The ‘culture war’ paradigm has come to dominate the legal discourse on conflicts between religious liberty and sexual and gender equality. Despite its intuitive appeal, this paradigm rests on a problematic methodology and flawed assumptions. As a result, the culture war paradigm misconceives religion as monolithically oppositional to equality and wrongly assumes that the conflict is a zero-sum game.

After identifying these problems, this article argues for an alternative framework that acknowledges the war that occurs within religion regarding equality challenges. The article argues that religious groups are diverse and dynamic and their response to sexual and gender nonconformity varies from opposition to tolerance in systematic and predictable ways. Drawing on qualitative and experimental evidence from the United States and Israel and on cases from a range of contexts, this article identifies a systematic practice of ‘social impact regulation,’ whereby religious decision-makers selectively apply and enforce religious norms based on the perceived impact of sexual nonconformity on the community and the social status of the religious norm.

The article discusses the consequences of this practice, demonstrates its breadth, and explores its implications for the culture war paradigm, for legal doctrine, and for the negotiation of conflicts between law and religion. It concludes with the argument that the current discourse must change. Religion and equality are interacting social processes, not incommensurable cultural opposites. The culture war paradigm should be modified or abandoned.

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INTRODUCTION

In an era characterized by increased social, cultural, and religious diversity, conflicts of norms proliferate. This has been particularly true with respect to gender and sexual orientation norms. To take one example, between 2001 and 2017, American support for same-sex marriage rose from 35% to 62%.1 During these years, religious communities experienced increasing tension between their traditional doctrines and the changing social environment.2 This tension increased as the change in social norms began to reshape legal norms—e.g., in Lawrence v. Texas,3 United States v. Windsor,4 and Obergefell v. Hodges.5 Legal scholars have addressed these conflicts as part of a legal ‘culture war’ between religious freedom and gender and sexual equality. This paradigm follows the footsteps of the sociological analysis of James Hunter, who argued that America has been engaged in a multifaceted conflict over the definition of American values and the face of society, that has been going on since the 60s.6

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2 Support in same-sex marriage among most organized religions lags behind the unaffiliated (85% support) with Catholics and Mainline Protestants at 67% and 68% support, Black Protestants at 44% and White Evangelicals at 35%. See, also, Darren E. Sherkat et al., Religion, politics, and support for same-sex marriage in the United States, 1988–2008, 40 SOC. SCI. RES. 167 (2011) (describing strong religious and conservative opposition to same-sex marriage during those years). Although virtually all religions have become more supportive of same-sex marriage, the official religious position in many denominations remained opposed to same-sex relationships. For example, Pope Francis would not support same-sex marriage, notwithstanding his generally tolerant approach, Carol Glatz, Pope says marriage can only be between a man and a woman and “we cannot change it,” CATHOLIC HERALD, (Sept. 3, 2017, http://www.catholic herald.co.uk/news/2017/09/03/pope-says-marriage-can-only-be-between-a-man-and-a-woman-and-we-cannot-change-it/.
6 JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW, AND POLITICS IN AMERICA 42 (1992) (arguing that “the divisions of political consequence today are... the result of differing worldviews... [The conflict revolves] around our most fundamental and cherished assumptions about how to order our lives—our own lives and our lives together in this society.”) There is a vast disagreement on whether there is, in fact, a culture war in America. See MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY POPE, CULTURE WARS?: THE MYTH OF A POLARIZED AMERICA (2005) (arguing that a voting patterns and popular attitudes on hot-button issues show that the American public is not polarized and largely centric); JAMES DAVISON HUNTER & ALAN WOLFE, IS THERE A CULTURE WARS?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE
The ‘culture war’ paradigm has come to dominate the legal discourse on conflicts between religious liberty and sexual and gender equality. Relying on Hunter, Professors Cochran and Helfand describe the conflict as a war in which “there is no common morality to which the competing sides may look; the sides have incommensurable values.”7 Professor Horwitz writes that the conflict between religious liberty and gender equality is “over irreconcilable values” and he decries that the debate “is so centered on a stark opposition between liberty and equality that any tertium quid is forgotten or ignored.”8 Professor Lupu identifies a “collision course.”9

This Article argues that the adaptation of the culture war paradigm to the legal context has not been sufficiently careful and the result is highly problematic. Although the metaphor might correctly describe politics, it does not accurately describe the relationship between religious decision-makers and anti-discrimination norms. Conceptualizing the conflict between religion and equality as a war between cultures—the religious versus the secular, the traditional versus the progressive—fails to acknowledge the conflict that occurs within religion, including the most conservative religions, in response to equality challenges. Organized religion, and even particular decision-makers, conflict regarding issues such as same-sex marriage, unmarried pregnancy, controversial health benefits, and so on. This Article seeks to shift the focus to the war within religion, demonstrate its influence on the religious response to equality challenges, and discuss several normative and practical implications of this variation.

My argument is accordingly threefold. The first Part discusses the culture war paradigm and argues that it suffers from four serious flaws. First, it ignores religious variation, although variation exists in at least two forms (Parts I.A and I.B). Religious groups are diverse—within each and every group there are differences of opinion as to how to practice the faith—and dynamic—they interact with external processes and they change. Often these two sources of variation—diversity and dynamism—interrelate, as decision-makers exercise the latitude they have in the interpretation of religious norms when applying these norms to particular cases. What we get is not the dichotomous and oppositional response that the culture war paradigm highlights, but a myriad of potential responses. Notably, Hunter’s original

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culture war paradigm acknowledged this intricate reality. But the nuance was largely lost when the paradigm was imported to the legal discourse.

The second flaw of the paradigm is methodological. The monolithically oppositional portrait of religion is actually not surprising, considering the methods that constitutional scholars use to study the conflict—primarily, the focus on high profile cases of religious objection. Cases are a typical source of knowledge for legal scholars, and indeed a helpful source for studying legal doctrine and court behavior. Nevertheless, litigated cases are a highly selective pool of disputes, particularly in the context of equality claims. Less than 1% of all discrimination grievances evolve into legal complaints and only 6% of court filings ever reach trial. Additional barriers within religious communities suppress conflicts from reaching the courts. Therefore, focusing on cases of religious objection is likely to skew the analysis. And it is probably one of the main cultivators of the assumption that the religious position is inevitably oppositional to equality norms.

Moving from court cases to the universe of conflicts outside the courtroom helps identifying an additional flaw of the culture war paradigm, which is insufficient explanatory power. Put simply, the paradigm lacks tools to explain instances of religious compliance and compromise. And there is a lot to explain, because in reality conflict is absent from many potentially conflictual scenes. Part I.C exemplifies this puzzle by comparing two conflicts involving Catholic dioceses, one in San Francisco and one in Boston. Both dioceses objected to same-sex relationships. Both clashed with the liberal governments of the cities in which they resided. The San Francisco


11 ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 13, 41–42,47–49 (1st ed. 2017) (surveying evidence from multiple sources and estimating the rate of EEOC complaints at 1% of all grievances and that of lawsuits at 3% of all grievances).
diocese found a solution and began conforming with the law. In contrast, the
Boston diocese abdicated the activities that sparked the conflict. The culture
paradigm cannot explain how two branches of the same religion that
adhere to the same doctrine and share the same beliefs responded to identical
legal pressures in opposite directions.

Because of these flaws, the culture war paradigm obscures the reality of
the war within religion, in which religious decision-makers respond to
equality challenges not only with fire and fiery, but also with tolerance and
compromise. The critical question that follows is, what factors determine
whether the religious response to equality challenges would be oppositional or tolerant?

Uncovering these factors will improve our understanding of the conflict
and can help us steer away from impasse. To get there, Part II argues, legal
scholarship cannot continue to focus on court cases. The shift to focus on the
war within religion requires more intense usage of empirical studies,
primarily sociological and psychological studies that can uncover the
dynamics that occur within communities and institutions.

Parts III and IV then turn to examine the response of religious institutions
to sexual nonconformity. Educational institutions were used as the case study
for this examination because of their central normative function and the
amount of conflict which they attract and generate as a result of this
function. Drawing on a series of 41 in-depth interviews with Christian
Catholic and Orthodox Jewish educational leaders (Part III) and on a large
decision-making experiment (Part IV), I argue that the religious response to
claims for sexual and gender equality is moderated by what I term social
impact regulation. That is, decisions to exclude or tolerate sexual
nonconformists, including LGBT and unmarried pregnant employees,
students, and families, vary based on the perceived impact of nonconformity
on others in the community and on the status of the religious norm more
generally. In particular, two factors—the role of the nonconformist and the
publicity (or sphere) of nonconformity—systematically vary the responses of
religious leaders. As the Experiment quantitatively demonstrates, the impact
of these factors on conflicts between religion and equality is broad,
systematic, and highly consequential.

Notably, social impact regulation is not limited to responses to public
violations of religious norms. Religious leaders also made substantial efforts
to ignore and tolerate private violations of religious norms. For example,

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12 See infra, footnote 70. Notably, communities may navigate the conflict differently in
different contexts (e.g., schools, churches, for-profit corporations) and dilemmas (e.g.,
LGBT issues, unmarried pregnancies, contraceptives).
leaders often attempted to ‘privatize’ LGBT lifestyle and unmarried relationships rather than expose and condemn them, directing individuals to keep their nonconformity discreet from the community, in order to refrain from punishing and excluding them.

Social impact regulation indicates that organized religion’s approach to gender and sexual equality is not monolithic, nor is it necessarily oppositional as the culture war paradigm posits. In actuality, religious leaders have substantial latitude in applying religious norms to specific cases, and they use it systematically to control their responses to challenges posed by equality norms. Concerns about social impact shape the religious response to equality challenges and moderate the emergence and nature of the religious objection, thereby shaping the conflict itself.13

Part V charts the key normative implications of the social impact regulation of equality challenges within organized religion. First, it requires scholars to revise or forgo the culture war paradigm, because, however one might explain the empirical findings, the explanation refutes the notion of a war between incommensurable cultures. Second, social impact regulation requires the courts to develop new doctrinal frameworks to address the social impact regulation of gender and sexual nonconformity in cases that raise tension with anti-discrimination law. Three such candidate models are outlined. Finally, the empirical insights suggest additional tools to negotiate and mitigate conflicts between equality and religious liberty.

Notably, the existence of social impact regulation should concern both religious liberty advocates and sexual and gender equality advocates, due to its two simultaneous effects. On one hand, social impact regulation narrows the freedom of sexual nonconformists in religious institutions because it confines their behavior to certain roles and realms. On the other hand, it moderates the enforcement of religious norms and increases tolerance of sexual nonconformity in religious institutions. A phenomenon that simultaneously confers disadvantages and advantages on sexual nonconformity in religious societies merits substantial normative scrutiny. I conclude by observing that social impact regulation is merely one form of the regulation of the war within religion and by calling for research that will expand our understanding of this new paradigm.

13 This is not to argue that social impact factors are the only factors shaping the religious response to equality challenges or that they explain the entire variation of religion with respect to equality. See, e.g., Netta Barak-Corren, Does Antidiscrimination Law Influence Religious Behavior: An Empirical Examination, 67 HASTINGS L.J. 957 (2016) (finding that the legal response to religious objection moderates or intensifies the emergence of further religious objection). Mapping the domain of factors—each with potentially different implications—is a topic for multiple studies.
THE WAR WITHIN

I. UNDERSTANDING THE CONFLICT BETWEEN RELIGION AND EQUALITY

A. The Culture War Paradigm

The culture war paradigm is the common framework today for describing and analyzing tensions between religious liberty and equality claims. This paradigm resonates with many in the public, it fits the dramatic preferences of the media, and it is amplified by the adversary nature of law and the increasing polarization of American political discourse. Despite its clear appeal, the culture war paradigm produces an inaccurate understanding of the conflict as occurring between, rather than within, cultures. It presents religious reactions to issues of gender and sexual equality as universally antagonistic, whereas in fact, there is substantial diversity even inside the most conservative communities, and substantial dynamism in the religious responses to the conflict. While scholars do recognize the existence of religious diversity, they do not sufficiently consider its implications for and impact on the conflict between religion and equality.

