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Motivational Law

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MOTIVATIONAL LAW

ARNOLD S. ROSENBERG*

I.	INTRODUCTION	112
II.	THE CONCEPT OF MOTIVATIONAL LAW	114
	A. <i>Defining Motivational Law</i>	114
	B. <i>Uses of Motivational Law: Some Examples</i>	115
	1. Obscenity Laws	115
	2. Military Disciplinary Rules	116
	3. Religious Laws	118
	4. Censorship Laws	121
	5. Credit Counseling Requirement for Consumer Bankruptcy	121
	6. Prohibition of Abortion Counseling	122
	7. Rehabilitation in the Criminal Justice System.....	123
	8. Motivational Rules in the Common Law	123
	9. Monarchical Privileges	124
	10. Procedural Due Process	124
	C. <i>Motivational Law in Legal Theory</i>	125
	D. <i>Motivational Law's Boundaries</i>	127
III.	HOW MOTIVATIONAL LAW WORKS	131
	A. <i>Motivational Law as Intrinsic Social Control</i>	131
	B. <i>Psychological Mechanisms of Motivational Law</i>	132
	1. Cognitive Dissonance	132
	2. Shaming, Moral Community-Building, and Regulatory Communities	134
	C. <i>Motivational Law as Legitimacy-Builder in Religious and Secular Governance</i>	136
IV.	FAILURES AND SUCCESSES OF MOTIVATIONAL LAW: DOES IT REALLY WORK?	139
	A. <i>Motivational Law's Failures</i>	139
	B. <i>Does Religious Motivational Law Work? The Hellfire Controversy</i>	141
	C. <i>Motivational Law's Unfortunate Successes</i>	147
	1. Motivational Law, Authoritarianism, and Repression	147
	2. Cults and Concealment	149

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3. Ritualization and Standardization.....	151
V. A THEORY OF THE EFFICACY OF MOTIVATIONAL LAW.....	152
A. <i>Conditions for Motivational Law to Improve Compliance with Regulatory Law</i>	152
B. <i>The Allure of Motivational Law as “Regulation Lite”</i>	154
C. <i>Motivational Law’s Innate Conservatism</i>	155
VI. CONCLUSION.....	157

I. INTRODUCTION

Lawmakers use law not only to order and empower, but to exhort and persuade. To paraphrase Richard E. Neustadt, the power to make law is no greater than the power to persuade people to comply with it.¹ This Article introduces a new concept of law’s motivational functions and the laws that serve those functions, which I call “motivational law.”² One law may possess the function of motivating people to comply with another law. Even laws that are not primarily motivational frequently are couched in exhortative or persuasive rhetoric to increase compliance, or to give the impression that they will have that effect.

Motivational law is found in the requirement of consideration for contract formation, obscenity laws, censorship laws, religious laws on diet, dress and ritual, military regulations, and in a host of other contexts. Even due process has a motivational function. Rules of procedure may or may not result in just outcomes, but the appearance of fairness with which they clothe the judicial system motivates citizens to accept those outcomes and obey judicial orders.³

“Soft law”⁴ lies at the heart of New Governance⁵ theory, and it, too, is

¹RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLICIES OF LEADERSHIP* 10 (John Wiley & Sons 4th ed., Columbia Univ. 1960). (Presidential power is the “power to persuade . . .”). Alexander Bickel made a similar comment on the power of the judiciary. A court opinion, like poetry, he said, “makes nothing happen.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 245.(Yale Univ. Press 2nd ed. 1962).

²The concept of motivational law builds on ideas in my book on Jewish liturgical law and practice, ARNOLD S. ROSENBERG, *JEWISH LITURGY AS A SPIRITUAL SYSTEM* (1997). In the book I explored the motivational purposes of Jewish liturgy and ritual, and the historical and textual evidence of those purposes. I wish to thank my colleagues Eric Mitnick, Linda Keller and the other members of the Junior Faculty Writing Group at Thomas Jefferson School of Law for their helpful comments on earlier drafts of this article.

³See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

⁴“In its broadest scope, the formula ‘soft law’ labels those regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or a regime of formal sanctions.” Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006). “Advocates of soft law claim that social integration is best effected through multilevel decentralized processes resulting in open-ended and flexible guidelines and standards. Conversely, defenders of hard law insist that social policies must be pursued through a centralized, vertical and formal decision-making process yielding uniform and binding rules creating justiciable rights.” *Id.* at 505. See also Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Health Care*, 2002 WIS. L. REV. 575, 600 (2002) (“Soft law is a term used to refer to guidelines,

motivational law. People are more likely to be motivated to comply with rules that govern their conduct if those rules are formulated with their participation and enforced by persuasion rather than threats.⁶ If a spoonful of sugar makes the medicine of regulation go down, a rule that compels a regulator to administer that spoonful of sugar, or a principle that exhorts the regulated to swallow it, is motivational law.

Motivational law sometimes lacks a clear connection to its intended impact on compliance, and the disconnect may cause societal tension. Social scientists never found a clear connection between obscenity laws and compliance with laws against rape and sexual abuse.⁷ Numerous efforts by social scientists to prove that religious motivational laws (e.g., “go to church on Sunday”) motivate people to comply with laws against crimes involving violence or dishonesty have produced inconsistent results. As discussed further in this Article, to the extent motivational law succeeds in motivating compliance with other laws, that success frequently depends on peer group influence.

Motivational law has a dark side. It possesses an inherently conservative tendency that aids regimes and other authorities in asserting their power and resisting legal and social change. However, those who challenge a regime or authority may set up a competing motivational law. Conflicting motivational laws frequently mark the fault lines of legal and social conflict.

After defining the concept of motivational law and giving several examples in Parts II.A and II.B, I discuss in Part II.C how motivational law fits into theories of law. In Part II.D, I explore the boundaries of motivational law and what it means to say that a law is “motivational.” Part III.A examines motivational law as a type of intrinsic social control, and Part III.B explains how motivational law works through moral community-building, naming and shaming, cognitive dissonance and cognitive biases. Part IV.A asks why motivational law often fails, IV.B looks at the equivocal evidence of the efficacy of religious motivational law in preventing delinquency, and in IV.C I take a look on the dark side at the sad instances where motivational law

recommendations, policy suggestions, and other government systems designed to influence behavior without imposing formal legal obligations.”).

⁵See *infra* note 12.

⁶This is what Orly Lobel seems to mean when she asserts that “‘soft’ does not mean ‘voluntary.’” Orly Lobel, *Surreply: Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 506 (2004). If an environmental regulatory agency obtains the participation of regulated businesses in formulating pollution control regulations, the resulting rules will be easier to enforce without the need for time-consuming and costly coercive action by the government, though coercive measures would still be available as a last resort. See Errol Meidinger, *Competitive Supra-Governmental Regulation: How Can It Be Democratic?*, at 3 (July 26, 2007) (unpublished paper presented at the Annual Meeting of the Law and Society Association, Berlin, Germany) (on file with the author) (“One of the most striking developments in supra-governmental regulation has been the broad and continuous expansion of participation and transparency, although both remain subject to improvement. Most programs now provide for multi-stakeholder participation, notice and comment processes for rulemakings and adjudications, public responses to comments and explanations of decisions, formalized dispute resolution and appeals processes, publication of rules, procedures and decisions, and so on.”).

⁷See *infra* note 21.

succeeds, examining how authoritarian regimes and cults use motivational law to consolidate and preserve their power.

In Part V, I offer a theory of the efficacy of motivational law. Motivational law improves compliance with regulatory law only if (1) either the motivational law itself is enforced by sanctions and threat of sanctions sufficiently severe to have a deterrent impact or the motivational law is consistent with the self-interest of those being regulated, and (2) the linkage between the motivational law and regulatory law is evident to those persons who are supposed to comply with the motivational law. However, lawmakers are drawn to use motivational law by appearance instead of reality, hence many motivational laws are enacted that work poorly in achieving compliance. Instead, they tend to exert a conservative influence on social and legal change.

II. THE CONCEPT OF MOTIVATIONAL LAW

A. *Defining Motivational Law*

Motivational law consists of those rules and principles,⁸ a purpose or function of which is to motivate people to comply with rules and principles that regulate their conduct toward each other or their environment. I will refer to the latter as “regulatory” laws. A law is not motivational merely because citizens are enthused about complying with it. To fit this definition of motivational law, the law must at least be capable, or regarded as capable, of motivating compliance with a regulatory law. A regulatory law may be another law or rule that regulates conduct, or it may be that a single law possesses both motivational and regulatory functions.

For example, the common law requires the formality of consideration to form an executory contract for multiple reasons, including evidentiary, channeling, and “cautionary” functions.⁹ The rule requiring consideration is a regulatory law in its evidentiary function, but a motivational law to the extent it performs a cautionary function. If the formality of consideration motivates the parties to be serious about what they are doing, presumably they will make only those contractual promises that they are motivated and able to keep.¹⁰ Why we should want parties to be motivated to keep their promises and to avoid making promises if they are not serious is a matter of efficiency, social policy and, in the view of some, morality, but what is important here is that the consideration requirement exists in part because of the assumption—accurate or not¹¹—that it helps to ensure that people will be motivated to comply with their duties under contract law.

Motivational law in governance is on the rise. New Governance relies on

⁸See Part II.C, *infra*, for discussion of whether motivational law is “law.”

⁹Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).

¹⁰*Id.* at 800, 805, 815.

¹¹See, e.g., Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 828 (1995) (questioning whether the consideration requirement actually accomplishes its cautionary function); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993); James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283 (1991); James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 993 (1990).

increasing motivation to comply as a substitute for traditional command-and-control structures.¹² New Governance and legal pluralist¹³ theorists reject the classic Austinian definition of law as a command accompanied by threat of a sanction for non-compliance,¹⁴ and advocate regulation that is cooperative, decentralized or “orchestrated” among levels of authority, flexible, participatory, and dynamic, and functions through the identification and pursuit of mutual interests.¹⁵ In simpler terms, governments can achieve higher levels of compliance with regulatory law through an approach to regulation that is personalized, consistent with social norms about how people should approach others, does not demean or shame those whose interests are involved, and gives the stakeholders a sense that they have both a say in what is to be required and a stake in complying with those requirements. Soft law exists to increase compliance with regulatory law, and it does so largely by increasing motivation to comply. Soft law is a form of motivational law.

