *See*, e.g., *Hobby Lobby*, *supra* note 8; Zubik, *supra* note 8; State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (holding that a florist who refused to provide service to a same-sex marriage has discriminated against the couple); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (same with respect to a photographer); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 137 S. Ct. 2290 (2017) (same with respect to a baker), *granting* *cert*. *to* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015). Among these analyses, prominent examples include Paul Horwitz, *The Hobby Lobby Moment The Supreme Court - 2013 Term: Comments*, 128 Harv. Law Rev. 154 (2014).; Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 Harv. J. Law Gend. 35 (2015).; Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbably Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 Harv. J. Law Gend. 153 (2015).; Alex J. Luchenister, *A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 Harv Pol Rev 63 (2015).; Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 Ala. Civ. Rights Civ. Lib. Law Rev. 77 (2015).; Joshua Bauers, *The Price of Citizenship: An Analysis of anti-Discrimination Laws and Religious Freedoms in Elane Photography, LLC v. Willock*, 15 Rutgers J. Law Relig. 588 (2013). [↑](#footnote-ref-15)
15. See Part I.A for an elaborate discussion of this argument. [↑](#footnote-ref-16)
16. See Part I.B for an elaborate discussion of this argument. [↑](#footnote-ref-17)
17. Ellen Berrey, Robert L. Nelson & Laura Beth Nielsen, Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality 13, 41–42,47–49 (1st ed. 2017). (Surveying evidence from multiple sources and estimating the rate of EEOC complaints at 1% of all grievances and that of lawsuits at 3% of all grievances). [↑](#footnote-ref-18)
18. See Part II.A for an elaborate presentation of this argument [↑](#footnote-ref-19)
19. Marci A. Hamilton, God vs. the Gavel: The Perils of Extreme Religious Liberty 33, 35 (2014). (arguing that accommodations encourage religious “narcissism” and further disobedience); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale Law J. 2516, 2544 (2014). (arguing that "religious accommodation may extend, rather than resolve, conflict"); Paul Horwitz, *Against Martdom: A Liberal Argument for Accomodation of Religion*, 91 Notre Dame Law Rev. 1301, 1306 (2016). (arguing that refusal to accommodate religious norms may cause religious radicalization and stronger attachment of the individuals to illiberal views); Madhavi Sunder, *Cultural Dissent*, 54 Stanford Law Rev. 495, 507 (2001). (Considering the law's role in "facilitating or hindering modernization and social change, focusing in particular on how law has become complicit in the backlash project of preserving cultural traditions against change"). [↑](#footnote-ref-20)
20. Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior: An Empirical Examination*, 67 Hastings L.J. 957, 994, 1004–1005 (2016). (also showing variation in dismissal rates between Christian denominations and in comparison to unaffiliated, atheists, and agnostics). [↑](#footnote-ref-21)
21. *Id.* at 1006. [↑](#footnote-ref-22)
22. *Id.* at 983-84. [↑](#footnote-ref-23)
23. See Part II.B for a discussion of the methodology. [↑](#footnote-ref-24)
24. See Part III for a discussion of the qualitative findings. [↑](#footnote-ref-25)
25. In particular, see Part IV which discusses the experimental results. [↑](#footnote-ref-26)
26. Notably, this Article does not attempt to explain the entire variation of religion with respect to equality, nor does it correspond with all of the important contributions of scholars working in this field. [↑](#footnote-ref-27)
27. Robert F. Jr. Cochran & Michael A. Helfand, *Who Should Influence WHom Symposium: The Competing Claims of Law and Religion*, 39 Pepperdine Law Rev. 1051, 1056 (2011). [↑](#footnote-ref-28)
28. Horwitz, *supra* note 18, at 1303. Notably, the third way that Horwitz advocates is legal pluralism that accommodates religious illiberalism. [↑](#footnote-ref-29)
29. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 Ala. Civ. Rights Civ. Lib. Law Rev. 1, 1 (2015). [↑](#footnote-ref-30)
30. Barak-Corren, *supra* note 19 (presenting evidence on substantial variation regarding sexuality norms among all large American Christian denominations) and *infra* **note** …. [↑](#footnote-ref-31)
31. Barak-Corren, *supra* note 19, at 993-96, 1003-10 (providing evidence from large-scale experiments among U.S. Christians of decision and attitudinal change in response to alternative legal outcomes) and *infra* **note** …. [↑](#footnote-ref-32)
32. Caroline Mala Corbin, *Above the Law-The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham Rev 1965, 1968 (2006). *Id.* at 1968. [↑](#footnote-ref-33)
33. *Id.* at 1976-77. Corbin, *supra* note 32 at 1976–1977. [↑](#footnote-ref-34)
34. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the production of Sexual Orientation Discrimination*, 100 Calif. Law Rev. 1169, 1231–1236 (2012). [↑](#footnote-ref-35)
35. Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return us to a Religious Understanding of the Public Marketplace*, 5 Northwest. J. Law Soc. Policy 236, 241, 244–46 (2010). [↑](#footnote-ref-36)
36. Mark Joseph Stern, *Anti-Gay Segregation May Soon Be Coming to Oregon*, SLATE (Feb. 4, 2014), http://www.slate.com/news-and-politics/2018/03/judge-stephen-reinhard-blogs/outward/2014/02/04/oregon\_anti\_gay\_referendum\_the\_initiative\_is-dead-at-87\_homophobic\_segregation.html. [↑](#footnote-ref-37)
37. Maggie Gallagher, *Why Accommodate - Reflections on the Gay Marriage Culture Wars*, 5 Northwest. J. Law Soc. Policy 260, 269 (2010). [↑](#footnote-ref-38)
38. Professor Koppelman, for example, argues that these concerns are exaggerated, Andrew Koppelman, *You Can’t Hurry Love - Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brooklyn Law Rev. 125, 134–35 (2006). Koppleman relies on mostly anecdotal evidence to back this claim. I am more sympathetic to these concerns after finding, in previous work, that religious accommodations, at least in some settings, can expand religious objection. *See* Barak-Corren, *supra* note 19. [↑](#footnote-ref-39)
39. *See*, e.g., NeJaime, *supra* note 33; NeJaime & Siegel, *supra* note 18. It is rare to find analyses that consider the conditions under which religious objection might decline or other forms of religious dynamism, but see the discussion in Part I.B. below. [↑](#footnote-ref-40)
40. Horwitz, *supra* note 1818 at 1306. In effect, one cannot evaluate the likelihood and magnitude of martyrdom, relative to other responses, without data. In a previous work on the conflict between religion and equality (which Horwitz cites), I find little empirical support for the concern that refusing religious accommodation would cause massive disobedience or lead to the erosion of the rule of law or democratic legitimacy (Barak-Corren, *supra* note 19). I provide suggestive data on “martyrdom” in Part IV.E.4. [↑](#footnote-ref-41)
41. Horwitz, *supra* note 18, at 1306. Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 Notre Dame Law Rev. 1301, 118 (2016). [↑](#footnote-ref-42)
42. *Id,* at 1311. *Id.* at 118. [↑](#footnote-ref-43)
43. *Id,* at 1334. *Id.* at 121. [↑](#footnote-ref-44)
44. Sunder, *supra* note 18, at 498. Madhavi Sunder, *Cultural dissent*, Stanford Law Rev. 495–567, 498 (2001). [↑](#footnote-ref-45)
45. Wiliam N. Jr. Eskridge, *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. Law Rev. 657 (2011). [↑](#footnote-ref-46)
46. *Id.* at 705. [↑](#footnote-ref-47)
47. *Id.* [↑](#footnote-ref-48)
48. *See* also Pew Research Center, *supra* note 2. (reporting, among other findings, that all religious denominations, including conservative Evangelical groups, have become more supportive of same sex-marriage in recent years). [↑](#footnote-ref-49)
49. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 Boston Coll. Law Rev. 781 (2007). [↑](#footnote-ref-50)
50. *Id.* at 829-837 (Providing an elaborate account of the two stories, including some intersections between the leading characters). [↑](#footnote-ref-51)
51. *Id.* at 829-831. [↑](#footnote-ref-52)
52. *Id.* at 831. [↑](#footnote-ref-53)
53. *Id*. at 831-837. [↑](#footnote-ref-54)
54. *Id.* at 844. [↑](#footnote-ref-55)
55. *Id*. at 838. Martha Minow, *Should religious groups be exempt from civil rights laws*, 48 BCL Rev 781, 58 (2007). [↑](#footnote-ref-56)
56. *Id.* at 831. [↑](#footnote-ref-57)
57. Eskridge, *supra* note 44, at 678. [↑](#footnote-ref-58)
58. In particular, see Part V. [↑](#footnote-ref-59)
59. Notably, this Article does not attempt to explain the entire variation in the religious response to equality challenges. Instead, it focuses on a central phenomenon which consists of multiple factors that influence the conflict jointly and separately. [↑](#footnote-ref-60)
60. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law Soc. Rev. 525 (1980). [↑](#footnote-ref-61)
61. *See*, also, William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 Law Soc. Rev. 631 (1980).; Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 Annu. Rev. Law Soc. Sci. 105 (2014). [↑](#footnote-ref-62)
62. Miller & Sarat, *supra* 59, at 565 ("Our research points the way toward yet a further "backward" movement in the sociology of law. Legal realism moved the study of law from an exclusive preoccupation with courts and in so doing helped establish the intellectual respectability of dispute processing and other sociological studies of law"). Notably, studying cases and opinions is crucial to understanding how courts adjudicate cases and what legal arguments fare better in court. The criticism is relevant to questions about the evolution of social conflicts and the impact of law outside the courtroom. [↑](#footnote-ref-63)
63. Peter Siegelman & John J. Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 Law Soc. Rev. 1133 (1990). [↑](#footnote-ref-64)
64. *Id.* at 1150-54. [↑](#footnote-ref-65)
65. Carol J. Greenhouse, Praying for Justice: Faith, Order, and Community in an American Town (1989). (offering an ethnographic study of attitudes toward conflict and law in a predominantly white, middle-class, suburban, principally Southern Baptist community). [↑](#footnote-ref-66)
66. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 701 (2012) (describing a religious school that dismissed a teacher who alleged disability discrimination after she consulted with a lawyer, arguing that she was obliged to settle disputes under the church internal dispute mechanism). [↑](#footnote-ref-67)
67. Carol Weisbrod, The Boundaries of Utopia 61–63, 68 (1980). (describing how utopian communities in nineteenth century America used contract and property laws to construct spaces for their own practices). A contemporary example is provided by Zack Ford, *Arkansas Catholic schools crack down on LGBT students* Think Progress (Sep. 12, 2016), <https://thinkprogress.org/arkansas-catholic-lgbt-policy-d91d804532e9/> (reporting on the catholic diocese of Arkansas that coded prohibitions on LGBT activity in its student handbook following legal challenges, in an apparent attempt to contract out of antidiscrimination law). [↑](#footnote-ref-68)
68. Berrey, Nelson, and Nielsen, *supra* note 17. [↑](#footnote-ref-69)
69. An additional support for this claim can be derived from our failure to trace a legal record for most incidents in which the media reported about a dismissal of an LGBT or unmarried pregnant person by religious institutions. I.e., in most of these reported events there was no record of a legal proceeding ever being filed. [↑](#footnote-ref-70)
70. Barak-Corren, *supra* note 19, at 976-79. [↑](#footnote-ref-71)
71. This approach draws on the full cycle research method, *See*, Robert B. Cialdini, *Full-cycle social psychology*, 1 *in* Applied Social Psychology Annual 21 (Leonard Bickman ed., 1980).; Gary Alan Fine & Kimberly D. Elsbach, *Ethnography and Experiment in Social Psychological Theory Building: Tactics for Integrating Qualitative Field Data with Quantitative Lab Data*, 36 J. Exp. Soc. Psychol. 51 (2000). On the advantages of using mixed-methods research in law, *see*, Berrey, Nelson, and Nielsen, *supra* note 17. [↑](#footnote-ref-72)
72. *Id.* See also Barak-Corren, *supra* note 19, at 977. [↑](#footnote-ref-73)
73. Cialdini, *supra* note 70, at 44. [↑](#footnote-ref-74)
74. The interviews are part of a series of research projects on conflicts between law and religion. One project, that examined the impact of antidiscrimination remedies on religious behavior, was published in Barak-Corren, *supra* note 19. Another project, that surveyed different strategies for coping with the conflict based on interviews with additional populations in Israel, was published in Netta Barak-Corren, *Beyond Dissent and Compliance: Religious Decision Makers and Secular Law*, 6 Oxf. J. Law Relig. 293 (2017). The contribution of the present Article is unique in its argument, theory construction, and combination of methods and datasets. [↑](#footnote-ref-75)
75. For example, the Catholic Church is hierarchic in the organization, ruling, and interpretation of religious norms, whereas Orthodox Judaism has a local, un-hierarchical structure. Several studies compared Orthodox Jews and Roman Catholics in America and in Israel, including Tova Hartman Halbertal, Appropriately subversive: Modern mothers in traditional religions (2002). (studying how conservative, educated women from the two religions negotiate their identities as women and mothers against conservative and feminist ideals); Cohen Adam B. & Hill Peter C., *Religion as Culture: Religious Individualism and Collectivism Among American Catholics, Jews, and Protestants*, 75 J. Pers. 709 (2007). (studying differences in collectivist versus individualist tendencies between the three religions and findings that Jews are most collectivist, Protestants most individualist, and Catholics in between). Notably, there are some structural similarities between the two groups. Catholics in America and Orthodox Jews in Israel have a distinct religious identity, separate schooling systems, and conservative positions on sexuality. At the same time, they participate in the hegemonic culture in their respective countries (in terms of language, holidays, civic status, workforce, etc.). The conflicts they experience are therefore primarily linked to faith, rather than to nationality or immigration status. [↑](#footnote-ref-76)
76. On the approach of Orthodox Judaism to homosexuality, *see* Rachel Shapiro Safran, A multidimensional assessment of Orthodox Jewish attitudes toward homosexuality 41–42 (2013). (Comparing Orthodox Jewish attitudes to those of other religions and describing great similarity, “as homosexuality has become increasingly more normative in secular culture, rabbis have been faced with many more questions. Furthermore, the desire for Orthodox Jewish gay and lesbian individuals to remain in their communities is strong and Jewish leaders have been forced to respond to their inquiries about how to live both an Orthodox and gay lifestyle. Rabbis have expressed halachic opinions (rulings based on Orthodox Jewish law) ranging from banning both the homosexual act and the homosexual person to just banning the homosexual act and accepting the homosexual individual”). Safran notes that distinctions between celibate and sexually active LGBT people were made by both priests and rabbis. *See* also Tova Hartman Halbertal & Irit Koren, *Between “Being” and “Doing”: Conflict and Coherence in the Identity Formation of Gay and Lesbian Orthodox Jews*, *in* Identity and story: Creating self in narrative 37 (Dan P. McAdams, Ruthellen Josselson, & Amia Lieblich eds., 2006). [↑](#footnote-ref-77)