These perceptions are present on both sides of the debate. For example, Professor Corbin criticizes organized religion’s employment practices, writing that “religious organizations can, and regularly do, deny women the influential position of minister, priest, rabbi, and imam on the grounds that religious doctrine requires such discrimination. Religious organizations whose beliefs do not require discrimination or even forbid it can also assert the ministerial exemption.” Corbin then criticizes religion for broadening the definition of “minister” to include a range of positions and organizations that extend far beyond the traditional clergy, thus broadening the scope of discrimination. Note that Corbin acknowledges that not all religious organizations insist on discrimination, yet she remains concerned that they would assert it anyway, simply because they can. Religious organizations emerge from this description as entities that assert their power to discriminate

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14 Hunter recognized that the cultural division often falls within churches and religions, and not necessarily between them, although he primarily emphasized how different religions can find themselves on the same side. Hunter, supra note 2 at 140. For more recent data, see Pew Research Center, supra note 9; Barak-Corren, supra note 13 (both presenting evidence on substantial variation regarding sexuality norms among all large American Christian denominations and across all levels of worship).

15 Barak-Corren, supra note 13, at 993-96, 1003-10 (providing evidence from large-scale experiments among U.S. Christians of decision and attitudinal change in response to alternative legal outcomes) and infra Part IV.E.


17 Id. at 1976-77. Id. at 1976–1977.
as widely as possible. A similar concern is expressed by Professor NeJaime in his objection to allowing religious individuals and entities to refuse to “treat as valid” same-sex marriages. NeJaime believes that the exemptions for such discriminatory behavior are overly broad and warns that religious individuals would take every opportunity to express condemnation and disapproval of LGBT people.18 Professor Flynn also fears that religious exemptions from antidiscrimination laws will be frequently invoked.19 Mark Stern is concerned that if there is any religious accommodation, “inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation.”20 Professor Gallagher describes a view of religious objectors, that she does not share, which sees them “as hateful bigots.”21

Without taking any stand here regarding the substantive arguments of these scholars,22 it should be emphasized that these sources collectively portray religious attitudes as antithetical to equality and susceptible to even further escalation. Religion also emerges from these arguments as a monolithic entity in the sense that there is little if any discussion of religious responses other than objections to antidiscrimination law. Dynamic analyses refer mostly to the concern that religion will become even more extreme and more discriminatory.23

22 Professor Koppelman, for example, argues that these concerns are exaggerated, Andrew Koppelman, You Can’t Hurry Love - Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions, 72 BROOK. L. REV. 125, 134–35 (2006). Koppelman relies on mostly anecdotal evidence to back this claim. I am more sympathetic to these concerns after finding in a previous work that religious accommodations, at least in some settings, can in fact expand religious objection. See Barak-Corren, supra note 13.
23 See, e.g., NeJaime, supra note 18; Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L. J. 2516 (2014) (arguing that “religious accommodation may extend, rather than resolve, conflict”); MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 33, 35 (2014) (arguing that accommodations encourage religious “narcissism” and further
This analysis surprisingly persists even in arguments supporting religious liberty. For example, Professor Horwitz argues that refusals to accommodate religion may “push some religious individuals and communities to become more strongly attached to illiberal beliefs and practices,” and even seek martyrdom.\textsuperscript{24} Horwitz notes in passing that law “may [also] cause some groups, or some members of those groups, to alter their beliefs and conform their conduct to liberal norms of equality and nondiscrimination,”\textsuperscript{25} but he does not pursue this idea further. Horwitz’s argument is particularly interesting because it is sensitive to the problematic assumptions underlying the debate. Horwitz describes objections to religious accommodations as rooted in perceptions, which he designates as fears, that religious groups are deeply illiberal organizations that inflict substantial harm on their members and on others.\textsuperscript{26} Instead of refuting or complicating these perceptions, Horwitz, in essence, encourages liberals’ fears, warning liberals that by refusing accommodation, they will actually advance illiberalism and martyrdom.\textsuperscript{27}

\textbf{B. From a War between Cultures to a War within Culture}

There are several important exceptions to the dominant culture war paradigm. Professor Sunder recognizes the existence of “cultural dissent,” or “challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership.”\textsuperscript{28} Sunder criticizes the courts for their monolithic view of religion and argues that this approach risks ossifying religious culture in its traditional form.\textsuperscript{29} She argues that cultural challenges, many coming from devout women and LGBT individuals, should be acknowledged as claims of cultural and religious rights. In sum, Sunder

\textsuperscript{24} Horwitz, supra note 8, at 1306. In effect, one cannot evaluate the likelihood and magnitude of martyrdom, relative to other responses, without data. In a previous work on the conflict between religion and equality (which Horwitz cites), I find little empirical support for the concern that refusing religious accommodation would cause massive disobedience or lead to the erosion of the rule of law or democratic legitimacy (Barak-Corren, supra note 13). I provide some data on “martyrdom” in Appendix B, Part C.4, suggesting that the rate of intended illegal objection to unfavorable judicial outcomes is quite low.

\textsuperscript{25} Horwitz, supra note 8, at 1306.

\textsuperscript{26} Id. at 1311. Paul Horwitz, Against Martyrdom: A Liberal Argument for Accommodation of Religion, 91 NOTRE DAME L. REV. 1301, 118 (2016).

\textsuperscript{27} Id. at 1334. Id. at 121.

\textsuperscript{28} Madhavi Sunder, Cultural Dissent, 54 STAN. L. REV. 495, 498 (2001).

\textsuperscript{29} Id. at 507 (considering the law’s role in “facilitating or hindering modernization and social change, focusing in particular on how law has become complicit in the backlash project of preserving cultural traditions against change”).
elucidates the diversification of religion at the grassroots while sharing the predominant opinion that religious leadership is rigid and anti-egalitarian.

In contrast, Professor Eskridge describes the gradual shift favoring egalitarianism in the attitudes of organized religion towards slavery in the past and homosexuality today. Eskridge proposes that this shift contributed to the growth of antidiscrimination protections.30 Among other events, Eskridge describes an amicus brief against Texas’s Homosexual Conduct Law filed by “six denominations and twenty-three gay-affirming groups within other denominations”31 in Lawrence v. Texas.32 Some of these groups considered homosexual sex a sin, yet believed that criminalizing homosexuality was unchristian; others did not consider homosexuality a sin at all.33 Eskridge describes this brief as part of a larger series of intense debates within and between churches about their attitudes regarding sexual orientation. Eskridge points to similar historic processes with respect to slavery, that eventually affected all religious denominations. His analysis demonstrates that dynamism is reserved not only to progressive denominations, but also characterizes at varying levels even the most conservative denominations.

Professor Wilson holds a unique position in this debate. At the descriptive level, she frequently affirms the culture war paradigm by focusing on the actual opposition between conservative religion and liberal egalitarians. At the political level, however, Wilson seeks to refute the paradigm, believing it is possible to “square faith and sexuality”34 by enacting LGBT discrimination protections that include specific, well-tailored religious exemptions.35 Wilson’s focus on achieving compromise between cultures is laudable, but she, too, does not sufficiently consider the implications of the conflict within culture and what they might mean for her proposed solutions.

Crucially, if religion is diverse and dynamic both at the grassroots level, as Sunder claims, and at the leadership level, as Eskridge argues, the conventional culture war paradigm largely misses the mark. The conflict is

31 Id. at 705.
33 Eskridge, Id.
as much *within* cultures as it is *between* cultures. Sunder and Eskridge each highlights a different account of religious groups’ positions vis-à-vis equality, but how can these accounts be reconciled? More specifically, what determines the position that organized religion takes towards equality challenges, whether oppositional, as emphasized by Sunder, or tolerant, as emphasized by Eskridge?

C. The War within Culture: Between Opposition and Tolerance

A useful starting point in endeavoring to answer this question can be found in Professor Minow’s description of contemporary church-state equality conflicts.\(^{36}\) Minow describes two conflicts that are almost reverse images of one another from start to finish.\(^{37}\) The first conflict involves a dispute between the Catholic Church and the San Francisco government over health insurance for same-sex partners.\(^{38}\) The Church initially opposed the city’s intention to oblige contracting parties, including the Church, to provide health benefits to same-sex partners. But ultimately, the parties negotiated a solution which allowed each employee to designate *any* member of the household, regardless of the relationship, to receive health benefits. Justifying the solution, the Archbishop explained that “[w]e would know no more or no less about the employee’s relationship with that person than we typically know…. What we have done is to prohibit local government from forcing our Catholic agencies to… recognize domestic partnerships as a category equivalent to marriage.”\(^{39}\) In contrast to the compromise achieved in San Francisco, is the crisis that evolved in Boston once news broke that Catholic charities were placing children with LGBT parents for adoption.\(^{40}\) As Minow relates, an internal conflict erupted within the Catholic community, with lay Catholics supporting LGBT placements but the Catholic leadership objecting and seeking an exemption from antidiscrimination law. Ultimately, the Church ceased providing adoption services in Boston.

Minow notes the paradox posed by these contrasting stories of tolerance and opposition and suggests that “attitudes of respect, flexibility, and humility can help generate new answers beyond ‘exemption’ and ‘no exemption’ when religious principles and civil rights laws collide.”\(^{41}\) This advice, while sound, is very general. I propose that more specific lessons can

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\(^{37}\) *Id.* at 829-837 (Providing an elaborate account of the two stories, including some intersections between the leading characters).

\(^{38}\) *Id.* at 829-831.

\(^{39}\) *Id.* at 831.

\(^{40}\) *Id.* at 831-837.

\(^{41}\) *Id.* at 844.
be drawn from these two virtually reverse cases. It is particularly helpful to elucidate these lessons here, because they serve as the basis for this study’s empirical strategy and contextualize its findings.

So what explains the contrasting results of the Boston and San Francisco religion versus equality conflicts? The first and obvious fact to note about the San Francisco and Boston cases is that religious doctrine did not dictate their outcomes. In both cases, the official position of the Church was and still is opposed to recognition of same-sex marriage and partnerships. Yet in one case, the Church was able to reconcile its position with LGBT families’ demand for equal treatment and in the other case it failed to do so. This outcome was also not a function of the background law, as both cities prohibited LGBT discrimination with no religious exemptions. The initial status quo also did not play a role in the outcomes in the two cases. In Boston, the Church, on its own initiative, was already engaged in placing children with LGBT parents, yet eventually withdrew from adoptions altogether. In San Francisco, the Church initially refused to provide health benefits to same-sex partners, yet ultimately provided it. These two opposing reactions demonstrate that the dynamic within religious groups can work both ways. If it was not religious doctrine, legal doctrine, or the initial positions that led to these contrasting outcomes, what can explain the highly antithetical results in these two cases?

