

COMPLIANCE WITH THE LAW UNDER RELIGION-BASED NORMATIVE CONFLICTS:

A BEHAVIORAL ANALYSIS AND PRELIMINARY PRESCRIPTIONS

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**I. Introduction**

Consider the following scenarios:

1. A religious person wishes to participate in a traditional ritual that involves the consumption of a drug that he holds sacred. The drug is considered a proscribed conduct under State laws. How does the individual decide whether to follow the religious norm or adhere to the law?
2. The state prohibits discrimination based on sex, race, ethnicity and the like in all state-funded schools. According to the religious belief of the community

that operates one such school, allowing children of a different ethnicity in the school endangers the religiosity of the community's children and is thus prohibited. What may affect the parents' decision to comply with anti-discrimination laws or to follow the religious prohibition?

3. A religious individual experiences distress, anger and humiliation after learning about the exhibition of a picture which she considers blasphemous. She wishes to defend her religion in line with the prohibition on blasphemy, yet the response that she considers appropriate is proscribed by law. How does the individual decide whether to act according to her religious belief or adhere to the law?

These three scenarios join around a common theme: they all describe a state of normative conflict that individuals and groups face between their obligations under the law and their obligations under their religion. Religion-based normative conflicts are enduring and have been extensively analyzed through various lens, primarily constitutional law and legal philosophy. This paper takes a different approach. It asks two questions: how individuals make decisions in such cases, and what mechanisms should the law deploy in order to increase compliance? By attempting to get at the answers, I hope to offer some preliminary prescriptions to a society that wishes to mitigate and avoid such conflicts to the extent possible.

Religion-based normative conflicts involve contentious issues ranging from polygamy,<sup>1</sup> education,<sup>2</sup> and forcible gender separation<sup>3</sup> to the erection of illegal outposts

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<sup>1</sup> Reynolds v. United States, 98 U.S. 145 (1879) (one of the first landmark free exercise cases, where the court rejected a claim that criminal prohibitions on polygamy could not be constitutionally applied to those whose religion commands the practice).

by religious orthodox.<sup>4</sup> The three opening scenarios illustrate the type of problems that we are dealing with.

The first scenario takes after the case of Alfred Smith and Galen Black, two members of the Native American church that enshrines the peyote plant. Smith and Black were discharged from their work at a drug rehabilitation center and later denied unemployment compensations because they used the drug during a ceremony of their church. At the time the case was litigated, the state of Oregon prohibited any use of peyote under its drug law. The two men thus faced a normative conflict between the legal prohibition and the employer's prohibition on the use of drugs, on the one hand, and the religious ritual, on the other hand. They chose to stick with their religious tradition

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<sup>2</sup> State of Wisconsin v. Jonas Yoder, Wallace Miller, and Adin Yutzy, 406 U.S. 205 (1972) (where the court granted Amish parents an exemption from sending their children to school according to the compulsory education law of Wisconsin, reversing their prior convictions for breaking that law). See an elaborate discussion next to footnote 10.

<sup>3</sup> HCJ 746/07 *Naomi Ragen and others v. Ministry of Transport* [2011], available in: [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.htm](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.htm) (last viewed on January 2013) (where the Israeli supreme court prohibited the customarily separation of men and women in public bus lines in which women were required to board by the rear door and sit at the back, and men board by the front door and sit at the front seats. Women were also required to dress modestly when boarding these lines. The bus company did not initiate the sex separation and it was privately enforced by coercive means by ultra-orthodox passengers in those lines; the judgment imposed affirmative obligations on the bus company to stop instances of coercive separation and reiterated the criminality of private conducts that coerced the separation) (hereinafter *Ragen* case).

<sup>4</sup> For a roughly balanced overview of the phenomenon, see: ASHER COHEN & BERNARD SUSSER, *ISRAEL AND THE POLITICS OF JEWISH IDENTITY: THE SECULAR-RELIGIOUS IMPASSE* 53 (2000). Oded Haklai, *Religious—Nationalist Mobilization and State Penetration Lessons From Jewish Settlers' Activism in Israel and the West Bank*, 40 *COMP. POLITIC. STUD.* 713 (2007). ISRAEL'S RELIGIOUS RIGHT AND THE QUESTION OF SETTLEMENTS, INTERNATIONAL CRISIS GROUP – WORKING TO PREVENT CONFLICT WORLDWIDE 3-7, 27 (20 July 2009) (hereinafter: *Religious right report*), in: [http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/89\\_israels\\_religious\\_right\\_and\\_the\\_question\\_of\\_settlements.pdf](http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Israel%20Palestine/89_israels_religious_right_and_the_question_of_settlements.pdf).

despite considerable sanctions – job loss, a potential incarceration<sup>5</sup> - and in the litigation they made it clear that they believed *they were right not to obey the law*. Smith and Black were not alone. A host of cases were litigated in the United States around the use of drugs for sacramental purposes.<sup>6</sup>

Another type of religion-based normative conflict is illustrated in the second scenario, that draws rather freely on the circumstances of *Noar KeHalacha Association v. Ministry of Education* (the *Immanuel School* case),<sup>7</sup> an Israeli case that involved a group of 40 parents circa who refused to send their daughters to the publicly-funded primary school in Immanuel after the Supreme Court ordered that the ethnic segregation that the school imposed between Ashkenazi and Sephardic students be terminated. The parents, mostly of Ashkenazi origin, argued that exposing their daughters to the modern way of life of the Sephardic families is “inconsistent with the strict laws of modesty that they follow”<sup>8</sup> and demanded that the students study in separate. When the Court decided to

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<sup>5</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (hereinafter: *Smith* case). *Employment Div. v. Smith*, 485 U.S. 660 (1988).

<sup>6</sup> P. W. EDGE, *RELIGION AND LAW* 82-86 (2006) (discussing litigation of the use of drugs for religious motives in several states, including the U.S. and the U.K.). *People v Mitchell*, 244 Cal. App. 2d. 176 (1966); *US v Middleton* 690 F.2d. 820 (1982); *People v Mullins*, 50 Cal. App. 3d 61 (1975) (all cases involving claims that the use of marijuana was done for religious purposes).

<sup>7</sup> HCJ 1067/08 *Noar KeHalacha Association v. Ministry of Education* [2010] (*Immanuel* case), [http://elyon1.court.gov.il/files\\_eng/08/670/010/o24/08010670.o24.htm](http://elyon1.court.gov.il/files_eng/08/670/010/o24/08010670.o24.htm).

<sup>8</sup> *Id.*, paragraph 4. Notably, the parents stressed that the segregation was not ethnic-based but religion-based, and pointed to the fact that 27% of the girls in the Ashkenazi section were in fact Sephardic. The Sephardic petitioners conversely claimed that the restrictions imposed on girls who sought admission to the school were ethnic and exclusionary of Sephardic girls (among them, the requirement to say prayers in Ashkenazi Hebrew and to accept the religious authority of the local Ashkenazi rabbi). Finding the segregation of the school to be discriminatory, the court stressed the strict physical separation that the school deployed. A wall was constructed in the middle of the school and different uniforms were enacted for each group of students. The scope of the physical separation apparently convinced the court that the segregation was not solely religion-based.

desegregate the school the parents stopped sending their daughters to school. They were ultimately found in contempt of the court and the fathers were sent to jail (the court first tried to impose a fine on the school and then on the parents but these measures did not bring about compliance).<sup>9</sup> After ten days of imprisonment a settlement was negotiated.

What is striking in the *Immanuel School* case is how persistent the parents were. They retained their refusal to send their daughters to school despite the escalating enforcement measures, even after multiple attempts of compromise were made and the school itself declared it is willing to comply with the Court's decision. What can explain this behavior, and is there any way in which the legal system could have increased compliance among the deviant parents?

In a similar U.S. case, *State of Wisconsin v. Jonas Yoder et al.*,<sup>10</sup> a group of Amish parents were convicted and fined in a Wisconsin court for violating the compulsory education law of the state for not sending their children to school. The Amish parents in *Yoder* made a roughly identical argument to that of the ultra-orthodox Ashkenazi parents in *Immanuel*. They claimed that according to their belief high school education is dangerous and inconsistent with their way of life and insisted that they be exempted from the application of the law due to their religious obligation.<sup>11</sup> This case,

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<sup>9</sup> This decision was highly controversial at the time. For instance, see: Yedidia Stern, *A Tragedy of Errors*, HAARETZ, June 18, 2010, available in <http://www.haaretz.com/print-edition/opinion/a-tragedy-of-errors-1.296925> (last viewed on January 2013); Ruth Gavison, *HCJ Immanuel – an Israeli Tragedy*, YNET NEWS, June 22, 2010, [in Hebrew], available in <http://www.ynet.co.il/articles/0,7340,L-3908892,00.html> (last viewed on January 2013).

<sup>10</sup> *Yoder* case, supra note 2.

<sup>11</sup> *Id.*

like the former one, raises serious questions regarding the ability of the law to ensure compliance in religion-based normative conflicts.<sup>12</sup>

To broaden the picture let us also consider the third scenario. A prototype (and perhaps stereotype) of the conflict between conservative religion and liberal law, controversies around blasphemous speech repeat themselves around the world, crossing countries and religions. The recurring theme is some form of expression – be it a book, a newspaper article, a cartoon, a picture, a parade – which is found to be blasphemous, sacrilegious and offensive of religion by many fervent believers. Some believers respond with letters, demonstrations, suits, all valid forms of protest under the law – but others resort to violence. Take the case of Andreas Serrano’s notorious photograph *Piss Christ*, in which the figure of the crucifix is photographed immersed in urine, semen and blood. The picture shocked Christian clergy and believers worldwide. During its presentation in the National Gallery of Victoria in Melbourne, Australia, it survived two consecutive attacks, the second directed also against the assigned security guard, and may have attracted more violence lest the exhibition was cancelled the next day. Both the gallery’s curator the artist received life threats.<sup>13</sup>

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<sup>12</sup> For the purpose of the current discussion I put aside the holding of the court that the Wisconsin law as applied to the Amish was unconstitutional. I do so both because the holding is immaterial to the point which I am trying to make, and because I think it is conceivable to imagine the Court reaching a different decision today – indeed, more similar to how *Smith* was decided years ahead. For different views on the court’s current approach see: Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

<sup>13</sup> Reid Mortensen, *Art, Expression and the Offended Believer*, LAW AND RELIGION 181, 181-183 (R. J. Adhar ed., 2000). A print of the picture was later vandalized by Christian protestors in Sweden and in France: A. Sage, *Vandalism and threats greet Piss Christ in France*, REUTERS, April 18, 2011, <http://www.reuters.com/article/2011/04/18/us-france-art-idUSTRE73H4JR20110418> (last visited Jan 25, 2013).

When the protest takes the form of a mass, the violence turns massive as well. A memorable example is the Jyllands-Posten Muhammad cartoons controversy that started in Denmark and enflamed the Muslim world, causing some 200 deaths and putting cartoonists under heavy security due to life threats and assassination attempts by Muslim Danes.<sup>14</sup> The abundance of examples suggests that the religious prohibition on blasphemy is one of the strongest religious taboos. The fact that under religious norms blasphemy is subject to punishment, often violently, poses a serious problem for liberal democracies that mostly refrain from prosecuting blasphemous speech; some abolished the offence altogether.<sup>15</sup> Is the conflict between law and religion on the permissible boundaries of expression bound to make religiously motivated violations of the law a recurring theme? Can there be a way out of the vicious cycle of expression and violence?

#### **A. The argument in a nutshell**

This paper will seek answers to these questions by analyzing the normative conflict based on two streams of scholarship: social psychology and the economic analysis of law. The economic and the psychological scholarships provide several different answers to the question of why individuals obey the law, and each approach marginalizes the role of its contestants in explaining law-abiding behavior. Putting aside

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<sup>14</sup> Peter McGraw and Joel Warner, *The Danish Cartoon Crisis of 2005 and 2006: 10 Things You Didn't Know About the Original Muhammad Controversy*, HUFFINGTON POST (2012), [http://www.huffingtonpost.com/peter-mcgraw-and-joel-warner/muhammad-cartoons\\_b\\_1907545.html](http://www.huffingtonpost.com/peter-mcgraw-and-joel-warner/muhammad-cartoons_b_1907545.html) (last visited Jan 25, 2013).  
[http://en.wikipedia.org/wiki/Jyllands-Posten\\_Muhammad\\_cartoons\\_controversy](http://en.wikipedia.org/wiki/Jyllands-Posten_Muhammad_cartoons_controversy) ;

<sup>15</sup> For an overview of the relations between blasphemy in the world's religions and in the law, with relation to freedom of expression, see L. W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 3-14, 527- 533 (1995). Also see M. M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153 (1993).

the general debate, I argue that at least when it comes to normative conflicts between law and religion none of these approaches provides a complete and satisfactory answer as to why individuals obey or disobey the law. Based on empirical findings and on some insights of the existing models I suggest a new approach: an *Identity/Situation model* of decision-making under religion-based normative conflicts. I argue that in situations that call for *deliberation*, the strength of one's religious identity relative to one's civic identity influences the mode of analysis that one uses to decide whether to obey the law: *a cost-benefit analysis* or *a legitimacy-based analysis*. In situations that call for *conformity*, the relative salience of each identity will impact on directly the norm to which one conforms. I argue that there is little the law can do about conformative situations, and more that can be done about deliberative situations. Here I argue that the interplay of individuals' religious identity and their civic identity divides the realm of normative conflicts into two cases: an easier case and a hard case.

*In the easier case* individuals are committed both to religion and to the state. Even when they experience normative conflicts, their general identification with the state is strong. According to psychological findings, these individuals are more inclined to deploy a legitimacy-based analysis: they look at the legitimacy and morality of the law and are greatly influenced by procedural fairness when making law compliance decisions. Hence, to encourage a compliant behavior among high-identifiers the state should maintain procedures that are transparent, neutral, respectful and inclusive.

*The hard case* is different. It is harder because individuals have uneven commitments to religion and to the state. Their identification with the state is low, and they may be more inclined to disobey the law in a state of normative conflict. Research

suggests that low-identifiers are less responsive to procedural fairness and more responsive to considerations of utility when they experience conflicts with authorities. I extrapolate from these findings to argue that religious low-identifiers would be more likely to follow a cost-benefit analysis (CBA) and take into account discrepancies in costs and benefits of the legal and the religious systems when the two normative systems conflict. I further argue that the law is likely to lose this analysis, as legal sanctions are often insufficient to counter religious sanctions and rewards. Thus, I argue that to successfully tackle the hard cases lawmakers need to choose one of two: *accommodate* religious belief by creating exceptions, or offer *positive incentives* as legal sanctions are not enough. Positive incentives can both alter the CBA of specific conflicts *and* gradually strengthen the civic identity of low-identifiers, what would enable the state to rely more on procedural fairness in the long run. I discuss two examples of such positive incentives.

I will present my argument in three parts: following the introduction, the second section lays the foundations to understanding the conflict between law and religion from the standpoint of the religious individual. The third section examines how the conflict is potentially explained by each of the three approaches I identified in the literature: the rational (cost-benefit) analysis, the legitimacy-based (fairness) analysis, and conformity. I provide a short critical analysis of each approach and address their contribution and shortcomings in accounting for religion-based normative conflicts. In the fourth section I introduce and flesh out the new model. Finally, in the fifth section I tie the knots and discuss general observations and prescriptions that stem from the argument. I conclude by identifying the contribution of empirical research to my topic and call for future research that will substantiate or refute my argument based on actual data.

**B. Basic clarifications on scope and methodology**

Before I delve into the analysis, several clarifications as to my basic premises and reservations are due. First, this paper singles itself from much of current literature on law and religion by refraining from addressing constitutional questions on the optimal balance or boundaries of rights. Instead, my analysis is institutional and behavioral in the sense that I am looking for ways to mitigate this conflict and encourage compliance with the law. For this purpose I assume that it is society's best interest that individuals obey the law in the general case and challenge it only through democratically accepted means (like judicial proceedings or referendums). Naturally this assumption is open to debate and contest at certain times and in certain societies, but it seems an acceptable assumption to make regarding the modern liberal democracies that this paper addresses.

Second, the paper establishes a conceptual framework rather than a particularized analysis of specific religions. The reason is that conflicts between law and religion do not seem to be limited to one place or time, or to be the province of only one religion. Rather, these conflicts seem to be an enduring phenomenon that preoccupies many believers and societies around the globe. As an overwhelming 84% of the world's population identify with a religious group; 56% of Americans say that religion is very important in their lives<sup>16</sup> -- conflicts of norms between law and religion seem inevitable wherever and whenever the two normative systems do not entirely overlap.

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<sup>16</sup> THE GLOBAL RELIGIOUS LANDSCAPE: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MAJOR RELIGIOUS GROUPS AS OF 2010, THE PEW FORUM ON RELIGION & PUBLIC LIFE (2012), *available in* <http://www.pewforum.org/global-religious-landscape-exec.aspx> (last visited on 1.24.2013). HOW RELIGIOUS IS YOUR STATE?, THE PEW FORUM ON RELIGION & PUBLIC LIFE (2009), *available in* <http://www.pewforum.org/How-Religious-Is-Your-State-.aspx> (last visited on 1.24.2013).

Third, in terms of methodology the study draws on two partially overlapping fields of legal research: law and behavioral economics and law and norms. The relevance of non-legal norms to the design of laws and institutions has been widely acknowledged.<sup>17</sup> Yet the analysis is usually focused on domains in which law and norms interact positively or exclusively, and less on situations in which law and non-legal norms conflict.<sup>18</sup> The present study is interested in precisely such situation: religion-based normative conflicts; this focus, I hope, raises an additional contribution to the literature – this time the literature of law and norms.