B. Uses of Motivational Law: Some Examples

1. Obscenity Laws

Modern obscenity laws originated as motivational laws in 17th century England introduced by the Puritan ecclesiastical courts to induce citizens to comply with religious prohibitions of immodest behavior. Immodest behavior was prohibited lest it motivate people to violate religious laws banning extramarital sex.¹⁶

The motivational nature of obscenity law persisted in the United States. Anthony Comstock, founder of the Committee for the Suppression of Vice, whose efforts resulted in the restrictive Comstock Act of 1873, was a strict Congregationalist who

¹²Orly Lobel, *The Renew Deal: the Fall of Regulation and the Rise of Governance in Contemporary Thought*, 89 MINN. L. REV. 342 (2004); Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Orly Lobel, *Surreply: Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 489 (2004); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?* 89 GEO. L.J. 257 (2001); Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479 (2005).

¹³Legal pluralism embraces non-governmental regulatory orderings as part of “law,” and the rules of non-governmental organizations that contribute to New Governance include many with a motivational purpose or function. See Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); Christine Parker, *The Pluralization of Business Regulation*, at 5 (July 25, 2007) (unpublished paper given at the Law & Society Association Annual Meeting, Berlin, Germany) (on file with author); Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World*, 54 CURRENT LEGAL PROBS. 103 (2001); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. LAW & SOC’Y. 296 (2000)...

¹⁴See *infra* p., 74.

¹⁵Lobel, *supra* note 12, at 348.

¹⁶Mark Conrad, *Censorship in America*, 10 HUM. RTS. 28, 30 (1982). Censorship previously had been limited to cases of blasphemy and heresy. *Id* at, 28-30.

perceived himself as working to enforce God's law.¹⁷ The most powerful pressure group for film censorship in the United States from the early 1930's through the 1960's was the Legion for Decency, a Catholic organization, which established its own film rating board and pressured the motion picture industry in Hollywood to enforce its Motion Picture Production Code.¹⁸ A "C" rating from the Legion for Decency "direct[ed] the nation's 45 million Catholics to avoid the film as they would avoid any other occasion for sin."¹⁹

More recently, prominent feminists such as Catherine MacKinnon and Andrea Dworkin have supported anti-pornography laws as motivational law on the assumption that such laws would reduce the motivation for men to violate laws against the rape and abuse of women.²⁰ However, social scientists draw conflicting conclusions from the results of existing studies as to whether exposure to pornography increases aggressive behavior toward women.²¹

2. Military Disciplinary Rules

Military disciplinary rules are one of the oldest forms of motivational law. Soldiers of the Roman Legions were forbidden from marrying, in order to "restore

¹⁷*Id.* at 31.

¹⁸Robert J. Klein, *Film Censorship: the American and British Experience*, 12 VILL. L. REV. 419, 424-427 (1967).

¹⁹*Id.* at 426, quoting Stone, *The Legion of Decency: What's Nude?* 5 RAMPARTS 48 (1965).

²⁰An anti-pornography ordinance written by Dworkin and MacKinnon briefly became law in Indianapolis. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 n.2 (1986). Cf. Paul Chevigny, *Pornography and Cognition: a Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 432 (1989); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (Perigee Books 3rd ed., 1981); Andrea Dworkin, *Pornography Happens to Women* (1993), available at <http://www.nostatusquo.com/ACLU/dworkin/PornHappens.html> (address given at the University of Chicago Law School); Catherine MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT. L. 993 (2005). Catherine MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143 (1995).

²¹"Despite the accumulation of an exceedingly large body of literature on the effects of exposure to sexually explicit materials [cites omitted] and despite the efforts of no fewer than five commissions of inquiry on this subject appointed by the US [cites omitted] and Canadian [cites omitted] governments, conclusions concerning effects of exposure to sexually explicit materials remain elusive." Azy Barak & William A. Fisher, *Effects of Interactive Computer Erotica on Men's Attitudes and Behavior Toward Women: an Experimental Study*, 13 COMPUTERS IN HUM. BEHAV. 353, 354 (1997) (finding "use of computer pornography did not affect . . . attitudes or behavior toward women"); William A. Fisher & Guy Grenier, *Violent Pornography, Anti-Woman Thoughts, and Anti-Woman Acts: In Search of Reliable Effects*, 31 J. SEX RES. 23 (1994) (no reliable effects demonstrated). A meta-analysis of several studies in 2000 concluded that pornography may increase aggression toward women among men who already are aggressive, while having divergent effects on non-aggressive men. Neil M. Malamuth, Tamara Addison & Mary Koss, *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?* 11 ANN. REV. SEX RES. 26 (2000). Malamuth, lead author of the meta-analysis, previously had published his own conclusion that pornography's effect on aggression had been reliably demonstrated, and his own work was included in his meta-analysis.

old' discipline."²² Soldiers are required to salute a superior officer, not to be insubordinate, to wear a uniform on duty, to make their beds, and to comply with a host of other disciplinary rules.

By complying with these disciplinary rules before they go into combat, soldiers are supposed to become motivated to obey the orders given by their commanding officer and the rules of engagement established when they are in battle,²³ as required by military law.²⁴ They also are supposed to acquire the motivation to refrain from acts, such as torture of prisoners and unnecessary violence against non-combatants, that would violate the law of war,²⁵ and to refrain from acts of disloyalty or fear that would violate laws against treason,²⁶ desertion,²⁷ and, in the American military, numerous other provisions of the Uniform Code of Military Justice.²⁸

Events in the Middle East illustrate the importance of law as both a source of intrinsic control even within a command and control structure, and a source of instability. At Abu Ghraib, soldiers, indoctrinated to obey their superiors, tortured prisoners in accordance with what they thought were the rules of engagement: do anything you have to do to get prisoners to talk.²⁹ Similarly, Khalid Sheikh Mohammed beheaded Daniel Pearl (or so he claimed), and was proud of it, because a regimen of indoctrination³⁰ prescribed by the motivational law of the Muslim

²²SARA ELISE PHANG, *THE MARRIAGE OF ROMAN SOLDIERS (13 B.C.-A.D. 235): LAW AND FAMILY IN THE IMPERIAL ARMY* 325 (E.J. Brill, 2001).

²³MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 16 (1999). (discussing Aristotle's view that restraint in combat depends on soldiers' being of suitable temperament and disposition, and that "the dedicated exercise of a vocation cultivates within its conscientious practitioners . . . the virtues peculiar to it," which the author calls a process of "habituation").

²⁴For relevant offenses under American military law, see Arts. 88-92, Uniform Code of Military Justice, 10 U.S.C. §§ 888-892 [hereinafter U.C.M.J.].

²⁵The law of war generally is found in four documents: the Hague Conventions, Feb. 2, 1910, 36 Stat. 2259, 2277, and 2314; the Geneva Conventions, Feb. 2, 1956, 6 U.S.T. 3114, 3217, 3316, and 3516 and their 1977 Protocols, and the Conventional Weapons Treaty of 1980, 1342 U.N.T.S. 137. MICHAEL W. REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* (Vintage Books, 1st ed, 1994) These documents establish four basic principles: military necessity, distinction, proportionality, and humanity. A. P.V. ROGERS, *LAW ON THE BATTLEFIELD* 1-26 (Juris Publishing 2nd ed., 1996). Cf. Manuel E.F. Supervielle, *Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L. L. REV. 191 (2005) (arguing for mandatory education on the Islamic view of the law of war for U.S. soldiers sent to Iraq).

²⁶18 U.S.C. § 2381.

²⁷Art. 85, U.C.M.J., 10 U.S.C. § 885; *United States v. Gonzalez*, 42 M.J. 469 (C.A.A.F. 1995).

²⁸See Arts. 86 through 106a and 133, U.C.M.J., 10 U.S.C. §§ 886-906a and 933.

²⁹On a different version of the facts, if the soldiers knew or had reason to know that torture was prohibited by the rules of engagement, one could construe Abu Ghraib as a failure of motivational law. I do not mean to take sides regarding the specific facts of that incident.

³⁰On its official website, <http://www.ummah.net/ikhwan/> the Muslim Brotherhood states

Brotherhood, of which he was a member from the time he was 16,³¹ succeeded in motivating him to commit atrocities in compliance with that organization's version of Islamic law (*shari'a*) on the conduct of a holy war (*jihad*).

3. Religious Laws

Motivational law has ancient roots in law-based³² religions such as Islam and traditional Judaism, in which rules on liturgy and ritual and rules mandating religious dress, diet and holiday observance—rules with a motivational purpose³³—not only have kept religious communities intact, but have endowed their religious legal systems with great longevity and effectiveness. An Orthodox Jewish man's wearing ritual fringes on his clothing may be a cultural norm, but it is a norm with a motivational purpose³⁴ thrust upon Orthodox Jews by a 3,400-year-old Biblical injunction they regard as law.³⁵ Islam, too, is full of rules that mandate motivational practices to ward off the ever-present temptation to violate religious law.³⁶

that its members are indoctrinated to become “organized and self-struggling” through a regimen of “Islamic education (*tarbieh*),” which includes “*Halaqa* (a weekly unit study and practice meeting);” “*Katibah* (a monthly several-units-meeting);” a “trip”; “camp”; “course”; “workshop”; and “conference.” (last visited Nov. 15, 2007).

³¹See Christina Lamb, *Focus: The Confessions of Khalid Sheikh Mohammed*, SUNDAY TIMES, Nov 15, 2007, at 15, available at <http://www.timesonline.co.uk/tol/news/world/article1052662.ece?token=null&offset=0>.

³²Law-based religions identify the objective of one's life with compliance with a code of rules, established under divine authority. Traditional Judaism and Islam both have codes of law, even covering tort and contract law. In contrast, in faith- or mind-state-based religions, the objective of one's life is to gain immortality by achieving a certain state of consciousness. In the Protestant denominations of Christianity the state of consciousness is complete faith in Jesus as the savior from sin, and in Buddhism it is *satori* leading to *nirvana*. See *infra* notes 37-38.

³³Regarding the motivational purpose of Jewish liturgy, see ARNOLD S. ROSENBERG, *JEWISH LITURGY AS A SPIRITUAL SYSTEM* 4 (1997).

³⁴*Numbers* 15:38-39 (Schocken):

Speak to the Children of Israel and say to them that they are to make themselves tassels on the corners of their garments...that you may look at it and keep-in-mind all the commandments of YHWH and observe them, that you not go scouting-around after your heart, after your eyes which you go whoring after

Biblical translations in this article are from *The Schocken Bible: Volume I: The Five Books of Moses* (Everett Fox trans., 1995).

³⁵Historically, the practice of wearing knotted ritual fringes may have been derived from ancient Persian religion. Some Zoroastrians today continue to wear knotted cords, called *kusti*, as a reminder of their religious obligations. MARY BOYCE, *ZOROASTRIANS: THEIR RELIGIOUS BELIEFS AND PRACTICES* 31 (1979).