77. *See*, *e.g.,* Hamilton v. Southland Christian Sch. Inc., 680 F.3d 1316 (11th Cir. 2012) (finding dismissal for conception three weeks prior to wedding may proceed to trial), No. 6:10-cv-871-ACCTBS, 2012 WL 5896367 (M.D. Fla. Sept. 20, 2012) (finding in favor of teacher); Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (providing dismissal for undergoing IVF treatment to conceive a child with husband may proceed to trial), No. 1:2012-cv-122-RLM, 2015 WL 143977 (N.D. Ind. Jan. 12, 2015) (finding jury award of $1.95 million, which was later reduced pursuant to Title VII’s cap); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012) (denying the school motion to dismiss holding that the ministerial exemption does not apply since a computer and technology instructor is not a minister); *see also* Dana Liebelson & Molly Redden, A Montana school just fired a teacher for getting pregnant. That actually happens all the time. Mother Jones (Feb. 10, 2014 2:32 PM), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/> (depicting 10 cases of unmarried pregnant women or women who have used artificial insemination who were fired). [↑](#footnote-ref-78)
78. *See*, *e.g.,* *Zmuda*, *supra* note 6; Woodard v. Jupiter Christian Sch., Inc., 913 So. 2d 1188 (Fla. Dist. Ct. App. 2005) (denying appeal of gay student which was expelled after his teacher confronted him about his sexual Orientation by using the impact rue); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that opposition to homosexuality is part of Boy Scouts of America's freedom of association); *Miami teacher says Catholic school fired her for marrying woman,* CBS News (Feb. 12, 2018, 10:59 AM), <https://www.cbsnews.com/news/jocelyn-morffi-miami-teacher-fired-catholic-school-marrying-woman/> (Miami lesbian school teacher argues she was fired after marrying her partner); Amanda Terkel, *Gay Teacher Fired After Posting Marriage Announcement On Facebook*, Huffington Post (Jan. 14, 2015, 03:26 PM), <https://www.huffingtonpost.com/2015/01/14/lonnie-billiard_n_6472566.html> (A teacher at Catholic high school which was fired a week after announcing his marriage to his same-sex partner filed lawsuit); Meredith Bennett-Smith, *Carla Hale, Gay Teacher, Fired From Catholic High School After Being “Outed” By Mother’s Obituary*, Huffington Post (Apr. 18, 2013, 11:25 AM), <https://www.huffingtonpost.com/2013/04/18/carla-hale-gay-fired-teacher-catholic-high-school_n_3103853.html> (Ohio lesbian school teacher was fired after someone notified the diocese that she had included the name of her female domestic partner among survivors in a local newspaper obituary); *Ken Bencomo, Gay Catholic Teacher Fired For Marrying, Gets Huge Student Support*, Huffington Post (Aug. 13, 2013, 12:00 PM), <https://www.huffingtonpost.com/2013/08/13/gay-catholic-teacher-fired_n_3749270.html> (Los Angeles Catholic school teacher was fired after his marriage to his partner was published in the newspapers); *Al Fischer, Gay Music Teacher Fired From Catholic School, Marries Partner In New York*, Huffington Post (Mar. 11, 2012, 10:20 AM), <https://www.huffingtonpost.com/2012/03/11/al-fischer-fired-gay-catholic-music-teacher-wedding-_n_1337482.html> (St. Louis gay music teacher at a Catholic school was fired after marrying his partner in a civil ceremony in New York). [↑](#footnote-ref-79)
79. *See*, *e.g.,* *Plonit*, *supra* note 7; RLC 1298/03 (Tel Aviv) Leah Rahum V. Ministry of Social Affairs and Social Services [2006] Nevo (Hebrew) (rejecting a claim of discrimination for unmarried pregnancy); RLC 835805/10 (Tel Aviv) Nurit Nachmayev V. Community Welfare Ltd. [2013] Nevo (Hebrew). [↑](#footnote-ref-80)
80. RLC 79106/13 (Tel Aviv) Marina Meshel v. The Center for Educational Technology [2014] Nevo (Hebrew). [↑](#footnote-ref-81)
81. Jeremy Sharon, *Rabbi Levenstein: Eradicate homosexuality just like we did AIDS*, Jerusalem Post (Feb. 16, 2018), <http://www.jpost.com/Israel-News/Rabbi-Levenstein-Eradicate-homosexuality-just-like-we-did-AIDS-542793> (citing a prominent Israeli Jewish Orthodox rabbi who compared homosexuality to AIDS); Yair Ettinger, *“Women Should Not Fight in IDF,” Says Rabbi Colleague of Levinstein*, Haaretz (Mar. 12, 2017), <https://www.haaretz.com/israel-news/.premium-women-should-not-fight-in-idf-says-rabbi-colleague-of-levinstein-1.5447481> (citing another rabbi who objects to the service of women in the Israeli army). In addition to these conflicts, it is worth noting that Catholic hospitals in America and Jewish Orthodox hospitals in Israel impose similar restrictions on access to reproductive services and abortions, citing religious beliefs. *See* ACLU and Merger Watch Report, *Health Care Denied*  22 (2016). [↑](#footnote-ref-82)