The factor proposed here and developed in this Article, is the difference between public and private action. Minow notes that “high profile publicity… contributed to the failure of accommodation over adoption policies.”\(^{42}\) Indeed, in Boston publicity sabotaged the Catholic Charities low-profile placements of children with LGBT parents. But this was only part of the picture. Comparing the two cases suggests that the interplay between public and private had an even stronger influence, because in San Francisco, it was privacy that facilitated the provision of health benefits to LGBT partners. Recall that in the San Francisco compromise, the parties negotiated a solution which allowed each employee to designate any member of the household, regardless of the relationship, to receive health benefits. According to the Archbishop’s explanation, this framework allowed the Church to “not know” what exactly is “the employee’s relationship with that person.”\(^{43}\) Keeping the nature of the relationship private satisfied the Church’s interest in avoiding recognition of same-sex relationships as equal to marriage. A rule that links benefits with marriage requires LGBT employees to go public and thus requires employers to “know” the sexual identity of the partner. In contrast, a rule that breaks the link between benefits and marriage avoids the dilemma

\(^{42}\) Id. at 838.
\(^{43}\) Id. at 831.
by obscuring the identity of the partner entirely. The fact that a self-imposed privacy mechanism removed the Church’s objection to providing benefits to same-sex partners, along with other designated persons, is revealing. Using this mechanism, the Catholic Church was able to acquiesce in LGBT equality, similar to fundamentalist churches during the civil rights era that first acquiesced and then embraced racial equality.44

This Part has argued that the dominant view of the conflict between religion and equality as a war between cultures is incomplete and simplistic and must be refined with the understanding that the conflict is within culture as much as it is between cultures. This insight raises a crucial question to the negotiation and resolution of these conflicts: what factors determine whether religion takes an oppositional or a tolerant position towards equality challenges? The answer necessarily involves many elements. As the next Parts will demonstrate, the Boston/San Francisco contrast is not an anecdote. The distinction between public and private has a broad, systematic, and highly consequential impact on conflicts between religion and equality.45

This Article will also show that the public/private distinction is part of a broader framework that religious communities employ to regulate cultural challenges, a framework this Article terms social impact regulation. Organized religion’s attitude to gender and sexual equality is not monolithic, nor is it necessarily oppositional as the culture war paradigm posits. A large part of what determines whether the religious response to equality is oppositional or tolerant depends on the perceived impact of sexual nonconformity on others in the community and on the status of religious norms. The methodology of the study and its findings regarding how social impact regulation shapes the religious response to equality challenges will now be discussed.46

II. OVERVIEW OF METHODOLOGY

The contributions of this Article rest on several layers of data and analysis. To facilitate reading and interpreting the findings, this Part outlines and explains the methods used to obtain the data. It begins by explaining why the dominant focus on court cases and judicial opinions currently used in the analysis of the conflict is inadequate for producing an accurate understanding of conflicts between religion and equality. This Part then proceeds to describe the alternative methodology of this Article, focusing instead on the actions and decisions of religious decision makers.

44 Eskridge, supra note 30, at 678.
45 In particular, see Part V.
46 Notably, this Article does not attempt to explain the entire variation in the religious response to equality challenges. Instead, it focuses on a central phenomenon which consists of multiple factors that influence the conflict jointly and separately.
A. Studying the Conflict from Cases: The Limitations

A long line of work by law and society scholars has established that social disputes are dynamic processes that evolve in phases. Professors Miller and Sarat offered the metaphor of the “dispute pyramid,”\(^{47}\) to describe the evolution of disputes from injuries starting with claims and confrontations with the injuring party, moving on to the involvement of lawyers and ending with adjudication.\(^{48}\) Miller and Sarat defined this process as a pyramid because many disputes are dropped at each phase, as claimants settle their claims or choose to withdraw them altogether. The cases that ultimately become lawsuits represent a small fraction of all disputes, and the cases that result in a judicial decision are only a tiny fraction among those. Miller, Sarat and others have criticized legal scholarship for overly focusing on adjudication and failing to grasp its limited role in the much broader reality of dispute resolution.\(^{49}\)

The focus on court cases is particularly problematic in the context of equality claims, where it is likely to lead to biased evaluations of the characteristics of the conflict. In a seminal survey of employment antidiscrimination cases, Siegelman and Donohue\(^{50}\) discovered significant differences between published and unpublished cases. Published cases had thicker files and more plaintiffs, and were more likely to be class actions, to include allegations of continuous violations, to seek more forms of remedy, to yield larger monetary awards, and to be submitted faster than unpublished cases. Published cases were also less likely to involve discrimination in firing and more likely to involve retaliation.\(^{51}\)

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\(^{47}\) Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & SOC’Y REV. 525 (1980).


\(^{49}\) Miller & Sarat, supra 47, at 565 (“Our research points the way toward yet a further "backward" movement in the sociology of law. Legal realism moved the study of law from an exclusive preoccupation with courts and in so doing helped establish the intellectual respectability of dispute processing and other sociological studies of law"). Notably, studying cases and opinions is crucial to understanding how courts adjudicate cases and what legal arguments fare better in court. The criticism is relevant to questions about the evolution of social conflicts and the impact of law outside the courtroom.


\(^{51}\) Id. at 1150-54.
Previous studies did not break down their results by type of employers, such as religious or non-religious, and bias is expected to be even higher in disputes involving religious institutions. Early sociological research on the relationship between religious communities and the law showed that orthodox religious communities tend to avoid litigation and prefer internal dispute settlement mechanisms.\textsuperscript{52} Communal norms and institutions often discourage members from turning to secular courts, filing suit, or even consulting a lawyer, all of which can result in retaliation.\textsuperscript{53} Religious communities might also attempt to impose religious norms and prevent the application of state standards through contractual arrangements.\textsuperscript{54} Given the tiny fraction of discrimination grievances that actually become cases\textsuperscript{55} and the additional suppression of conflict in religious communities, using studies of judicial cases to analyze conflicts between organized religion and equality claims is unlikely to provide a sufficiently accurate picture of the conflict.\textsuperscript{56}

\textit{B. Studying the Conflict from Within: A Mixed-Methods Approach}

Due to the limitations of relying on court cases and the scarcity of alternative data on conflicts between religion and equality, this study relies on a multistage, mixed-methods methodology that I first presented elsewhere.\textsuperscript{57}
This approach examines the decision making involved in the application of religious norms to equality challenges within the religious community using two complementary methods: qualitative, in-depth interviews and a quantitative experimental survey.\textsuperscript{58} In-depth interviews facilitate a rich exploration of the motivations and experiences of religious decision makers and permit the generation of hypotheses through multiple, real-world observations. The experiment provides a controlled test of the hypotheses, captures real-time decisions, enables the determination of causality, and allows for greater generalizability. While each method has its drawbacks, they complement and compensate for each other. The small-n and selection concerns that characterize interview-based research are mitigated by a large-n sample and the randomized controlled design of the experimental survey. Concerns about realism and “ecological validity,” namely whether experiments provide accurate simulation of real world decisions, are mitigated by experimental designs drawing on real world situations found in the qualitative data and by the qualitative evidence documenting practices in the real world.\textsuperscript{59} Thus, the integration of qualitative and quantitative methods enhances the relevance, generality, and validity of the findings\textsuperscript{60} and constructs a comprehensive portrait of decision making in the context of normative conflicts between equality and religion.

Qualitative data collection began with in-depth interviews of 41 educational leaders, 17 Roman Catholics in the United States and 24 Orthodox Jews in Israel.\textsuperscript{61} Jewish and Catholic communities, despite their considerable ritual, theological, historic and organizational differences,\textsuperscript{62}
have been involved in similar legal and social battles in recent years over their regulation and treatment of women, reproduction, and LGBT individuals. Catholic institutions have been involved in numerous conflicts over the dismissal of pregnant out-of-wedlock teachers and LGBT teachers and students. Orthodox communities in Israel sought the dismissal of

Israel, including Tova Hartman Halbertal, Appropriately Subversive: Modern Mothers in Traditional Religions (2002) (studying how conservative, educated women from the two religions negotiate their identities as women and mothers against conservative and feminist ideals); Adam B. Cohen & Peter C. Hill, Religion as Culture: Religious Individualism and Collectivism Among American Catholics, Jews, and Protestants, 75 J. PERS. 709 (2007) (studying differences in collectivist versus individualist tendencies between the three religions and findings that Jews are most collectivist, Protestants most individualist, and Catholics in between). Notably, there are some structural similarities between the two groups. Catholics in America and Orthodox Jews in Israel have a distinct religious identity, separate schooling systems, and conservative positions on sexuality. At the same time, they participate in the hegemonic culture in their respective countries (in terms of language, holidays, civic status, workforce, etc.). The conflicts they experience are therefore primarily linked to faith, rather than to nationality or immigration status.

On the approach of Orthodox Judaism to homosexuality, see Rachel Shapiro Safran, A Multidimensional Assessment of Orthodox Jewish Attitudes Toward Homosexuality 41–42 (2013) (Comparing Orthodox Jewish attitudes to those of other religions and describing great similarity, “as homosexuality has become increasingly more normative in secular culture”). Safran notes that distinctions between celibate and sexually active LGBT people were made by both priests and rabbis. See also Tova Hartman Halbertal & Irit Koren, Between “Being” and “Doing”: Conflict and Coherence in the Identity Formation of Gay and Lesbian Orthodox Jews, in Identity and Story: Creating Self in Narrative 37 (McAdams, Josselson, & Lieblich eds., 2006).

See, e.g., Hamilton v. Southland Christian Sch. Inc., 680 F.3d 1316 (11th Cir. 2012) (finding dismissal for conception three weeks prior to wedding may proceed to trial), No. 6:10-cv-871-ACCTBS, 2012 WL 5896367 (M.D. Fla. Sept. 20, 2012) (finding in favor of teacher); Herx v. Diocese of Fort Wayne-South Bend Inc., No. 1:2012-cv-122-RLM, 2015 WL 143977 (N.D. Ind. Jan. 12, 2015) (finding jury award of $1.95 million for dismissal based on IVF treatments, which was later reduced pursuant to Title VII’s cap); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012) (denying the school motion to dismiss holding that the ministerial exemption does not apply since a computer and technology instructor is not a minister); see also Dana Liebelson & Molly Redden, A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time. Mother Jones (Feb. 10, 2014), https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/ (depicting 10 cases of unmarried pregnant women or women who have used artificial insemination who were fired).


pregnant out-of-wedlock teachers⁶⁶ and an LGBT tutor⁶⁷ and Orthodox rabbis have sparked public uproar following speeches that condemned homosexuality, LGBT people, and the feminist movement.⁶⁸ Collecting data

(holding that opposition to homosexuality is part of Boy Scouts of America's freedom of association); Miami teacher says Catholic school fired her for marrying woman, CBS NEWS (Feb. 12, 2018), https://www.cbsnews.com/news/jocelyn-morffi-miami-teacher-fired-catholic-school-marrying-woman/ (Miami lesbian teacher argues she was fired after marrying her partner); Amanda Terkel, Gay Teacher Fired After Posting Marriage Announcement On Facebook, HUFFINGTON POST (Jan. 14, 2015), https://www.huffingtonpost.com/2015/01/14/lonnie-billard_n_6472566.html (A teacher at Catholic high school which was fired a week after announcing his marriage to his same-sex partner filed lawsuit); Meredith Bennett-Smith, Carla Hale, Gay Teacher, Fired From Catholic High School After Being “Outed” By Mother’s Obituary, HUFFINGTON POST (Apr. 18, 2013), https://www.huffingtonpost.com/2013/04/18/carla-hale-gay-fired-teacher-catholic-high-school_n_3103853.html (Ohio lesbian teacher was fired after someone notified the diocese that she had included the name of her female domestic partner among survivors in a local newspaper obituary); Ken Bencomo, Gay Catholic Teacher Fired For Marrying, Gets Huge Student Support, HUFFINGTON POST (Aug. 13, 2013), https://www.huffingtonpost.com/2013/08/13/gay-catholic-teacher-fired_n_3749270.html (Los Angeles Catholic school teacher was fired after his marriage to his partner was published in the newspapers); Al Fischer, Gay Music Teacher Fired From Catholic School, Marries Partner In New York, HUFFINGTON POST (Mar. 11, 2012), https://www.huffingtonpost.com/2012/03/11/al-fischer-fired-gay-catholic-music-teacher-wedding-_n_1337482.html (St. Louis gay music teacher at a Catholic school was fired after marrying his partner in a civil ceremony in New York).

⁶⁶ RLC 12137/09 (Tel Aviv) Plonit v. Almonit [2013] Nevo (Hebrew) (finding that a teacher who was fired from a religious school for pregnancy out of wedlock was unlawfully discriminated on the basis of pregnancy); RLC 1298/03 (Tel Aviv) Leah Rahum V. Ministry of Social Affairs and Social Services [2006] Nevo (Hebrew) (rejecting a claim of discrimination, finding that the ultra-Orthodox daycare facility dismissed the teacher for her non-religious lifestyle and not for unmarried pregnancy); RLC 835805/10 (Tel Aviv) Nurit Nachmayev V. Community Welfare Ltd. [2013] Nevo (Hebrew) (rejecting a claim of discrimination for unmarried pregnancy, concluding that the employee did not lift the burden of proof that she was fired, rather than resigned).