³⁶For instance, some ascribe to the requirement of *salat*, the five-times-daily prayer mandated by Islamic law, a rationale that resembles that of the knotted ritual fringes in Judaism and Zoroastrianism:

The constant guarding against disobedience [of Islamic law] and sins wakes you up for the morning prayer. *Salat* is not just what you say with your mouth and do with your limbs. It is a state of your heart. So when you do things in a day for God and avoid

Christianity is predominantly, though not exclusively, a faith-based religion. Roman Catholicism considers Old Testament motivational laws on religious dress and ritual to be non-binding,³⁷ and the Protestant denominations since Martin Luther have considered that one can be saved through faith in Jesus alone rather than through good works, though faith motivates people to perform good works.³⁸

other things because of Him, it means you're thinking about Him, and therefore it becomes easy for you to strive for Him against yourself and your desires.

Saba Mahmood, *Rehearsed Spontaneity and the Conventionality of Ritual: Disciplines of Salat*, 28 AM. ETHNOLOGIST 827, 831 (2001), quoting "Mona," a member of the Women's Mosque movement in Cairo.

³⁷The Catholic Church follows Thomas Aquinas, who classified the Old Testament laws on religious dress and ritual purity as "ceremonial" and therefore not binding, having been superseded by the new covenant ("New Law") of Jesus. See THOMAS AQUINAS, *SUMMA THEOLOGICA (PRIMA SECUNDAE PARTIS) Question 101* (2d ed. 1920) (online ed., Kevin Knight trans., 2006), available at <http://www.newadvent.org/summa/2101.htm>:

[T]he ceremonial precepts are those which refer to the worship of God. Now the Divine worship is twofold: internal, and external. For since man is composed of soul and body, each of these should be applied to the worship of God; the soul by an interior worship; the body by an outward worship: hence it is written (Psalms 83:3): "My heart and my flesh have rejoiced in the living God." And as the body is ordained to God through the soul, so the outward worship is ordained to the internal worship. Now interior worship consists in the soul being united to God by the intellect and affections. Wherefore according to the various ways in which the intellect and affections of the man who worships God are rightly united to God, his external actions are applied in various ways to the Divine worship. For in the state of future bliss, the human intellect will gaze on the Divine Truth in Itself. Wherefore the external worship will not consist in anything figurative, but solely in the praise of God, proceeding from the inward knowledge and affection, according to Is. 51:3: "Joy and gladness shall be found therein, thanksgiving and the voice of praise." But in the present state of life, we are unable to gaze on the Divine Truth in Itself, and we need the ray of Divine light to shine upon us under the form of certain sensible figures, as Dionysius states (*Coel. Hier.* i); in various ways, however, according to the various states of human knowledge. For under the Old Law, neither was the Divine Truth manifest in Itself, nor was the way leading to that manifestation as yet opened out, as the Apostle declares (Hebrews 9:8). Hence the external worship of the Old Law needed to be figurative not only of the future truth to be manifested in our heavenly country, but also of Christ, Who is the way leading to that heavenly manifestation.

But under the New Law this way is already revealed: and therefore it needs no longer to be foreshadowed as something future, but to be brought to our minds as something past or present: and the truth of the glory to come, which is not yet revealed, alone needs to be foreshadowed. This is what the Apostle says (Hebrews 11:1): "The Law has [Vulg.: 'having'] a shadow of the good things to come, not the very image of the things": for a shadow is less than an image; so that the image belongs to the New Law, but the shadow to the Old.

³⁸Martin Luther wrote:

Faith is a living, bold trust in God's grace, so certain of God's favor that it would risk death a thousand times trusting in it. Such confidence and knowledge of God's grace makes you happy, joyful and bold in your relationship to God and all creatures. The

Islamic societies in which motivational law is deeply ingrained clash with predominantly Christian democracies that do not use it as much and understand it even less.

Ancient religious rulemakers assumed that mandating rituals, liturgy or religious dress would increase compliance with other religious laws and bind the religious community together.³⁹ The Bush Administration's policy of funding "faith-based" social service organizations is rooted in a similar assumption, fed by studies funded and conducted by Christian conservative organizations,⁴⁰ that increased religious faith could increase compliance with law. However, the objective of law-based religions such as Judaism and Islam is not that the adherent should have faith or be saved through faith but that the adherent should comply with regulatory religious laws that govern his or her conduct vis-à-vis other people, nature and the divine.

Holy Spirit makes this happen through faith. Because of it, you freely, willingly and joyfully do good to everyone, serve everyone, suffer all kinds of things, love and praise the God who has shown you such grace. Thus, it is just as impossible to separate faith and works as it is to separate heat and light from fire!

63 DR. MARTIN LUTHER'S VERMISCHTE DEUTSCHE SCHRIFTEN 124-125 (Johann K. Irmischer ed., Robert E. Smith trans., 1854), available at <http://www.iclnet.org/pub/resources/text/wittenberg/luther/luther-faith.txt>.

³⁹For example, following the destruction of the Second Temple, Rabban Gamaliel II standardized the format of the *Amidah* ("Standing Prayer") as a substitute for Temple sacrifice, in order to make it more likely that the community would survive to restore compliance with divine commandments concerning sacrificial worship that required the return of the exiled Jews and rebuilding of the Temple. THE BABYLONIAN TALMUD, Berakhot 26b; ROSENBERG, *supra* note 33, at 75-76; ISMAR ELBOGEN, JEWISH LITURGY: A COMPREHENSIVE HISTORY 31-32, 201-02 (Raymond Scheindlin trans., 1993). See also Ezra Fleischer, *On the Beginnings of Obligatory Jewish Prayer*, 59 *TARBIZ* 397 (1990) (Hebrew); *The Shemone Esre: Its Character, Internal Order, Content and Goals*, 62 *TARBIZ* 179 (1992) (Hebrew); Reuven Kimelman, *The Daily Amidah and the Rhetoric of Redemption*, 79 *JEWISH. Q. REV.* 165 (1989); Leon J. Liebreich, *The Intermediate Benedictions of the Amidah*, 42 *JEWISH. Q. REV.* 423 (1952).

⁴⁰For example, *So Help Me God: Substance Abuse, Religion and Spirituality* was a 2001 study largely funded by the John Templeton Foundation and conducted by the National Center on Addiction and Substance Abuse, an organization, chaired by Joseph Califano, with a board of directors that included Columba Bush (wife of Gov. Jeb Bush), Kenneth Chenault, a prominent donor to conservative causes, and Nancy Reagan. The title of an article about Califano made the point: *Thou Shalt Not: Once a Presidential Adviser and Legal Heavyweight, Joe Califano Now is Thundering Against Drugs. And Woe Be to Those Who Doubt His Data or Get in His Way*. WASHINGTONIAN MAG. Oct., 1998, at 71. Another example is Byron R. Johnson, OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE (2002), http://www.manhattan-institute.org/html/crrucs-obj_hope.htm, which was dedicated "to the memory of Dr. David B. Larson, the pioneering leader of faith factor research." When doing "faith factor research," it is not likely that one will find "faith" not to be a factor. Dr. Johnson was "deluged with requests for...research to support . . . assertions by President Bush and other politicians that religious programs can transform . . . lives . . . , and that it can do so for less money than government programs." Laurie Goodstein, *Church-Based Projects Lack Data on Results* N. Y. TIMES, Apr. 24, 2001, at A12. Johnson was quoted as saying that "there is little reliable research proving the effectiveness of religious programs," a point that one has to glean from reading his cautiously-worded conclusions very carefully. Both studies were published independently rather than in peer-reviewed journals.

4. Censorship Laws

Authoritarian regimes use censorship laws to motivate citizens to comply with their commands. Most laws requiring censorship of the news have a motivational purpose in this sense.⁴¹ The statute of Nazi Germany requiring all healthy “Aryan” children over the age of nine to join the Hitler Youth⁴² served the motivational purpose of ensuring their indoctrination and obedience, as well as expanding the force of free child labor to support the German military and propaganda machines. The Ministry of Information of the People’s Republic of China currently censors Internet news services according to 2005 regulations, which give the purpose of censorship as to ensure news reports are “serving socialism,” “upholding the interests of the state,” and “correctly guiding public opinion.”⁴³

5. Credit Counseling Requirement for Consumer Bankruptcy

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) imposed new eligibility requirements for consumers who file Chapter 7 bankruptcy petitions.⁴⁴ The principal new requirement is the means test contained in Bankruptcy Code §707(b), but BAPCPA also requires that the debtor undergo credit counseling, both before and after the petition is filed.⁴⁵

⁴¹Of course, not all censorship of news is motivational. Military press censorship has the non-motivational function of withholding strategic information from the enemy. Cf. Jack A. Gottschalk, *Consistent with Security: a History of American Military Press Censorship*, 5 COMM. & L. 35 (1983). The several exceptions in the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b) (2000), exist for non-motivational purposes, rather than because release of the excepted information would endanger the legitimacy of the government.

[FOIA’s] basic policy of “full agency disclosure unless information is exempted under clearly delineated statutory language,” indeed focuses on the citizens’ right to be informed about “what their government is up to.” Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.

U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 773 (1989) (citations omitted).

⁴²Reich Youth Service Law, December 1939. See ALFONS HECK, A CHILD OF HITLER: GERMANY IN THE DAYS WHEN GOD WORE A SWASTIKA 7 (1985).

⁴³People’s Republic of China Ministry of Information and State Council, Rules on the Administration of Internet News Services (September 25, 2005). See Kristen Farrell, *Big Mamas are Watching: China’s Censorship of the Internet and the Strain on Freedom of Expression*, 15 MICH. ST. J. INT’L L. 577, 589 (2007).

⁴⁴Pub. L. 109-8, 119 Stat. 23 (2005).

⁴⁵With few exceptions, the debtor must have undergone a “briefing” by an approved budget and credit counseling agency within 180 days before filing the petition that covered the types of credit counseling programs available, and assisted the debtor in preparing a “related budget analysis”. 11 U.S.C. § 109(h) (2000). Approved pre-petition briefings must take at least 90 minutes. BAPCPA §104, codified at 11 U.S.C. § 342(b) (2000), also requires the clerk of the Bankruptcy Court to give notice to debtors of the “alternative” of credit counseling. After filing the petition, the debtor must complete “an instructional course concerning personal financial management” as a condition for discharge. 11 U.S.C. § 727(a)(11) (2000). See Karen Gross and Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management*

These eligibility requirements generally were intended to motivate consumer debtors to comply with their obligations under contract law to the extent possible rather than discharge them in bankruptcy:

[B]ankruptcy should not merely be a means of violating promises willy-nilly. A promise to repay money is an important legal and moral obligation, neither lightly to be undertaken nor lightly cast away. Filing bankruptcy represents a decision to repudiate promises made in exchange for goods, services, and other promises. Of such promises and reciprocity is the fabric of civil society woven.⁴⁶

Chapter 7 debtors with incomes above the state median now risk dismissal of their petitions for “abuse” under §707(b) unless they show their disposable income, calculated according to a formula based on living expense standards developed for tax collection purposes, would be insufficient to pay at least \$100 per month on their general unsecured debts, or if able to pay between \$100 and \$166, that over five years they still could not pay at least 25% of those debts. Debtors who flunk the means test must spend five years paying all of their disposable income to creditors under Chapter 13, or forego bankruptcy altogether.