82. Notably, this Article does not aim to compare the two religions in the ordinary sense, for example it does not map their differences or infer institutional or normative insights from their differences. The purpose is substantially more modest: to present empirical evidence that shows that these communities experience similar challenges and respond to them in similar ways. The evidence does not speak to the similarity of the communities as much as it suggests that the modes in which they resolve and regulate conflict have some general, stable qualities. [↑](#footnote-ref-83)
83. The research was approved by the Harvard IRB (#F24214-101) and by the Israeli Ministry of Education (file 7693(y)/827). [↑](#footnote-ref-84)
84. *See supra* note 9. [↑](#footnote-ref-85)
85. Barak-Corren, *supra* note 19 (surveying cases and providing qualitative and experimental evidence on the extent of religious conflict in schools and the impact of antidiscrimination law on the dynamic of conflict). Conflicts have continued to accumulate since then, *see* *supra* notes 76-77 and accompanying text. Notably, communities may navigate the conflict differently in different contexts (e.g., schools, churches, for-profit corporations) and dilemmas (e.g., LGBTs, unmarried pregnancies, contraceptives). [↑](#footnote-ref-86)
86. Miller & Sarat, *supra* 59; Felstiner, Abel & Sarat, *supra* note 60; Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life (1998). [↑](#footnote-ref-87)
87. Mario Luis Small, *`How many cases do I need?’: On science and the logic of case selection in field-based research*, 10 Ethnography 5 (2009). (arguing that this question is irrelevant to qualitative research and drawing the distinction between mapping variation—which qualitative research does—and explaining variation—which it does not). [↑](#footnote-ref-88)
88. A typical conflict involved a choice between tolerating sexual nonconformity and taking adverse action against the nonconformist (usually by terminating employment or education). Additional gender-related conflicts included objections to the contraceptives mandate (in the U.S; some institutions were involved in litigation against the act) and objections to co-education or co-military service of men and women (in Israel). [↑](#footnote-ref-89)
89. Specifically, the count excludes discussions were generated by the interviewer (As detailed in Appendix A, at an advanced stage of the interview a typical case was raised—if the interviewee had not raised such case beforehand—to focus the discussion and gauge the leaders’ views regarding these conflicts). [↑](#footnote-ref-90)
90. Throughout this article, I use pseudonyms when I quote extensively from the interviews. Otherwise, I provide references to interviewee/interview number, using J to denote Jewish leaders and C to denote Catholics. Transcripts are on file with author. [↑](#footnote-ref-91)
91. J21. Similar statements were made by J11, J12, J18, J29. [↑](#footnote-ref-92)
92. J2, J3, J7, J8, J11, J12, J15, J16, J17,J18, J19, J21, J23, J25, J27,J28,J29,J33,J35. [↑](#footnote-ref-93)
93. J16 and J29 respectively. Similar statements were made by J19, J21. These policies resembled the decision of the High Council for Religious Education, an agency that reviewed the dismissal in the *Plonit* case, *supra* note 7, before the lawsuit. The Council believed that a leave should have been offered to the pregnant teacher. [↑](#footnote-ref-94)
94. Many educational leaders suggested similar DADT solutions. Some variation existed regarding the ‘don’t ask’ component. Some supported the prohibition on asking (11,15), others thought schools are entitled to ask (3,4,7,8). [↑](#footnote-ref-95)
95. *See*, generally, Moti Arad, Desecrating Shabbat in Parrhesia: A Talmudic Concept and its Historical Meaning (2009). Yehuda Amital, *Can a person who desecrates Shabbat in public be counted towards a minyan?*, VBM, *available at* <http://etzion.org.il/en/can-person-who-desecrates-shabbat-public-be-counted-towards-minyan>. [↑](#footnote-ref-96)
96. Within religion, the conflict arises between the sanctity of God and the sanctity of life, as the royal decree threatens to kill the believer unless s/he violates the precept. [↑](#footnote-ref-97)
97. *See* also Bavli Eruvin 69a, Shulchan Arukh*,* OC 385:2 (discussing the public/private distinction as a central criterion for determining community membership for the purposes of Eruv); Bavli Sanhedrin 26b (discussing the public/private distinction, with a particular emphasis on the meaning of public nonconformity, as a criterion for eligibility for providing legal/religious testimony). [↑](#footnote-ref-98)
98. J3, J8, J11, J21. [↑](#footnote-ref-99)
99. J21, and similarly J14, J15, J19. [↑](#footnote-ref-100)
100. J21, and also J15. [↑](#footnote-ref-101)
101. C17. Similar statements by C5, C8, C11, C16. [↑](#footnote-ref-102)