⁶⁷ RLC 79106/13 (Tel Aviv) Marina Meshel v. The Center for Educational Technology [2014] Nevo (Hebrew) (rejecting a discrimination claim of an LGBT math tutor who claimed she was fired for conversing with her Jewish Orthodox students on gender and sexuality).

⁶⁸ See, e.g., Jeremy Sharon, Rabbi Levenstein: Eradicate homosexuality just like we did AIDS, JERUSALEM POST (Feb. 16, 2018), http://www.jpost.com/Israel-News/Rabbi-Levenstein-Eradicate-homosexuality-just-like-we-did-AIDS-542793 (citing a prominent Israeli Jewish Orthodox rabbi who compared homosexuality to AIDS); Yair Ettinger, “Women Should Not Fight in IDF,” Says Rabbi Colleague of Levinstein, HAARETZ (Mar. 12, 2017), https://www.haaretz.com/israel-news/premium-women-should-not-fight-in-idf-says-rabbi-colleague-of-levinstein-1.5447481 (citing a rabbi objecting to the service of women in the Israeli army). In addition to these conflicts, it is worth noting that Catholic hospitals in America and Jewish Orthodox hospitals in Israel impose similar restrictions on access to reproductive services and abortions, citing religious beliefs. See ACLU and Merger Watch Report, Health Care Denied 22 (2016).
in both communities was not intended to be a comparative exercise, but an independent exploration of similar conflicts that arose in different locations. However, as data collection progressed, it became evident that these communities approach equality challenges and regulate sexual nonconformity in ways too similar to be analyzed separately. Ultimately, the evidence from two religious groups facing similar challenges in different legal regimes and social contexts raises intriguing questions about the interplay between religion and society and contributes to the robustness and breadth of the findings.

The interview sample consisted of managers, administrators, and teachers in religious schools as well as informal educational institutions (see Table 1). Educational institutions were the focus for the sampling because of their central normative function in religious societies and the amount of conflict which they attract and generate as a result of this position. Interviewing the leaders of these institutions offered the possibility of learning from individuals who served as the regulators and enforcers of religious norms, many of whom, it turned out, were directly involved in deciding conflicts regarding the employment of LGBT and pregnant out-of-wedlock employees and the exclusion of such students and families. The interviews were

Notably, this Article does not aim to compare the two religions in the ordinary sense, for example it does not map their differences or infer institutional or normative insights from their differences. The purpose is substantially more modest: to present empirical evidence that shows that these communities experience similar challenges and respond to them in similar ways. The evidence suggests that the modes in which these communities resolve and regulate conflict have some general, stable qualities.

The research was approved by the Harvard IRB (#F24214-101) and by the Israeli Ministry of Education (file 7693(y)/827).


Barak-Corren, supra note 13 (surveying cases and providing qualitative and experimental evidence on the extent of religious conflict in schools and the impact of antidiscrimination law on the dynamic of conflict). Conflicts have continued to accumulate since then, see supra notes 64-65.
designed to identify the key conflicts, considerations, and strategies used by the religious leaders to manage conflicts between law and religion in their fields. In keeping with Austin, Sarat, and others, these conflicts have been defined broadly, to include both those controversies that developed into legal cases, and those that evolved differently.

Notably, the objective of the qualitative fieldwork was not to generate findings that would be statistically representative or generalizable to other populations. Rather, the goal was to offer a rich theoretical understanding of the phenomenon, generate hypotheses that could be quantitatively tested, and produce reliable research materials for the experiment. Appendix A supplements the description of the qualitative methods.

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74 Mario Luis Small, ‘How many cases do I need?’: On science and the logic of case selection in field-based research, 10 ETHNOGRAPHY 5 (2009) (arguing that this question is irrelevant to qualitative research and drawing the distinction between mapping variation—which qualitative research does—and explaining variation—which it does not).
Findings from the qualitative fieldwork grounded and focused the experimental phase of the research in two ways. First, the qualitative data indicated that conflicts over gender and sexuality were among the primary tensions preoccupying religious educational leaders, and that the most troublesome dilemmas involved unmarried pregnancies and same-sex relationships (see Table 2). Sixty-three percent of American leaders and 42%
of Israeli leaders personally dealt with or were concerned about LGBT issues and 75% of the American and 58% of the Israeli leaders dealt with or were concerned about unmarried pregnancy.\footnote{A typical conflict involved a choice between tolerating sexual nonconformity and taking adverse action against the nonconformist (usually by terminating employment or education). Additional gender-related conflicts included objections to the contraceptives mandate (in the U.S; some institutions were involved in litigation against the act) and objections to co-education or co-military service of men and women (in Israel). Table 2 presents the share of interviewees in each sample that described a specific case or an example of a conflict related to the category. Only interviewees who raised the dilemmas independently of the interviewer and/or personally encountered these dilemmas were included.} Therefore, the materials used in the quantitative experiment were based on these identified issues.

\begin{table}
\centering
\caption{Types and frequencies of conflicts that concerned religious leaders in the United States and in Israel}
\begin{tabular}{lcc}
\hline
Dilemmas or conflicts regarding… & United States & Israel \\
\hline
LGBT issues & & \\
- LGBT teacher & 0.63 & 0.42 \\
- LGBT student & 0.44 & 0.33 \\
- LGBT parent & 0.19 & 0.29 \\
Pregnancy out of wedlock & & \\
- Of teacher & 0.75 & 0.58 \\
- Of student & 0.56 & 0.54 \\
- Of someone else & 0.25 & 0.08 \\
Other conflicts & & \\
- The contraceptives mandate & 0.13 & 0.21 in schools \\
- Gender integration/separation & 0.31 & - \\
- Illegal immigration of students & 0.13 & 0.33 \\
- Settlement evacuation & 0.06 & - \\
- Expelling/screening students in contravention of education law (not for sexual reasons) & - & 0.21 \\
\hline
\end{tabular}
\end{table}

Second, the experiment was designed to test two primary hypotheses that emerged from the qualitative data about factors that could potentially shape decisions to dismiss or exclude sexually nonconforming individuals in contravention of equality law. Specifically, the experiment tested the hypothesis that religious decision-making could be shaped by the social impact of non-conforming behavior, as operationalized by the sphere of activity (public or private) and the role of the non-conforming actor (student...
Subjecting these hypotheses to a controlled and randomized design enabled a test of the effects of the different factors on real-time decision making as well as an evaluation of the potential magnitude of these effects. In addition, the experiment allowed for a test of more sophisticated questions, including whether the factors of sphere and role interact and whether the effect of social impact regulation is limited to the original response to the challenge, such as dismissal decisions, or carries over to compliance decisions following unfavorable judicial rulings. The analysis was also able to control for the impact of various demographics, thereby strengthening the robustness of the effects.

The experiment was conducted in Israel, as it provided a simpler and clearer setting to test the research hypotheses than the United States. First, Israeli Antidiscrimination law uniformly prohibits discrimination based on sex, pregnancy, and sexual orientation in employment and in public accommodations, including in education. In contrast, in the U.S. only discrimination based on sex and pregnancy is uniformly prohibited across the nation, under Title VII of the Civil Rights Act. Sexual orientation discrimination in employment and education has not been explicitly prohibited in federal law thus far, although a shift in the EEOC interpretation of Title VII began to show in July 2015, in *Baldwin v. Foxx*.

In addition, only about half the states at the time of the experiment had specific laws prohibiting sexual orientation discrimination (many still do not have such laws). The lack of statutory uniformity in the U.S. problematized the option of conducting a study that asks religious participants to decide a conflict between religion and law, since in many states the conflict is far from clear.

The experiment recruited a large sample of Jewish Orthodox participants (N=559), including a substantial sub-sample of current or former teachers. The hypotheses, sample, procedure, and results are described in Part IV and in Appendix B.

Having now presented the methodology used to examine the decision making involved in how religious groups react to equality challenges, this Article will now discuss the findings, starting with the first phase that included qualitative, in-depth interviews with religious educational leaders.

### III. The Social Impact Regulation of Equality Challenges

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

A. Sphere: Public is Out, Private is In

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

Mr. O’Malley: [W]e are not going on a hunt to try to find what people are doing right and wrong in their world and try to enforce these standards. But when they're made apparent to us, or they become public information, then it becomes our responsibility to say, “Wait a minute.” We also have to be public in our response... So we enforce the teachings of the church. That's why we exist.\(^{77}\)

1. Israel

Religious educational leaders divided the space into public and private spheres, each ruled by different standards. For the leaders, schools were the prototype of the public sphere: a public enterprise, a common space through which the religious public express and realize their faith. Rabbi Asher, a yeshiva head, emphasized the shared interests of the entire community in the school, where “the parents or the students, I take them together as one package, wish to educate their children according to their values.” Mr. Binyamin, head of a religious youth movement, described schools as “a reflection of the religious worldview.” This view of schools, as a public

\(^{77}\) Throughout this article, I use pseudonyms when I quote extensively from the interviews. Otherwise, I provide references to interviewee/interview number, using J to denote Jewish leaders and C to denote Catholics. Transcripts are on file with author.
sphere aimed to serve and reflect the religious community, was tied to the belief that schools ought to be administered according to religious norms. Ms. Zvulon noted that schools are where individuals “cannot go against the spirit of Jewish law” or “cease holding the educational line of the religious school.”

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

The distinction between behavior in school and at home was very common, yet it was more than a moral judgment between prohibited and permissible conduct. It was also a dynamic tool that leaders used to turn a prohibited conduct into a permissible conduct, or at least tolerable one. For example, religious leaders who considered unmarried pregnancy a problem suggested “not publicizing it” or putting “[the teacher] on a leave of absence during pregnancy, perhaps even pay[ing] her salary during that time.”

These policies were noted as alternatives to dismissal—solutions that keep nonconformists in the system. Mr. Shimon, a rabbi and principal of a yeshiva high school, had also avoided dismissal by applying a private/public policy to homosexuals in his school:

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

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

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

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78 Leader #J21. Similar statements were made by Leaders #J11, J12, J18, J29.
79 Leaders #J2, J3, J7, J8, J11, J12, J15, J16, J17, J18, J19, J21, J23, J25, J27, J28, J29, J33, J35.
80 Leaders #J16 and J29 respectively. Similar statements were made by Leaders #J19, J21. These policies resembled the decision of the High Council for Religious Education, an agency that reviewed the dismissal in Plonit, supra note 66, before the lawsuit. The Council believed that a leave should have been offered to the pregnant teacher.
students, then I will allow it here.”

Notably, this account differentiates between students and teachers, in that students are expected to be celibate regardless of their orientation and the expectations from teachers are more detailed, but the contours of the solution are essentially identical. In both cases, individuals may communicate about their nonconformity to leadership but are instructed to keep it private from peers and subordinates. The application of the public/private distinction is dynamic—it begins with the notion that the school is a public religious sphere, yet continues with the formation of islands of privacy within the public sphere, contained in private discussions between LGBT individuals and their supervisors.81 This policy thus clearly resembles “don’t ask, don’t tell” (DADT), but it also relaxes the “don’t tell” prohibition by allowing and even encouraging individuals to open up to their supervisors.

In forming his policy, Mr. Shimon noted the Halakhic distinction between *tzin’aa* [private] and *parrhesia* [public], which has appeared in relation to several discussions of tensions between individual behavior and religious prohibitions throughout rabbinic canonical legal texts, most significantly in the influential Babylonian Talmud (Bavli).82 In Bavli, Kiddushin 40a, for instance, the distinction appears as an instruction to an individual tempted to sin: “if a man sees that his [evil] desire is conquering him, let him go to a place where he is unknown, don black and cover himself with black, and do as his heart desires, but let him not publicly profane God’s name.” The distinction was also discussed as a criterion for martyrdom. Bavli Sanhedrin 74a-75a instructs that “in public, one must be martyred even for a minor precept rather than violating it,” if ordered to do so under a “royal decree” aimed to abolish Judaism (situation known as *Shmad*). Notably, in this context, the public/private distinction is applied in response to the appearance of a foreign legal norm—the royal decree—that creates a conflict with and within religious norms.83 The distinction between private and public plays a vital role in these examples—as well as in numerous other contexts—in

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81 Many educational leaders suggested similar DADT solutions. Some variation existed regarding the ‘don’t ask’ component. Some supported the prohibition on asking (Leaders #11,15), others thought schools are entitled to ask (Leaders #3,4,7,8). Notably, DADT-like solutions were one component of social impact regulation, in addition to privatization, role distinctions, role transfers, and more.