The same motivational concept underlies credit counseling. The pre-bankruptcy “briefing” requirement can make bankruptcy impracticable where time is of the essence.⁴⁷ Post-bankruptcy financial management counseling is supposed to motivate the debtor to manage her finances so as to avoid future breaches of contract.⁴⁸

6. Prohibition of Abortion Counseling

The Missouri statute upheld by the United States Supreme Court in *Webster v. Reproductive Health Services*,⁴⁹ prohibiting abortion counseling for pregnant women, was intended to prevent the encouragement of abortion. Proponents of the legislation believed that women have a legal obligation to protect their unborn children which would be violated by an abortion, and that counseling by abortion advocates would motivate them to violate that obligation. Put another way, the purpose of the Missouri statute was to prevent interference with motivation on the part of pregnant women to comply with a perceived obligation to protect the fetus.

Education, 13 AM. BANKR. INST. L. REV. 549 (2005).

⁴⁶Edith H. Jones and Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 181 (1999).

⁴⁷*See, e.g.*, In re Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005) (dismissing petition where debtor failed to satisfy the pre-bankruptcy “briefing” requirement of § 109(h), though a foreclosure sale of her home was scheduled for the same day that she filed her petition).

⁴⁸Gross and Block-Lieb, *supra* note 45, at 549 (stating that the purpose of credit counseling requirement in BAPCPA was to give debtors “the financial knowledge or insights to make better choices in the consumer financial markets after their cases were closed”).

⁴⁹*Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

7. Rehabilitation in the Criminal Justice System

Laws aimed at rehabilitating offenders have an obvious motivational function. Rehabilitation recently has seen a resurgence as an objective in criminal justice, particularly in the juvenile justice system,⁵⁰ with the establishment of specialized courts that have a rehabilitative focus, attempting to motivate juveniles with drug problems, for example, to refrain from further violations of anti-drug laws and laws prohibiting crimes they committed, such as robbery and burglary, to feed their drug habit.⁵¹ Some states have gone so far as to enact statutes establishing what they call “motivational boot camps” for offenders.⁵²

Motivational law also has crept into sentencing in recent years as trial judges have devised creative approaches that incorporate motivational techniques in order to prevent recidivism. One such technique is formal shaming, by such measures as requiring defendants convicted of drunk driving to place signs on their cars identifying them as convicted drunk drivers.⁵³ Where formal shaming is imposed with the intent to change the mind of the defendant and instill motivation to comply with the law, it is a form of motivational law. For instance, convicted felons may be forced to have ongoing interaction with their victims or others harmed by their conduct in the hope that they will be sensitized to the consequences of their crimes and avoid them in the future. Such sentencing practices may be justified as rehabilitative,⁵⁴ but whether formal shaming works will depend largely on whether the individual is a member of a group whose opinion of his behavior matters to him, whether that group’s conduct toward the individual is altered by knowledge of his crime, and whether the individual has a means of redeeming himself in the eyes of the group through compliance with the law.⁵⁵

8. Motivational Rules in the Common Law

As discussed above, the requirement of consideration to form a contract possesses a motivational function.⁵⁶ It is not alone; other common law rules also serve motivational purposes. For example, the rule of evidence law making evidence of subsequent remedial measures inadmissible in tort cases to prove negligence or culpability originated in the English chancery courts to avoid “hold[ing] out an inducement for continued negligence,”⁵⁷ *i.e.*, to avoid motivating past tortfeasors to

⁵⁰Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951 (2006).

⁵¹*Id.* at 954.

⁵²*See, e.g.*, 61 PA. STAT. ANN. § 1121 (Supp. 1998); Pa. Dep’t of Corrs. v. Yeskey, 524 U.S. 206 (1998).

⁵³Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1990).

⁵⁴*Id.* at 1894-1895.

⁵⁵*Id.* at 1888.

⁵⁶*See supra* note 9, at 1.

⁵⁷*Columbia & P.S.R. R.R. Co. v. Hawthorne*, 144 U.S. 202 (1892) (citing *Hart v. Ry. Co.*, 16 N.W. 358, 359 (1883)); 2 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §283, 175 (James H. Chadbourne ed., 1979). *See also* FED. R. EVID. 407.

breach their duty to exercise due care in the future. Like consideration, livery of seisin in property law, the required formalities to make a will, and the use of a seal as a substitute for consideration all performed motivational functions in addition to their evidentiary functions, attempting to drive home to the parties the seriousness of what they were doing in order to ensure they were motivated to comply with the legal duties they were undertaking, or in the case of a will, to encourage them to ensure that their named executor and beneficiaries were motivated to comply with the duties they were imposing and to accept the allocation of rights among them under the will.

9. Monarchical Privileges

Absolute monarchies have relied on motivational law since antiquity. In ancient Persia, the visitor had to prostrate himself for, kneel in front of, bow for or blow a kiss to the king. The Greeks originally observed such rules only for gods, but beginning in the 4th century B.C. various Greek rulers, including the rulers of Syracuse, then the largest and most powerful of the city-states, and later Alexander the Great himself, declared themselves gods and imposed similar requirements to motivate their subjects to obey the laws they dictated.⁵⁸

Laws regarding the privileges and pomp of modern constitutional monarchies are a vestige of these ancient practices intended to motivate compliance with the ruler's commands. The institution of royalty in a constitutional or parliamentary monarchical system today performs primarily a motivational function.⁵⁹ Laws that command public respect for the position of the Queen of England are supposed to fortify the inclination of her subjects to comply with the laws enacted by her government.⁶⁰

10. Procedural Due Process

In a broad sense, the Due Process Clause of the Fifth Amendment of the United States Constitution is an example of motivational law. Authorities generally are regarded as having the right to dictate behavior if their claim of this right derives from a process regarded as fair, and if their past efforts at dictating behavior had outcomes regarded as fair. For example, citizens more willingly accept the outcomes

⁵⁸See Jona Lendering, *Alexander the God*, http://www.livius.org/aj-al/alexander/alexander_z3.html (last visited Oct. 24, 2007). See also *Praise Poem of Shulgi*, <http://earth-history.com/Sumer/sumer-poem-shulgi.htm> (last visited Oct. 24, 2007) (ancient Sumer, over 4,500 years ago).

⁵⁹One commentator on a BBC News program regarding whether to abolish the monarchy made the following connection between motivation and the institution of the monarchy:

Republics are very sterile, where you don't look to the head of state with any kind of affection. If you saw the candidates at the last Irish presidential election you would understand, there was no passion and even a little apathy about the choice. The monarchy is instantly recognisable across the world and a great reflection of historical stability.

Talking Point: What's the Enduring Appeal of the Royal Family? (BBC Television Broadcast Aug. 9, 2000) available at http://news.bbc.co.uk/1/hi/talking_point/843408.stm.

⁶⁰For example, new citizens in the U.K. must take an oath of allegiance to the Queen. Nationality, Immigration & Asylum Act, 2002, c. 41, § 3, sched. 1 (Eng.). Practicing any harm to, or slandering, the King, Queen or heirs apparent is considered high treason and is punishable by life imprisonment. Crime & Disorder Act, 1998, c. 37, § 36 (Eng.).

of litigation and comply with court orders if the court that issues those orders has a track record of issuing orders regarded as just and follows procedures generally regarded as consistent with norms of fairness.⁶¹ The same rules of procedure that make the judicial system fair, or at least give it the appearance of fairness, also motivate citizens to comply with the orders and judgments that are the system's output.

C. Motivational Law in Legal Theory

H.L.A. Hart famously distinguished between primary "duty-imposing" rules and secondary "power-conferring" rules, and located the "central elements" of law in the interplay between these two kinds of rules.⁶² Hart's theory of law performs poorly, however, in identifying the central elements of motivational law.

Many motivational laws are primary rules by Hart's definition because they require human beings "to do or abstain from certain actions, whether they wish to or not,"⁶³ yet compelling the actions they enjoin people to do or abstain from doing is secondary to their overall purpose. Wearing *tzitzit*, ritual fringes, for example, is a primary rule in Jewish law; a Jewish man is obligated to wear them whether he wishes to or not. Yet, the principal objective of the rule on wearing *tzitzit* is to motivate people to perform divine commandments, or *mitzvot*. A Jewish man who wears *tzitzit* but performs no other commandments has fulfilled the letter of the primary rule but frustrated its purpose.

Moreover, many of the 613 divine commandments in the Torah (Five Books of Moses) would be neither primary nor secondary rules according to Hart, since they neither impose a duty nor give powers to people.⁶⁴ Rather, they are mere exhortations to do things that one is, in Hart's terminology, "obliged" rather than "obligated" to perform. For example, Deuteronomy provides that if one goes to war, one should not fear his enemies,⁶⁵ and it commands people to "love God"⁶⁶ and imitate God's good and upright ways.⁶⁷ Fear is natural in war, the commandment is just an exhortation to try to overcome it, and one can never say she has loved God or imitated God's ways sufficiently to have satisfied the commandment to do so. Under Hart's analysis these "commandments" are not even rules, yet the commandment to wear *tzitzit* to remind oneself to perform those non-rules is a primary rule.

Other motivational laws would be secondary rules in Hart's analysis. The common law does not compel a party to enter into a contract, it just empowers it to do so by, *inter alia*, complying with the formality of consideration. But the purpose of the formality, apart from its evidentiary and channeling functions, is to motivate contracting parties to be serious about promises, and by virtue of that seriousness, to

⁶¹TYLER, *supra* note 3.

⁶²H.L.A. HART, THE CONCEPT OF LAW 81, 240 (1997).

⁶³*Id.* at 81.

⁶⁴HART, *supra* note 62, at 81. For a complete list of the 613 commandments organized by subject-matter, see <http://www.jewfaq.org/613.htm>.

⁶⁵Deuteronomy 3:22, 7:21, 20:3, 20:4 (Schocken).

⁶⁶Deuteronomy 6:5 (Schocken).

⁶⁷Deuteronomy 28:9 (Schocken).

comply with the obligations they assume under contract law. Secondary rules can perform a motivational function just as primary rules can, but this identity of function is lost in Hart's dichotomy of laws.