## **II. Law and religion: supporting and competing normative systems**

Law and religion are both regulators of human behavior, and their relationship has always been entangled and complex. This section lays the foundations to the paper by exploring the tension between law and religion as regulators of conduct that can either complement each other or compete with each other. First we shall examine how religion *supports* the law in areas where the two normative systems converge on the appropriate standard for behavior; then we shall address the circumstances where religion *competes* with the law in areas where the two normative systems disagree on the appropriate standard – either in general, or in particular circumstances. The purpose of this investigation is to flesh out the notion of religion-based normative conflict and to lay

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<sup>17</sup> For a representative and non exhaustive sample see: L. Bernstein, *Opting out of the legal system: extralegal contractual relations in the diamond industry*, 21 J. LEGAL STUD. 115 (1992). C. R. Sunstein, *Social norms and social roles*, 96 COLUM. L. REV. 903 (1996). R. H. McAdams, *Origin, Development, and Regulation of Norms, The*, 96 MICH. L. REV. 338 (1997).

<sup>18</sup> McAdams, *supra* note 17, at. 347-349, esp. footnote 43 (reflecting the relative lack of research on this issue).

down the concepts that will serve us in analyzing behavior under such conflict in the following sections.

**A. Religion as a supportive normative system**

Religion, in the broadest of terms, is a belief system that generally rests on supernatural assumptions.<sup>19</sup> But it also plays an important institutional and normative role in human life. As Professor Iannaccone noted, “virtually all institutions work to articulate and instill values – families, firms, schools, political organizations, military units, and even prisons. But none is so dedicated to this enterprise as are religions.”<sup>20</sup> What makes religion unique in reference to other institutions is the scope of its normative enterprise. Religion seeks to regulate not only human conduct, but also human belief. And the scope of its regulations covers almost every type of conduct and belief in virtually all areas of life, from diet and clothing to procreation, education, commerce and crime. The extent of control religion claims over human life makes it a pivot that defines identity, shapes morality and ethics, and creates and preserves social communities.

As a normative system, religion contains various types of norms that differ in terms of their relative strength and the extent to which they have parallels in *other* normative systems. Some areas are regulated exclusively by religion, like rituals, diet, and modesty, norms that are usually at the center of religious experience. Other religious norms overlap with universal morality and ethics (e.g. the prohibition on telling lies or on

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<sup>19</sup> R. STARK & W. S. BAINBRIDGE, *A THEORY OF RELIGION* 39-40 (1987); R. STARK & W. S. BAINBRIDGE, *FUTURE OF RELIGION* \_\_\_\_ (1985).

<sup>20</sup> L. R. Iannaccone, *Religion, values, and behavioral constraint*, in *SYMPOSIUM ON THE ECONOMIC ANALYSIS OF SOCIAL BEHAVIOUR, CONVENED BY THE FRAZER INSTITUTE 4* (1995), [http://www.religionomics.com/archives/file\\_download/35/Iannaccone+-+Values.pdf](http://www.religionomics.com/archives/file_download/35/Iannaccone+-+Values.pdf) (last visited Jan 13, 2013).

adultery; the instruction to treat others with dignity and respect). Other religious norms have a mixed social-religious nature (e.g. preferential treatment of members that share one's religion, prohibitions on interfaith marriage). There is also a considerable overlap between religion and the law. This overlap has institutional and substantive dimensions. In terms of institutional resemblance, many religions – including the three monotheistic religions – have created rich and comprehensive normative codes referred to as religious law, which share many characteristics of a legal system. In terms of substantive resemblance, and as a result of the formative role of religion in the development of modern legal systems, many laws – especially but not exclusively criminal laws – mirror religious prohibitions. As a result, law and religion converge on the appropriate standard of behavior in many issues even nowadays. The prohibitions on murder, theft, deception, and fraud, are prototypical examples. These duplicate prohibitions – proscribed by both law and religion – manifest how religion can support the law in promoting compliance.

A large number of empirical studies conducted across the United States since the 1960s were aimed to test the hypothesis that religion plays a supportive role in encouraging law-abiding behavior and that religiosity reduces crime. The majority of these studies did find such an effect, but usually a limited and weak effect.<sup>21</sup> Three main

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<sup>21</sup> Colin J. Baier & Bradley R. E. Wright, “*If You Love Me, Keep My Commandments*”: A Meta-Analysis of the Effect of Religion on Crime, 38 J. RESEARCH IN CRIME & DELINQUENCY 3 (2001) (A meta-analysis of 60 past studies found a moderate deterrent effect of religiosity on criminal behavior of individuals). H. G. Grasmick, R. J. Bursik Jr & J. K. Cochran, “*RENDER UNTO CAESAR WHAT IS CAESAR’S*”, 32 THE SOCIOLOGICAL QUARTERLY 251, 252 (1991) (noting that out of the 65 studies conducted by 1983, only 10 found no relationship and that all 6 studies conducted among adults found a relationship between religion and reduction of crime). Studies were conducted also outside the United States, e.g. in Britain, Israel, with similar results. See: Sergio Herzog, *Religiosity and perceptions of crime seriousness by Jewish and Muslim respondents in Israel*, 24 DEVIANT BEHAVIOR 153 (2003).

limitations were documented: first, a negative correlation was documented only with respect to some offences (mainly victimless offenses, such as drug use), and not other offences. Second, the statistics suggest that the effect depends on the level of religiosity of the environment more than the personal religiosity of the individual. Religion mainly influences behavior where the individual is surrounded by *many other* religious people and not in more secular areas where the religious individual has fewer religious others around.<sup>22</sup> Third, and perhaps related, *religious activities*, not beliefs or values, were found to be the dimension that predominantly correlated with less crime.<sup>23</sup>

The explanation that seems to account for the last two findings is that individuals who are immersed and involved in their congregation are more frequently exposed to normative messages and thus to religious inculcation; they are also subject to more frequent and close monitoring and sanctioning of their behavior.<sup>24</sup> The findings thus highlight the importance of the *social control* aspect of religion.

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<sup>22</sup> T. D. Evans et al., *Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality*, 33 CRIMINOLOGY 195 (1995) (describing the consensus on the magnitude of the effect and the controversies around the type of offences, the contexts in which the effect is present, and secular constraints). R. Stark, *Religion as Context: Hellfire and Delinquency One More Time*, 57 SOCIOLOGY OF RELIGION 163, 169-170 (1996) (Arguing that the relationship between religiosity and delinquency is contingent on the presence of “moral communities”, contexts such as a geographic religious community or parental control; individual religiosity in and of itself is insufficient to reduce criminal behavior).

<sup>23</sup> Evans et al., *Id.*, at 209-210. Several studies investigating corporate crime also indicated the importance of religious participation rather than belief measures: S. D. Dyreng, W. J. Mayew & C. D. Williams, *Religious Social Norms and Corporate Financial Reporting*, 39 J. BUS. FINANCE & ACCOUNTING 845 (2012). G. Grullon, G. Kanatas, & J. Weston, *Religion, Ethics, and Corporate Behavior*, working paper (September 8, 2009). Available at: <http://ssrn.com/abstract=1472118>. S. T. McGuire, T. C. Omer & N. Y. Sharp, *The Impact of Religion on Financial Reporting Irregularities*, 87 ACCOUNTING REV. 645 (2012).

<sup>24</sup> Evans et al., *Id.* (explaining inter alia that: “continual reinforcement of religious moral values and policing of behavior are more likely when one is embedded in such a

The findings that (at least some dimensions of) religiosity can *support* compliance with the law should not come as a surprise, especially in light of the type of behavior that was studied. The studies investigated criminal behavior of the kind prohibited by both religion and law (like delinquency and property crimes) or broadly condemned as harmful and dangerous, in which case the prohibition is generally compatible with religious worldview (like drug abuse). Violations resulting from *conflicts* between law and religion were not investigated here. Taken in this light, we might indeed be surprised that the effect documented in the studies was not in fact *larger* and broader.

The notion of religion as a supporting normative system is important, as we shall see, not only because it gives us a more complete understanding of the dual role that religion plays with respect to law, but also because it is useful to conduct a typology of the different cases in which religion *competes* with the law. I shall turn to address this side of the law-religion relationship now.

## **B. Religion as a competing normative system**

As every two non-identical normative systems, religion and law can conflict and compete. I propose here a typology of conflicts between law and religion into two broad categories: (1) conflicts where religion and law hold inconsistent views on the appropriate standard of behavior in a case; and (2) conflicts where religion and law generally converge on the appropriate standard in the case but run into a conflict in the specific circumstances. As we shall see, it is sometimes difficult to sustain this distinction

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community of fellow believers. As White (1968: 27-28) noted, “the fact that an individual believes strongly or even prays often, is not as effective in directing his behavior as are the sanctions [religious and otherwise] he receives from other people.” ... Thus, even if an individual professes hellfire beliefs or claims an internalized religious orientation in daily life, such religiosity is a less effective inhibitor for them than for those who regularly and directly account to a religious community”).

in practice, as it often depends on the level of generality in which we define the norms involves. I still find it analytically important, however, as I think that the distinction makes sense and has implications at least in some cases.<sup>25</sup>

***1. No convergence on the ethical, Recurring conflicts***

The first type of normative conflict is that in which the legal rule and the religious norm are situated in stark and direct conflict. This is the case whenever the law directly *prohibits* a conduct which religion *requires* or *strongly encourages*, or when the law *promotes* or *protects* a conduct which religion *prohibits*. The first scenario I discussed, the *Smith* case, belongs in this category. The total ban on the use of peyote stands in stark contrast to the religious obligation to use the drug in sacramental rituals. Another example in this category pertains to religious norms with respect to women and their role in the family and in public life. Bars on freedom of movement, dress and marriage, forcible gender-based segregation of the public sphere,<sup>26</sup> polygamy and female genital mutilation, all are considered strong norms in some religions<sup>27</sup> but are prohibited in liberal democracies.<sup>28</sup> The third example is the legal protection to free speech when it conflicts with religious prohibition on blasphemy, discussed in the third scenario.

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<sup>25</sup> I do not suggest that the following typology is necessarily exhaustive. More lines can be drawn within each category, noting for instance the act-omission distinction (for a similar proposal see EDGE, *supra* note 6, at 87). Perhaps also one could choose a different organizing principle for the typology. I chose the general convergence on the ethical as the organizing principle because it seemed to me to capture the gist of these conflicts.

<sup>26</sup> *Ragen* case, *supra* note 3 (as the case explains, the ultra-orthodox men at least view the separation as required by the modesty standards that Judaism impose on adherents).

<sup>27</sup> See for instance the *Reynolds* case, *supra* note 1 (where the defendant, George Reynolds, argued that the Mormon religion required him to marry multiple women and that the penalty for refusing to practice polygamy was eternal damnation).

<sup>28</sup> For a great discussion of the tension between these religious norms – and more – and liberal values see SUSAN M. OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999).

*Prohibitive vs. optional norm.* The cases I reviewed so far are cases where there is an explicit and direct conflict between two contrasting requirements: equality vs. modesty/appropriate family roles; prohibition on drugs vs. mandatory use of drugs. A more moderate form of the no-convergence conflicts is one where the first norm is prohibitive and the second norm is optional. The line between a conduct that religion requires of the individual and a conduct that religion merely allows may be thin and vague from the individual's perspective and may depend on contextual and situational circumstances. But I assume that whenever the individual perceives the conflict to arise between a legal *prohibition* and a religious *option*, they will feel that they have some area of maneuver that renders the conflict less acute in comparison to the first category. Theories of norms in social psychology seem to support this observation: injunctive norms appear to have greater influence on people.<sup>29</sup> Two other factors that have impact are how important the norm is considered to be and how specific it is.<sup>30</sup> The more important and the more specific – the greater influence the norm has on behavior. Taken together, these findings provides psychological support to my conceptual analysis that norm that are optional, less important and more abstract are likely to produce conflicts in a lower level of intensity.

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<sup>29</sup> Psychological research of norms distinguished between *injunctive* norms, which specify what is commonly regarded as ought to be done, and *descriptive* norms, which describe what others mostly do in a given situation – but not necessarily ought to do. Several studies found people to be, in certain situations, more influenced by injunctive norms than descriptive norms. See R. A. BARON & D. BYRNE, *SOCIAL PSYCHOLOGY* 354 (2004); Rachel I. McDonald, Kelly S. Fielding & Winnifred R. Louis, *Energizing and De-Motivating Effects of Norm-Conflict*, 39 *PERS. SOC. PSYCHOL. BULL.* 57 (2013).

<sup>30</sup> BARON & BYRNE, *Id.*, at 131-132 (discussing empirical findings that people are more inclined to act based on attitudes that they perceives as strong, specific and important to them, and that are also accessible in the circumstances).

2. *General convergence on the ethical, Specific conflicts*

A second category of conflicts is where the law and religion are generally aligned, but conflict ensues in a specific case. Both law and religion proscribes harming other people and harming their property – in the general case. They converge on the ethical standard of behavior, and religion functions as *a supportive* normative system. Yet the general convergence might break in the circumstances of a specific case, where a higher religious norm intervenes.

This scenario is also known as the *teleological suspension of the ethical*. This term, coined by the nineteenth century Danish philosopher Søren Kierkegaard, refers to situations in which individuals put aside the ordinary ethical – their universal moral commitments, including many religious commitments – to achieve an ulterior religious goal. Kierkegaard applied this concept on the biblical story of the Binding of Isaac, and argued that Abraham was willing to violate the universal norm against murdering an innocent and his parental duties towards his son in order to follow a duty to a higher source of command than standard ethics – the divine.<sup>31</sup> Abraham suspended ordinary ethics to accomplish a higher religious goal; and the end justified the means. Similarly, religion-based normative conflicts today can take the form of a clash between ordinary ethics (converging with the law) and higher religious norms that are experienced as or argued to be important enough to justify unethical means.

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<sup>31</sup> See McDonald, William, *Søren Kierkegaard*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2012 Edition, Edward N. Zalta ed.), Ch. 4, <http://plato.stanford.edu/archives/fall2012/entries/kierkegaard/> (last viewed on January 2013). Calvin O. Schrag, *Note on Kierkegaard's Teleological Suspension of the Ethical*, 70 ETHICS 66–68 (1959). John Ladd, *Politics and Religion in America: The Enigma of Pluralism*, in RELIGION, MORALITY AND THE LAW: NOMOS XXX 263, 272 (J. Roland Pennock & John W. Chapman eds., 1988).

I classify cases of teleological suspension of the ethical again into two categories: cases where there religion and law *explicitly converge* on the ethical in the general course of things, and cases where the two are *compatible*, but religion has *no specific* prohibition that parallels the legal one. Things get a little complicated though.

***Explicit convergence on the ethical.*** The first group seems to describe cases like the third scenario: in the general case both religion and law proscribes violence towards other persons and their property. There is thus no conflict between a legal prohibition on vandalism or threats of violence and religion, as both proscribe these behaviors. Yet in the particular cases of *Piss Christ* and the Mohammad cartoons a conflict emerged because a higher religious rule – the prohibition of blasphemy – intervened and required (from the standpoint of the religious individual) that blasphemy is removed and the blasphemer is punished.<sup>32</sup>

Wait, you might say -- how can this scenario fit into the general convergence group when I also classified it under the no-convergence group of conflicts (under the assumption that there is no convergence between law and religion in terms of the tension between freedom of speech and the prohibition on blasphemy). This is the point where I have to admit that my typology is probably contingent on the level of generality in which norms are viewed. However, I still think that it is important to identify the cases where there is *some level* of generality where explicit convergence is found, because these are the cases where individuals are presumably more reluctant to deviate from the law because such act will also run against and established religious norm. They not only

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<sup>32</sup> The perception that believers are obliged to go against blaspheme, avenge it and punish its perpetrators are apparently rooted in religious belief. For an overview see LEVY, *supra* note 15, at 3.

experience a law-religion normative conflicts but also an intra-religious normative conflict between the competing religious norms. Thus, they might seek first *other venues of action* that do not bring the two religious commitments into conflict, and the law (which has stakes in this conflict) will gain from this search for consistency. The role of religion as a supportive normative system can come into play. In section V, I argue that the law should institute and maintain such venues of action like judicial recourse and administrative hearings, so as to allow believers to utilize legitimate venues to express protest.

***Implicit compatibility.*** The second category of teleological suspension of the ethical is where the law prohibits a conduct that religion has little or nothing to say about (thus the prohibition raises no conflict in general), but when a specific and higher-order religious norm interferes - the conduct may become mandatory or strongly encouraged. I would classify the *Immanuel school* case in this category. This may be a rare example, as religions usually define clear standards regarding treatment of out-groups; but in the present case there is no direct religious prohibition or alternatively a requirement of ethnic discrimination among Jews. The two normative systems seem quite compatible. But when it comes to schooling, a higher norm that seems to deal with the proper ways to educate children interferes, and this norm gives rise to the normative conflict.

Another example that belongs in this group is the illegal erection of outposts in the West Bank, under the control of Israel. Jewish orthodoxy that sponsors the construction of the outposts has no conflict with secular planning and construction law in the general case, but it also doesn't have an explicit prohibition on illegal construction. Therefore, the two normative systems are generally compatible. Yet in the case of the

outposts a higher-order religious mandate intervenes: the mandate to inhabit the whole of Israel and ensure Jewish control in the territories. The grounds for such religious beliefs are immaterial for the purposes of my argument.<sup>33</sup> What matters is only that individuals subjectively believe or made to believe in them and are ready to act on their belief. This gives rise to the normative conflict and to possible violation of the law.

In my view, the “implicit compatibility” category that I’ve just discussed is *more* problematic from the standpoint of the law than the “explicit convergence” category because when *both* religion and law proscribe the conduct in the general case, individuals are probably more reluctant to disobey the law even when a higher religious norm intervenes. As noted, the individual will strive to minimize her normative conflict as she sees *both norms as binding*. But when the conflict emerges between a legal norm that has no parallel in the religious normative system and a high-order religious norm intervenes, and then the conflict enjoys *no moderating influence* and is inevitably more intense.