83 Within religion, the conflict arises between the sanctity of God and the sanctity of life, as the royal decree threatens to kill the believer unless s/he violates the precept.
structuring the boundaries of the rabbinic society and the possibilities of tolerating deviant behavior. In some cases, including these examples, the distinction is related or justified on the basis of the broader influence the behavior would have on the community.

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

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

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84 See also Bavli Eruvin 69a, Shulchan Arukh, OC 385:2 (discussing the public/private distinction as a central criterion for determining community membership for the purposes of Eruv); Bavli Sanhedrin 26b (discussing the public/private distinction, with a particular emphasis on the meaning of public nonconformity, as a criterion for eligibility for providing legal/religious testimony).

85 Leaders #J3, J8, J11, J21.

86 Leader #J21, and similarly Leaders #J14,J15,J19.
pregnancy case, “because everyone can see [pregnancy].” Overall, the findings map a systematic and dynamic sphere-based variation in the religious response to and regulation of gender and sexual nonconformity, that moderated the emergence and escalation of conflict.

2. United States

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

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

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

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

Peterson and Jefferson describe a common implication of the public/private distinction: refraining from knowing, or willful ignorance. In addition, and similar to their Jewish counterparts, Catholic leaders also created policies intended to hide religious nonconformity, thereby making it “private”. One principal described his policy with respect to same-sex marriage as, “let’s just make sure that an e-mail or an invitation [to the wedding] doesn’t go out to every faculty member... that the employee is respectful of the teachings of the church and is not bringing his partner to these events.”

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87 Leader #J21, and also Leader #J15.
88 Leader #C17. Similar statements were made by Leaders #C5,C8,C11,C16.
89 Leader #C13. A policy regulating all Catholic schools in Arkansas also alludes to the distinction in prohibiting students from publicly advocating or expressing same-sex
administrator explained, “You could put somebody on leave; they could take the person out of the classroom and put them in another position.” While efforts to “privatize” and hide nonconformity were common, the limitations of the public/private distinction were recognized by Catholic leaders as they were by Jewish leaders. As one principal noted, “it's very hard to hide someone who's pregnant… I think if someone was gay it would be easier to hide than a pregnancy in the building.” This difference in “privatizability” differentiated between the LGBT and pregnancy cases, at least for some leaders.

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

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

Although Catholic leaders did not cite Canon law or doctrine, their use of the private/public distinction and their particular concern for social impact resonate with the Gospel and with contemporary discussions.


90 Leader #C5. Additional examples provided by Leaders #C6, C7, C8, C13.
91 Leaders #C11,C12.
92 Leader #C17. Similarly, one of Hartman’s Catholic teachers described a conversation in which her Bishop told her: “we can have the biggest argument you’ve ever had in your life. But when we go out there, it has to be a cheery ‘aye-aye, sir’ … we have to present a united front. We teach what the Church teaches.” Hartman interprets the bishop to provide room for private disagreement while insisting on public agreement. “He did not want to silence her as an individual woman,” she writes, “only as the teacher of Catholic girls.” HARTMAN HALBERTAL, supra note 78 at 114.
93 Several early sources emphasize the aggravating function of social impact and publicity, for example Mathew 18:6: “If anyone causes one of these little ones—those who believe in me—to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea.” Parallel verses are found in Mark 9:42 (referring to “scandalizing” the faithful) and Luke 17:2. Canon 915 denies the Holy Communion from those “who obstinately persist in manifest grave sin.”
application of public/private distinctions to facilitate the inclusion of sinners in the community appears in the Buenos Aires and Rome guidelines regarding remarried and divorced couples. The Buenos Aires Bishops wrote that “It may be right for eventual access to sacraments to take place privately, especially where situations of conflict might arise. But at the same time, we have to accompany our communities in their growing understanding and welcome, without this implying creating confusion about the teaching of the Church on the indissoluble marriage.” (emphasis added).94 These guidelines were endorsed by the Pope, and the Rome diocese followed suit, allowing the communion to take place “in a discreet manner,” “but not however in the case in which, for example, [the couple’s] condition is shown off ostentatiously as if it were part of the Christian ideal, etc.”95 Notably, the public/private distinction is not articulated as a formal rule in these documents; nevertheless, it guides the development of the Catholic response to challenges of nonconformity and inclusion.96

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

B. Role: Heightened Positions, Less Tolerance

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

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

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

Ms. Fordham: Well we would hope [so]. And most do not become

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95 This policy is referred to as “the internal forum” or “foro interno”. The original text in Italian reads in “in maniera riservata” and “ma non invece nel caso in cui, ad esempio, viene ostentata la propria condizione come se facesse parte dell’ideale cristiano, ecc.” See “La letizia dell’amore”: il cammino delle famiglie a Roma, Relazione del Cardinale Vicario, 13-14, Diocese di Roma (Sept. 19, 2016; In Italian)

96 Note that the public/private distinction was related to social impact concerns in both Jewish and Catholic sources and in contexts broader than education.
pregnant, so I think it’s working, for the most part. But when they do, again, they’re forgiven and it’s not a livelihood. It’s not like they’re fully formed adults. So there needs to be different standards.”

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


100 Leaders #C8,C9,J8,J9. Appendix B, Part D, shows that participants’ comments in the experiment include some, although not many, expressions of empathy towards nonconforming students.

101 Leader #C17; Preferences for ‘rehabilitation’ over exclusion could be related to the
deviate from the norms, as this is what students typically do.\textsuperscript{102} Finally, schools also depend on the business of students and parents, which may lead them to factor their interests and (perceived) preferences into the enforcement policy.\textsuperscript{103}

These are all plausible reasons that can contribute to the distinction between students and teachers. Yet another dimension of the teacher-student distinction is the particular relationship between role and social impact. Specifically, religious leaders viewed (some) roles as more influential than others and more likely to shape community norms. Teachers in particular were considered as more influential than students, and under social impact regulation that meant stricter application of religious norms to teachers. It is noteworthy, however, that role was not exhausted in the teacher/student relationship. Some leaders, both in Israel and in the U.S., applied the heightened teacher status to every employee in the school apparatus, whether she was a teacher or a cafeteria employee, perceiving any formal role as a source of social impact. Others viewed parents as holding an intermediate normative role. Hence, role is probably a more flexible concept; for lack of space, I focus on the teacher/student distinction, which was most common, and leave the rest to future research.\textsuperscript{104}

1. Israel

Jewish leaders perceived teaching as a position of social impact. Teachers were perceived as “role models” who must exemplify the ideal of religious life through good deeds and personal conduct.\textsuperscript{105} This power came with great responsibilities, because teacher nonconformity could inspire the same behavior in students. Discussing the pregnancy case, Mr. Levi, a national-orthodox vice principal, said:

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

more general interest of the community to retain its members and preserve its integrity. I discuss this explanation in Part V. Notably, ‘rehabilitation’ could also mean therapy in the case of homosexual students. Appendix B, Part D, shows that participants’ comments in the experiment include some references to therapy.

\textsuperscript{102} Relatedly, teaching is supposed to guide and correct for errors. Therefore, students who deviate might actually reinforce the system and act within its behavioral norms.

\textsuperscript{103} Leaders #J12,J21,C16.

\textsuperscript{104} I should emphasize that this Article does not aim to exhaust the multiple mechanisms that could contribute to the distinction between teachers and students, some of them are hard to untangle, even in an experiment. My aim is rather to elucidate the social impact aspect of the role distinction and to explore it as part of this larger form of regulation.

\textsuperscript{105} Leaders #J3,7,8,9,11,12,14,16,17,18,19,20,26,29,31.
Notably, Jewish leaders were particularly concerned about voluntary unmarried pregnancy by women who decide to raise a child alone, typically via artificial insemination. Based on social impact concerns, many educational leaders believe that it is imperative to remove such teachers—even at the expense of going to court—to prevent students from wrongly assuming that deviating from the traditional family model is permissible. Mr. Cohen, a national-orthodox principal, stated:

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

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

2. United States

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

For teachers, pregnancy out of wedlock typically resulted in some regulation—with differing levels of tension with antidiscrimination law based on the specific policies. Teachers were dismissed, put on leave (with

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106 Leaders #J7,11,16,19,29.
107 Leaders #J8,9,11,20,39.
or without pay), moved to a back-office position for the duration of the pregnancy, or even encouraged to marry. Students, in contrast, were almost always kept in school and counseled through their pregnancy. LGBT students were treated similarly; all other things being equal, nonconforming students were more likely to be kept part of the school community whereas teachers were more likely to be excluded. Ms. Peterson, a retired superintendent and principal, illustrated this point. Referring to teen pregnancy among students, she said: “I had three girls that year that were pregnant. All three of them were permitted to remain in school […] And then, I also know that it was around that same time… that a student came out to our senior counselor, that she was gay. And our senior counselor worked with her throughout the year. And again, there was no talk of dismissing her.”

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

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

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

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

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

I observed that the role-based distinction operated similarly, and for the same reasons, in sexual identity cases. Mr. Jefferson, a superintendent, justified the decision to dismiss the vice principal who married his boyfriend in Zmuda109:

To have somebody who is working with young people, particularly in a leadership role, who signed a contract that clearly says that he was asked to

109 Supra note 65.
support and live up to the teachings of the church. I can see why the archdiocese had to take that step [of dismissing him].

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

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

One interesting difference between the U.S. and Israeli samples was that American educational leaders were more likely to speak about teachers’

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110 Leaders #C8,C9,J16.
111 See, e.g., Hosanna-Tabor, supra note 65 (holding that the ADA does not apply in the case of a “Called teacher”).
112 See, e.g., Hamilton, supra note 64 (holding that antidiscrimination law applies in the case of a lay teacher).
113 Leaders #C5,C1,C9,C16,J9,J11,J15,J16,J17,J19,J23,J29,J37,J39.
responsibilities in contractual terms and to use legal jargon.\textsuperscript{114} However, the increased legalism in discourse did not seem to substantial differences in practice. The Catholic approach was incredibly similar to the Jewish approach (although they rarely talked about it, Orthodox schools in Israel also include religiosity clauses in their employment contracts, J11-2). Put simply, despite differences in legal doctrine and culture between Israel and the U.S., Jewish and Catholic leaders described their expectations, standards, and normative policies towards teachers and students in remarkably similar terms. Their shared understanding of the religious enterprise at large, rather than the particulars of their faith or their understanding of the law, appeared to define their approach to equality challenges.\textsuperscript{115}

\textit{C. Questions and Limitations}

The findings from the qualitative fieldwork shed light on the existence of systematic variation in the religious regulation of sexual nonconformity. In contrast to the ‘culture war analyses’, conservative religious leaders do not rush to secure a ‘license to discriminate’ whenever they encounter sexual nonconformity in their institutions. They also do not act as though the values involved are incommensurable. Instead, they attempt to find accommodations on the ground, drawing on distinctions of sphere and role in an attempt to square traditional and liberal norms.

There are two overlapping concerns about social impact underlying this regulation. First, the leaders believe that normative deviations create a risk that others might follow suit, and therefore conditions that vary the nonconformist’s scope of influence—her role and the sphere in which she acts—are relevant to the application of the norm. Second, the leaders believe that role and sphere also create or strengthen an obligation to respond to nonconformity in ways that affirm the religious norm, otherwise its social status could decline. While both sphere and role distinctions are rooted in concerns that nonconformity might spread, they also allow it to persist. As a result, social impact regulation simultaneously narrows the expression of sexual nonconformists and increases tolerance towards sexual nonconformity in religious institutions.

These findings bolster the public/private analysis I conducted in Part II(B) to explain the puzzling difference between the San Francisco and Boston controversies over LGBT relationships and parenting.\textsuperscript{116} The findings also elucidate the importance of publicity and privacy from a religious perspective and indicate that the reach and relevance of social impact regulation is

\textsuperscript{114} Leaders #C1,C2,C5,C6,C8,C11,C12,C13,C14,C15,C16.