According to Lon Fuller's functionalist conception of law⁶⁸ and the more recent legal pluralist theories, motivational laws would qualify as laws. In Fuller's theory, laws must satisfy seven conditions: they must be expressed in general yet understandable terms; publicly promulgated; prospective in effect; consistent with one another; not require conduct beyond the powers of the affected parties; not be changed so frequently that the subject cannot rely on them; and administered consistently with their wording.⁶⁹ Motivational laws are generally capable of satisfying these conditions but are no different from regulatory laws in these respects. As in Hart's case, the lack of a distinction in Fuller's theory obscures the distinction between motivational law and regulatory law in practice.

Motivational laws are particularly common among religions and in industry self-regulation. Lacking coercive power, most religious institutions and trade organizations must find alternative sources of motivation to achieve compliance with their rules. Are religious laws, industry codes, and other non-governmental rules that perform a motivational function "laws" even though they are not enacted by the sovereign authority? Hart would deny that a rule can be "law" when it is not promulgated by a sovereign whose orders are habitually obeyed.⁷⁰ Weber and Durkheim would characterize them as norms. Yet, functionally they may be any of the above, or all of them.

Non-governmental rules such as industry codes and religious laws easily qualify as "law" in legal pluralist theory, in which the quest for "law" is a largely semantic endeavor.

An "extended" view of legal pluralism points out that . . . in contemporary societies there are a range . . . rule systems, normative orderings and symbolic meaning systems that should, or could, also be described as "law". Families, corporations, ethnic and religious groups, friendship groups and many other 'semi-autonomous social fields' can all 'generate rules and customs and symbols internally' that influence people's behaviour and consciousness as much, or more, than does the official law.⁷¹

In the view of legal positivists, motivation for compliance makes no difference in determining whether a rule or principle is "law". Consider *hijab*, Islamic law requiring modesty in dress. *Hijab* is normative in many parts of the Islamic world, but it also is a set of rules based on interpretations of passages of the *Qu'ran*⁷² and

⁶⁸See LON L. FULLER, *THE MORALITY OF LAW* 46-91 (2d ed. 1969).

⁶⁹*Id.* at 46-91.

⁷⁰HART, *supra* note 62, at 44-49; *id.* at 50 (devoting considerable attention to what is meant by "habit" and "obedience").

⁷¹Parker, *supra* note 13, at 3-4 (citing D.J. GALLIGAN, *LAW IN MODERN SOCIETY* 173-192 (Clarendon Law Series, 2007)); See also Tamanaha, *supra* note 13, at 298; Black, *supra* note 13, at 134-35; Merry, *supra* note 13, at 886-88.

⁷²*Qu'ran* 33:59 ("believing women" told to "cast their outer garments over their persons . .

the *Hadith*,⁷³ backed by a threat of divine punishment for non-compliance. By Austin's classic definition of "law" as a command backed by a threat of a sanction,⁷⁴ Islamic rules regarding *hijab* are law, whether or not the woman to whom the command is directed believes in the divine sanctions that are the only possible formal punishment. Legal pluralism, too, renders motivation irrelevant; just about any rule, principle, norm or custom is "law."

D. Motivational Law's Boundaries

A command coupled with a threat of sanctions is motivational in that the purpose of the threat is to instill motivation to comply. However, by my definition,⁷⁵ "murder is a felony punishable by life in prison" is a regulatory rather than motivational law because its purpose or function is to regulate human behavior by making murder illegal, not to motivate compliance with another law.

Psychologists disagree on how to define "motivation."⁷⁶ One concise and comprehensible definition is the "drives, urges, wishes, or desires which initiate . . .

. . . that they should be known (as such) and not molested"); *Qu'ran* 33:32 (wives of the Prophet told "if you fear God, do not be too complacent in your speech, lest the lecherous-hearted should lust after you. Talk with such people in plain and simple words. Abide still in your homes and do not display your finery as women used to do in the days of ignorance. Attend to your prayers, give alms and obey God and His Messenger. O woman of this house, the Almighty wants to cleanse you from the filth [these hypocrites want to besmear you with] and to fully purify you"); *Surah an-Nurayah* 31 (enjoining women to dress modestly except in the presence of close relatives, small children "to whom the nakedness of women is not apparent," and "followers from the men who do not feel sexual desire")

⁷³The authoritative *Hadith* of *Sahih Bukhari* provides the most widely accepted source for *hijab*. It says, "My Lord agreed with me ('Umar) in three things . . . (2) And as regards the veiling of women, I said 'O Allah's Apostle! I wish you ordered your wives to cover themselves from the men because good and bad ones talk to them.' So the verse of the veiling of the women was revealed." BUKHARI, Vol. 1, Book 8, *Sunnah* 395. SUNAN ABU DAWUD, Vol. 3, Book XXVII, Ch. 1535, Hadith No. 4092 is also cited: "A'isha said: Asma', daughter of Abu Bakr, entered upon the Apostle of Allah (May peace be upon him) wearing thin clothes. The Apostle of Allah (peace be upon him) turned his attention from her. He said: O Asma', when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to her face and hands."

⁷⁴JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 14-15 (David Campbell & Philip Thomas eds., 1998). Austin, writing in the early 1830s, and following Bentham, was attempting to give a definition of law that was not loaded with moral judgments, law as it is rather than law as it should be. A law, which actually exists, is a law, though we happen to dislike it. *Id.* at 184-85. Natural law philosophers, in contrast, postulated the existence of a divine law, sometimes consistent with earthly legislation and sometimes not. In this context, Austin's definition actually broadened the notion of law from those earthly enactments that were consistent with divine law or morals, to include those that were not. He was careful to add that the promise of a reward is not a "sanction," therefore legislation that promised a reward for obeying a command, but lacked a threat of punishment for violating it, was not a "law." *Id.*

⁷⁵See Part II.A of the text.

⁷⁶A 1981 study catalogued a total of 102 different definitions of "motivation" used in psychology. Paul R. Kleinginna & Anne M. Kleinginna, *A Categorized List of Motivation Definitions, With a Suggestion for a Consensual Definition*, 5 *MOTIVATION & EMOTION* 263, 273-87 (1981). See also Richard A. Littman, *Motives, History and Causes*, in NEBRASKA

“behavior”.”⁷⁷ Laws can instill the drive, urge, wish and desire to comply with other laws in three ways other than deterrence: by creating incentives or the perception of incentives for compliance with other laws, making it easier or more feasible for people to comply with other laws, or mandating or inducing people to act in ways that make them more likely to comply with other laws.

Incentives need not be tangible; they can be religious rewards.⁷⁸ Another instrumental form of motivational law is laws that place in people’s hands the means to comply with other laws, such as laws mandating publicity and educational campaigns to promote compliance with new statutes or administrative regulations and laws appropriating funds to facilitate compliance with previously unfunded legal mandates. Congress takes motivation into account continually when it appropriates funds for public education and advertising campaigns to promote compliance with statutory obligations.⁷⁹ The federal government spends over \$1 billion annually for advertising.⁸⁰

Motivational laws may mandate or facilitate actions to heighten the perception of legitimacy, or mandate or facilitate actions that heighten the normative influence of a reference group or community to comply with laws or rules consistent with, or expressive of, the norms of the group or community.⁸¹ Motivational laws also can

SYMPOSIUM ON MOTIVATION: 1958 114, 136-37,(Marshall R. Jones ed., 6th vol. 1970) (1958). A Google search for a definition of “motivation,” http://www.google.com/search?hl=en&defl=en&q=define:MOTIVATION&sa=X&oi=glossary_definition&ct=title, conducted on April 15, 2007, yielded 30 definitions. Among the best and simplest: “desire to accomplish a goal or participate in an endeavor;” “feelings that drive someone toward a particular objective;” and “the need or desire that determines an individual’s effort, behaviors and actions.”

⁷⁷James A. Bayton, *Motivation, Cognition, Learning: Basic Factors in Human Behavior*, 22 J. MKTG. 282, 282 (1958).

⁷⁸The Bible says God rewards goodness—performing God’s commandments - “unto the thousandth generation.” *Exodus* 20:6 (Schocken). And the Qu’ran says “martyrs” (*shahadeh*) “will be with . . . goodly” women who have “obey[ed] Allah and the Apostle.” *Qu’ran* 4:69. Of course, what constitutes “martyrdom” is hotly contested within Islam and is beyond the scope of this paper.

⁷⁹Typical examples abound. *See, e.g.*, S. 1139, 108th Cong. §2(b) (2003) (mandating a compliance campaign focused on reducing alcohol-impaired driving and increasing seat belt use); H.R. 4747, 108th Cong. §6 (2004) (proposing ten million dollars for education regarding the Dietary Supplement Health and Education Act of 1994 through “public education forums, advertising, and the Internet”).

⁸⁰KEVIN R. KOSAR, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, PUBLIC RELATIONS & PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES at n.29 (2005), available at <http://www.fas.org/sgp/crs/misc/RL32750.pdf> (citing KEVIN R. KOSAR, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, GOVERNMENT ADVERTISING EXPENDITURES: AN OVERVIEW (2004)). In addition, federal agencies contracted out \$88 million for public relations services. *Id.* at 8. Federal funding for publicity is normally supposed to promote compliance with law; appropriations laws for roughly the past fifty years have included a provision that prohibits expenditure of funds “for propaganda and publicity purposes not authorized by Congress.” *Id.* at 5.

⁸¹*See* David Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts and Karma in Thailand*, 30 LAW & SOC. INQUIRY 469 (2005) (showing a decline in legal consciousness corresponding to a sense of powerlessness due, *inter alia*, to the perception of increased corruption in the Thai judicial system).

function through legal consciousness, by raising awareness of legal rights and obligations.⁸² While motivational laws promote a consciousness of duties under religious law, they do not necessarily lead to increased consciousness of legal rights under secular law. In fact, religious forms of discourse and religious grounds are sometimes used by religious adherents to rationalize the conscious decision to refrain from exercising legal rights they possess under secular law.⁸³

Laws that mandate or facilitate acts that heighten the normative influence of a reference group or community to comply with laws or rules consistent with, or expressive of, the norms of the group or community include laws that promote group cohesion and allegiance to the group. Religious laws promoting a sense of spiritual community or religious identity in turn motivate individual members of the group to do what they perceive will enhance their reputation within the group.⁸⁴ Laws on national independence celebrations or recital of a national anthem have the purpose of heightening the influence of the community on individuals to promote compliance with other laws that require citizens to perform civic duties such as military service,

⁸²The term “legal consciousness” is used loosely in scholarship. Some use the phrase to refer to attitudes about law. See, e.g., Loretta J. Stalans & Karyl A. Kinsey, *Self-presentation and Legal Socialization in Society: Available Messages About Personal Tax Audits*, 28 *LAW & SOC’Y REV.* 859 (1994) (discussing legal consciousness as the degree to which the rule of law is part of the socialization and habits of the population, in the sense that law is injected into daily routine and thereby structures social interaction). Others discuss legal consciousness as a normative consensus about law and fairness. See TYLER, *supra* note 3; CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, & COMMUNITY IN AN AMERICAN TOWN* (Roger Sanjek ed., 1986); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). Still others use “legal consciousness” to refer to the ways in which people discuss or experience law. See, e.g., PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (William O’Barr & John M. Conley eds., 1998); JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (William O’Barr & John M. Conley eds., 1990). I use the term as Stalans & Kinsey define it.