I think that the last examples and the notion of the teleological suspension of the ethical captures what seems to be a core mechanism that drives religiously motivated acts of noncompliance with the law: a higher source of authority or norm intervenes and suspends the law, and sometimes other religious commitments as well.<sup>34</sup> The ultimate

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<sup>33</sup> Of course, none of the classifications that I make here is free of doubts. The commandment to inhabit the whole of Israel raises debates among Jewish denominations as to whether such requirement even exists and if so, under what conditions. See the RELIGIOUS RIGHT REPORT, *supra* note 4, *id.* In addition, many religious individuals believe that they are generally obliged to follow state law for religious reasons, what may place the conflict in the province of the previous category – explicit convergence, specific conflict. Again it follows that my typology is more of a framework of analysis and not a rigid and precise classification. Rather, it differs from one denomination to the other. What is important for my argument is only the *subjective* standpoint on the matter.

<sup>34</sup> R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED* 82 (1999) (drawing on the example of Jewish extremism in Israel prior to the assassination of Prime Minister Rabin,

source of authority is thus a core issue.<sup>35</sup> The more an individual acts on the basis of the supremacy of divine law and the more important the norm in question is perceived to be,<sup>36</sup> the more the individual is expected to violate the law.

But this does not mean that lawmakers cannot foresee these conflicted situations and mitigate the conflict in advance. One possible direction that rises from the typology I suggested here is to identify conflicts that also characterized as intra-religion normative conflicts. These are natural candidates to be mitigated by providing believers with other venues of action but the deviant one. More possible directions as well as obstacles will be addressed in the following chapters. The next chapter is functional: it reviews the common models that explain compliance with the law and offer prescriptions on how to install legal rules to promote compliance; the purpose of this review is to understand whether the model is applicable to our case, and whether the prescriptions are workable solutions to religion-based normative conflicts as well.

### **III. What explains compliance with the law: three models**

Legal, economic and psychological literatures offer three main explanations as to why people comply with the law, each focusing on different factors and offering different prescriptions for the lawmaker interested in encouraging compliance with the law. *The rational analysis model* argues that individuals comply with the law only to the extent

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the author argues that all world religions have created “emergency” rationales, capable of suspending nearly all laws and allowing nearly all actions to believers).

<sup>35</sup> S. C. Idleman, *Why the State Must Subordinate Religion*, LAW & RELIGION – A CRITICAL ANTHOLOGY 175, 185-186 (S. M. Feldman ed., 2000); S. Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1467 (1985). C. H. Esbeck, *Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos*, 70 NOTRE DAME L. REV. 581, 637 (1994).

<sup>36</sup> See BARON & BYRNE, *supra* note 29, at 131.

they find it beneficial, following a rational cost-benefit analysis. Conversely, *the legitimacy-based analysis model* argues that individuals are not guided by cost-benefit considerations but rather by normative considerations about the legitimacy and morality of the law. Their judgments of these issues are largely facilitated by how fair they perceive legal authorities to be. The third model, *compliance as conformity to social influence*, emphasizes the role of simple conformity to other people and norms, as distinguished from deliberative analysis, in compliance with the law.

This chapter presents the models in more detail and applies them to the situation of religion-based normative conflicts. Based on this, I argue that neither model provides a complete explanation to why people decide to (dis)obey the law in religion-based normative conflicts. Instead of viewing the three models as contrasting and distinct as their leading proponents do, I argue that the analysis should be reconstructed around the interplay of individual's identities. Specifically, individuals who strongly identify with the state (e.g. proud of being a citizen, very patriotic) are more likely to deploy the normative model, whereas individuals with a low civic identity and strong religious identity are more likely to deploy the rational model. When one identity is particularly salient – whether due to group influence or in a specific context – individuals are likely to conform to the norm that the salient identity implies.

#### **A. Compliance with the law as a rational analysis**

The first and most pervasive approach to analyze behavior in legal writing is the economic analysis of law. This line of scholarship, based on *rational choice theory*, portrays the individual as a rational maximizer who makes decisions based on a cost-benefit analysis (CBA). The theory assumes that each individual has a utility function,

which reflects her preferences, desires and personal taste – a function that the individual seeks to maximize at all circumstances. To do so, the individual needs to consider the implications of her potential decision: what benefits it will bring about and what costs it will entail. Thus, in order to reach a decision whether to obey the law in a particular case, the individual presumably assesses the benefits and costs she is expected to incur as a result of compliance and weigh them against each other. The ultimate decision is the outcome of a rational calculus, whether the benefits of adherence outweigh the costs (including the benefits of *non-compliance*) according to the individual's utility function.<sup>37</sup>

Assuming such rational decision-making process, the economic analysis of law explores the factors that can influence the individual in her decisions. The usual focus is on *external influences (incentives)*, under the assumption that the law is more apt to influence behavior through environmental factors than through manipulating internal motivations. External incentives are generally divided to *rewards (or subsidies)* - factors that encourage behavior by producing benefit; and *sanctions (or taxes)* - factors that discourage behavior by generating costs. When it comes to compliance, the general assumption is that *as long as the legal system provides enough incentives, individuals will obey the law*.<sup>38</sup> Legal incentives are mostly in the form of sanctions, such as fines, confiscations and incarceration; rewards, though present (e.g. in the form of privileges or tax benefits), are less common. Importantly though, the efficiency of incentives is not

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<sup>37</sup> Garry Becker, *Crime and Punishment: an economic approach*, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1 (Becker & Landis Eds., 1974).

<sup>38</sup> Steven Shavell, *Economic Analysis of Public Law Enforcement and Criminal Law*, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004); A. M. Polinsky & S. Shavell, *The theory of public enforcement of law*, HANDBOOK OF LAW AND ECONOMICS 405 (Polinsky & Shavell eds., 2007).

measured only by their magnitude, but also by the likelihood of their application. In the case of sanctions, this likelihood means that the combined chances of apprehension, prosecution and conviction. The total cost in rational terms is always a product of both the magnitude and probability of the incentive.<sup>39</sup>

*Can the model adapt to explain religion-based normative conflicts?* From the perspective of *homo economicus*, the rational decision maker, there is nothing special in a state of normative conflict in general or in a religion-based normative conflict in particular. If a specific norm is deemed more important, this will reflect in the value of the incentives it offers. The individual is expected to take the course of action that will deliver the greatest positive surplus, whether it means obeying the law or following the religious norm.<sup>40</sup> Is it really so?

Many arguments can be made against this prediction. I will focus only on two: first, the argument that there is something special about norms – including religious norms – that unsettles the application of rational analysis to behaviors driven by norms. Second, the more general argument from behavioral economics that people systematically deviate from the predictions of rational analysis. I will say several things about the first argument, and fewer things about the second argument, mainly because so much was already said on this point by others.

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<sup>39</sup> Polinsky & Shavell, *Id.*; Daniel S. Nagin & Raymond Paternoster, *The Effects of the Perceived Risk of Arrest: testing an expanded conception of Deterrence*, 29 CRIMINOLOGY 561, 580 (1991).

<sup>40</sup> A note to the reader who finds it strange to analyze religion with economic tools: this is less of a puzzle than it might seem. The economic analysis of religion does not concern itself with the normative force of religious convictions, only with the ways in which religion induces and influences behavior; see Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 3 (1989). And more generally: L. R. Iannaccone, *Introduction to the Economics of Religion*, 36 JOURNAL OF ECONOMIC LITERATURE 1465–1495 (1998).

What is it about religious norms that can hamper rational analysis? Norms can fit in the economic analysis in two ways: as (external) incentives for behavior that operate much like legal rules, only with different incentives;<sup>41</sup> or as an (internal) part of individuals' preferences, embedded into their utility function.<sup>42</sup> Under the first option, normative conflicts do not pose a special challenge for the rational analysis model: the utility that individuals derive from following norms, be it sentimental, ideological or social, enters the calculus like any other utility. Laws and norms are assessed on the same footing. Under the second option, however, norms and laws are not similarly situated, as laws are external incentives whereas norms are internalized into the utility function itself. They form an *identity*, an ideal prescription on how to behave, that sticks with the individual regardless of external rewards or punishments:<sup>43</sup> rather, people act according to what their identity implies out of a sense of obligation.<sup>44</sup>

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<sup>41</sup> See more below, in section IV.C.1: low identifiers. In general, see: Louis Kaplow & Steven Shavell, *Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System*, 115 J. POL. ECON. 494, 502 (2007). Shavell, *supra* note 110.

<sup>42</sup> Becker, at 225 e.g., *supra* ("Norms are those common values of a group which influence an individual's behavior through being internalized as preferences."). Robert Cooter criticized the analysis of norms as incentives, R. Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998). ("Modern microeconomics trivializes moral commitment by treating it as an exogenous taste"). The idea was expanded and formulated in G. Akerlof & R. Kranton, *Economics and Identity*, QUARTERLY J. ECON. 715, 720 (2000); G. Akerlof & R. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSPECTIVES 9 (2005).

<sup>43</sup> With respect to the definition of identity, note the following observation: "although the concept of identity has taken on a variety of different meanings in various disciplines within social psychology, ... social identity is often defined broadly as an expansion of self-concept involving a shift in the level of self-conception from the individual self to the collective self, often based on perceived membership in a social category." N. J. Goldstein & R. B. Cialdini, *using social norms as a lever of social influence*, in THE SCIENCE OF SOCIAL INFLUENCE 167, 170 (A.R. Pratkanis ed., 2007): Cooter, *Id.*, at 598-603, points at the rationality of a conscious and rational choice to change one's preferences (utility function), when the change is expected to lead the individual to Pareto

This notion, if true, is not a fatal blow to the rational analysis model. True, the economic analysis has downplayed the role of internal factors, preferences in particular, in human choices.<sup>45</sup> But as long as the utility that people derive from their normative preferences can be quantified and assessed, people can still engage in CBA when they decide how to act in normative conflicts. Yet decisions from identity disclose preferences that do not seem to comport with standard CBA, such as altruism or non-selfishness, preferences for the welfare of others and/or for reciprocity. A large body of empirical studies showed that many individuals exhibit such preferences and behave contrary to their self-interest as traditionally defined, even when they derive no apparent benefit as a result – not even non-material gains such as reputation or meaningful relationships.<sup>46</sup>

As to the general shortcomings of the economic analysis, much has been said by now to solidify the argument that individuals are not purely rational and thus rational

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self-improvement. But one may not necessarily assume a conscious change of preferences for Akerlof & Kranton's theory to work.

<sup>44</sup> Akerlof & Kranton, *Economics and Identity*, *supra* note 42, 728, 733.

<sup>45</sup> T. R. Tyler & J. M. Darley, *Building a law-abiding society: Taking public views about morality and the legitimacy of legal authorities into account when formulating substantive law*, 28 *HOFSTRA L. REV.* 707, 714 (1999). E. Fehr & H. Gintis, *Human motivation and social cooperation: Experimental and analytical foundations*, 33 *ANNU. REV. SOCIOLOGY* 58 (2007).

<sup>46</sup> STOUT, *supra* note 109, *Id* (reviewing the research). For critiques of the economic analysis shortcomings in this regard see Cooter, *supra* note 42, at 597; Sunstein, *supra* note 17, at 910-911, 931-933. R. B. Korobkin and T. S. Ulen, *Law and behavioral science: removing the rationality assumption from law and economics*, 88 *CAL. L. REV.* 1051, 1068 (2000). Although many critics believe that these findings refute the notion of rationality altogether, I do not share this criticism. These findings merely suggest that individuals can derive substantial gain from comporting with internal value systems, even when there is no external gain, material or non-material. Such behavior is perfectly rational as long as it comports with the individual's utility function. Sunstein, *supra* note 17, at 909.

analysis is not *actually* how they decide whether to obey the law.<sup>47</sup> Not that individuals are not guided by self-interest – they are, at least some of them.<sup>48</sup> But their decision-making is systematically imperfect.<sup>49</sup> They are much more deterred by the likelihood they get caught than by the severity of the punishment<sup>50</sup> (violating the equal weight assumption<sup>51</sup>) and they are overly optimistic that they would not get caught. Sometimes they do not even consider the sanction.<sup>52</sup> They are further biased by salience of events and by the ambiguity of their occurrence, both inflicting on how they perceive enforcement efforts and the chances they get caught.<sup>53</sup>

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<sup>47</sup> D. Kahneman, *A perspective on judgment and choice: mapping bounded rationality*, 58 AM. PSYCHOLOGIST 697 (2003). C. Jolls, C. R. Sunstein & R. Thaler, *A behavioral approach to law and economics*, STAN. L. REV. 1471 (1998).

<sup>48</sup> Fehr & Gintis, *supra* note 45, at 43, 48-50 (2007) (describing evidence that many individuals do not cooperate if no punishment mechanisms are operative and that individual self-interest largely dominates behavior in lab experiments).

<sup>49</sup> In general see: Korobkin & Ulen, *supra* note 46, at 1113-1119. For a discussion of the findings with respect to criminal law, see: Jolls, Sunstein, and Thaler, *supra* note 47. McAdams & Ulen, *Behavioral Law and Economics*, CRIMINAL LAW AND ECONOMICS 403, 415, 417 (Nuno Garoupa ed., 2009); Jolls et al., at 1538; C. Jolls, *On law enforcement with boundedly rational actors*, HARVARD LAW AND ECONOMICS DISCUSSION PAPER (2004), [http://papers.ssrn.com/ezip-prod1.hul.harvard.edu/sol3/papers.cfm?abstract\\_id=631222](http://papers.ssrn.com/ezip-prod1.hul.harvard.edu/sol3/papers.cfm?abstract_id=631222) (last visited Jan 8, 2013).

<sup>50</sup> R. Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 L. & SOC'Y REV. 7 (1989). Raymond Paternoster, *The deterrent effect of the perceived certainty and severity of punishment: A review of the evidence and issues*, 4 JUSTICE QUARTERLY 173-217 (1987); R. Paternoster & L. Iovanni, *The deterrent effect of perceived severity: A reexamination*, 64 SOCIAL FORCES 751-777 (1986). Tyler and Darley, *supra* note 45, at 712-713. D. Kahan, *infra* note 73, at 377-382 (arguing that contrary to the standard economic analysis, a strategy of low probability / high severity of sanction can produce more crime rather than less, because it conveys a message that crime is rampant and tolerated).

<sup>51</sup> Becker, *crime and punishment*. Polinsky & Shavell, *supra* note 38, at 420.

<sup>52</sup> P. H. Robinson & J. M. Darley, *Does criminal law deter? A behavioural science investigation*, 24 OXFORD J. LEGAL STUDIES 173 (2004).

<sup>53</sup> Thomas A. Loughran et al., *On Ambiguity in Perceptions of Risk: implications for Criminal Decision Making and Deterrence*, 49 CRIMINOLOGY 1029 (2011). McAdams &

These deviances from the rational analysis model make the point that the model cannot explain (non)compliant behavior in full and a more nuanced approach is needed. We shall turn now to examine the second model, which attempts to provide a fuller explanation based on empirical research of human decisions.

## **B. Compliance with the law as a legitimacy-based analysis**

Even before behavioral economics started questioning the validity of the rational model of compliance with the law, the economic analysis was criticized on the basis of its extensive focus on external influences on behavior and relative disregard of internal motivations. In several influential works, psychologists Darley, Tyler and colleagues argued that people are primarily motivated to obey the law by an internal motivation, a “feeling of obligation or responsibility to act appropriately”.<sup>54</sup>

Tyler and colleagues’ empirically based model hinges compliance on the existence of *norms* that support law-abiding behavior. According to the model, obeying the law does not result of a utilitarian analysis of the costs and benefits that the law entails, neither of social sanctions, but rather of a “normative analysis”.<sup>55</sup> Two normative considerations are specifically at play: the extent to which the law is perceived as *moral*, and the extent to which the law is perceived as *legitimate*.<sup>56</sup>

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Ulen, *supra* note 49, at 417, 422.; Jolls, Sunstein, and Thaler, *supra* note 47, at 1536. Jolls 2004, *supra* note 49, at 10-13.

<sup>54</sup> Tyler and Darley, *supra* note 45, at 714. T. R. TYLER, WHY PEOPLE OBEY THE LAW (1990, reprinted 2006). P. H. ROBINSON & J. M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW. (1995). T. R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS 11, 13 (2007).

<sup>55</sup> TYLER 2006, *Id.*, 57-60.

<sup>56</sup> TYLER 2007, *supra* note 54, at 28. Tyler and Darley, *supra* note 45, at 714.

*Legitimacy* is “a quality possessed by an authority, a law, or an institution that leads others to feel obligated to accept its directives.”<sup>57</sup> If the law – or any other authority – is perceived as legitimate, it means that individuals are willing to suspend their personal judgment and defer to the judgment of the lawmaker, believing that the law is entitled to determine standards for behavior in the relevant area.<sup>58</sup>

Yet legitimacy judgments may hinge on factors other than direct assessments of the source of authority. Tyler and colleagues examined three elements that arguably shape legitimacy perceptions, to which they refer as the determinants of *procedural fairness*: (1) feelings that the authorities’ motives or intentions can be trusted (trustworthiness/benevolence); (2) beliefs that authorities’ actions are based on a nonbiased consideration of facts (neutrality); (3) feelings that authorities accord treatment with dignity and respect.<sup>59</sup> The more individuals feel that authorities comply with these determinants, the more they perceive them as legitimate, and the more they are willing to accept their decisions and obey the law. Notably, this list of factors is chiefly based on interpersonal aspects of people’s experience with the authorities,<sup>60</sup> highlighting that the

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<sup>57</sup> TYLER 2007, *supra* note 54., at 22-23.

<sup>58</sup> *Id.* KELMAN & HAMILTON, CRIMES OF OBEDIENCE 16 (1989).

<sup>59</sup> Y. J. Huo, H. J. Smith, T. R. Tyler & E. A. Lind, *Superordinate identification, subgroup identification, and justice concerns: is separatism the problem; is assimilation the answer?*, PSYCH. SCIENCE 40 (1996)., at. 40. T. R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 991 (2006).