\textsuperscript{115} Part V engages with several potential explanations to social impact regulation.

\textsuperscript{116} See footnotes 37-43 and accompanying text.
broader than these two controversies. It appears in Judaism, in addition to Catholicism; in relation to unmarried relationships and pregnancies, in addition to LGBT issues; and in educational institutions, in addition to the church and its charities. Social impact regulation emerges as a set of factors that shapes the religious response to equality challenges along a broad range of situations.

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

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

Third, it is difficult to conclude, based on the interviews, whether religious leaders sufficiently considered the legal aspects of the dilemmas they described. Lawyers were not involved in most of the conflicts described in both countries, and most leaders did not refer to law as an influence on their decisions. It was not clear that they were even familiar with what law dictates. This ambiguity raised the concern that sphere and role reflect strictly internal modes of decision-making that would disappear when law becomes salient. The experiment therefore expands the examination to situate sphere and role in a legal context, in two ways. First, the decision-making dilemmas included in the experiment explicitly noted the existence of antidiscrimination law. Second, the experiment examined changes in the relevance of sphere and role following a legal proceeding, by investigating whether their impact extends to compliance with unfavorable court decisions. Such investigation also provides an estimate of religious objection and examines how it varies based on social impact concerns.
Another question that the interviews do not answer relates to the relationship between role and sphere. More specifically, how do these distinctions relate to each other and what is their relative impact? One possible interaction could be mutual reinforcement. Consider Mr. Jefferson’s account:

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

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

When asked whether the same would apply to a teacher, she said:

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

Interviewer: Role towards whom?
Ms. Paul: The role models they are to the children. Like leading by example.
Interviewer: Would that would make a solution of staying at home and then coming back impossible?
Ms. Paul: Not an option, not in my opinion.

Ms. Paul’s selective application of the sphere distinction suggests that the application of sphere is moderated by role. Taken together, these different accounts recommends an examination of role and sphere independently, to determine their relationship and relative contribution to social impact regulation. Such a test is rarely possible in real-world interactions, but an experiment can achieve this goal by design, as I will show below.

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

IV. THE EXPERIMENT

A. Overview and Hypotheses

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

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

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

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

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

**Hypothesis 1b (sphere-c):** Compliance with an unfavorable court decision will vary between the public and private conditions to a lesser degree than in the original dismissal decision.117

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

The experiment tested these hypotheses on the two dilemmas that most frequently concerned religious leaders in Israel and the U.S., concerning LGBT and unmarried pregnant individuals. This design enabled a test of

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117 This formulation avoids testing the null hypothesis (a lack of sphere effect).
social impact regulation in different cases, and with respect to norms that vary in their religious stringency. In the interviews, Jewish leaders typically viewed the prohibition on same-sex relationships as more stringent than the prohibition on unmarried pregnancy because homosexual intercourse is literally prohibited in the Torah (Leviticus 18:22, 20:13; the parallel Christian prohibition appears in Romans 1:26-27). In contrast, the prohibition on unmarried pregnancy, or at least the IVF variant that primarily concerned Jewish leaders, was not literal but inferred; some rabbis permitted it under certain conditions; and some leaders believed that the positive value of child rearing mitigates its severity. This normative variation provided an opportunity to test the generalizability of the sphere effect. Finally, the design also allowed for an analysis of potential moderators: gender, religious affiliation, age, etc.

B. Participants

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

C. Materials

The experiment adapted the same-sex and unmarried pregnancy cases to decision-making scenarios and tested dismissal intentions with respect to both. The vignettes describing the cases were designed based on the religious educators’ detailed descriptions, producing realistic and culturally precise scenarios. The pregnancy case focused on an individual who underwent artificial insemination to become pregnant out of wedlock. The gay case focused on an individual who engaged in a homosexual relationship. In both cases, the individual tells the principal of her/his situation and the principal becomes concerned that this situation may not conform to the school’s religious values. The participants further read that the principal knows that dismissal would be inconsistent with generally applicable antidiscrimination laws (as is the law in Israel; Appendix B provides the full text of the materials and conditions) and deliberates about what to do.

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118 J1,8,9,11,12,14,15,19. In the experiment, we also measured religious stringency directly (see below).

119 The IVF scenario emerged from the interviews as the more common type of unmarried pregnancy in Israel.
### Table 3. The Experiment: Summary Statistics from the Sample

<table>
<thead>
<tr>
<th>General Sample</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>0.74</td>
</tr>
<tr>
<td>Age</td>
<td>28.8 (12.5)</td>
</tr>
</tbody>
</table>

**Religious subgroup**
- Non-religious: 0.02
- Traditional ("Masoriti"): 0.03
- Lightly religious ("light"): 0.03
- Religious Liberal: 0.11
- Religious: 0.24
- Orthodox liberal ("Torani liberali"): 0.19
- Orthodox conservative ("Dati Torani"): 0.35
- Ultra-Orthodox ("Haredi"): 0.03

**Residence**
- Central area: 0.41
- Jerusalem: 0.25
- Judea & Samaria: 0.23
- Israeli North/South: 0.11

**Participation in religious services**
- Three times a day: 0.22
- Daily: 0.29
- Weekly: 0.24
- Less than weekly: 0.17
- Never: 0.08

**Worldview**
- 3.75 (1.6)

**Supports Talmudic studies for women**
- 0.66

**Supports sex separation in school from k1 or earlier**
- 0.73

**Ever received legal training**
- 0.06

**Ever involved in a Lawsuit**
- 0.11

**Ever served as a schoolteacher**
- 0.33

N = 559 participants

### Teachers sub-sample (33%)

<table>
<thead>
<tr>
<th>Women</th>
<th>Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.77</td>
<td>34.4 (13.3)</td>
</tr>
</tbody>
</table>

**Religious subgroup**
- Non-religious: 0.01
- Traditional ("Masoriti"): 0.02
- Lightly religious ("light"): 0.02
- Religious Liberal: 0.10
- Religious: 0.18
D. Procedure

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

Sphere (public/private) and role (students/teacher) were randomized between participants. For example, in the public condition, the scenarios described both the gay and pregnant individuals as acting in public (and participants were not exposed to the private version of these scenarios). This design allowed for a stringent test of the sphere effect, avoiding direct within-subject comparison between public and private settings. The randomization of Role between subjects was applied to the gay scenario, that introduced either a teacher or students involved in a same-sex relationship.\textsuperscript{120}

\textsuperscript{120} Note that the pregnancy case was not modified. First, it was implausible to describe a young student undergoing artificial insemination. Second, keeping the pregnancy case constant across role conditions created a highly controlled setting to compare decisions in the gay teacher and student cases while having the side benefit of examining whether different role contexts influence decisions in the pregnancy case.
In each experimental cell, following consent and basic demographics, the two scenarios were presented in random order. In each scenario, participants were first asked what they would do if they were the principal of the school. They answered using a scale ranging from 1 (should definitely not dismiss) to 9 (ought to dismiss the individual), with 5 as scale midpoint (may decide either way). They were also allowed to offer alternatives or comments in an open-text box. In each case, participants then proceeded to read that the principal decided to dismiss the individual, the individual filed suit, and the court conducted a trial and after hearing the testimonies of the parties decided that dismissal was unlawful and that the individual should be reinstated. Participants were then asked what they would do at that point and responded on a scale that ranged from 1 (would definitely disobey) to 9 (ought to comply) with 5 (may decide either way) as scale midpoint. (Reversed for analysis). Here too, participants were allowed to offer comments or alternatives. Participants beliefs regarding unmarried pregnancy and same-sex relationships and additional demographics were collected at the end.

E. Experimental Findings

1. The impact of sphere
   a. Adherence to antidiscrimination law

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

Table 4 reports the mean intention to dismiss gay and unmarried pregnant individuals by case and condition. As expected following H1a, the results reveal a causal and highly significant relationship between the publicity of the deviance from religious norms and the dismissal of gay and unmarried pregnant individuals, $F_{(1,279)} = 8.88, p = .003$. 


To examine potential differences in norm stringency, I first analyzed whether such differences existed in the sample. Participants were asked to rate at the end of the experiment whether they believed that each of the two conducts is religiously permissible, more permissible than forbidden, more forbidden than permissible, or religiously forbidden. The results confirmed the existence of substantial differences in norm stringency perceptions. Whereas 43% of participants believed that unmarried pregnancy is somewhat or entirely forbidden, 93% believed the same regarding same-sex relationships. These differences persisted in participants’ second-order perceptions regarding the permissibility of employing a person that engaged in these conducts (Table 5). I thus refer to the cases as low stringency (pregnancy) and high stringency (gay).

<table>
<thead>
<tr>
<th>Case</th>
<th>Sphere</th>
<th>Intention to terminate employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pregnancy</td>
<td>Private</td>
<td>3.09 (2.39)</td>
</tr>
<tr>
<td></td>
<td>Public</td>
<td>3.39 (2.44)</td>
</tr>
<tr>
<td>Gay</td>
<td>Private</td>
<td>5.04 (2.75)</td>
</tr>
<tr>
<td></td>
<td>Public</td>
<td>6.31 (2.57)</td>
</tr>
</tbody>
</table>

*Note:* The table provides means and standard deviations (in brackets). Intentions were measured on a 1 to 9 scale, as detailed in the main text.

<table>
<thead>
<tr>
<th>Conduct</th>
<th>% Believed conduct is religiously forbidden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unmarried pregnancy</td>
<td>0.43</td>
</tr>
<tr>
<td>- Employing an unmarried pregnant teacher</td>
<td>0.34</td>
</tr>
<tr>
<td>Same-Sex Relationship</td>
<td>0.93</td>
</tr>
<tr>
<td>- Employing a teacher involved in SSR</td>
<td>0.62</td>
</tr>
</tbody>
</table>

*Note:* The table presents proportion of sample in each category. Beliefs were measured on a four point scale with the following options: permissible, more permissible than not, more forbidden than not, forbidden. Responses were dichotomized into permissible/forbidden.
The average intention to dismiss in the gay (high stringency) case across conditions was substantially higher than in the pregnancy (low stringency) case (within-subject $F = 261.36, p = .000$). In addition, the impact of publicity was statistically greater in the gay case ($M_{public} = 6.31, SD = 2.57$ vs. $M_{private} = 5.04, SD = 2.75$; higher means indicate higher intention to dismiss) than in the pregnancy case ($M_{public} = 3.40, SD = 2.44$ vs. $M_{private} = 3.09, SD = 2.39$), and this interaction was highly significant ($F = 10.59, p = .001$). Figure 1 presents a summary of these results with dismissal intentions dichotomized into dismiss/keep based on the scale mid-point. The data showed no order effects (in other words, it did not matter which case—gay or pregnancy—was presented first).

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

2. **The impact of sphere and role**

   a. Adherence to antidiscrimination law

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

Table 6 reports the mean intention to oust (by dismissal or expulsion) gay individuals as a function of their role (teacher or student) and the publicity of their sexual identity (public or private). As expected under H1a and H2a, the results suggest that both publicity and role significantly shape the decision to
dismiss/expel gay individuals. Religious participants were more likely to oust gay individuals when their sexual identity was public than when it was private \( F(1,528) = 9.568, p = .002 \), and when the individuals were teachers rather than students \( F(1,528) = 30.971, p = .000 \).