⁸³To illustrate this point, consider what David Engel characterized as a decline of legal consciousness in northern Thailand. Engel, *supra* note 81, at 469. During the period between 1975, when he conducted initial field research, and 1998 through 2004 when he conducted a second study, he found tort victims in Chiangmai had become less inclined to pursue judicial remedies and tended to rationalize their decisions through Buddhist teachings. *Id.* at 469- 472. He attributed this disinclination to globalization. *Id.* Engel’s data, however, reflect not that his subjects had become less conscious of their legal rights, but less motivated to pursue legal remedies. They used religious language and precepts to rationalize what were pragmatic decisions in light of the cost and corruption of the local judicial system. Engel’s results also may have been influenced by the religion he chose to study, because Buddhism, above most other religions, stresses mind-state rather than compliance with laws that govern worldly conduct.

⁸⁴An example is the requirement in Judaism of a *minyan*, a group of ten adults that is a requisite for formal prayer. Mourners cannot perform their obligation under religious law to recite the mourner’s prayer (*Kaddish Yatom*) without a *minyan*. See ABRAHAM MILLGRAM, *JEWISH WORSHIP* 155 (1971); ROSENBERG, *supra* note 33, at 50. The *minyan* requirement both reinforces the community and satisfies the need of mourners to be assuaged. *Id.* Analogous laws in other religions require individuals to have a spiritual advisor or mentor or to participate in group missionary work.

jury duty, or voting in elections, and to comply with laws prohibiting acts against the national security.

Where rules coincide with social norms, motivation comes from the same sources as the norms: education, family life, peer group influence. Norms function through inculcated self-regulatory mechanisms,⁸⁵ such as internalized moral principles.⁸⁶ Because norms are held by a peer or reference group, compliance with norms also may be driven by fear that one will be punished, shamed or shunned by that group if she fails to comply with its norms; though norms usually act to increase motivation, they may be enforced through extrinsic control where motivation is lacking.⁸⁷

However, norms are an imperfect source of motivation for intrinsic control. They are not universally and thoroughly inculcated in people, that is why society has its rebels, misfits, and ne'er-do-wells who are motivated to violate norms. Moreover, laws and norms are not always consistent with each other. One need only consider the laws banning marijuana use to acknowledge this truism.

Legitimacy is another source of motivation for intrinsic control.⁸⁸ Tyler's classic study of the legitimacy of the court system⁸⁹ showed that people are more willing to comply with a law or recognize the validity of a decision, even against self-interest, if they believe the law or decision was arrived at in a procedurally just fashion in which those affected were afforded a fair chance to be heard and like cases were treated alike. However, people's trust in authority figures or institutions may falter, or, as in the case of highway speed limits, a norm—e.g., "it's okay to go ten miles over the limit, everyone else does"—or personal need or convenience may dictate non-compliance with rules despite the legitimacy of the institution that made the rule.

Motivational law both reinforces other sources of motivation for intrinsic control and may fill the gap where other sources of motivation prove inadequate to bring

⁸⁵See Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457, 462-63 (2007); TYLER, *supra* note 3, at 165.

⁸⁶*Cf.* W. Bradley Wendel, *Morality, Motivation and the Professionalism Movement*, 52 S.C. L. REV. 557, 593 (2001).

⁸⁷See Note, *Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2207 (2003) ("Shaming can be a cheaper and more effective punishment than imprisonment for low-level offenders."); Christopher S. Elmendorf, *Ideas, Incentives, Gifts and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 461 n.215 (2003) (summarizing social psychological studies of the importance of reference and peer group influence in social control). The effectiveness of shunning or the threat of shunning in motivating behavior probably has neurobiological underpinnings. *Cf.* Naomi I. Eisenberger, Matthew D. Lieberman, & Kipling D. Williams, *Does Rejection Hurt?: An fMRI Study of Social Exclusion*, SCIENCE, Oct. 10, 2003, at 290 (finding emotional pain experienced due to social exclusion involves the same portions of the brain as physical pain).

⁸⁸See Richard Fallon, *Legitimacy and The Constitution*, 118 HARV. L. REV. 1787, 1852-53 (2005); *see also* Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159, 160 (2007).

⁸⁹TYLER, *supra* note 3, 20-22, and authorities cited by Tyler. Tyler's later work has given more detailed guidance regarding those factors that contribute to the perception of fairness.

about compliance or tend to induce non-compliance. Norms and legitimacy may drive compliance with laws that are consistent with normative behavior and imposed by a trusted authority, but laws can either reinforce or counteract normative influences by creating incentives or the perception of incentives for compliance, making it easier or more feasible for people to comply, reinforcing trust in the source of the law, or mandating or inducing people to act in ways that make them more inclined to comply.

III. HOW MOTIVATIONAL LAW WORKS

A. *Motivational Law as Intrinsic Social Control*

Macchiavelli observed that governments cannot govern without the goodwill of their subjects.⁹⁰ Tom R. Tyler has echoed this insight: “[T]he viability of legal authorities in a democratic society depends upon their ability to secure *voluntary* compliance with the law. . . . The legal system has, at best, a limited ability to compel people to obey the law and is heavily dependent on widespread voluntary cooperation with judicial directives.”⁹¹

Tyler and others have distinguished extrinsic from intrinsic social controls.⁹² Extrinsic, or instrumental, controls include traditional command-and-control structures which function through sanctions and the threat of sanctions, and sometimes through reward and the promise of reward. Intrinsic controls function through the self-motivation of citizens to comply with rules, independent of sanctions or reward.

Command-and-control structures strain available resources; pointing guns at people to coerce compliance demands reliable manpower and firepower, and governments cannot point guns at all of their citizens, all the time. Extrinsic controls cannot succeed in the absence of some degree of intrinsic control. Intrinsic controls back up extrinsic controls when extrinsic controls fail, and reduce the likelihood that they will fail.

Motivational law is central to this back-up system of intrinsic controls. It is supposed to increase motivation to comply with regulatory law, but what motivates compliance with the motivational law? If motivational law merely shifted a government’s gun-pointing from coercing compliance with one type of law I have called “regulatory” to coercing compliance with another type of law called “motivational,” motivational law would make little sense. One answer is that motivational law increases the probability of compliance with regulatory law by increasing the number of ways in which, and often, the number of persons through whom, compliance can be achieved.

As an example, women’s compliance with the motivational laws of *hijab* is supposed to protect them by affecting men’s behavior, causing men to be more

⁹⁰See NICCOLO MACHIAVELLI, *THE PRINCE* Ch. III (Harvey C. Mansfield trans., Univ. of Chicago Press 2d ed. 1998) (“Although one may be very strong in armed forces, yet in entering a province one has always need of the goodwill of the natives.”).

⁹¹Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 *LAW & SOC. INQ.* 983, 984 (2000) (emphasis in the original).

⁹²For a recent summary of the literature drawing this distinction, see Tyler, Callahan & Frost, *supra* note 85, at 461-63.

motivated to obey laws against adultery, rape and sexual abuse, which according to my definition are “regulatory” laws.⁹³ A Muslim woman might be motivated to comply with the rules of *hijab* because she genuinely feels that compliance will protect her from rape and abuse, but she could have several other motives. She might otherwise risk punishment by her government, as in theocratic Iran, or believe she would be punished by Allah. She might comply because she fears shunning, as a statement of her ethnic identity, or because she believes in the legitimacy of Allah’s wisdom and that Allah’s purpose in commanding her to comply with *hijab* is irrelevant. She might comply with *hijab* because she is motivated by her compliance with other motivational laws such as *salat* (the Islamic prayer ritual repeated five times daily), by habit, or by self-interest, *e.g.*, protection from the sun.

Why, then, use *hijab* as motivational law, rather than simply relying on threat of punishment, Allah’s legitimacy, fear of community rejection, habit or self-interest to obtain compliance with Islamic laws on extramarital sex, rape and sexual abuse? Men may not respond to threats of punishment, they may not believe in Allah or in the likelihood of divine punishment (or that belief might be insufficient deterrent to affect their behavior), and community rejection, habit and self-interest often fail to prevent sexual abuse and other conduct targeted by the laws of *hijab*. *Hijab* is supposed to provide a second set of controls if men otherwise cannot control themselves.

B. Psychological Mechanisms of Motivational Law

1. Cognitive Dissonance

Behavioral and cognitive reasons for compliance include behavioral conditioning, *e.g.*, if the law mandates conduct which individuals have learned to regard as normative or that has become habitual, or otherwise embedded in the subconscious mind,⁹⁴ and neural structure,⁹⁵ if the law mandates behaviors consistent with those selected by the cognitive and decision-making apparatuses of the human brain under similar circumstances.⁹⁶

⁹³See text at note 73.

⁹⁴See Jeremy Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155 (2005); Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425 (2005); MICHAEL A. BISHOP & J.D. TROUT, *EPISTEMOLOGY AND THE PSYCHOLOGY OF HUMAN JUDGMENT* (2005); Alfred F. MacKay, *Human Motivation: The Inadequacy of Economists’ Models*, 10 HOFSTRA L. REV. 441 (1981).

⁹⁵Neuroeconomics is casting new light on how the functioning of the brain affects the perception and efficacy of deterrents and rewards. See generally John Cassidy, *Mind Games: What Neuroeconomics Tells Us About Money and the Brain*, NEW YORKER, Sept. 18, 2006, at 30; STEVEN R. QUARTZ & TERRENCE J. SEJNOWSKI, *LIARS, LOVERS AND HEROES: WHAT THE NEW BRAIN SCIENCE REVEALS ABOUT HOW WE BECOME WHO WE ARE* (2002); PAUL W. GLIMCHER, *DECISIONS, UNCERTAINTY AND THE BRAIN: THE SCIENCE OF NEUROECONOMICS* (2003).