<sup>60</sup> Tyler *Multiculturalism, Id.*, at 990. T. R. Tyler & E. A. Lind, *A Relational Model of Authority in Groups*, Volume 25 in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115–191 (Mark P. Zanna ed., 1992). TYLER 2007, *supra* note 54, at 35 (summarizing the argument in the following form: "Here I am referring to the ability of legal authorities to shape public views through their policies and practices. This approach is based upon the argument that personal and indirect experience matters. indirect experience occurs through the mass media or informal reports of experience of others - neighbors, family and friends").

way the law is *applied*, as distinct from its substantive content, has much influence on individuals' decision to obey the law.

**Morality** is the internal motivation “to behave in accord with one’s sense of what is appropriate and right to do in a given situation.”<sup>61</sup> As in legitimacy, assessments of morality denote an internal feeling of responsibility to follow the law. Not as in legitimacy, assessments of morality pertain to the substantive content of the law, rather than the characteristics of its authority.<sup>62</sup> Morality drives individuals’ behavior irrespective of the legality of the act. When individuals refrain from committing murder they do so because they perceive the taking of another person’s life to be immoral, regardless of its legality. And when youth consume alcohol or use drugs, knowingly violating the law, they do so partially because they see nothing wrong with using drugs.<sup>63</sup> Empirical evidence shows that people are more willing to comply with the law when they believe the law is congruent with their moral values.<sup>64</sup> In fact, morality was referred to as the most important determinant of compliance with the law when individuals assessed it in conjunction with two other factors – the risk of detection and legitimacy of the authorities.<sup>65</sup>

The model does not explore factors that directly influence perceptions of morality,<sup>66</sup> and notes that such perceptions are usually traced to early childhood.<sup>67</sup>

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<sup>61</sup> TYLER 2007 *supra* note 54, at 27.

<sup>62</sup> TYLER 2007, *supra* note 54, at 29.

<sup>63</sup> Tyler and Darley, *supra* note 45, at 716, 719.

<sup>64</sup> TYLER 2007, *supra* note 54, at 29. TYLER 2006, *supra* note 54, at 33-35. ROBINSON AND DARLEY, *supra* note 54, at 1-2.

<sup>65</sup> TYLER 2007, *supra* note 54, at 31 (summarizing the results of Tyler’s 1990 study).

<sup>66</sup> In later work Tyler and his collaborators omit any reference to moral congruence even where it is clearly relevant, as in public perceptions of Supreme Court decisions on

However, the empirics reveal that the three determinants of procedural fairness influence *also* perceptions of morality. Procedural fairness does not only render the law more legitimate, it also advances views that the law is congruent with one's morality. In Tyler's words: "people's views about the morality of rules are responsive to procedural justice. If legal authorities make decisions and implement rules following fair procedures ... people are more likely to view the law as consistent with their own moral values".<sup>68</sup> Individuals thus tie between the quality of the treatment accorded by the authorities and the legitimacy and morality of the law and the legal system as a whole.<sup>69</sup> The even more promising finding is this: "what is particularly striking about procedural justice judgments is that they shape the reactions of those who are on the losing side of cases. If the person who does not receive an outcome that they think is favorable or fair feels that the outcome was arrived at in a fair way, they are more likely to accept it".<sup>70</sup> It follows, that procedural fairness impact not only perceptions of morality and legitimacy, but also mitigate utility considerations and make the decision to obey the law more contingent on fairness evaluations than on outcome considerations.

The series of empirical finding offered by the legitimacy-based model, particularly the latter one, provide a strong argument against the rational analysis model,

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abortions. See in T. R. Tyler & G. Mitchell, *Legitimacy and the empowerment of discretionary legal authority: The United States Supreme Court and abortion rights*, 43 DUKE LAW JOURNAL 703 (1994).

<sup>67</sup> Tyler and Darley, *supra* note 45, at 718 (citing research of developmental psychologists).

<sup>68</sup> TYLER 2007, *supra* note 54, at 36, 39.

<sup>69</sup> TYLER 2007 *supra* note 54, at 37. T. R. Tyler & J. Fagan, *Legitimacy and Criminal Justice: Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

<sup>70</sup> TYLER 2007, *supra* note 54, at 39.

at least in its standard form – as they seem to disclose nonstandard preferences that the have no necessary relation to self-interest and indeed can act against it. Cost-benefit analysis does not seem to be the main factor that individuals consider in their compliance decisions and the legitimacy-based model seems to describe and predict behavior better.

*Can the model adapt to explain religion-based normative conflicts?* The application of the legitimacy-based analysis to religion-based normative conflicts raises several concerns. If individuals really make their decisions based on assessments of legitimacy of authorities and morality of laws, then at least in some cases, when a religious individual engage in a direct assessment of the norms in conflict she might find the legal rule to be less moral than the competing religious norm (assuming that religious individuals derive their moral perceptions largely from religion). This has the potential to undercut the moral basis of the law in the eyes of religious individuals.<sup>71</sup>

Similarly, a direct legitimacy assessment of the norms in conflict can entail the conclusion that the divine authority is more legitimate than the legal one, in the sense that religious individuals might feel more obligated to accept what they perceive as divine directives – or ministerial directives – and defer to them rather than to conflicting legal rules. As noted in section II, religion-based normative conflicts often hinge on believers' perception that the ultimate authority to guide and determine conduct belongs with the divine rather than the law; such perception might turn religion into a more legitimate authority in the eyes of believers, and may erode the legitimacy of the law in the process.

Despite the negative results that a direct assessment might entail, the promise of the legitimacy-based model is in the extensive evidence that fair procedures can

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<sup>71</sup> ROBINSON AND DARLEY, *supra* note 54., at 202 (making a similar argument with respect to discrepancies between law and morality in general).

*themselves* facilitate perceptions of legitimacy and morality. To the extent that procedural fairness can facilitate moral congruence and legitimacy also in religion-based normative conflicts, as it does in other contexts, the main part of the model can be extended to cover these situations as well. If so, “all” that lawmakers need to do in order to guarantee compliance in religion-based normative conflicts is to make sure that the authorities in charge of designing and applying the law do so according to the determinants of procedural fairness, namely in a benevolent, neutral and respectful way. Such procedures will accord the law the stamp of legitimacy and morality, and will induce compliant behavior, even if otherwise the law were perceived to be in conflict with religion.

However, extrapolating the legitimacy-based model to religion-based normative conflicts is less straightforward than it might seem, as we shall see in the next chapter. The interplay of the religious and the civic identity brings cost-benefit analysis back to the front (in some cases) as well as conformity (in other cases). In general, the legitimacy-fairness model does not explain cases where individuals disobey the law though they *do not* dispute its morality/legitimacy. Several factors can give rise to such conducts – self-interest, a belief that an exception applies, sheer impulse, the influence of others – all seem to constitute important exceptions to the model. It turns that much like the rational analysis model, the legitimacy-fairness model cannot account for the full scope of (non)compliant behavior.<sup>72</sup> We shall thus turn to explore what the third model of compliance adds to the analysis: conformity.

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<sup>72</sup> Two general methodological criticisms are also in place although I do not take to develop them here. First is the inconsistent use of the term “fairness” or “fair” in the Tyler’s questionnaires. Particularly, some studies used the word “fair” to describe both utility considerations (“fair outcome”) and procedural considerations (“fair treatment”) – thereby associating the very two things that are assumed to be distinct. Huo et al., *supra*

### C. Compliance with the law as conforming to social influence

The third approach to why people obey the law is the *conformity model*.<sup>73</sup> This model puts in center-stage the influence of social norms on compliant behavior, as a primary cause for action. Unlike the rational analysis model, that portrays an individual who factors social norms into her cost-benefit analysis, or the legitimacy-fairness model that largely confines the contribution of social norms to their impact on the analysis of the law's morality, the conformity model portrays an individual who does not necessarily engage in *any* deliberate analysis – utilitarian or legitimacy-fairness oriented. Rather, this model argues that individuals obey the law *simply because* other people usually do so, and disobey when the circumstances invert.<sup>74</sup>

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note 59, at 42. (The questionnaire asked, on the one hand, “overall, how fairly were you treated...?” and, on the other hand, “how fair was the outcome you received?”). “Fair” was also used to describe some – but not all – of the *determinants* of fairness, presumably conflating variables. T. R. TYLER & Y. J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 149 (2002) (same). Tyler & Mitchell, *supra* note 66, at 811 (using “fair” to refer to the trustworthiness determinant);

Second, Tyler's data was mainly collected through ex post surveys that probed participants regarding their view of *past* interactions with the law. The focus on individuals' accounts of past compliance (or noncompliance), opens the floor to the critique that the studies merely provide answer to how people *retrospectively rationalize* decisions they already made, with the aid of hindsight – a cognitive process not necessarily identical to real time decision making whether to obey or disobey the law. Indeed, empirical evidence suggests that hindsight perceptions and ex post reasoning are subject to multiple biases and that individuals misrepresent their ex ante reasons when reflecting at it retrospectively: K. A. Kamin & J. J. Rachlinski, *Ex post ≠ ex ante*, 19 L. & HUM. BEHAV. 89 (1995). J. Haidt, *The emotional dog and its rational tail: a social intuitionist approach to moral judgment*, 108 PSYCHOL. REV. 814 (2001).

<sup>73</sup> D. Kahan, *Social Influence, social meaning, and deterrence*, 83 VA. L. REV. 349 (1997); L. ROSS & R. NISBETT, THE PERSON AND THE SITUATION 28 (1991); R. Martin and M. Hewstone, *Social-influence Processes of Control and Change: Conformity, Obedience to authority, and Innovation*, THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 347 (Hogg & Cooper eds., 2003).

<sup>74</sup> For the proposition that people engage in normative actions, including moral judgments, without cognitive deliberation, see: J. Haidt, *The emotional dog and its rational tail: a social intuitionist approach to moral judgment*, 108 PSYCHOL. REV. 814

Psychological science has shown over the years that the pressure to conform to social norms is great. Conformity can serve as a single and ultimate cause of action, as was demonstrated by the famous Ash paradigm.<sup>75</sup> Conformity can also shape opinions and polarize groups considerably.<sup>76</sup>

However, conformity is also limited in several important respects and it certainly cannot explain in full why people obey the law. First, people mainly conform to norms they already identify with and to others whom they already like (what has been labeled as

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(2001). McDonald, Fielding, and Louis, *supra* note 29., at 58 (“although people do not necessarily engage in deliberative processing of the conflicting norms prior to behavioral decision making, [norms] may still impact behavior”). BARON & BYRNE, *supra* note 29, at 349. Robinson & Darley, *supra* note 52, at 415 (arguing based on empirical evidence that individuals “are driven principally by emotion or peer pressure”). John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189, 195-196 (2005) (same). H. G. Grasmick & D. E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980). (describing positive correlation between law-abiding behavior and belief about peer behavior). JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 69-70 (1989); C. R. TITTLE, *SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE* 196-99 (1980); Also see Kahan, *Id.*, at 352-357 and the sources cited in footnotes 18-27. (arguing that individuals do not decide to commit crimes in isolation and are much more likely to do so when crime is widespread).

<sup>75</sup> ROSS & NISBETT, *supra* note 73, at 28-33 (describing the results of Solomon Asch’s experiments that demonstrated how a majority of individuals suspend their individual judgment and conform to the group at least part of the time, and the body of research that expanded these findings to various areas of judgment and action, including social and political judgments), pp. 44, 52. Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, in NEBRASKA SYMPOSIUM ON MOTIVATION, 1969, at 237, 287-93 (William J. Arnold & David Levie eds., 1969) (describing the spontaneous rejoinder of passerby to criminal act with no apparent cause other than the sight of others openly engaging in criminal activity).

<sup>76</sup> C. R. Sunstein, *Deliberative trouble? Why groups go to extremes*, 110 YALE L. J. 71 (2000) (hereinafter: Sunstein *group extremes*) (discussing empirical findings and real life examples where deliberation in groups led individuals to hold positions more extreme than those held by any individual member before the group interaction began).

*cohesiveness*).<sup>77</sup> Thus, conformity cannot explain why people obey the law when they do *not* identify with the rules or with their issuers (but rational analysis can, if the incentives to comply are substantial enough).

Further, much depends on the specific situation. Conformity needs the visible action of others to be most effective – otherwise it loses much of its power.<sup>78</sup> When individuals act on their own, without the inducing consensus of the group, conformity largely depends on their *normative focus*<sup>79</sup> and *self-awareness*.<sup>80</sup> This means that individuals generally conform to social norms (including laws) only to the extent that the norm is *focal* at the time they need to make the decision (e.g. after viewing a message containing a normative content)<sup>81</sup> or that they turn their focus inside (e.g. after looking at the mirror or writing short stories about themselves).<sup>82</sup> The normative or the internal

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<sup>77</sup> BARON & D. BYRNE, *supra* note 29, at 353-354, 477-479. F. Gino, S. Eyal & D. Ariely, *Contagion and differentiation in Unethical behavior*, 20 PSYCH. SCIENCE 393 (2009).

<sup>78</sup> BARON & D. BYRNE, *supra* note 29, at 352 (describing another version of the Asch experiment, in which the group did not publicly express its consensus and as a result, conformity dropped sharply). Sunstein *group extremes*, *supra* note 76, at 117 (discussing Fishkin's evidence that group deliberation does not lead to conformity and extreme if individuals do not vote as a group but express their views following deliberation individually and confidentially).

<sup>79</sup> R. B. Cialdini, R. R. Reno & C. A. Kallgren, *A focus theory of normative conduct: Recycling the concept of norms to reduce littering in public places*, 58 J. PERS. & SOC. PSYCHOL. 1015 (1990).

<sup>80</sup> N. Mazar & D. Ariely, *Dishonesty in everyday life and its policy implications*, JOURNAL OF PUBLIC POLICY & MARKETING 1, 8 (2006). C. S. Carver & M. F. Scheier, *Self-Focusing Effects of Dispositional Self-Consciousness, Mirror Presence, and Audience Presence*, 36 J. PERS. & SOC. PSYCHOL. 324 (1978).

<sup>81</sup> *Id.* C. A. Kallgren, R. R. Reno & R. B. Cialdini, *A Focus Theory of Normative Conduct: When Norms Do and Do not Affect Behavior*, 26 PERS. SOC. PSYCHOL. BULL. 1002 (2000); R. B. Cialdini & N. J. Goldstein, *Social influence: Compliance and conformity*, 55 ANNU. REV. PSYCHOL. 591 (2004). Ariely & Mazar, *supra* note 80, at 8-9 (describing studies in which recalling the Ten Commandments or the existence of a university honor code reduced dishonest behavior).

<sup>82</sup> Carver & Scheier, *supra* note 80, *Id.* Ariely & Mazar, *supra* note 80, *Id.*

focus presumably increases awareness to the gap between the *actual* self and the *ideal* self and appeals to the need to live up to the ideal self – and conform to the norm implied by it. Overall, conformity explains both compliance and noncompliance with the law in terms of following others, but it can also explain why people comply with the law (or fail to do so) on their own – when they are normatively focused. Even so, conformity does not explain why individuals sometimes choose to *dissent* and not conform even when the norm is focal and consensus is salient. Such instances certainly occur.<sup>83</sup> (The picture will be more complete once we consider the interplay of identities, which I present next).

*Can the model adapt to explain religion-based normative conflicts?* The first difficulty in applying the conformity model to situations of religion-based normative conflicts is conceptual and general. How can we explain behavior in terms of conformity when choosing between norms consists at the same time in conformity with the chosen norm and nonconformity with the norm not chosen? One might argue that it is conceptually invalid to refer to decision-making under normative conflicts in terms of conformity in light of this internal contradiction.

A more nuanced concept of conformity can save some of the model. If conformity is a function of normative focus and not of absolute adherence then it is coherent for a person to conform to the more salient norm on the expense of the less salient norm. This mechanism can also apply when individuals act under the influence of group consensus – these are situations in which they are probably conscious only of ad hoc group norms and

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<sup>83</sup> Matthew J. Hornsey et al., *On being loud and proud: Non-conformity and counter-conformity to group norms*, 42 BRITISH JOURNAL OF SOCIAL PSYCHOLOGY 319–335 (2003) (describing an experiment in which participants who has a strong moral basis for their attitudes on social issues such as gay marriage did not conform and even exhibited counter-conformity - i.e., dissent - when they were minority within a group).

not of other conflicting norms (like the law). Yet this relativist account of conformity is not fully satisfactory. Does it mean that individuals who conform to one norm rather than the other experience *no normative conflict* whatsoever? Do they feel pressure to conform or does conformity come easily? If they do experience conflict, what explains their behavior with respect to the norm *not chosen*? Conformity does not offer an answer.

This exact puzzle prevents conformity from providing a satisfactory account of religion-based normative conflicts, in my view. Conformity plays the role of a double-edge sword in these conflicts: on the one edge, it induces people to obey the law. Presumably, people obey the law because others do so as well, and because the law incorporates many social norms and values that, if focal, induce individuals to act accordingly. But on the other edge, conformity also induces people to obey religious directives, if others follow them or if they are normatively focal. The evidence seems to suggest two factors in particular that can help predict whether individuals will choose religion over law or vice versa: cohesiveness and the extent that a group consensus (law-abiding or religious-abiding) exists. Thus, the more an individual identifies with religion (*high cohesiveness*) and is immersed in a monolithic religious group (*high consensus*), the more she is likely to conform to religious rather than legal norms. But what happens when the two factors go in opposite directions – when a religious person is immersed in a law-abiding group? The outcome here is less clear under the model.

In sum, conformity seems to explain some of individuals' behavior under religion-based normative conflicts, but not all. It cannot explain any form of dissent nor can it explain complex interactions between factors. It is also noteworthy that not all situations call on individuals to conform. When no clear consensus is apparent; when

individuals are not particularly focused on or attentive to norms; when cohesiveness is low; in all these situations conformity is much less effective and other models – such as cost-benefit analysis and legitimacy-fairness analysis – can kick in.

What model then can best describe individual behavior under religion-based normative conflicts, taking into account the strength and shortcomings of three existing models? To answer this question, which stands at the core of my argument, we shall now turn to the next section.