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

<table>
<thead>
<tr>
<th>Sphere</th>
<th>Mean (SD)</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gay students</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private</td>
<td>3.38 (2.49)</td>
<td>119</td>
</tr>
<tr>
<td>Public</td>
<td>4.16 (2.76)</td>
<td>131</td>
</tr>
<tr>
<td>Gay teacher</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private</td>
<td>5.04 (2.75)</td>
<td>138</td>
</tr>
<tr>
<td>Public</td>
<td>6.31 (2.57)</td>
<td>143</td>
</tr>
</tbody>
</table>

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

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

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

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

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

3. **Examining moderators of sphere**

One remaining question concerns the smaller public/private difference in the pregnancy case as compared to the gay case. Sphere had a significant effect in both cases, yet the interaction between case and publicity was highly significant, F(1,279)=10.59, p=.001.\(^1\)

\(^1\) Notably, the proportion of public/private dismissal rates in each case is comparable (44%/65% in the LGBT case, 15%/23% in the pregnancy case, a 0.68-0.65 ratio). Hence, the following examination of the interaction result may be unnecessary. Yet, given the novelty of the results and the lack of baseline data on the magnitude, floor and ceiling of the sphere and case effects, the effect warranted further examination.
analyzed, including differences in norm stringency (NS), gender, religious sub-group affiliation, past teaching experience, and age. Table 6 shows that most of these mechanisms (all but gender and age) significantly correlated with dismissal decisions, yet the Sphere effect remained robust in all models. The interaction between sphere and case became insignificant in two models. First, when differences in NS were large—namely, when participants differentiated substantially in their normative evaluations of the gay and pregnancy cases (NS differences were 1 SD above the mean)—the impact of Sphere on pregnancy dismissals diminished. In contrast, when differences in norm stringency were small—namely, when participants did not differentiate between the cases and viewed both as relatively forbidden (NS differences were 1 SD below the mean, a difference nominally close to zero)—the impact of Sphere on pregnancy dismissals was large. Notably, this effect was not driven by the order in which cases were presented. Sphere and Order had no significant effect on normative stringency judgments and including Order in the model did not change the results. These results suggest that the significant interaction results from participants who did not view unmarried pregnancy as particularly problematic, and hence did not attribute importance to its social impact.

Interestingly, age also moderated the impact of sphere in the two cases. In the gay case, all age groups, young and old, were similarly influenced by the sphere effect. But in the unmarried pregnancy case, the youngest cohort (15-24) was indifferent to private/public differences. This finding could indicate the beginning of a normative change towards unmarried pregnancy in the Jewish Orthodox society. Notably, individual differences in residency, conservativeness, strength of religious identity, and frequency of prayer, did not explain the interaction and are not reported below.

122 Computed per individual, as the difference between the stringency of the norm against same-sex relationships minus the stringency of the norm against unmarried pregnancy.
123 The experiment collected several measures of religiosity, including frequency of prayer and religious identification, and the analyses yielded similar results in all models. Results are on file with author.
124 The 35-44 cohort was similar to the 15-25 cohort, but due to the small number of observations (n=27 versus n=121 in the young cohort) the interpretation of this cohort is difficult. The intermediate age group, 25-34, which was better represented (n=88), showed a clear sphere effect in the unmarried pregnancy case, similar to the older age groups.
Table 7. Testing potential moderators of the sphere effect

<table>
<thead>
<tr>
<th></th>
<th>df (1)</th>
<th>df (2)</th>
<th>df (3)</th>
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<td>.38</td>
<td>-</td>
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<td>Public x R</td>
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<td>-</td>
<td>.74</td>
<td>-</td>
</tr>
<tr>
<td>Public x T</td>
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<td>-</td>
<td>-</td>
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<td>-</td>
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<tr>
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<td>-</td>
<td>6.46**</td>
</tr>
<tr>
<td>Age (A)</td>
<td>5</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

N 281 281 281 281 273

Notes: The table reports F values and degrees of freedom for each effect, focusing on the teacher data. + Significant at the 10 percent level; * Significant at the 5 percent level; ** Significant at the 1 percent level.

F. Discussion

The results of the experiment support the theory of social impact regulation. Sphere and role had substantial effects on real-time decisions, each increasing the dismissal of sexual nonconformists in 21-22 percentage points. These results point to the independent and large contribution of each of these factors to social impact regulation and to the religious response to
equality challenges. Notably, religious educators (33% of the sample) were more inclined to dismiss sexual nonconformists than non-educators, and were similarly influenced by variations in sphere and role.

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

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

125 This conclusion is also supported in the results of the textual analysis, Appendix B, Part C.1, that found that character and moral status reasoning appeared in only 6% of the comments, as compared to social impact reasoning that appeared in 57% of the comments. In addition, the rate of moral status reasoning, in contrast to social impact, did not differ between sphere conditions.
V. SOCIAL IMPACT REGULATION: EMPIRICAL AND NORMATIVE QUESTIONS

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

A. What Explains Social Impact Regulation?

Social impact regulation warrants further reflection and explanation for several reasons. First, this phenomenon does not fall neatly into one of the existing models of selective enforcement. The selection of social impact regulation was not founded only on a sense of justice and compassion, general efficiency considerations, scarcity of resources, or preferential treatment of a favored group of gender or race. Rather, it was operated on the specific distinctions of sphere and role with their specific logic and modus operandi. In addition, social impact regulation involves contradictions and tensions that are difficult to conceptualize solely through the prism of selective enforcement. For example, the pertinent decision-makers willfully assume responsibility to uphold the very norms that they selectively enforce (“We enforce the teachings of the church. That's why we exist”), typically consider sexual nonconformity as a sin, and fear from its consequences. Second, social impact regulation is also not consistent with a social deterrence model, that predicts that enforcement bodies would supplant actual sanctions for threats and would cultivate fear of sanctions to deter noncompliance. While the findings cannot attest to the likely possibility that nonconformists in religious communities fear sanctions, religious leaders did not show signs of intentionally cultivating such fears. Some even assisted nonconformists to escape sanctions.

Why, then, religious communities enact social impact regulation? I consider three potential explanations or causes. Each explanation provides

127 Id. at 30-31.
128 Id. at 20.
130 C16. Similar statements were made by J11, J12, J18, J21, J29.
132 See footnotes 79-80, 89-91 and accompanying text.
different meaning for the phenomenon's normative weight and importance. The explanations are interesting in and of themselves, but they also illustrate the inadequacy of the culture war paradigm to explain the variation and dynamism that were documented throughout this Article.

1. Social impact regulation as a compromise

One reason to tolerate risk to religious normativity is if the costs of conflict—both interpersonal and legal—are greater than the costs of tolerance. If this is the case, educational leaders might compromise religious normativity to reduce or avoid conflict. The religious leaders' descriptions of the conflict as “agonizing” (J32), “painful” (J27), “really, really tough” (C9), and a “PR nightmare” (C13) support the possibility that the conflict is at least personally costly. Their accounts sometimes disclosed competition between their emotional reaction and the principles they felt obliged to follow (“I see her tears and feel her pain,” said J2).

Distinctions of sphere and role might have emerged as a solution because they provide a middle way. On one hand, they preserve the religious order at the institutional and formal level. On the other hand, the distinctions preserve nonconformists as part of the community and maintain good terms with the law (at least as long as they succeed in preventing conflict). Social impact regulation is thus capable of sustaining both community norms and community members.

The extent to which this compromise would seem appealing to particular decision-makers may depend on multiple factors, including the existence or absence of pressure from lawmakers. The findings from the interviews indicated that social impact regulation is often applied “spontaneously,” without a threat of lawsuit, and also appears in regimes that exempt religious institutions entirely from antidiscrimination law.\footnote{133 See, e.g., 186 F.Supp.2d 757 (W.D.Ky. 2001), aff’d in part, rev’d in part, 579 F.3d 722 (6th Cir. 2009), cert. denied, 131 S. Ct. 2091 (2011), and 131 S. Ct. 2143 (2011) (dismissing the discrimination claim of a lesbian therapist who was employed on the condition that she kept her sexual orientation discreet and was dismissed after her orientation became publicly known; discrimination on the basis of sexual orientation was not prohibited at Pedreira’s city in Kentucky at the time of the dismissal and therefore her case was dismissed).} Yet there are also cases that exemplify its emergence in response to direct legal pressure. The San Francisco agreement is one such example. As described earlier,\footnote{134 See footnotes 36-43 and accompanying texts} the Church agreed to provide healthcare to one legally domiciled adult (LDA) in the household, while insisting on “not know[ing]” the nature of the relationship between the employee and the LDA. Changing the definition of the eligible person from a romantic partner to an LDA changed the relationship from
public to private. In public statements, the Archbishop justified the agreement as a compromise, needed “to prohibit local government from forcing our Catholic agencies” to recognize domestic partnerships. An identical policy was adopted by the Church in Michigan in 2016 in response to changes in the law and pressures to offer health benefits to same-sex partners. Similarly, the agreement was presented as a compromise, “due to recent changes in Federal law…The inclusion of the LDA (Legally Domiciled Adults) benefit allows for the MCC health plan to be both legally compliant and consistent with Church teaching.”

The San Francisco and Michigan agreements demonstrate the direct use of social impact principles in the construction of compromises, not only in relation to individuals (e.g., in employment or education) but also in relation to general policy problems.

2. Social impact regulation as a distinction between wrongs

A second potential explanation for the religious willingness to tolerate sexual nonconformity under social impact regulation is rooted in the distinction between two types of wrongs: *malum prohibitum*—wrong prohibited—and *malum in se*—wrong in itself.

Same-sex relationships and out-of-wedlock pregnancies were clearly considered wrong by Jewish and Catholic leaders. But what kinds of wrong? One possibility is that these wrongs are *mala in se*, because they deviate from the righteous model.

But if same-sex relationships and out-of-wedlock pregnancies had been perceived as mala in se, sphere and role should not have mattered much. Consider incest as the counterfactual. Most people perceive incest as *malum in se*; the belief that incest is wrong is so deeply rooted that people condemn even consensual, victimless, adult incest.

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137 Notably, the experimental results do not bear on this question, as the measurement of norm stringency focused only on perceptions regarding the permissibility of the conduct and did not inquire about the type of wrong it might be deemed to be. This limitation could be addressed in future research.

seems repulsive to most people, perhaps even more repulsive than condemning incest across the board. It is hence difficult to imagine the religious leaders comfortably defending private incest.\textsuperscript{139}

It therefore seems unlikely that same-sex and unmarried relationships are a wrong of the same type of incest. Social impact regulation appears to suggest that leaders evaluated these nonconformities, even implicitly, as more similar to \textit{mala prohibita}. As Mark Davis notes, one of the characteristics of \textit{mala prohibita} offences—among which he lists homosexuality—is that society particularly objects to their public manifestations, but not so much to their occurrence behind closed doors.\textsuperscript{140}

Consequently, the leaders’ choice of regulatory framework was more similar to how people think of traffic laws (the classic \textit{mala prohibita}); crossing the street in red is not intrinsically wrong but should nevertheless be prohibited because society should ensure safety. Accordingly, and analogous to the sphere distinction, most people would consider red-light crossing to be significantly less harmful at midnight, on an empty street—when no one sees it or is harmed by it. At the same time, and analogous to the role distinction, while many would excuse ordinary folks in such circumstances, fewer would absolve policemen in the same way. People typically believe that policemen must always follow the law, not because traffic offences are intrinsically wrong, but because the police are expected to model compliance.

The Catholic placement of children with same-sex couples in Boston\textsuperscript{141} seems to exemplify this distinction. The placement was voluntary and did not respond to any direct legal challenge; therefore, it does not seem to reflect a compromise, but more of a perception that same-sex parenting is not inherently bad and thus could be permitted in some circumstances. The refusal of the Church to continue with the practice after it became public is consistent with a distinction between wrongs; while the nature of the wrong

\textsuperscript{139} Notably, concealing sexual offences—for example the Catholic child molestation scandal—bears some similarity to social impact regulation, but is ultimately different on several counts. First, it often protects role-bearers (e.g., teachers, priests) instead of holding them to higher standards, in contrast to the role distinction. Second, we would not expect religious leaders to talk openly about concealment of sexual abuse as they did with respect to sexual nonconformity. Third, the experiment found that social impact regulation was significantly endorsed by the community, whereas the cover up of sexual abuse caused uproar and disbelief among religious communities.

\textsuperscript{140} Mark S. Davis, \textit{Crimes mala in se: An equity-based definition}, 17 CRIM. JUSTICE POLICY REV. 270 (2006). I elaborate on anti-sodomy laws in the next section. Notably, I do not suggest that the leaders believed that religious doctrine referred to these conducts as \textit{mala prohibita}, but rather that the leaders themselves were not necessarily committed to the idea that unmarried pregnancy and same-sex relationships are intrinsically wrong. Under this explanation, the scripture guided their judgments through its legal authority, not necessarily its moral persuasion. I thank Rick Garnett for an insightful feedback on this point.