⁹⁶See Terrence Chorvat & Kevin McCabe, *Neuroeconomics and Rationality*, 80 CHI-KENT L. REV. 1235, 1252 (2005); Terrence Chorvat, Kevin McCabe & Vernon Smith, *Law and Neuroeconomics*, 13 SUP. CT. ECON. REV. 35, 54-61 (2005); Peter A. Alces, *On Discovering Doctrine: “Justice” in Contract Agreement*, 83 WASH. U. L. Q. 471, 477-78

Cognitive dissonance may be the key cognitive mechanism at work in motivational law. According to Festinger's original theory of cognitive dissonance,⁹⁷ cognitive inconsistencies of sufficient magnitude induce an aversive motivational state—cognitive dissonance—in which an individual will attempt to alter his or her cognition or behavior so as to reduce the inconsistency. More recent studies suggest cognitive discrepancy motivates people committed to a behavior or belief to engage in information processing that supports their commitment. The discrepancy undermines the potential for effective action consistent with the commitment, in that action undertaken in a conflicted mind-state is not likely to be as effective as action undertaken in a condition of certainty.⁹⁸ If dissonant information overcomes a certain threshold, the level of which depends on the strength of the commitment and the volume and strength of the non-dissonant information, the individual will be motivated to alter her behavior or belief.⁹⁹

Motivational laws function in a number of ways that can be explained in terms of cognitive dissonance theory. Some work by screening out discrepant information. Political censorship laws are supposed to screen out discrepant information and enable propaganda and indoctrination to build commitment to actions consistent with those mandated by the regime, and belief supporting that commitment. Obscenity laws and religious laws such as *hijab* are supposed to prevent emotional arousal from visual stimuli. They also, in theory, enable religious institutions and other sources of moral instruction to build commitment to beliefs that upon arousal, would create dissonance and thereby restrain abusive action. The consideration requirement for formation of a contract is supposed to create a discrepancy between one's act in signing a contract that pronounces its seriousness through the recital of consideration, and any internal reservations about the seriousness of that act, so that if a party to a contract in the process of formation harbors such reservations, he or she will be motivated to take some action to reduce or eliminate the discrepancy, e.g., by disclosing those reservations or declining to sign the contract. Similarly, military disciplinary rules are supposed to create a commitment to—indeed, a habit of—obeying orders that is sufficiently powerful to motivate soldiers to do so even in the face of information in battle that seems to make such obedience foolhardy.

Motivational law has a built-in advantage as a tool to build commitment to compliance with regulatory laws, to the extent it is enforceable by sanctions. Motivational law takes advantage of the motivation created by the threat of sanctions to build commitment to a motivational behavior that, in turn, builds commitment to the behavior that is the objective of regulatory law. For instance, if a soldier fails to salute a superior officer, the soldier may be punished. The threat of punishment

(2005); Nina Mazar & Dan Ariely, *Dishonesty in Everyday Life and Its Policy Implications*, 2006 J. PUB. POL'Y & MKTG. 117 (2006).

⁹⁷LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

⁹⁸Eddie Harmon-Jones, *A Cognitive Dissonance Theory Perspective on Persuasion*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 99, 107 (James Price Dillard & Michael Pfau eds., 2002). The neural bases for cognitive dissonance theory are further explored in a recent collection of articles on the subject. EDDIE HARMON-JONES & PIOTR WINKIELMAN, SOCIAL NEUROSCIENCE: INTEGRATING BIOLOGICAL AND PSYCHOLOGICAL EXPLANATIONS OF SOCIAL BEHAVIOR (Eddie Harmon-Jones & Piotr Winkielman eds., 2007).

⁹⁹Harmon-Jones, *supra* note 98, at 107.

motivates soldiers to salute, and saluting, in turn, builds commitment to compliance with the orders of the officers whom they salute. Disobeying someone whom one regularly salutes, on pain of punishment for failure to salute, would create significant cognitive dissonance, so soldiers will be motivated instead to engage in information processing that supports their commitment to compliance.

Cognitive dissonance, however, also can weaken compliance with motivational law. For example, speed limits on the highways have a motivational function. Many highways designed to safely accommodate traffic moving at 80 m.p.h. are posted with 55 or 60 m.p.h. speed limits, ostensibly for the purpose of ensuring that drivers do not drive at an unsafe speed and thereby endanger others. However, drivers going 70 m.p.h. know, or at least, believe based on their perception of the highway itself that their speed is not really unsafe. Even traffic officers share this belief, so they typically choose to ticket drivers whose speed is more than five or ten m.p.h. beyond the speed limit rather than drivers two or three m.p.h. over the limit. The motivational speed limits are ignored due to the dissonance created by the discrepancy between designed-for-80 and speed-limit-60.

2. Shaming, Moral Community-Building, and Regulatory Communities

Empirical evidence points, albeit equivocally, to the “moral community” or “reference group” as a key element in the functioning of motivational law.¹⁰⁰ Studies in regulatory theory have revealed that shaming and the threat of shaming appear to function better as a deterrent than the threat of physical punishment, but the threat of shaming alters behavior only if the individual is concerned about his or her reputation in a community.¹⁰¹

Many motivational laws rely on community-building and the threat of shaming for their effectiveness. Certainly it is an element in the effectiveness of military disciplinary rules that they render disobedience of orders shameful in the eyes of one’s fellow soldiers. Religious codes of dress, ritual and diet function within religious moral communities and also serve to bind those communities together. If the moral community dissolves, so does compliance with its motivational laws. Compliance with Jewish dietary laws, for example, is limited to a small minority of American Jews, mostly in Orthodox religious communities. Meanwhile, the American Jewish community is diminishing in strength as a moral community, though it remains an ethnic minority. Shunning and excommunication are formalized versions of shaming used in some religious communities, though they are less common today in mainstream religion.¹⁰²

The threat of humiliation often leads wrongdoers to attempt to conceal their actions despite the lack of formal punishment. Communities of the religiously observant typically exist within a larger society, and concealment—e.g., of domestic abuse—may be condoned and even abetted by others within the community in order to avoid a collective loss of face.¹⁰³

¹⁰⁰See *infra* Part IV.B.

¹⁰¹See Toni L. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1883 (1991).

¹⁰²See generally *infra* note 114.

¹⁰³See Massaro, *supra* note 101, Part IV.C.

The success of a non-coercive “soft law” approach¹⁰⁴ to secular regulation depends on whether the regulated actor is motivated to cooperate with its regulators in order to save face among, or conform to the behavior of, his or her peers or based on positive feelings toward the regulators. Soft law works because it motivates regulated actors to comply with regulatory law, and it motivates regulated actors better if they are part of a regulatory community. That regulatory community may consist of peers who are subject to the same regulatory laws, or it may consist of both peers and the regulators themselves. By making the regulated actor fear being shamed in the eyes of that regulatory community, soft law motivates compliance with hard law.

Thus, nursing home operators are more likely to comply with regulatory requirements if they find non-compliance shameful in the eyes of their peers than if they are threatened with coercive action.¹⁰⁵ Some corporations in the forest products industry comply with forest certification rules drafted by a non-profit group with industry participation, not because the rules are favorable to the industry, but because they “could not afford to get a bad name”¹⁰⁶

Mandatory arrest of alleged domestic abusers tends to increase, not decrease, domestic violence among men who do not find arrest shameful, while it reduces domestic violence among those who do.¹⁰⁷ Compliance with a request or demand is more likely if the subject likes the requester or perceives that others comply.¹⁰⁸

¹⁰⁴The dichotomy between hard and soft law is problematic. See TYLER, *supra* note 3. Regulators seldom take a uniform hard or soft law approach when they interface with the persons whose activities they are responsible for regulating. More often bank examiners or nursing home inspectors employed by the same regulatory agency, for example, resemble the old cartoon characters Mutt and Jeff or a “good cop, bad cop” routine, some bearing goodwill and “soft law” and others readily brandishing the club of “hard law” and enforcement action. Whether the good cops or bad cops will prevail in administrative agency-level decision-making depends a great degree on the political and policy persuasions of those in higher positions within the agency. Moreover, the decision whether to send out good cops or bad cops, or some of each, to examine, inspect or monitor a regulated actor is often a conscious judgment made by a supervisor based on input from prior examinations or inspections. A supervisor who perceives the regulated actor as motivated to comply, and therefore likely to act cooperatively and in good faith with respect to the regulatory process, is likely to send an examiner or inspector who takes a motivational “New Governance” approach, while if the supervisor making the assignment perceives the regulated actor as motivated not to comply, and therefore untrustworthy, he or she is likely to assign an examiner or inspector who takes a more adversarial “hard law” approach. *Id.*

¹⁰⁵Makkai and Braithwaite found that what they term “reintegrative shaming” was more effective than stigmatization, *i.e.*, labeling the individual as evil (as through coercive action or the threat of such action), in obtaining increased legal compliance by nursing homes. See Toni Makkai & John Braithwaite, *Reintegrative Shaming and Compliance with Regulatory Standards*, 32 CRIMINOLOGY 361, 361 (1994).

¹⁰⁶See Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 299 (2002) (quoting forest industry representative as saying his company would comply with standards on forest certification drafted by the Forest Stewardship Council, a non-profit group).

¹⁰⁷LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 1-2 (1992); Makkai & Braithwaite, *supra* note 105, at 363-64.

¹⁰⁸Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity*,

Compliance does increase when threats are made, but only if the threats are public and the opportunity to comply is private, suggesting that shame rather than fear is the principal factor in increasing compliance.¹⁰⁹ If shaming is ongoing and does not offer the wrongdoer a means of reintegration, as through a ceremony celebrating a return to compliance, the ties of the wrongdoer with the relevant group are weakened and the wrongdoer simply decides he or she doesn't care anymore what the group thinks.

C. Motivational Law as Legitimacy-Builder in Religious and Secular Governance

People are more likely to comply with a rule or principle if they regard the authority issuing the rule or principle as legitimate. Motivational law, in turn, can contribute to building legitimacy. The term "legitimacy", however, often is misused in ways that obscure its motivational function.¹¹⁰ Tom R. Tyler defines legitimacy as "a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits."¹¹¹ "'Legitimacy' connotes a faith or trust in individuals, procedures, and/or organizations. It denotes the ability to make people think that a claim to obedience is self-evident"¹¹²

When the term "legitimacy" is used to refer to a constitutional provision, statute or judicial decision, it is not only different from the use of the term to refer to a government or other authority, it is a *misuse* of the term that obscures its

and Compliance, in II HANDBOOK OF SOCIAL PSYCHOLOGY 151, 151-81 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

¹⁰⁹Amy Kaplan & Joachim Krueger, *Compliance After Threat: Self-Affirmation or Self-Presentation* [sic]? 4 CURRENT RESEARCH IN SOCIAL PSYCHOLOGY 178, 179, 192 (1999), available at <http://www.uiowa.edu/~grpproc/crisp/crisp.4.7.htm>. See also Christopher S. Elmendorf, *Ideas, Incentives, Gifts and Governance: Toward Conservation Stewardship of Private Land*, in *Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 461-62 (2003).