#### **IV. An identity/Situation model to compliance with the law**

So far we reviewed three models to compliance with the law: a rational analysis, a legitimacy-fairness analysis, and simple conformity to social influence (without any analysis). While all contribute to the analysis of compliance in religion-based normative conflicts, each has its shortcomings. I thus use this section to propose and develop a new model based on two dimensions: *situation* and *identity*. The model draws on basic components of the three existing models, but offers a new and more comprehensive insight into the complexity of religion-based normative conflicts.

##### **A. First dimension of the model: identity**

In 1996 Huo, Smith and colleagues decided to investigate the impact of subgroup identification on compliance with authority. Analyzing conflicts between employees and supervisors from different *ethnic* backgrounds at a public-sector organization, the researchers found that accepting the supervisors' decisions depended on how much the employees identified with their ethnic group relative to how much they identified with

the organization.<sup>84</sup> Employees who *had strong superordinate identification* (i.e., highly identified with the organization for which they worked) were more influenced by *procedural fairness* than the favorability of the outcome in their decision to accept authority; whereas employees who highly identified with their *ethnic group* and weakly identified with the organization were much more influenced by the *outcome* of the decision – that is, by utility considerations. In other words, the *mode of analysis* that employees deployed in considering whether to accept authority *hinged on the interplay of their two identities*: the superordinate identity and the ethnic identity.<sup>85</sup>

Additional studies extrapolated this conclusion to other types of conflicts and identities:<sup>86</sup> the debate on affirmative action where the superordinate identity examined was “being American” and the subgroup identity was race; and conflicts on allocation of resources, where the superordinate identity was the local community and the subgroup identities reflected the competing interests.<sup>87</sup> Together, these studies suggest that individuals rely on procedural fairness judgments when they identify with the authorities and what they represent. They rely on utility considerations – on costs and benefits – when they do not identify so much with the authorities and highly identify with a closer subgroup. Although these studies did not examine whether religious identity has a similar

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<sup>84</sup> Huo et al, *supra* note 59, at 41-42.

<sup>85</sup> *Id.*, at 42-43.

<sup>86</sup> See the studies cited in footnote 87.

<sup>87</sup> T. R. Tyler & P. Degoey, *Collective Restraint in a Social Dilemma Situation: The Influence of Procedural Justice and Community Identification on the Empowerment and Legitimation of Authority*, 69 J. PERS. & SOC. PSYCHOL.482 (1995) (examining the willingness to obey decisions of a local political authority dealing with a contested water crisis). Tom Tyler, Peter Degoey & Heather Smith, *Understanding why the justice of group procedures matters: A test of the psychological dynamics of the group-value model*, 70 J. PERS. & SOC. PSYCHOL.913 (1996).

impact to that of other subgroups, the central role of religion in the lives of adherents suggest that it probably plays a role *at least* as central as ethnic identity in influencing decision-making processes.<sup>88</sup>

What happens when individuals have *several* strong identities? Importantly, these identities are not necessarily in conflict. Several studies found that individuals who highly identify with *both* their identities adhered to *procedural fairness* rather than outcomes, much like individuals who highly identified with the subordinate group only.<sup>89</sup> It follows that having several strong identities (in our case, the religious *and* the civic) does not necessarily undermine one's civic identity.

What happens when people do not identify with the authorities *at all*? Here we can draw on studies that examined whether out-group norms – norms of groups that individuals do not identify with (e.g. Anglophone norms for Quebec's Francophone population) – also affect behavior. Similarly to low-identifiers (who do identify to some extent with the superordinate group) researchers found that these norms influence behavior “only when backed by rewards and punishments.”<sup>90</sup> It thus seems that the lower

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<sup>88</sup> Note that Tyler believes there should be no difference between ethnic identity and other identities, whether gender-based or religion-based, but this hypothesis was not tested. See Tyler *multiculturalism*, *supra* note 59, at 1004.

<sup>89</sup> Huo et al., at 44. Y. J. Huo, *Procedural justice and social regulation across group boundaries: does subgroup identity undermine relationship-based governance?*, 29 PERS. SOC. PSYCHOL. BULL. 336 (2003). Tyler *multiculturalism*, *supra* note 59, at 1009-1010.

<sup>90</sup> Winnifred R. Louis, Donald M. Taylor & Rebecca L. Douglas, *Normative Influence and Rational Conflict Decisions: Group Norms and Cost-Benefit Analyses for Intergroup Behavior*, 8 GROUP PROCESSES INTERGROUP RELATIONS 355, 357 (2005). S. Reicher & M. Levine, *Deindividuation, power relations between groups and the expression of social identity: The effects of visibility to the out-group*, 33 BRIT. J. SOC. PSYCHOL. 145 (1994). Brewer, *infra* note 92, at 478-479, also draws a connection between outcome-based decision-making and lack of identification with the group (“If there is no collective identity, or if the collective is too large and amorphous, then most individuals behave selfishly, pocketing as much money as they can for themselves before the public good

the identification - the greater the inclination to rely on utility considerations in adhering to norms and decisions associated with the low identification group.

So much for the evidence. But what explains this shift? Why do people value fair treatment over favorable outcomes when they identify with a group, and outcomes over treatment when they do not? What is it about group identity that inverts preferences this way? Hue and colleagues argue that “when one identifies with the group represented by the authority, the authority's actions carry information about one's value to and position within the group, and this information is more important than the outcome attached to the authority's decision.” In other words, the reason why fair treatment is valued in first principle is that it carries information on social status. When the individual does not view itself as part of the group that the authorities represent and does not feel like her social status with respect to this group matters, the quality of treatment has no informative value.<sup>91</sup> Hence, there is no reason to value quality of treatment over the concrete outcomes.

I want to offer a refinement to this explanation. While the theory explains why group-identifiers value fair treatment, one additional step is needed to explain why they value it *more* than the *outcome* of the treatment. I propose the following step: group membership, and particularly social status in a group, is *itself a source of utility usually*

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runs out. However, when an intermediate group identity is available, individuals are much more likely to sacrifice self-interest on behalf of collective welfare”).

<sup>91</sup> Huo et al., *supra* note 59., at 40-41 (“The underlying assumption of the group-value model is that people derive a sense of self-worth from group membership. Individuals assess their status within groups by evaluating the extent to which important group representatives, such as authorities, treat them fairly ... The group-value model proposes that the importance of relational issues to acceptance of authority is linked to identification with the group that empowers the authority”). Similarly, in Tyler *Multiculturalism*, *supra* note 59, at 990.

*more valuable than any one time unfavorable outcome.* Here is why. Individuals derive various utilities from group memberships: self-worth, meaningful relationships, employment opportunities, social support, and safety networks.<sup>92</sup> The combined value of these utilities is usually higher than any one-time disutility the group inflicts on a member. High-quality treatment reassures the person that she can still derive these utilities from the group – because good treatment is usually a good predictor of favorable outcomes.<sup>93</sup> It thus makes sense to favor treatment over outcomes when identification with the group is strong. Strong membership is an asset more valuable than a single unfavorable decision. Here is where the theory reconnects to the explanation of Huo and colleagues: if people know that they cannot derive utility from the group that accords the treatment, the cue of good treatment no longer points to a utility greater than the specific outcome at hand; the treatment of the present does not entail a prospect of favorable outcomes in the future, one that could overcome the unfavorable outcome of the present. Hence, people have no reason to value the quality of the treatment they receive; and they attribute the greater value to the outcome at hand.

To be sure, I do not suggest that people go through this deductive process in every decision to obey the law or to follow an authoritative decision. Rather, this explains why it makes sense for procedural fairness to evolve as a *contextual heuristic*: a mental

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<sup>92</sup> . B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERS. SOC. PSYCHOL. BULL. 475, 475-476 (1991). In the context of religious communities, view the discussion adjacent to footnote 105.

<sup>93</sup> I develop below the notion that fair treatment is a heuristic to assess social status in a group; but since there is also a statistical link between quality of treatment and quality of outcomes, fair treatment can also serve as a heuristic to assess the favorability of the outcomes when no direct information is available. Tyler also admits the possibility that “people may use the fairness or unfairness of procedures as a heuristic for determining the justice of the outcome distribution”, see Tyler *multiculturalism*, *supra* note 59, at 997-998, but does not develop it further.

shortcut to assess one’s social status within a specific group. Individuals rely on fair treatment rather than outcomes (that is the heuristic), but only in the context of a valued group membership, a group one identifies with (this is why it is context dependent). Hence, at least in the type of situations we explored thus far (more on this to follow) identity shapes compliance with the law *indirectly*: it affects the mode of analysis that individuals use to decide whether to obey the law - legitimacy-fairness or cost-benefit—rather than directly leading individuals to obey or disobey the law.

**B. Second dimension of the model: situation**

So far I have established the first dimension of the model: identity. Doing so I also focused on one type of conflictive situations: situations that allow individuals to analyze and reason their actions, where the decision to comply is *deliberative*. In the present section I discuss how different situations of normative conflicts trigger different modes of decision-making and focus on the second type of situations in my model: situations that call for *straightforward conformity*.

**Table 1: The Identity/Situation Model for decision-making under religion-based normative conflicts**

		<i>Identity</i>			
		<b>Religious &gt; Civic</b>		<b>Civic ≥ Religious</b>	
<i>Situation</i>	<b>Deliberation</b>	Cost-Benefit Analysis		Legit-Fairness Analysis	
		Comply	Not comply	Comply	Not comply
	<b>Conformity</b>	Not comply		Comply	

The Identity/Situation model has two dimensions: (1) the interplay of identities (religious/civic), and (2) the type of situation (deliberative/conformative). The two dimensions interact: identity plays a role across situations. The behavioral predictions of the model are summarized in the table.

Different situations vary in the way they impact individuals' decision-making, and this impact is significant. Recall our discussion of the three models, and especially of the conformity model. It showed how powerful factors like group consensus, other people's actions, outside stimulus (e.g. salient messages) and incentives can be. Based on the analysis of the strengths and limits of conformity that I carried in section III.C, I divide the landscape of religion-based normative conflict situations roughly into two:

*Situations that call for deliberation.* These are the situations where normative conflicts occur in a context that provides room for internal deliberation prior to acting (distinguished from situations where individuals simply follow other people or salient norms without assessing or analyzing the norms in conflict). All types of normative conflicts I discussed thus far could belong in this category as long as conformity does not dominate the situation (see below); and the longer it takes the conflict to unfold, the more opportunities are there for internal deliberation along the way. The type of deliberation – cost-benefit or legit-fairness – will depend on how the two identities play out. The way individuals ultimately choose to settle the normative conflict will hinge on the outcome of their deliberation (*Table 1, row 1*).

*Situations that call for conformity.* These are situations where individuals act under the influence of others or the salience of one of the competing norms. The “others” will often be religious – members of the individual's community or group – but conformity can also work the other way if a religious person is deeply immersed in a highly consensual civic population that the individual identifies with (*Table 1, row 2*).<sup>94</sup> Religion-based normative conflicts can also start deliberative and turn conformative once

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<sup>94</sup> On the double-edge role of conformity in religion-based normative conflicts see p. 39.

a consensus around the religious deviant emerges. The first few deviants might engage in prior deliberation but subsequent others simply follow them without much analysis.<sup>95</sup>

Identity interacts with conformative situations as it does with deliberative situations. The evidence discussed in section III.C suggests that the more an individual identifies with religion (*high cohesiveness*) and is immersed in a monolithic religious group (*high consensus*), the more she is likely to conform to religious rather than legal norms – and the other way around if she is a high civic identifier immersed in a civic consensus (*Table 1, row 2*). Indeed, conformity means to act according to the standard of behavior that the salient identity *in situ* implies.<sup>96</sup> In religion-based conflicts, prototypical situations are those where individuals act as a group to vandalize or attack others in the name of religion. But conformity is not only a spur-of-the moment behavior. The collective parental disobedience in the *Immanuel school case* demonstrates a situation where parents disobeyed the law as a group to the point of going to jail together. This collective conduct seems to build on strong conformity that remained constant throughout litigation over a long period of time.

To conclude the discussion of the situational dimension of the model, let us note again the relation between conformative and deliberative situations. As noted above, conformity works best in conditions of high consensus and high cohesiveness. Thus, room for deliberation and analysis opens up whenever the situation ranks low along these factors. Once the situation is deliberative, evidence suggests that the interplay between

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<sup>95</sup> Worthy of note is the view that there is no clear and dichotomous line between an action committed out of public conformity and an action committed due to an acceptance of the norm. See H. Kelman, *Interests, Relationships, Identities: Three Central Issues for Individuals and Groups in Negotiating Their Social Environment*, 57 ANNU. REV. PSYCHOL. 1, 3, 14 (2006).

<sup>96</sup> See the text adjacent to footnote 42-44.

competing identities – essentially whether the individual is low-identifier or high-identifier – determines whether CBA or legit-fairness analysis would kick in and their outcome would settle the conflict to one side or the other. This is a different process than in conformity situations, where individuals conform to the norms of the salient identity *in situ*, religious or civic, without further analysis.

We have seen thus far that both the interplay of identities and the type of situation affect how individuals decide whether to comply with the law or follow religious directives in normative conflicts. But before we proceed to the prescriptive analysis it is necessary to flesh out the model further: what does it mean for low-identifiers to engage in a rational analysis of religion-based normative conflicts? And what does it mean to conform in religion-based normative conflicts? The next section addresses precisely these questions.

### **C.     Fleshing out the model**

The Identity/Situation model suggests that individuals use different modes of analysis based on the interplay of their identities and the type of the situation. So far I drew on existing models to compose a more accurate and comprehensive model of behavior in religion-based normative conflicts. Here I take a step forward and attempt to flesh out those prongs of the model that call for further analysis. The “fleshing out” will focus on two such prongs: low-identifiers and conformity situations. The reason to put aside high-identifiers, at this stage, is that the model has no specific prediction for this group to distinguish it from the regular legitimacy-fairness case: individuals who have a high civic identify are expected to defer to their fairness heuristics, like other individuals, even if they also identify with religion. But in the case of individuals who highly identify

with *religion* and weakly identify with the state, a closer examination is needed to understand how cost-benefit analysis plays out under religion-based normative conflicts. I offer such a novel examination of the CBA of religion-based normative conflicts below.

**1. *Low-identifiers: the CBA of religion-based normative conflicts***

Below I analyze the main issues involved in a CBA of the decision to obey the law in cases of normative conflicts. Based on this analysis, I argue that when it comes to the low-identifiers, the law is likely to lose the utilitarian analysis: religion is likely to prevail as the incentives it provides for low-identifiers are more significant than those offered by law, except, maybe, where the legal norm in conflict is highly protected.

An important clarification is due at the outset. The argument that low-identifiers are more inclined to use a rational analysis and engage in a cost-benefit analysis *does not mean* that the analysis employed is strictly rational in the *homo economicus* sense. Conversely, following the ample evidence on bounded rationality, I assume that it is subject to biases and heuristics as any other CBA.<sup>97</sup> Yet it is still an attempt to assess costs and benefits, rather than to decide the question based on normative grounds.

***Mapping the incentives.*** On a first glance, the costs and benefits that one derives from adhering to legal rules seem very different from those derived from following religious commandments. Legal rules operate through external, state-enforced sanctions and entail costs such as fines and incarceration. Conversely, the incentive mechanisms of religious commandments are usually thought to be internal and self-enforced and to entail mainly emotional costs: remorse, pangs of conscience, guilt. On one side of the CBA

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<sup>97</sup> See discussion *supra*, next and based on the sources cited in footnotes 47-53.

scales we seem to find external incentives with material utilities, and on the other side internal incentives with non-material utilities.<sup>98</sup>

But a closer look reveals the differences *in kind* are not as sharp as they seem (differences in *quantity*, on the other hand, are substantial – more on that below). Both legal and religious rules provide internal *and* external incentives and entail material *and* non-material utilities. First, let us look at the law. In the general case, the law invokes a sense of internal obligation to obey in people,<sup>99</sup> an internal mechanism of self-enforcement: there is a *norm* to obey the law.<sup>100</sup> How much is left of this internal obligation for low-identifiers? This is an open question. Presumably, the internal obligation is either missing or is considerably weaker in the case of individuals who obey the law based on outcomes rather than fairness. This does not affect however the second issue, namely that legal sanctions also confer utilities beyond material ones. Incarceration involves not only a material loss of time and income but also a heavy emotional toll of having one's freedom deprived and one's family away. The very outcome of being

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<sup>98</sup> Note that there is nothing in rational choice theory to make it incompatible or inapplicable to non-material utilities. Sentiments of worth and virtue, guilt and shame, and the social stigma placed by others, all have place in the equation. See J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch.III (Oxford, 1907, reprint of 1823) (e.g., in II. *Four Sanctions or Sources of Pain and Pleasure*, Paragraph IV, §XII: “Does the political sanction exert an influence over the conduct of mankind? The moral, the religious sanctions do so too. In every inch of his career are the operations of the political magistrate liable to be aided or impeded by these two foreign powers: who, one or other of them, or both, are sure to be either his rivals or his allies. Does it happen to him to leave them out in his calculations? he will be sure almost to find himself mistaken in the result. Of all this we shall find abundant proofs in the sequel of this work. It behoves him, therefore, to have them continually before his eyes; and that under such a name as exhibits the relation they bear to his own purposes and designs.”). Louis Kaplow & Steven Shavell, *Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System*, 115 J. POL. ECON. 494, 502 (2007).

<sup>99</sup> See sources cited in footnote 54 and accompanying text.

<sup>100</sup> For the economic foundations of this argument see *supra*, sources cited in footnote 42-44 and accompanying text.

indicted or convicted for a crime carries a social stigma that can have detrimental implications on personal and communal relationships, on self-esteem, etc. These non-material sanctions can be very effective: research suggests that individuals are more influenced from social stigma than formal sanctions in their decision to comply.<sup>101</sup>

Now let us turn to religious sanctions. *Material* utilities and *external* enforcement stem from one shared source: *the religious community*. Religious life involves a high degree of proximity between the person and the congregation, what naturally creates many incentives for the individual to comply with religious commandments. As a result, the community has a substantial influence and sanctioning power over the individual.<sup>102</sup> Socio-religious sanctions range from condemnation and stigma to shunning and expulsion.<sup>103</sup> Importantly, the congregation offers rewards too, such as praise, relationships, esteem, and status. As a result, within the community individuals who deviate from the law in order to uphold or promote religious norms can wear their deviance like a crown.<sup>104</sup> The praise and the condemnation conferred by the congregation can be translated into material utilities by the social and business relationships that develop amongst members.<sup>105</sup> As community members interact, professional

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<sup>101</sup> E. Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996); James P.F. Gordon, *Individual Morality and Reputation Costs as Deterrents to Tax Evasion*, 33 EUR. ECON. REV. 797, 808 (1989).