\textsuperscript{141} Supra note 40.
could justify lenient enforcement, it is not a ground to repeal a law. Understanding social impact regulation as a distinction between wrongs is not necessarily an alternative to understanding it as a compromise. The two explanations nuance each other. First, the distinction-between-wrongs analysis explains why compromise is possible; if equality challenges were considered mala in se, it is unlikely that a compromise could have been achieved, regardless of the benefits. Second, the distinction-between-wrongs analysis can highlight what compromises are possible. Requiring religious communities to repeal religious norms that clash with the law is not an option. But redefining categories in ways that avoid the conflict—e.g., the legally domiciled adult category—can productively harness social impact regulation to break through the impasse. Third, the distinction-between-wrongs analysis serves as a reminder that social impact regulation is not only a compromise, but also a mode of selective enforcement that could be applied voluntarily, without direct legal pressure.

I now turn to a third explanation of social impact regulation, one that is not pragmatic or normative, but rather sociological.

3. Social impact regulation as a bridge to liberalism

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

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144 Lawrence, supra note 32.
of the land.\textsuperscript{145}

Justice Scalia famously argued in \textit{Lawrence} that invalidating the criminal prohibition on homosexual conduct and extending the right to privacy to homosexuals was a slippery slope that would result in legalizing same-sex marriage.\textsuperscript{146} If this historical process has any relevance to social impact regulation, it suggests that it could be a phase that precedes a broader acceptance of sexual nonconformists. The time trend seems to support this hypothesis. Support of same-sex marriage is steadily growing among all religious sects, particularly among younger generations.\textsuperscript{147} The experiment further finds that age plays a double role in the application of social impact regulation, with younger generations less likely to view unmarried IVF pregnancy as forbidden and less likely to dismiss nonconformists in public or in private.\textsuperscript{148} However, it is important to note that liberalization is not a necessary consequence of social impact regulation. Jewish communities applied the sphere distinction to desecrators of the Sabbath for centuries, without resulting in public normalization of desecration (although the meaning of observance has changed throughout the years). Whether social impact regulation is part of a liberalization process is therefore an open question. Some religious leaders noted that their communities were changing, while others were more skeptical that formal change is likely to occur ("I don't think the doctrine of organized religion is going to change. Not in my lifetime," said one Catholic leader). Yet even if social impact regulation does not predict a nearing change, it may still be the case that any such change requires first a limited form of acceptance to emerge.

As noted before, the three explanations to social impact regulation are not mutually exclusive. Compromise could be a phase to something else and normative distinctions can emerge in response to social change. While none of these explanations provide a single and conclusive answer, each of them unsettles the picture of the culture wars paradigm, which is dominated by incommensurable moralities, irreconcilable values, fears of escalation, and collision courses.\textsuperscript{149} In contrast, social impact regulation draws a picture composed of compromise, or nuanced distinctions, or liberalization, or all of the above. Religion and equality are not incommensurable opposites. As

\textsuperscript{146} \textit{Lawrence}, supra note 32, at 2488, 2490.
\textsuperscript{148} See footnote 124 and accompanying text.
\textsuperscript{149} See footnotes 7-9 and accompanying text.
religion struggles with finding nuanced responses to quality challenges, law needs to start acknowledging these nuances and developing a response.

B. How Social Impact Regulation Informs Law and Politics

1. The adjudication of religious objection

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

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

The second model is almost exactly opposite. Under this model, a religion that selectively enforces its norms indicates inconsistency, which could either count as insincerity or as plain discrimination. Thus, selective enforcement severely undermines the religious argument. Several courts adopted this view, holding that enforcing the rule against sex out of wedlock based on the visibility of pregnancy amounts to sex discrimination. Under this model,
an institution would need to show strict enforcement to prevail. In *Boyd v. Harding Acad. of Memphis, Inc.*, the religious college successfully defended against a discrimination claim after its president testified of conducting active investigations to inquire whether employees engaged in sex outside of marriage and dismissing all such employees without regard to the visibility of their violation, men and women alike. Note that this approach is exactly opposite from *Schuth*: instead of requiring religious institutions to find inclusive solutions and tolerate private nonconformists, the *Boyd* decision incentivizes institutions to intrude into the private life of employees, make all nonconformities public, and enforce religious norms without selection, in order to secure a legal exemption. The logic of these cases hold that a religious entity needs to show consistency in the application of its norms to refute discrimination claims.

Consistency is certainly important and has a normative and evidentiary value, yet it is also a confusing concept. Like equality, which only applies if two people are similarly situated, consistency should only be evaluated if two decisions are similarly situated. It is not clear that this is the case for decisions that vary in their sphere and role attributes. Therefore, we can consider a third model, that would not automatically penalize religious inconsistency, nor would it demand religious communities to exercise social impact regulation. Such model could consider an institution’s previous record in handling equality challenges and examine whether the record indicates a pattern of discrimination (for example, only women lose their job for unmarried relationships) or a pattern of regulation that effectively accommodates

the case of an unmarried pregnant teacher to proceed to trial, holding that the school could not “use the mere observation or knowledge of pregnancy as its sole method of detecting violations of its premarital sex policy” without violating Title VII); Vigars v. Valley Christian Ctr. Of Dublin, 805 F. Supp. 802, 807 (N.D. Cal. 1992) (permitting the claim to proceed to trial, reasoning that “women would be subject to termination for something that men would not be, and that is sex discrimination”). This approach has been applied to other rules and forms of selective enforcement, e.g., EEOC v. Mississippi College, 626 F.2d 477, 486 (5th Cir. 1980) (explaining that the Baptist college’s argument would fail if the plaintiff would show evidence that the proclaimed Baptist hiring policy was selectively enforced); Herx v. Diocese of Fort Wayne-South Bend Inc., No. i:i2-CV-i22 RLM, 2015 WL 1013783, at *2 (N.D. Ind. Mar. 9, 2015) (accepting a discrimination claim of a married teacher, fired for IVF treatments, who showed that three male employees who were thrown out of a strip club after harassing one of the performers were reprimanded but not fired).

153 88 F.3d 410, 414–15 (6th Cir. 1996) (affirming the decision of the district court to dismiss the claim).

154 Id. at 412. Wilson reaches a similar conclusion in her analysis of these and other cases, see Wilson, *supra* note 50 at 448–452.
nonconforming individuals (some forms of social impact regulation could fit into this category).

Importantly, the third model could attribute positive—not negative—value to selective enforcement if shown to be part of a policy that attempts to self-accommodate the tension between religion and equality norms. A religious organization that accommodates sexual nonconformity independently in 80% of the cases and turns to the court to seek exemptions in the remaining 20%, should not be disfavored compared to an organization that externalizes the costs of faith in 100% of the conflicts; if anything, the former organization should probably be favored. Under the third model, a policy of selective enforcement which reflects a nuanced position would be an advantage. A recent example of such nuanced position—albeit one that involves its own challenges—was presented in *Masterpiece Cakeshop*. In this case, a baker arguably offered to sell off-the-shelf products to a same-sex couple but refused to create a custom-made cake for their wedding. This distinction is different from the social impact distinction and presents its own challenges, but it demonstrates a similar attempt to find nuance and reconcile faith and equality. The majority for the Court wrote a narrow opinion and avoided a decision on this particular argument. Had the Court accepted the baker’s distinction, it would have bolstered the third model.

This section presented three optional models to address social impact regulation in the adjudication of conflicts. Two of these models received some support from courts and the third model is novel and more exploratory. Notably, I do not intend to determine which model is preferable; and other models may also be relevant. My aim is to demonstrate the importance of incorporating social impact regulation into the legal analysis. The reality is that social impact distinctions are present in many cases—from therapists fired for being outed as gay to students prohibited from bringing a gay partner to a school prom—but they have not been systematically explored or theorized as part of a general phenomenon thus far. Understanding them against the background of this Article opens new channels for debate and analysis, for scholars and litigators alike.

2. The negotiation of solutions and accommodations

In addition to informing the adjudication of conflicts, social impact regulation can also inform political negotiations seeking the reconciliation of

155 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U. S. __ (2018) (holding that the Colorado Civil Rights Commission violated the free exercise clause in the process of assessing a cakeshop owner’s reasons for declining to make a cake for a same-sex couple’s wedding).

156 Pedreira, *supra* note 133; *Gay teen wins fight over Catholic prom, supra* note 99.
conflicts between religion and equality. To negotiate successful solutions, negotiators must understand the conflict that they negotiate. In general, this means that negotiators should put aside the culture war paradigm and consider religious variation, latitude, and dynamism. They should actively search for information about these aspects and should not accept as given the notion that organized religion has no latitude in the application of its norms. More specifically, negotiators should embrace two important lessons.

First, the stringency of the norm should be separated from the flexibility of its enforcement. Often, normative stringency leads to the conclusion that exemptions are warranted. In culture war terms, if culture A believes in marriage equality and culture B opposes same-sex marriage, the outcome is assumed to be either an exemption or a conflict, as there is no middle ground. What this Article reveals, however, is that the high stringency of the norm against same-sex relationships does not imply zero latitude in the application of this norm. In practice, the religious response to same-sex relationships (among other equality challenges) varies systematically based on conditions that are independent from the norm. Negotiators should embrace the gap between the norm and its enforcement because it opens a space for creative solutions and potential compromise.

Second, negotiators should be cognizant of the portfolio of strategies that is available to them through social impact regulation, and explore additional nuanced distinctions. Redefining categories, specifying roles, and expanding privacy protections, are only some of the avenues that emerge from this Article. None has been systematically examined in political negotiations thus far and all have demonstrated potential. While these tools should not be expected to succeed in all cases, they certainly expand the rather narrow portfolio that serves negotiators today, that is composed primarily of exemption and coercion.

CONCLUSION

All of the foregoing ideas raise many complexities; and we have not even touched upon the complicated literature on the legitimacy of public/private distinctions. Notably, social impact regulation is merely one form of the

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157 See Koppelman, supra note 38 at 139 (Arguing that religious exemptions are necessary due to the deep and stringent religious opposition to homosexuality); See also, Horwitz, supra note 19. (arguing that exemptions are needed because the values are incommensurable).

158 See, generally, CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 191–92 (1989) (criticizing the public/private divide and notions of privacy generally, and family privacy in particular, as the marker of women’s subordination and oppression); Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1–45 (1992) (arguing that the feminist perspective fails to acknowledge privacy as a desirable source of
war within religion and further research is necessary to develop this new paradigm.

The main aim of this Article was to modify the dominant view of the conflict between religion and equality as a war between cultures, with an elaborate understanding of the conflict as occurring both within and between cultures. Following this approach, and focusing on concrete cases studies, I investigated several conditions under which organized religion takes an oppositional or tolerant position towards equality challenges. This examination demonstrated that religion’s attitude to gender and sexual equality is far from monolithic and is not necessarily oppositional, even among individuals whose moral worldview rejects sexual nonconformity.

Based on these results, I argue that the current debate must change. Religion and equality are not incommensurable cultural opposites. Instead, they are social processes that constantly interact and, at times, converge. More research should be dedicated to explore these processes and their implications. In particular, this Article invites further normative analyses of social impact regulation, as well as further empirical investigations of the broader effects of social impact regulation and its interaction with the law. It is also important to study how sexual nonconformists respond to social impact regulation. We can hypothesize that their responses might be mixed\textsuperscript{159} and could be contingent on different implementations of the policy. How, and to what extent, would require a separate study.

\textsuperscript{159} Robbee Wedow et al., "I'm Gay and I'm Catholic": Negotiating Two Complex Identities at a Catholic University, 78 SOCIOL. RELIG. 289 (2017) (reporting a study of gay and lesbian students at a Catholic university that found different modes in which students negotiated their religious and sexual identities; some students embraced both identities, others rejected either the sexual or the religious identity, and yet others were uncertain).