102. C13. A policy regulating all Catholic schools in Arkansas also alludes to the distinction in prohibiting students from publicly advocating or expressing same-sex attraction “in such a way as to cause confusion or distraction in the context of Catholic school classes, activities, or events.” Addenda to the Manual of Policies and Regulations for Elementary and Secondary Catholic Schools of Arkansas, (2016), http://www.lrchs.org/wp-content/uploads/2016/07/Addendum-to-Handbook.pdf (last visited Apr 8, 2018). [↑](#footnote-ref-103)
103. C5. Additional examples provided in C6, C7, C8, C13. [↑](#footnote-ref-104)
104. C11, and C12. [↑](#footnote-ref-105)
105. C17. Similarly, one of Hartman’s Catholic teachers described a conversation in which her Bishop told her: “we can have the biggest argument you’ve ever had in your life. But when we go out there, it has to be a cheery ‘aye-aye, sir’ … we have to present a united front. We teach what the Church teaches.” Hartman interprets the bishop to provide room for private disagreement while insisting on public agreement. “He did not want to silence her as an individual woman,” she writes, “only as the teacher of Catholic girls.” Hartman Halbertal, *supra* note 75 at 114. [↑](#footnote-ref-106)
106. Several early sources emphasize the aggravating function of social impact and publicity, for example Mathew 18:6: “If anyone causes one of these little ones—those who believe in me—to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea.” Parallel verses are found in Mark 9:42 (referring to “scandalizing” the faithful) and Luke 17:2. Canon 915 denies the Holy Communion from those “who obstinately persist in manifest grave sin.” [↑](#footnote-ref-107)
107. *See* Paragraph 9 in Buenos Aires bishops’ guidelines on Amoris Laetitia: full text Catholic Voices Comment (2016), https://cvcomment.org/2016/09/18/buenos-aires-bishops-guidelines-on-amoris-laetitia-full-text/ (last visited Apr 8, 2018). [↑](#footnote-ref-108)
108. This policy is referred to as “the internal forum” or “foro interno”. The original text in Italian reads in “in maniera riservata” and “ma non invece nel caso in cui, ad esempio, viene ostentata la propria condizione come se facesse parte dell’ideale cristiano, ecc.” *See* “La letizia dell’amore”: il cammino delle famiglie a Roma, Relazione del Cardinale Vicario, 13-14, Diocese di Roma (19 September, 2016; In Italian) [↑](#footnote-ref-109)
109. *See* cases cited under footnote 77; this is not a complete list. Additional episodes are detailed, for example, in Michael Paulson, *Gay Marriages Confront Catholic School Rules*, The New York Times, January 22, 2014, https://www.nytimes.com/2014/01/23/us/gay-marriages-confront-catholic-school-rules.html (last visited Apr 8, 2018). [↑](#footnote-ref-110)
110. Milton J. Valencia, *Gay married man says Catholic school rescinded job offer*, Boston Globe, January 30, 2014, https://www.bostonglobe.com/metro/2014/01/29/dorchester-man-files-discrimination-against-catholic-school-says-lost-job-because-was-gay-married/0KswVITMsOrruEbhsOsOeN/story.html (last visited Apr 8, 2018). [↑](#footnote-ref-111)
111. Josephine Tovey, *Schools defend right to expel gays*, The Sydney Morning Herald, July 6, 2013, https://www.smh.com.au/national/nsw/schools-defend-right-to-expel-gays-20130706-2pirh.html (last visited Apr 8, 2018). (describing controversy over religious exemptions in Australia allowing schools to dismiss LGBT students); Gay teen wins fight over Catholic prom, CBC News, May 22, 2002, http://www.cbc.ca/news/canada/gay-teen-wins-fight-over-catholic-prom-1.348831 (last visited Apr 8, 2018). (describing a Catholic school decision to prohibit an LGBT student from bringing a same-sex date to the school prom). Maura Dolan, *School can expel lesbian students, court rules*, Los Angeles Times, January 28, 2009, http://articles.latimes.com/2009/jan/28/local/me-school28. (describing a case involving a Lutheran school that dismissed two students for having “a bond of intimacy” that was "characteristic of a lesbian relationship). [↑](#footnote-ref-112)
112. C8, C9; J8, J9. [↑](#footnote-ref-113)
113. C17; Preferences for ‘rehabilitation’ over exclusion could be related to the more general interest of the community to retain its members and preserve its integrity. I discuss this explanation in the general discussion. [↑](#footnote-ref-114)
114. Relatedly, teaching is supposed to guide and correct for errors. Therefore, students who deviate might actually reinforce the system and act *within* its behavioral norms. [↑](#footnote-ref-115)
115. J12, J21, C16. [↑](#footnote-ref-116)
116. J3,7,8,9,11,12,14,16,17,18,19,20,26,29,31. [↑](#footnote-ref-117)
117. J7,11,16,19,29. [↑](#footnote-ref-118)
118. J8,9,11,20,39. [↑](#footnote-ref-119)
119. e.g. *Shaela Evenson v. Butte Central Catholic Schools* 2014. [↑](#footnote-ref-120)
120. C8, C9, J16. [↑](#footnote-ref-121)
121. *e.g.,* *Hosanna*-*Tabor*, supra note 65 (holding that the ADA does not apply in the case of a “Called teacher”). [↑](#footnote-ref-122)
122. *e.g., Hamilton, supra* note 76 (holding that antidiscrimination law applies in the case of a lay teacher). [↑](#footnote-ref-123)