<sup>102</sup> See again the strong empirical evidence found in the context of the supportive role of religion in promoting law-abiding behavior and the sources cited in footnote 22.

<sup>103</sup> Shavell, *supra* note 110, at 230; McAdams, *supra* note 17, *Id.*

<sup>104</sup> Kahan, *supra* note 73, at 373-374.

<sup>105</sup> In a more general vein, a series of historical studies found a strong link between religiosity and economic outcomes in the community level. R. Sosis & E. R. Bressler, *Cooperation and commune longevity: A test of the costly signaling theory of religion*, 37 CROSS-CULTURAL RESEARCH 211 (2003) (finding evidence that 19<sup>th</sup> century American religious communities that imposed costlier requirements of observance on their

relationships are formed, reputation is established, and jobs are offered. The material and non-material benefits associated with membership in a congregation can generate in turn an independent incentive to promote the welfare of the congregation, and act in ways that promote religious interests – thereby invoking a prosocial behavior.<sup>106</sup>

The ability to reward compliant behavior, *in addition* to sanctioning it, is an important difference between religion and law. It applies across religious incentives: internal and external, material and non-material. In addition to (external) praise and recognition by others of one's virtues and religious adherence, (internal) rewards such as spiritual uplifting, virtuousness and righteousness are also in play when individuals follow religious norms. But there are generally no comparable legal mechanisms that reward individuals for good behavior. Individuals are not usually *praised* for following the law. Whether they even keep the law is not necessarily a matter of public knowledge. Not so with respect to religious adherence. The latter has salient public dimensions as

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members survived longer and enjoyed higher communal success). R. Sosis, *Religion and Intragroup Cooperation: Preliminary Results of a Comparative Analysis of Utopian Communities*, 34 CROSS-CULTURAL RESEARCH 70 (2000). (finding evidence that 19<sup>th</sup> century religious communities were more likely to survive than secular communities, linking it to theories that religious communities foster higher levels of trust and cooperation); G. Richardson & M. McBride, *Religion, longevity, and cooperation: The case of the craft guild*, 71 J. ECON. BEHAVIOR & ORG. 172 (2009) (similar).

<sup>106</sup> L. R. Iannaccone, *Sacrifice and stigma: reducing free-riding in cults, communes, and other collectives*, J. POL. ECON. 271 (1992). (arguing that the utility of each religious individual depends not only on his own inputs in religious activities but increases with others' inputs; and that members of religious communities take great interest in the social welfare of their community and act to increase it). On a close note, see B. J. Ruffle & R. Sosis, *Does it pay to pray? Costly ritual and cooperation*, 7 THE B.E. J. ECON. ANALYSIS & POL'Y (2007). (finding that primary practitioners in religious communities in Israel (kibbutzim) exhibit more cooperative behavior and are more willing to potentially compromise their self-profit; the degree of cooperation has positive relation to the frequency of participation in collective religious rituals, suggesting that religious participation facilitates cooperation).

religious compliance largely builds on communal rituals, volunteer work, and participation duties. The gap is particularly significant in the case of low-identifiers, whose ties to society at large are already weaker. The law has less to offer to low-identifiers compared with religion.

The main reason why we should note this discrepancy between rewards and sanctions is the behavioral evidence that people do not treat costs and benefits in the same way. They are more cautious with respect to benefits and risk seeking with respect to costs, and they prefer certain benefits – even if their utility is lower – over risky ones.<sup>107</sup> It follows that low-identifiers may prefer following norms that confer benefits over norms that confer only costs due to their biases towards benefits.

An emphasis is due on the influence of the *religious identity* on the CBA (which is of course strong in the case of low-identifiers). Religious identification provides individuals with an ideal prescription of behavior, and reinforces an internal obligation to live up to the identity by complying with religious commandments.<sup>108</sup> Religious identifiers thus derive an independent utility from following the norm, to no apparent parallel on the part of the law.<sup>109</sup> This is again a significant advantage of religion over the law when normative conflicts occur.

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<sup>107</sup> A. Harel & U. Segal, *Criminal law and behavioral law and economics: Observations on the neglected role of uncertainty in deterring crime*, 1 AMERICAN LAW AND ECONOMICS REVIEW 276 (1999) (making this assumption in the course of applying prospect theory to criminal decision making).

<sup>108</sup> For the general argument on the effect of identity – not necessarily religious identity – see *supra*, sources cited in footnote 42-44 and accompanying text.

<sup>109</sup> For evidence that individuals have a direct interest in upholding norms they identify with, and pay for this purpose, see Cooter, *supra* note 42., at 588-589 (modeling the willingness to pay to uphold norms); Fehr & Gintis, *supra* note 45, *id.* L. STOUT, CULTIVATING CONSCIENCE 88-93 (2010).

In sum, we see that both religion and law confer material and non-material, internal and external incentives to encourage compliant behavior. However, religion has a unique advantage in its ability: (1) to provide rewards, not only sanctions, for compliant behavior; and (2) to instill an internal obligation to follow its norms (whereas the law, in the case of low identifiers, apparently needs to rely mostly on external incentives).

Mapping incentives and utilities is only the first step. In order to proceed with the analysis one also needs to know how to compare them. The important question pertains to the relative magnitude and probability of the relative sanctions.

***Magnitude of sanctions.*** When it comes to magnitude, the first important variable is the relative importance of the conflicting norms. The higher the relevant norm ranks and the more injunctive it is, the greater the sanction for its violation<sup>110</sup> and the greater the influence it has on behavior also according to empirical findings (as I argued in section II.B.1).<sup>111</sup> We can also expect that the religious reward for complying in non-trivial situations such as normative conflicts may also greater.

How severe are the sanctions that each normative system imposes? In general, both law and religion has severe sanctions in their arsenal. Legal sanctions include capital punishment and life in prison at the high end, sanctions that entail ample material and non-material costs. Fines and confiscations can also impose substantial costs.

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<sup>110</sup> This seems to be true with respect to both religion and law. S. Shavell, *Law versus morality as regulators of conduct*, 4 AM. L. & ECON. REV. 227, 232 (2002). (noting that the more important the norm is, the higher is the expected sanction).

<sup>111</sup> See the analysis in Section II.B.1 above. Baron & Byrne, *supra* note \_\_\_, at 131-132, 354 (discussing empirical findings that people are more inclined to act based on attitudes that they perceives as strong, specific and important to them, and that are also accessible in the circumstances)

The magnitude of religious sanctions, however, is also great. Internal non-material sanctions, such as the fear of ending in hell or experiencing guilt and remorse, can have much weight. This weight is amplified by their divine origin, which puts them in a higher status than worldly rewards and punishment (and regular sentiments of guilt or virtue). In addition, socio-religious incentives (sanctions and rewards) are probably more influential than most socio-legal sanctions, as religious individuals - low-identifiers in particular - are more dependent on their religious community than on society at large. This is again particularly true in the case of low-identifiers, who perceive their social identity to be less important and meaningful than their religious identity. Sanctions inflicted by the community on which one depends for the fulfillment of life necessities and enjoyment alike and whose members one encounters on a daily basis are *severer* than sanctions imposed by society at large. The more the individual immerses herself in the community and participates in religious activities, so the magnitude of the sanction presumably grows.<sup>112</sup> By strengthening social ties, high participation raises the costs of deviant behavior as it might disrupt these ties.

When it comes to socio-religious *rewards*, however, the relationship between participation and magnitude seems inverse. A person that chooses to follow religious norms despite a personal cost of legal sanctions can gain praise and esteem even if they are not so immersed in the community. In fact, they might receive a *higher* reward for this act (e.g., an upgrade of their social status) compared with high participants, as the latter are expected to follow religious norms in any event, as their natural course of action. An act of deviance from the law with a religious motive can turn to be a

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<sup>112</sup> Iannaccone, *supra* note 20, at 5-6. Evans et al., *supra* note 24.

“shortcut” to achieve higher social status without putting in the effort that high participators put. High participation may therefore *raise the costs* of deviance from religious norms *but not the benefits* of compliance with religious norms; whereas low participation may *raise the benefits* associated with compliance with religious commandments on the expense of the conflicting legal rule.

Taking into account the magnitude of legal and religious costs, it is not at all clear what overcomes what.<sup>113</sup> Some religious sanctions can be heavily discounted and thus weigh less than it first seems. For instance, a sentence of eternal hell can be deemed less costly than several years in prison as it is imposed far in the future whereas incarceration is instantly imposed. Furthermore, afterlife punishments are probably subject to more aggressive discounting in light of the behavioral findings that people heavily discount their distant future and fail to take appropriate steps to safeguard it. What is true with respect to the post-retirement period (which is heavily discounted) is probably truer with respect to the post-*death* period.<sup>114</sup> However, this is not true with respect to *all* religious

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<sup>113</sup> Shavell, *supra* note 110, at 236-237. Though Shavell does not address the factor of discounting as I do (see above), he believes that the law provides stronger sanctions than religion, arguing that “at least for the great mass of individuals in modern industrialized nations, the disutility due to losing one’s entire wealth or of going to jail for life outweighs, and probably by a significant amount, the sting of guilt and of disapproval, or rather that plus the utility from virtue and praise.” Shavell stresses that individuals today are able to relocate freely and thus distance themselves from social disapproval.

I do not share Shavell’s view, at least when it comes to low-identifiers. These individuals will experience greater difficulty to distance themselves as religion for them is a central part of their identity that provides goods in many areas of life. The religious adherent may find it harder to replace her community for another and may grow dependent on it (see Iannaccone’s analysis of religion as a club good, *supra* note 20).

<sup>114</sup> Incorporating the behavioral findings on hyperbolic discounting discounts the distant punishment even more. For an overview on hyperbolic discounting and its effects on undersaving for the old age see D. I. LAIBSON, HYPERBOLIC DISCOUNT FUNCTIONS, UNDERSAVING, AND SAVINGS POLICY (1996), <http://www.nber.org.ezp-prod1.hul.harvard.edu/papers/w5635> (last visited Jan 23, 2013).

sanctions and rewards. Socio-religious sanctions, which I discussed in length, are imposed instantly, even faster than legal sanctions, and basic internal incentives such as guilt or virtue are also immediately experienced. These incentives are not discounted and they compete with the law on a more equal footing.

Putting together the elements we discussed so far indicates that religion may have an edge on the law in the case of low-identifiers, as it imposes more kinds of costs, some of them mean a great deal for people who highly identify with religion, and also offers rewards. The law has a wide arsenal of sanctions but they are not imposed in every case. Short-term imprisonment or small fines may be easily outweighed by religious incentives. But, as the lessons of behavioral economics have taught us, the CBA's more important factor is not the magnitude of the sanction but rather the probability of its enforcement.

***Probability of sanction.*** The probability of punishment depends on enforcement efforts in the case of *external* incentives and an acknowledgment that a wrongful act was committed in the case of *internal* incentives. I shall address each in turn.

When it comes to external enforcement of sanctions, both legal and religious, the probability of detection and application of the sanction (conviction, in the legal domain) are the central concerns. Several factors can affect the way individuals perceive these probabilities: (1) the salience of enforcement efforts (e.g. visible street presence of the police and maintenance of general public disorder has been associated with an increase in *overall* deterrence of all crimes<sup>115</sup>); (2) the importance of the norm or rule breached

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<sup>115</sup> This factor emerged as highly important in behavioral studies of deterrence and is usually classified as part of the literature on bounded rationality. Kahan, *supra* note 73, at 367-373.

(given limited resources, the police is more keen to solve murder cases than petty thefts);  
(3) the extent to which individuals who have valuable knowledge are willing to share this knowledge (in the legal domain, that means to cooperate with the authorities).

Holding each pair of factors constant, religious sanctions seems to be more probable than legal sanctions on all factors but the second (the importance of the norm). The enforcement of religious norms is embedded in religious lifestyle, it stems from the proximity of the community and the strength of the social ties. The people closest to the individual are also the enforcers of the norms, and enforcement is maintained daily by the meticulous observance of religious precepts and rituals. This account should be qualified, however, with respect to divine sanctions. These sanctions are uncertain, even though detection by the divine is certain, because believers can usually be saved through some process of repentance and pardon.

As to detection and report, violations of religious commandments are both easy to detect by the religious community by virtue of its proximity and information about them spreads fast. In cases of religion-based conflict in particular, the very same social proximity might reduce the probability of detection by the authorities, as members of the religious community might come to the perpetrator's aid and refuse to cooperate with the authorities, thereby lowering the probability to solve the case. It goes without saying that the community is not likely to impose social sanctions for law violations in such a context.<sup>116</sup> On the contrary, social rewards might be conferred.

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<sup>116</sup> An important precondition to the imposition of a social sanction is for community members to believe that the offender acted wrongly. The religious community can either be supportive of the law, indifferent to the law, or to favor deviant behavior so long it is aimed to further religious purposes. Only in the first scenario social sanctions will be imposed, and in the latter scenario the opposite is likely. As Robinson & Darley noted,

The same is not necessarily true however where the legal rule is of a high rank and the value it protects is considered very important. In these cases, the authorities usually put in much effort to prevent violations and treat them seriously if they occur. This can be foreseen by religious individuals and deter them. The importance of the legal norm in conflict can also mitigate the advantage that religion has along the other two factors. Enforcement efforts can be more salient or at least assumed to be fiercer, and even the community (few members are enough) can be more inclined to cooperate with the authorities when a serious legal prohibition is at stake. However, if the conflicting *religious norm* is also very important, religion and law may find themselves in a tie.

So far we discussed the probability of *external sanctions*. Unlike external sanctions, *internal sanctions* are self-imposed. Thus, they are only incurred if people *believe* they acted wrongly and that they *should* feel shame, guilt and remorse. But what is the probability that something like that will happen? According to behavioral findings, lower than we might think. When breaking the law, individuals tend to assess their violations as less severe than law-abiding individuals, and they seem to rationalize away feelings of guilt and remorse.<sup>117</sup> This implies that individuals incur little internal cost as

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“discrepancies between the criminal code and the community tend to... lessen the effectiveness of condemnation as a deterrent threat”. ROBINSON & DARLEY, *supra* note 54, at 201.

<sup>117</sup> P. Funk, *Governmental action, social norms, and criminal behavior*, 161 J.I.T.E. 522, 524-525 (2005) (citing research that compared criminals to students and convicts to unconvicts, finding that the former population evaluates crimes as less severe than the latter population; and arguing that psychological research hinges these differences on efforts of criminals to mitigate cognitive dissonance through self-serving biases). M. Levi & S. Jones, *Public and police perceptions of crime seriousness in England and Wales*, 25 BRIT. J. CRIMINOLOGY 234 (1985).

a result of their deviance, since internal self-serving mechanisms ease the guilt away.<sup>118</sup> These findings might receive support from our discussion of religion as a supportive normative system in section II. There I noted the literature that pointed that religious participation and community, rather than religious belief, has been found to be the dominant factor that influences compliance with the law.<sup>119</sup> Self-serving biases might be the mechanism that fuels this discrepancy. The process of rationalizing the act and easing away the guilt may be significantly more effective if individuals, on top of their ordinary self-serving biases, have an external justification – such as a state of normative conflict. Resting the deviant behavior on the *alternative norm* – religious or legal – can provide such a justification, a benign cause that neutralizes guilt. This mechanism can work in both directions – it can mitigate guilt for breaking the law for those who chose to deviate from the law, or it can mitigate guilt for deviating from the religious commandment for those who chose law over religion.

If this is true, self-serving biases substantially reduce the efficacy of internal sanctions. Interestingly, however, they probably increase the efficacy of internal *rewards*, as individuals are probably eager to reward themselves on doing something right. Considering that the individuals involved are low-identifiers, their inclination towards religious norms may work to ease away the guilt for breaking the law and operate internal feelings of virtue and courage even for sticking to the religious norm.

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<sup>118</sup> Funk, *supra* note 117, at 529, suggests that this phenomenon is linked to the vast research on self-serving biases, the widespread evidence that individuals form their beliefs and judgments in their own favor and screen away challenges and counter-information.

<sup>119</sup> See discussion next to footnote 22.

*Status of the scales.* Overall, the following general statements hold the gist of CBA of religion-based normative conflicts when performed by low-identifiers: (1) External sanctions and rewards have more potential to influence behavior than *internal sanctions*, as they are not mitigated by self serving biases. (3) External *religious* sanctions can be severer than legal sanctions and likelier to be imposed for violations of religious norms, *what can encourage low-identifiers to deviate from the law in cases of normative conflicts*. This tendency may be strengthened to the extent that the community is willing to hamper authorities' enforcement efforts in cases of religion-based normative conflicts, thus significantly reducing the likelihood that legal sanctions are imposed in the eyes of potential perpetrators.

(4) However, when it comes to *serious legal prohibitions*, these effects are mitigated at least partially by the severity of the legal sanction and the higher probability of enforcement in these cases (as legal authorities makes more effort to prevent, detect and investigate serious violations of the law). (5) Even in these cases, however, the decision to obey or disobey depends also on the importance of the competing religious norm; for the magnitude of the sanctions and rewards as well as their probability is expected to be higher also on the side of religion when the norm at stake is highly important. (6) finally, it is still possible that increasing saliency of enforcement efforts even through an increased regulation of public order may deter noncompliance, as it has been proven an effective measure in reducing crime in the past, though not in the context of religion-based normative conflicts.

Based on this analysis, I argue that *when it comes to the low-identifiers, the law is likely to lose the utilitarian analysis* and religion is likely to prevail, as the incentives it

provides are more significant than those offered by law for low-identifiers, except, maybe, where the legal rule is of a high rank or if the authorities deploy an effective high profile enforcement scheme.

## 2. *Situations of conformity in religion-based normative conflicts*

The tendency to conform creates more obstacles than opportunities when it comes to normative conflicts between law and religion. This is the thrust of this section. Unfortunately, this conclusion leads me to believe that a better understanding of conformity situations cannot be easily leveraged into bettering legal institutions, regardless of its intrinsic value. Indeed, little can be done to encourage compliance with the law when conformity pulls in the other direction.

To support this unsatisfactory conclusion, let me delve into how conformity operates when religious identity is salient. Recall that individuals only conform to norms of groups with which they identify. But how do individuals behave when they have multiple identities and each points to a different norm?<sup>120</sup> Researchers discovered that when individuals experience a *conflict* between their personal identity and their social identity, manipulations that made the social identity more salient increased cooperative behavior.<sup>121</sup> A focus on the group identity “motivates people to be loyal to the group, its

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<sup>120</sup> This situation is discussed in M. B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERS. SOC. PSYCHOL. BULL. 475, 478-479 (1991). Goldstein & Cialdini, *supra* note 43, at 170-171.

<sup>121</sup> Brewer, *supra* note 92, *Id.* M. B. Brewer & R. M. Kramer, *Choice behavior in social dilemmas: Effects of social identity, group size, and decision framing.*, 50 J. PERS. & SOC. PSYCHOL.543 (1986). M. B. Brewer & W. Gardner, *Who is this “ We” ? Levels of collective identity and self representations.*, 71 J. PERS. & SOC. PSYCHOL.83 (1996). Salience, as noted before, influences decision-making in general, including decisions pertaining to compliance with the law. See footnote 53 and adjacent text. Matthew J.

values, members and identity. People want to think and act in ways that promote the group and enhance its status.”<sup>122</sup>

It follows that *if* individuals are led in a specific instance to focus on their religious identity, they are likely to promote their religious denomination and/or congregation in that situation, even when this compromises their personal self-interest (for example, by increasing the risk they will be apprehended and charged with breaking the law).

Let us now have a closer look at situations that can trigger this chain of events. Among these are religious rituals and ceremonies: in the aftermath of these rituals religious identity is salient and individuals are more inclined to act in ways that promote religious interests. Mob situations also enhance the saliency of the religious identity and trigger conformity. Recall that the coordinated and visible action of others is a powerful cause of conformity; research shows that people in a mob not only tend to conform, they are also more likely to engage in *deviant behavior*.<sup>123</sup> Mob situations are arguably more prone to give rise to situation-specific deviant norms that the mob develops on the expense of general norms, including relevant laws.<sup>124</sup> This phenomenon arguably

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Hornsey et al., *On being loud and proud: Non-conformity and counter-conformity to group norms*, 42 BRIT. J. SOC. PSYCHOL. 319 (2003).

<sup>122</sup> Tyler & Smith, *Justice, Social Identity and Group Processes*.

<sup>123</sup> Kahan, *supra* note 73, at 353-354; B. Mullen, *Atrocity as a Function of Lynch Mob Composition: A Self-Attention Perspective*, 12 PERS. & SOC. PSYCHOL. BULL. 187 (1986). N. E. ELLEMERS, R. E. SPEARS & B. E. DOOSJE, *SOCIAL IDENTITY: CONTEXT, COMMITMENT, CONTENT*, 168-172 (1999).

<sup>124</sup> The exact psychological process that triggers deviance in mob situations is debated, though both sides agree that conformity drives behavior. The parties differ as to *how* exactly it does so: *Zimbardo*, *supra* note 75, argues that the mob leads to deindividuation, a loss of selfhood that occurs when an individual is highly immersed in a group. The loss of selfhood entails a loss of self-control that leads to anti-normative behavior. Alternative explanation is offered in S. D. Reicher, R. Spears & T. Postmes, *A Social Identity Model of Deindividuation Phenomena*, 6 EUROPEAN REV. SOC. PSYCHOL. 161 (1995). Reicher et al. argue that deindividuation does not cause a loss of self but rather activates individuals'

explains why many mass demonstrations following the Danish Cartoon controversy resulted in religiously motivated deviant behavior; and why mass ultra-orthodox protests following Shabbat controversies turn violent. When individuals are provoked by an insult or desecration of their religion, the mob norm in situ is likely to be deviant because people are both enraged and primed to act in the interest of religion. It is a well-documented human tendency that people tend to respond to offences by offending back.<sup>125</sup>

It follows that when religious individuals feel provoked by blasphemous speech or desecration of a religious institution, the provocation typically has a double effect: it elicits the individual's religious identity, what motivates the person to act in accordance with religious norms and interests; and it triggers a backlash, a tendency to offend back. When the basic tendency for reciprocity teams up with the salient religious identity and the increased motivation to act for the religious group, it may tip the normative conflict to the direction of breaking the law. Normative conflict in these situations is likely to resolve for religion and against the law despite the apparent lack of personal utility in committing the act. This behavior is expected to be more likely and/or amplified where the religious norm in conflict is central (perhaps this is why blasphemy is associated more than other religious norms with deviant behavior<sup>126</sup>).

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*social self*. Once the social self is salient individuals are induced to conform to norms that the group develop in situ, on the expense of more general norms.

<sup>125</sup> Such behavior is often noted as the “other side of fairness”, because it shows that reciprocity is not only manifested through altruistic behavior in response to fairness, but also through spiteful behavior in response to *unfairness*. STOUT, *supra* note 109, *id.* McAdams & Ulen, *supra* note 49, at 425. N. Garoupa, *Behavioral economic analysis of crime: A critical review*, 15 EUROPEAN J. L. & ECON. 5, 10 (2003).

<sup>126</sup> For a discussion of the important status of blasphemy see: LEVY, *supra* note 15, at 3. D. Nash, *Analyzing the History of Religious Crime: Models of “Passive” and “Active”*

What lessons can we take from the analysis to the legal domain? Unfortunately, the answer is not many. Where a specific identity is particularly salient, the individual is likely to conform to that identity, and there is little in the research to suggest ways to divert an individual from conforming to the religious identity. Notwithstanding, where *no* identity is particularly salient when the decision is made, individuals often take more than one identity into account<sup>127</sup> and we're back to square "deliberation". This is a reminder that though conformity exerts considerable influence on individuals it requires specific preconditions to operate. In deliberative situations, as I discuss in section V, several avenues are open to try and encourage compliant behavior.

What about encouraging compliance with the law by making civic identity more salient? This is certainly a tempting option. Efforts to strengthen civic identity certainly have a better prospect of success than any counter-effort to *weaken* or suppress the religious identity.<sup>128</sup> The harder question is whether it is really possible. Religion-based normative conflicts usually do precisely the opposite - they elicit the religious identity;

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*Blasphemy since the Medieval Period*, 41 J. SOC. HISTORY 5 (2007). The importance of blasphemy can also be derived from the various prohibitions on blasphemy in the laws of many states. These prohibitions may not be vigorously enforced today, but their continuing existence and persistence (unlike many religious prohibitions that are rarely enacted into law, like adultery, and other prohibitions that though enacted today seem on decline, like sodomy) teaches us about its relative importance in the religious normative system. See S. Ranalow, *Bearing a Constitutional Cross Examining Blasphemy and the Judicial Role in Corway v. Independent Newspapers*, 3 TRINITY C.L. REV. 95 (2000).

<sup>127</sup> McDonald, Fielding, and Louis, *supra* note 29, at 58 ("people are not only influenced by a single important ingroup but also by the norms of a range of groups (e.g., fellow citizens, fellow guests)"). R. R. Lau, M. Jacobs Quadrel & K. A. Hartman, *Development and Change of Young Adults' Preventive Health Beliefs and Behavior: Influence from Parents and Peers*, 31 J. HEALTH & SOC. BEHAVIOR 240 (1990) (college students were influenced by parental norms when making judgments regarding intoxicated driving even when the parents were viewed to be an out-group and were not around their children).

<sup>128</sup> See Tyler, *multiculturalism*, *supra* note 59, at 1015 (arguing that subgroup identities are particularly important for people and consequently difficult to suppress and that enhancing the superordinate social identity is a preferred strategy).

the possibility to make the civic identity salient in conformity situations outside of laboratory settings is relatively slim. Trying to tackle conformity situations directly is also not a promising avenue, in my view. Though theoretically we could have reduced the risks associated with mobs by prohibiting mass protests or religious conventions (thereby preventing mobs from forming in the first place), such prohibitions are too intrusive on religious freedom and freedom of speech to be seriously considered.

#### **V. Tying the knots: some preliminary prescriptions**

The Identity/Situation model argues that the decision to obey the law in religion-based normative conflicts is contingent on the situation (deliberative/conformative) and the relative strength in which one identifies with the state or with religion. The model particularly pivots on its identity dimension, as identities provide both a background against which individuals make decisions *and* ideal prescriptions for behavior that individuals seek to follow.

When it comes to conformative situations, I concluded the previous section by noting that research has thus far failed to suggest meaningful ways to tackle conformity. For lack of better insight, the present chapter will therefore focus on deliberative situations. There, as I argued above, the interplay of identities classifies individuals into high identifiers, individuals with a strong civic identification, and low identifiers, individuals with low civic identification but high religious identification. Each group exerts its own method of decision making: high identifiers decide whether to obey the law using a legitimacy analysis, which is heavily influenced by the fairness of the procedures used by lawmakers and authorities; whereas low-identifiers decide whether to obey the law using

an outcome-oriented analysis that, as I argued above, is likely to favor noncompliance and adherence to religious norms instead.

In this section I will explore several prescriptive suggestions that follow from this analysis. I shall thus divide my analysis into two cases: *the easier case*, which involves high identifiers, and *the hard case*, which involves low identifiers. Lawmakers should design laws with both groups in mind, considering that *both* may experience normative conflicts.<sup>129</sup> The classification into high- and low-identifiers does not necessarily mean that the former group has fewer normative conflicts; nor that the latter group is more likely to break the law under normative conflicts – though this may be the case. I shall thus proceed with my argument with respect to the two cases.

Admittedly, the *hardest case* is that of a strong religious identity in a conformative situation (*Table 1, row 2*). As noted, there seems to be little that can be done to tackle these situations (note that the impacts of conformity pose a general problem for criminal law, which far exceed the case of religion-based normative conflicts<sup>130</sup>). Nevertheless, some threads of thought are discussed below.

#### **A. The easier case: high civic-identifiers**

Religious individuals who highly identify with the state rely, according to the model, on fairness heuristics to assess the legitimacy and morality of the law, and

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<sup>129</sup> For the proposition, supported by experimental evidence, that strong-identifiers may also experience normative conflicts and deviate from the norms in order to adhere to other norms (e.g. collective group welfare) see: D. J. Packer & A. L. Chasteen, *Loyal deviance: Testing the normative conflict model of dissent in social groups*, 36 PERS. SOC. PSYCHOL. BULL. 5 (2010).

<sup>130</sup> See Kahan, *supra* note 73, at 373-374; COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT, 31-33, 39-44 (2002) (describing the inadvertent effect of a group of peers on the adolescent and youth delinquency). P. SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (2007) (describing the destructive and rooted mechanisms of gang rape and the challenges in uprooting the phenomenon).

ultimately to decide whether to obey the law. It follows that in order to encourage compliance lawmakers and law enforcers should enact and operate via fair procedures, so as to activate the fairness heuristic of all individuals who identify with society at large. This is presumably an easier task because religious high-identifiers are similar to other high identifiers who make decisions based on legitimacy and fairness and are supposedly responsive to similar procedures. No need to design a different treatment.

But what does fairness *mean*? Tyler and colleagues' empirical evidence suggests that individuals obey laws received and administered by authorities they perceive as (1) trustworthy, (2) neutral and (3) respectful. These are somewhat ambiguous concepts that do not provide much guidance as to what conducts count as benevolent/trustworthy/neutral in the eyes of individuals. And scoring high along these fairness dimensions may not be an easy task. Neutral treatment, for example, has been proven as particularly problematic in religious contexts, as the adequate standard for neutrality towards religion is debated among legal scholars and judges for years.<sup>131</sup> Many gave up on the idea and claim that it is impossible for the state to remain neutral in its relationship with religion.<sup>132</sup>

Perhaps a more modest concept of neutrality will do. Tyler found, for example, that a politically and religiously charged decision – to allow federally funded abortions –

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<sup>131</sup> Edwards v. Aguillard, 482 U.S. 578, 616-18 (1987) (Scalia, J., dissenting); M. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 131 (1992). D. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 INDIANA L. J. 1 (2000).

<sup>132</sup> S. D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 96 (1995); A. Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1118 (2013) (citing others who believe that there is no prospect to the doctrine of religious neutrality).

received more support when it followed *a public hearing* than when decided in private.<sup>133</sup>

More procedural mechanisms that are worthy of testing have to do with voice or *participation: opportunities to express oneself before the authorities*.<sup>134</sup> Providing opportunities to express one's anger and vent the conflict away can strengthen the legitimacy of the legal system and encourage compliance to the law. Plausibly, this will allow individuals to vent the tension, anger and dismay in non-deviant directions, and seek the solution of the conflict by civilized means.<sup>135</sup>

The law could provide several opportunities to voice one's opinion. The core and trivial example is judicial recourse. Procedural fairness provides an instrumental justification to judicial recourse in general and judicial review in particular, independent from constitutional and other non-instrumental justifications that may additionally support judicial review.<sup>136</sup> This justification runs against doctrines like state secrets that

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<sup>133</sup> T. Tyler, *Governing Amid Diversity: The Effect of Fair Decision-Making Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994).

<sup>134</sup> *Id* (finding that when someone who shared the participant's opinion had a chance to represent this opinion before the decision maker prior to the decision, support for the decision grew compared with a situation in which no voice was allowed). T. TYLER & S. L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 100-102 (2000) (describing findings that opportunities to express one's view affect fairness assessments indirectly).

<sup>135</sup> A close argument from a different direction, with no empirical support, was made by C. R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 154 (1996) (arguing that citizens should be allowed to depart from the rules in certain circumstances, e.g. in order to seek judicial decision on the constitutionality of rules. Notably, Sunstein argues that individuals should be allowed to first violate the rules and *then* seek redress, but this does not seem as a necessary component of the argument or indeed to bear on my point here).

<sup>136</sup> A. Harel & T. Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227-256 (2010) (arguing that a non-instrumentalist justification grounds judicial review in the right to a hearing; the components of the right to a hearing as developed by the authors echo and support the argument here, but the justification is non-instrumental). Y. Eylon & A. Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006) (similarly reject instrumental arguments to establish that the right to judicial

bar claims against the state, because they erode part of the legitimacy of the state. The justification also trickles down to civil procedure, and supports a wide authorization of testimonies, expert opinions, amici brief, etc. Notwithstanding the fact that not every decision to speak in court can be accommodated, the value of participation exposes the possible negative outcome of *denying* participation: it may compromise the legitimacy of the procedure and reduce the willingness to obey it. Allowing judicial recourse and paying heed to the procedures that promote participation, neutrality and the like, is beneficial since (a) voicing grievances is a component of procedural fairness that helps to legitimize the final decision; (b) the judicial proceeding creates a forum to further exhibit and apply procedural fairness, thus garnering more legitimacy to the decision and the institution; and (c) it creates a *non-deviant venue* to vent anger and resentment over religion-based normative conflicts that can supplant retaliation. This is particularly important noting my conclusion in section II, that when the normative conflict occurs not only between law and religion but also within religion, individuals will seek to find consistency and avoid the conflict. Other venues of action provide them this possibility and can thus avoid the conflict altogether.<sup>137</sup>

It seems to me that in light of the potential here, more venues of expression should be considered but the judicial one. This is especially true when the religion-based normative conflict is acute and urgent, as the judicial process is lengthy and cumbersome; or when the relationship between the court and the religious group has been notoriously bad (as is the relationship between the ultra-orthodox denomination in Israel and the

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review is justified even if it is found to be detrimental to the protection of rights; again, the argument does not interfere with the instrumental argument of procedural fairness).

<sup>137</sup> See discussion in Section II.B.2, pages 19-20.

Supreme Court). As Tyler and colleagues pointed out, much of the decision to comply hinges on the practice of authorities that *apply* the law, like agencies, local municipalities and the police.<sup>138</sup> It thus seems important that administrative authorities will, too, provide a right to a hearing, especially if an explicit request is made. Assuming that the findings of the normative model hold, individuals will be much more inclined to comply with any decision reached after a hearing took place, regardless of its favorability, as long as the hearing took place and they were treated throughout with respect and benevolence and neutrality.

Before I turn to address religious individuals that do *not* hold a strong superordinate civic identity, I should address those individuals that identify *both* with their subgroup *and* with society at large: the *double-identifiers*. This is not necessarily a small group, and certainly a group that society has an interest in preserving and encouraging.<sup>139</sup> As demonstrated in the research, multiple strong identities do not necessarily exclude each other or cancel each other's influence. The empirical findings of Huo, Tyler and colleagues demonstrate that when individuals have several strong identities they *continue to rely on fairness considerations* in their compliance decisions, even when their more proximate group identity is strong. These findings are in line with the theoretical argument (made for instance by Professor Shachar), that identities are not a matter of "either/or". Interestingly, Shachar also stresses the importance of state-group communication as a method to ease the conflict between the state and the group.<sup>140</sup>

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<sup>138</sup> TYLER 2007, *supra* note 54, at 48-54. TYLER AND HUO, *supra* note 72, *Id.*

<sup>139</sup> A. SHACHAR, MULTICULTURAL JURISDICTIONS – CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 124-125 (2001).