123. C5, C1, C9, C16, J9, J11, J15, J16, J17, J19, J23, J29, J37, J39. [↑](#footnote-ref-124)
124. C1, C2, C5, C6, C8, C11, C12, C13, C14, C15, C16. [↑](#footnote-ref-125)
125. *See* footnotes 49-55 and the accompanying text. [↑](#footnote-ref-126)
126. This formulation is necessary to avoid testing the null hypothesis (a lack of sphere effect). [↑](#footnote-ref-127)
127. J1,8,9,11,12,14,15,19. Conducting the experiment in Israel enabled this test, as Catholic leaders typically did not identify (when asked) a material difference between the stringency of engaging in a same-sex relationship or sex out of wedlock. However, some Catholic leaders did note the positive value of child rearing and concerns regarding abortions as factors that are merit more lenient treatment of unmarried pregnancy than same-sex relationships. Future research may expand the examination of differences in norm stringency to additional religious contexts. [↑](#footnote-ref-128)
128. The IVF scenario emerged from the interviews as the more common type of unmarried pregnancy in Israel. [↑](#footnote-ref-129)
129. Notably, the proportion of public/private dismissal rates in each case is comparable (44%/65% in the LGBT case, 15%/23% in the pregnancy case, a 0.68-0.65 ratio). Hence, the following examination of the interaction result may be unnecessary. Yet, given the novelty of the results and the lack of baseline data on the magnitude, floor and ceiling of the sphere and case effects, I believe that the effect warranted examination. [↑](#footnote-ref-130)
130. Computed per individual, as the difference between the stringency of the norm against same-sex relationships minus the stringency of the norm against unmarried pregnancy. [↑](#footnote-ref-131)
131. The experiment collected several measures of religiosity, including frequency of prayer and religious identification, and the analyses yielded similar results in all models. [↑](#footnote-ref-132)
132. The 35-44 cohort was similar to the 15-25 cohort, but due to the small number of observations (n=27 in that cohort versus n=121 in the young cohort) interpretation is difficult. The intermediate age group, 25-34, which was better represented (n=88), showed a clear sphere effect in the unmarried pregnancy case, similar to the other (older) age groups. [↑](#footnote-ref-133)
133. There was no difference in the number of explanations provided per condition. Less textual responses were provided by participants who dismissed the LGBT/pregnant person. [↑](#footnote-ref-134)
134. Disagreements were solved through discussion and if necessary, by the PI. The coding scheme and data will be made available in the online appendix. [↑](#footnote-ref-135)
135. The post/pre social impact mentions ratio in the private pregnancy case was 0.23 (5 to 17), compared with 0.2 (9 to 36) in the public pregnancy case. In the private gay case, the ratio was 0.44 (12 to 15), compared with 0.33 (12 to 24) in the public gay case. The remaining participants discussed social impact both before and after the court decision. [↑](#footnote-ref-136)
136. This number is based on the number of participants who suggested counter-impact in one or both of the dilemmas. The number rises if we count suggestions rather than participants because many participants suggested counter-impact in both pregnancy and same-sex dilemmas. Generally, the counts refer to participants unless explicitly noted otherwise. [↑](#footnote-ref-137)
137. Privatization was suggested 37 times prior to the court, 7 times in response to the court, and 6 times both before and after the court; counter-impact was suggested 91 times prior to the court, 24 times in response to the court, and 16 times both before and after the court. These figures are based on aggregating suggestions made in the two dilemmas. [↑](#footnote-ref-138)
138. Role transfer was suggested 6 times prior to the court and 25 times in response to the court. These figures are based on aggregating suggestions made in the two dilemmas. [↑](#footnote-ref-139)
139. We found a small overlap (5 cases) in which evasion coincided with role transfer, primarily because some participants suggested both. [↑](#footnote-ref-140)
140. Kenneth Culp Davis, Discretionary justice : a preliminary inquiry 166 (1971). ("selective enforcement may account for about half of all the discretionary power that is exercised in individual cases in our entire legal system"). [↑](#footnote-ref-141)
141. Stephen A. Schiller, *More Light on a Low Visibility Function: The Selective Enforcement of Laws (Part 2)*, 2 Police Law Q. 20, 24–29 (1972). [↑](#footnote-ref-142)
142. *Id.* at 30-31. [↑](#footnote-ref-143)
143. *Id.* at 20. [↑](#footnote-ref-144)
144. Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 Soc. Probl. 167, 169 (1981). [↑](#footnote-ref-145)
145. C16. Similar statements were made by J11, J12, J18, J21, J29. This perception of the religious school as a regulator of behavior is consistent with Cover, *supra* note 9. [↑](#footnote-ref-146)
146. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. Law Rev. 349 (1997).; Charles R. Tittle, Sanctions and social deviance : the questions of deterrence (1980). [↑](#footnote-ref-147)
147. See **footnote X** (C13) and adjacent text (discussing leaders who sought to ensure that invitations to same-sex wedding would not be sent to some members of the faculty to avoid the controversy), and **footnotes XX-XX** (C5, C6, C7, C8, C13) and adjacent text (discussing leaders who relocated an unmarried pregnant individual to a back-office position for the duration of her pregnancy). [↑](#footnote-ref-148)
148. Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination*, 67 Hastings LJ 957, 983–986, 996–1000 (2016). (finding that religious decision-makers reason the inclusion of sexual nonconformists and the suspension of judgment in these terms). [↑](#footnote-ref-149)
149. Minow, *supra* note 55 at 51. [↑](#footnote-ref-150)
150. Niraj Warikoo, Catholic Church in Michigan may expand health care to gay couples Detroit Free Press (2016), http://www.freep.com/story/news/local/michigan/2016/03/04/catholic-church-michigan-may-expand-health-care-gay-couples/81336744/ (last visited Apr 4, 2018). [↑](#footnote-ref-151)
151. (Black, Nolan, & Nolan-Haley, 1990). [↑](#footnote-ref-153)
152. (Davis, 2006). [↑](#footnote-ref-154)
153. Jonathan Haidt, *The emotional dog and its rational tail: A social intuitionist approach to moral judgment*, 108 Psychol. Rev. 814–834 (2001). (describing a series of experiments that yielded these results). [↑](#footnote-ref-155)
154. This is not entirely far fetched. Discretizing sexual offences had been the norm in some religious communities in the 20th century (most memorable is the Catholic child molestation scandal, where high ranking bishops are accused of deliberately hiding mass abuse in an effort to prevent public scandal). But we would not expect religious leaders, in such cases, to talk about their practices so openly as they did in the interviews—and to have their distinctions significantly affirmed by their communities, as revealed in the experiment. Rather, in the child molestation scandal Catholic communities were devastated to discover the Church cover up of the abuse. [↑](#footnote-ref-156)
155. I thank Rick Garnett for his insightful feedback that helped sharpening this point. [↑](#footnote-ref-158)
156. Allan Bérubé, Coming Out Under Fire: The History of Gay Men and Women in World War II 9–14 (2010). [↑](#footnote-ref-159)
157. Gregory M. Herek, Jared B. Jobe & Ralph M. Carney, Out in Force: Sexual Orientation and the Military (1996). [↑](#footnote-ref-160)
158. *Lawrence v. Texas* 2003 [↑](#footnote-ref-161)
159. *U.S. v. Windsor* 2013; *Obergefell v. Hodges* 2015 [↑](#footnote-ref-162)
160. Lawrence v. Texas, pages 2488,2490 [↑](#footnote-ref-163)
161. See footnotes XX-XX and the adjacent text. [↑](#footnote-ref-164)
162. Caryle Murphy, Most U.S. Christian groups grow more accepting of homosexuality Pew Research Center (2015), http://www.pewresearch.org/fact-tank/2015/12/18/most-u-s-christian-groups-grow-more-accepting-of-homosexuality/ (last visited Apr 4, 2018). [↑](#footnote-ref-165)
163. *Schuth v. Germany* , application no. 1620/03 final judgment [ECHR 2010], §72, and see the applicants explicit privacy justification in $46-48. [↑](#footnote-ref-166)
164. see if you can find this case. A religious school somewhere in the U.S. [↑](#footnote-ref-167)
165. Herx v. Diocese of Fort Wayne-South Bend Inc., No. i:i2-CV-i22 RLM, 2015WL 1013783, at \*2(N.D. Ind. Mar. 9, 2015**).** [↑](#footnote-ref-168)
166. Craig Masterpiece, *supra* note XX. [↑](#footnote-ref-169)
167. The final sample consists of participants who completed the core section of the experiment, which included answers to both dilemmas and the religious assessment of the conducts in question. Because participation was entirely voluntary, I tracked and analyzed dropouts to evaluate whether participants quit the experiment on a non-random basis (in particular I was worried that participants might drop out due to some negative reaction to the dilemmas). To evaluate this concern, several basic demographics (age, gender, religious affiliation, area of residence, frequency of prayer) were collected before the experiment. I created a dummy variable for dropouts (*Dropped*) and examined whether they differed from participants on these measures. Most dropouts occurred at or immediately after the collection of demographics, probably due to random loss of interest, before even seeing the vignettes. Dropouts were not visibly or statistically different from participants. Once the first dilemma was presented, dropping out became rare (559/582 completed, a 96% retention rate through the dilemmas). Subsequent dropouts occurred in the second wave of demographics and did not differ from those who remained in the study as a result of condition or demographics. The high retention rate at the experimental stage and the lack of visible differences between dropouts and participants at all stages of the study substantially alleviates response bias concerns. [↑](#footnote-ref-170)