<sup>140</sup> *Id.*

**B. The hard case: low civic-identifiers**

What are the implications of the model with respect to religious persons whose civic identification is low? Notably and perhaps surprisingly, the model argues that individuals who do not identify with society at large and strongly identify with their religious group will reach compliance decisions based on an outcome oriented, cost-benefit analysis –heavily skewed in the direction of religion. This argument is based on empirical evidence of how people with multiple identities – civic, ethnic, racial, political – decide and reason decisions to obey the law.<sup>141</sup>

This finding, though potentially troubling, has a potential positive flip side: low-identifiers' inclination to apply a cost-benefit analysis rather than a legitimacy-fairness analysis presumably makes them *more responsive* to external incentives. Hence, it should still be possible to control their behavior through *rewards and sanctions*.

This might sound as a very counter-intuitive conclusion for many readers, as we usually imagine the devout as an intensely spiritual group, motivated by immaterial incentives, insulated from the influence of society. And this may very well be true in the day-to-day life of low-identifiers. But social psychology teaches us that when low-identifiers encounter compliance dilemmas in the face of civic norms and laws (if you will: when they interact with the large society), they make their decisions based on the costs and benefits that the law entails. This does not mean that low-identifiers are easily deterred – the opposite is true, as the analysis I carried above revealed: religion exerts immense incentives on low-identifiers to comply with religion rather than with the law, and religious sanctions and rewards are highly effective. Religion has a particular

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<sup>141</sup> For the relevant discussion see Chapter V, particularly section A.

advantage over the law in offering significant rewards (spiritual and social) on top of sanctions for actions that promote religion or even the particular congregation even when they negate adherents' self interest.<sup>142</sup> This may explain why members of strict and insular religious communities like the Amish in America or the Ultra-Orthodox Haredim in Israel (presumably composed mainly of low-identifiers) are often willing to disobey the law in the name of religion. The cases of *Yoder* and *Immanuel School*, as many other cases involving the Amish church and the ultra-orthodox denomination in Israel, illustrate. When parents are willing to go to jail as long as they could accord their children education in line with strict religious precepts, it testifies for the strength and efficiency of the alternative sanctioning system— that is, religion.

Notwithstanding these hardships, guiding behavior through incentives is more realistic and defensible than suppressing the religious identity – the other alternative potentially stemming from the model. I thus discuss two ways to mitigate normative conflicts of low-identifiers: accommodation (of the religious norm) and amplification (of the civic identity).<sup>143</sup>

***Accommodation.*** The first and common way to mitigate religion-based normative conflicts is to accommodate the religious norm within the law, thus to evade the CBA and the conflict altogether. This idea is not new. It is how both the U.S. Supreme Court<sup>144</sup> and

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<sup>142</sup> For the elaborated analysis that led to this conclusion see Chapter V, section C.1.

<sup>143</sup> To be clear, I do not suggest that accommodation is a mitigating tool only for low-identifiers; clearly, it can mitigate the conflict also for strong-identifiers too. Rather, I argue that strong-identifiers will be willing to settle *for less* than accommodation in order to solve their normative conflict; and presumably they do not need amplification of their civic identity as it is already high.

<sup>144</sup> The Supreme Court granted *Yoder* an exception from the compulsory school-attendance Wisconsin law, ruling that the law cannot be enforceable on the Amish as it violates their First Amendment Freedom of Exercise rights. *Supra* note 2, *id.*

the Supreme Court of Israel<sup>145</sup> chose eventually to solve the religious education cases – by tailoring the law around the religious group, allowing religious individuals to opt out of the public education system and out of the law. Accommodation thus solved the normative conflict by removing the law from the arena.

Yet accommodations are only possible when lawmakers can refine and narrow the socially protected interest so as to circumvent the conflict with religion. The law can exploit in the process of accommodation its flexibility and specificity, in contrast to religion, which norms are often too broad and vast to leave any room for compromise.<sup>146</sup> Accommodations, in this sense, are the opposite of “incompletely theorized agreements”, though both solutions are aimed to address problems of political conflict.<sup>147</sup> Instead of evading the conflict by using regulations that are “incompletely specified”,<sup>148</sup> a narrowly tailored law can bypass the religion-based conflict precisely *if completely specified*. The process of creating exceptions means to focus on certain elements and to specify them as the complete and satisfactory conditions to the settlement of the conflict. Consider the *Smith* case as an example. If the Oregon legislature would have only better specified the prohibition on peyote, instead of what it actually did – construed a total ban on the drug,

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<sup>145</sup> The *Immanuel* case ended with the Israeli Ministry of Education cancelling the school’s subsidy, thereby allowing the school de facto to continue with its separation policy but without the support of the state – in line with the second prong of the Court’s decision. See *Immanuel schools* case, supra note 7, *id.* For the report on the settlement (which is not reflected in the decision, been reached in its aftermath), see: *Girls school in Emmanuel approved*, WWW.JPOST.COM, <http://www.jpost.com/Israel/Article.aspx?id=185925> (last visited Jan 24, 2013).

<sup>146</sup> By analogy, see Shavell, supra note 110, at 235 (noting that moral norms are broad and less refined than the law, as they needed to survive the times and to appeal to large audiences, and can be changed less easily than the law). On the idea that too broad regulations may impede moral evolution over time see SUNSTEIN, supra note 135, at 41.

<sup>147</sup> SUNSTEIN, *Id.*, at. 35-61.

<sup>148</sup> SUNSTEIN, *Id.*, at. 35.

the conflict could have been resolved fairly easily. A drug may be allowed despite its inherent dangers as long as the circumstances of use are moderated and controlled. Thus, the same as alcohol, which is prohibited in circumstances like driving, minors' consumption, in the street, etc., but is not restricted when used in sacramental ceremonies, peyote too can be prohibited in general and allowed in the narrow realm of religious rituals.<sup>149</sup>

Specificity may be hard to accomplish, as accuracy and precision are costly.<sup>150</sup> Yet its advantages are many, and perhaps even surmount those of incompletely theorized agreements. Not only that accommodations can evade the religions-based conflict altogether and from the start, accommodations are also capable of reducing friction between religion and the state in the long run, because it provides a definitive solution in some specified issue whereas incompletely theorized agreements are bound to bring the parties to court time and time again. Because incompletely theorized agreements support the notion of deciding cases narrowly and one at a time, they necessarily involve continuous litigation. Constant litigation entails high profile conflict, hence increases the saliency of the conflict in general and the conflicting religious norm(s) in particular, and consequently increases the tendency to disobey the law. When a conflict is constantly litigated it also makes it unlikely that religious individuals will develop a strong civic

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<sup>149</sup> The Peyote exemptions in federal law, and today in the Oregon law as well, have alluded to this principle. See the American Indian Religious Freedom Amendments Act of 1994 (AIRFAA); Oregon Revised Statutes §475.840 (exempting a Peyote use “(a) In connection with the good faith practice of a religious belief; (b) As directly associated with religiously done practices; and (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.”).

<sup>150</sup> SUNSTEIN, *supra* note 135, at 42 (arguing that incompletely theorized agreements are justified, inter alia, from a practical point as they may be “the best approach available for people of limited and capacities. Full theorization may be far too much to ask.”),

identity in conjunction with their religious identity, at least as long as it lasts. Thus, continuous litigation hampers the chances of turning low-identifiers into high- (or at least higher) identifiers. Instead of gradual and warranted relaxation of religious chasms, the religious denomination will be long ossified in a state of low-identification.

As with respect to high-identifiers, my argument with respect to low-identifiers provides a different justification to the constitutional requirement of “narrowly tailored” means. Whereas the traditional justification is about the requirement that acts of the state will minimize infringement upon constitutional rights due to their special legal and fundamental status, and notwithstanding this classical justification, my justification is about minimizing the *appearance of conflict* in the eyes of the believers, whether or not a constitutional right was in fact violated, and even if wasn’t. Still, a narrowly tailored law will serve the independent goal of increased compliance with the law and will mitigate religion-based normative conflicts in the long run.

My argument also has important qualifications, however. As a method, accommodations have apparent advantages but one clear disadvantage: there are some legal interests that are too important to be compromised by way of creating exceptions, narrowly tailored as they may be. Religion-based normative conflicts can and often pertain to rights and freedoms of others, whether the children sent to school, the woman seeking abortion or the artist who is accused of blasphemy. Religion-based normative conflicts as a result may deal with issues that society generally conceives as worthy of strict regulation, and cannot tolerate religious exceptions of a kind that compromises other values or freedoms. When the conflict concerns interests that society at large holds too important to compromise, accommodation is not a viable option.

*Amplification: using conformity to dull the other edge of the sword.* The study of identity reveals another way of action open for lawmakers that seek to mitigate religion-based conflicts, albeit admittedly more challenging: to enhance the saliency of individuals' superordinate identity – their identification with society at large.

Identity, as recalled, is both a preference and a background. It affects the type of analysis that individuals use in their decision whether to obey the law – normative vs. rational analysis – and provides a prescription for behavior that affects both the deliberative analysis (by raising the value of religious norms and incentivizing individuals to engage in religion-promoting behaviors); and situations of conformity, as individuals conform to group norms derived from group identity and act to promote group interests. Due to the pivotal status of identity, and specifically the interplay of identities, in the model, it is clear that amplifying the salience of the social law-abiding identity can be extremely fruitful if successful.

The problem, of course, (as I noted before) is that the advantages of a strong identity are usually exploited by religion in this conflict and not by the law, because low-identifiers by definition conform more often to their religious identity than to their civic identity. But, strengthening civic identity is nevertheless possible, by encouraging *strategic conformity to the law*. By this I mean utilizing the often-neglected power of the law to create *positive incentives* in order to enhance cooperation and compliance.

Recall, that low-identifiers are not necessary deviants; rather, they are responsive to outcomes and considerations of utility. When they find themselves in a normative conflict they engage in a CBA, and because of the central role of religion in their lives religious incentives are particularly effective – and religion is likely to come out of the

CBA triumphing over the law. How can we alter this balance and tip the scales towards compliance with the law? Based on my analysis of the low-identifiers' CBA of normative conflicts, my final argument in this paper is the following: as legal sanctions are generally insufficient to deter low-identifiers from disobeying the law, the possibility to shape these considerations by legal sanctions is hampered by the relative weakness of the law in comparison to religious reward mechanisms, positive reward mechanisms should be considered to support the use of legal sanctions and alter the balance between law and religion. What is needed is laws that signal common values and goals, attributes that the religious denomination or group shares with society at large and can amplify the civic identity of low-identifiers.<sup>151</sup> The idea is really to try and reconstruct a *fairness heuristic* for low-identifiers, along the lines that presumably led to the construction of such a heuristic in the first place for high-identifiers. By providing rewards associated with compliance with the law, the state signals to the religious individual that her civic identity and her social membership can be valuable sources of utility, and that compliance with the law can serve her own interests and the interests of her group (which are incorporated into her CBA in any event, as we've seen above). What starts as a strategic compliance with the law, driven by utility considerations and CBA, with time shall become an *internalized compliance* with the law – as most norms are installed. What starts with considerations of utility gradually builds into an internalized obligation.

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<sup>151</sup> This argument draws in part on similar ideas that were raised with regard to different dilemmas in the psychological literature, see S. L. Gaertner, J. F. Dovidio, P. A. Anastasio, B. A. Bachman & M. C. Rust, *The Common Ingroup Identity Model: Recategorization and the Reduction of Intergroup Bias*, 4 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 1 (1993); Louis, Taylor, and Douglas, *supra* note 90, at 358, 369-370.

This is the general concept. Now to some clarifications. First, I do not suggest that religious individuals or groups should be rewarded for complying with the law *per se*. The way to build a law-abiding civic identity goes through strengthening the civic identity while carefully refraining from conferring rewards exclusively on members of the religious group in what may lead to the opposite result – strengthening the religious identity without achieving similar result with the civic identity. What should be emphasized is the creation of a *link* between the religious individual and the state, through the creation of *joint interests and goals* between the religious group and the state. Religious individuals should feel that their civic identity is a valuable part of their self, alongside their religious identity and other identities.<sup>152</sup> Such feelings have the potential to shape their utility considerations and normative considerations alike.

What concrete examples can I offer to such rewards? Unfortunately, as the investigation of religion-based normative conflicts from the behavioral and institutional perspective is new and preliminary, I cannot offer many concrete examples. I will offer two possible such rewards: the first can be used and is in fact already of some use in courts; and the second is more in the province of the legislator.

The first positive incentive to be discussed provides perhaps counterintuitive example of a reward. I refer here (again) to the concept of accommodations. Why an accommodation is a benefit? Accommodation is a benefit by virtue of the fact that it relaxed the legal standard for religious individuals and allows them an exception from obeying the law in specific circumstances. But merely providing accommodations

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<sup>152</sup> Akerlof & Kranton, *supra* note 42, at 20, similarly argue that the process of establishing a (worker's) identity goes through instilling pride, motivation, providing a sense of stimulating challenge, "firing up" the individual.

without further thought does not satisfy the requirements that I laid out above. The necessary element to make accommodations a tool that ultimately encourages strategic *compliance* and gradually *strengthens civic identity* is that the reward (here, accommodations) creates a link between the religious and emphasizes joint interests.

To achieve this goal, accommodations should meet several requirements. First, they should be narrow, so they will not hamper the ultimate goal – that individuals will eventually be more inclined to comply with the law. Second, they should highlight the *benefit* that the accommodation entails to the religious individual and religion at large. This way, narrow accommodations will give religious individuals the sense that their “civic identity” is a source of value and that their participation in legal proceedings can be beneficial. This, in turn, has the potential of strengthening their civic identity. Simultaneously, the accommodated constructed should highlight the importance of those *legal values that are not compromised* by the accommodation and remain intact. This will preserve the integrity of the law and the status of important social values, and will simultaneously make the norms and specific laws in conflict *more salient*. This in turn is likely to increase the chances that these norms will be accepted and followed, in the present and in the future. Finally, striking a balance between finding accommodations on the one hand and preserving them narrow on the other hand is likely to allude to perceptions of neutrality of the public and religious high-identifiers, thereby to invoke the fairness heuristic of these groups. This should be a welcomed side effect.

The second positive incentive that lawmakers can provide to low-identifiers is access to state resources. This can take many forms, but the most direct ones is adequate

or proportionate representation in senior positions. Enacting a requirement to diversify<sup>153</sup> federal appointments, including by religious belief, or to diversify boards of publicly traded companies, can be a useful measure – though again, it should be carefully construed. It is a general measure, that does not address a particular normative conflict (unlike narrow accommodation discussed above) and is best adept to account to religion-based conflicts that rest on a history of exclusion and alienation of the pertinent religious group from access to the echelons of government. It need not be enacted necessarily where this is not the case.

If enacted, a measure of representation can achieve several important goals. First, this is clearly a benefit, a positive reward that signals to religious low-identifiers that their civic identity can be useful and valuable and that the law can be a positive instrument that confers utilities and not only sanctions. Second, bringing to government religious individuals who become idols and role models to other religious individuals creates exactly the *link* that I argued for between religious identity and civic identity, and entangles the two identities together in a way that is bound to strengthen civic identity and make it much more difficult to normative conflicts to ensue in the future. Third, this is done without compromising any rule or prohibition, and thus – unlike accommodation – creating the benefit does not come with a cost of compromising the rule of law.

Together, the two incentives I offered here demonstrate the potential of the transition from a sanction-based model of compliance with the law to a mixed-incentives

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<sup>153</sup> So as to comply with recent (and apparently forthcoming) Supreme Court decisions that tended to reject fixed quotas and rigid selection requirements based on race. Though to the best of my knowledge such programs were never offered with respect to religion, I assume that a diversity requirement that includes religious identity among other relevant identities but does not focus on religious identity can survive both equal protection scrutiny and establishment clause scrutiny.

model of compliance. Hopefully, introducing rewards to the set of legal incentives will be able to alter the cost-benefit analysis in cases of religion based conflicts and shift the outcome of the analysis towards compliance with the law rather than non compliance and adherence to the religious norm. Admittedly, while these two examples illustrate the potential of my argument they are merely the tip of the iceberg in terms of the scope and kind of positive incentives that the law can offer. More sophisticated mechanisms should be developed and explored in future research.

## **VI. Conclusion**

My goal in this paper was to analyze normative conflicts between law and religion from the standpoint of the individual. Departing from previous models of compliance with the law I suggested a novel model and argued that it captures better than existing models how individuals resolve conflicts between law and religion and decide which norm to obey. The Identity/Situation model is made of two dimensions: (1) the interplay of the religious and the civic identities, and (2) the type of situation: deliberative or conformative. I argued that in situations that call for deliberation, the strength of one's religious identity relative to one's civic identity influences the mode of analysis that one uses to decide whether to obey the law: a cost-benefit or a legitimacy-fairness analysis. And, in situations that call for conformity, the salient identity will have direct impact on the norm to which one will conform.

The model allowed me to demonstrate the strengths and weaknesses of the law in tackling religion-based normative conflicts and focus on two important cases: the easier case of high-identifiers, who obey the law to the extent its procedures are fair; and the hard case of the low-identifiers, who are likely based on cost-benefit analysis, to favor

religion rather than the law. This does not mean, however, that lawmakers have no means to deal with low-identifiers. I argued above that there are at least two possible ways of action: accommodating religious belief and providing positive incentives. The latter way is particularly promising as it enables lawmakers to preserve important social values, encourage strategic compliance with the law, and gradually construe a law-abiding identity.

Concluding this paper is impossible without emphasizing the preliminary nature of my research, as well as the crucial role of social psychology insights in the analysis. Though this paper draws in depth on a variety of studies, direct experimental studies on religion-based normative conflicts were not ensued so far, and the literature on normative conflicts in general is scarce and incomplete.<sup>154</sup> My attempt to apply current findings to religion-based normative conflicts is thus completely novel, and my contribution is hopefully in placing a new framework to analyze how religion-based normative conflicts are decided and what sorts of implications they may bear on legal institutions. This framework could and *should* be tested experimentally. Such effort may confirm or refute my suggested model, but it will surely contribute to our understanding of how individuals decide whether to comply with the law in these cases, and how legal institutions should be construed in order to mitigate religion-based normative conflicts.

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<sup>154</sup> McDonald, Fielding, and Louis, *supra* note 29.