¹¹⁰Richard Fallon distinguishes among legal, sociological and moral uses of the term "legitimacy." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-96 (2005), citing MAX WEBER, *ECONOMY AND SOCIETY* 33-38 (Guenther Roth & Claus Wittich, eds., Ephraim Fischhoff et al. trans., 1968) and Joseph Benschman, *Max Weber's Concept of Legitimacy: An Evaluation*, in *CONFLICT AND CONTROL: CHALLENGE TO LEGITIMACY OF MODERN GOVERNMENTS* 17 (Arthur J. Vidich & Ronald M. Glassman eds., 1979). Fallon's description of the sociological use of the term is off the mark. According to Fallon, "[w]hen legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." *Id.* at 1795 (emphasis in original). However, people may harbor a variety of motives for complying with an order of a government apart from fear of sanctions and hope of reward, some of which have nothing to do with the government's legitimacy. People may comply out of fear of shunning or shaming by a relevant community or reference group, or due to inculcated norms or habits, or out of self-interest, which is not synonymous with the "hope of reward." See also *infra* note 113.

¹¹¹TYLER, *supra* note 3, at 26.

¹¹²Paul H. Brietzke, *Law, Legitimacy and Coercion: One View from Law and Economics*, 25 VAL. U. L. REV. 343, 344 n.2 (1990).

motivational meaning.¹¹³ A statute or court or agency decision cannot be “legitimate” or “illegitimate,” but it can be legal or illegal, moral or immoral. However, an *authority* is legitimate if a relevant group is generally motivated to accept its claim to obedience without questioning its legal or moral justification.

What is important here is that some laws possess the purpose or function of increasing legitimacy by instilling faith and trust in an authority, whether government or god, legislature or court, institution or individual, in order to motivate people to obey the orders and decisions of that authority. These laws are motivational laws. For example, as discussed above in Part II.B, the requirement of due process has a motivational function that serves to reinforce the legitimacy of the judicial system, and the laws of the United Kingdom and other monarchies regarding royal privileges exist largely to lend legitimacy to the government in order to motivate citizens to obey its other laws.

Religious lawmakers, like secular ones, confront the problem of establishing and preserving legitimacy, but they must resolve it differently. In religious organizations other than theocracies and cults, instrumental motivation must involve divine sanctions and rewards, and functions only to the extent that adherents have internalized a belief in the existence and efficacy of such sanctions and rewards. Only the true believer will be deterred by the risk of divine punishment, and belief in the divine—the “legitimacy” of divine authority in a sociological sense—is a variable and fickle thing susceptible to doubt.

Not all religious laws lack earthly coercive enforcement. Theocracies, of course, have the ability to resort to coercion because they hold the powers of government, and cults, though they are not governments, have coercive power through both mental and physical control of their members when such power in the hands of a private organization is tolerated by government or when government is too weak to interfere with it. In religious communities such as the Mennonites, Mormons, Jehovah’s Witnesses and Korean churches, the threat of excommunication and shunning may be effective to deter violations of religious laws,¹¹⁴ though such sanctions are little used today in mainstream Judaism¹¹⁵ and Christianity.¹¹⁶ Islam

¹¹³Fallon elevates misuse of the word “legitimate” to alternative uses. Fallon, *supra* note 110, at 1794. If “[t]hat which is lawful is also legitimate,” there can be no such thing as “legal legitimacy.” *Id.* Conduct either is lawful or it is not, though the term “illegitimate” is often misused as a synonym for “unlawful” or to give emphasis to how clearly unlawful something is. Fallon makes a similar mistake in discussing moral “legitimacy:” “When the term is used in a moral sense, legitimacy is a function of moral justifiability or respect-worthiness.” *Id.* at 1796. The fact that some misuse the term as a synonym for “morally justified” does not make the usage proper.

¹¹⁴*See generally* Paul v. Watchtower Bible and Tract Soc’y, Inc., 819 F.2d 875, 877 (9th Cir. 1987) (discussing the “disfellowship” of church member); Bear v. Reformed Mennonite Church, 341 A.2d 105, 106 (Pa. 1975) (discussing community-wide ostracism of critic of church doctrine); Lide v. Miller, 573 S.W. 2d 614 (Tex. Civ. App. 1978) (discussing alleged ruin of dental practice following shunning of dentist by church); Justin K. Miller, Comment, *Damned if You Do, Damned if You Don’t: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271 (1988); Daniel Bahk, Note, *Excommunication and Shunning: The Effect on Korean Churches in America as a Networking Social Structure*, 3 RUTGERS J.L. & RELIGION 4 (2001).

¹¹⁵Excommunication, or *cherem*, virtually ended outside the ultra-Orthodox sects of Judaism after the Enlightenment as local Jewish communities in Europe lost their prior self-

continues to use excommunication (*takfir*) as in the case of Salman Rushdie, although a body of Islamic scholars convened by King Abdullah II of Jordan in 2005 issued a statement opposing the practice.¹¹⁷

In law-based religions such as Judaism and Islam, legitimacy depends on the rulemaker's convincing adherents or the religious hierarchy that he or she either is authorized by the divine sovereign to make rules, or that he or she is more expert than others in interpreting and applying the words of the divine sovereign. In Iran, rulemaking authority is vested in the Council of Experts, a body of 86 scholars of the *Qu'ran* and *Ahadith*. Hasidic *rebbe*s were originally selected based on knowledge of the Bible, *Talmud* and medieval religious codes and commentaries. In Roman Catholicism, the elected Pope is considered to be the authorized intermediary between God and man. In non-law-based religions such as evangelical Christianity, a preacher's charisma is more important in motivating compliance than practices institutionalized by motivational law. Motivational laws are marginalized and the search for religious experience and congregational dynamics predominate.¹¹⁸

The process of choosing and replacing religious rulemakers also differs in theocracies. In a religious hierarchy based on expertise, *a fortiori* only other experts are qualified to make decisions about who possesses the necessary qualifications to be a rulemaker. Rulemaking in law-based religions therefore is inherently undemocratic. Such hierarchies also are self-generating, an endless sequence of experts choosing other experts.

The second issue rulemakers must confront is how to proceed in making rules. There are no elected legislatures in Judaism or Islam, apart from theocratic Islamic states in which religious "experts" have veto power regarding candidacies, and the objective of the theocratic regime may ultimately be to restore the caliphate.¹¹⁹ Moreover, in both religions, in theory the rules of religious law have already been set

governing status.

¹¹⁶For example, Catholic bishops rejected excommunication of Catholic politicians who support funding for abortions as "counterproductive." See Thomas J. Reese, S.J., *Bishops Meet in Baltimore*, AMERICA, Nov. 25, 1989, available at http://woodstock.georgetown.edu/church_studies/reese/america/nc8911.htm.

¹¹⁷The statement was called the "Amman Message" and is available at <http://www.ammanmessage.com/> (last visited Aug. 24, 2007).

¹¹⁸In religions such as Reconstructionist Judaism and many of the Protestant denominations (e.g., Lutheranism, Presbyterianism, Unitarianism, and the Society of Friends (Quakers), individual congregations are given considerable autonomy in making their own rules. Even Martin Luther, however, intended that his liturgical innovations, principally the singing of Psalms in the vernacular, would "reinforce popular belief in Evangelical theology." Harold J. Berman, *The Spiritualization of Secular Law: The Impact of the Lutheran Reformation*, 14 J.L. & RELIGION 313, 322 n.29 (1999).

¹¹⁹In Iran, the elected Council of Experts consists of eighty-six members. The Council of Experts elects the President, who appoints the Guardian Council. The Guardian Council, so named because it is the "guardian" of the Islamic Revolution, decides who can be a candidate for the Council of Experts, acting as a filter through which only a handful of candidates who are considered sufficiently observant and knowledgeable about Islam can pass. Pepe Escobar, *The Roving Eye: The Ultimate Martyr*, ASIA TIMES, Mar. 31, 2006, available at http://www.atimes.com/atimes/Middle_East/HC31Ak03.html. For an insightful look at the political situation in Iran, see *id.*

both in divine writings and by ancient and medieval scholars,¹²⁰ it remains only for religious courts¹²¹ and prominent scholars to interpret and apply them.¹²² Contemporary rulemaking in law-based religions is delegated to a religious judiciary and to influential bodies of scholars.

Secular governmental rulemakers must be concerned with the process of contemporary rulemaking, such as the rule drafting process, soliciting public input, and publicizing new rules in the interest both of compliance and due process. The job of rule formulation and publicizing new rules has largely been completed in Judaism and Islam. Religions primarily must be concerned about the preservation of rules, while governments must be concerned with their formulation.

Secular regulators possess means of compelling enforcement that organized religions do not. A rabbi or an *imam* cannot go to a U.S. court and obtain an injunction to compel a shop owner, even one of their congregants, to sell only kosher or *halal* meat. A government or governmental agency like the United States Food and Drug Administration, on the other hand, could obtain an injunction to compel the same shop owner to sell only meat that satisfies secular standards governing slaughter and preparation.

IV. FAILURES AND SUCCESSES OF MOTIVATIONAL LAW: DOES IT REALLY WORK?

A. Motivational Law's Failures

A glance at the examples of motivational law in Part II of this Article should leave the reader wondering, "Does motivational law ever actually work?"

- Parties to contracts routinely ignore pro forma recitals of "in consideration for one dollar receipt of which is hereby acknowledged," and the evils of people not understanding the seriousness of the contracts they sign persist.¹²³

¹²⁰In Judaism, most of the existing body of religious law was created by the rabbis of the *Mishnah* and *Talmud*, who lived between 200 B.C.E. and 500 C.E., and by medieval commentators who followed them. This body of religious law was codified between the 12th and 16th centuries, most authoritatively in the *Shulhan Arukh* ("Set Table"), completed by Rabbi Joseph Caro in 1555, and in *The Mappah* ("Tablecloth"), a set of notes to the *Shulhan Arukh* written by Rabbi Moses Isserles of Krakow in the late 16th century which reflected the differences between the Sephardic and Ashkenazic Jewish traditions. JUDAH GRIBETZ ET AL., *THE TIMETABLE OF JEWISH HISTORY* 165 (1993). For another important codification of Jewish law, see MOSES MAIMONIDES, *THE CODE OF MAIMONIDES: MISHNEH TORAH* (Menachem Kellner trans., Yale Univ. Press 2004) (1135).

¹²¹In Judaism, a religious court is called a *beit din*, or "house of justice" and consists of three members. Islam has *Shari'a* courts with a similar function.

¹²²Regarding the principles of Jewish law as construed by scholars, see José Faur, *The Fundamental Principles of Jewish Jurisprudence*, 12 N.Y.U. J. INT'L L. & POL. 225 (1979). In Islam, the *Qu'ran* and the memorized teachings of Muhammed and his followers (*Ahadith*) are construed according to rules of Islamic jurisprudence called *fiqh*, of which there are several schools of thought (*Maddhab*). For a more detailed discussion of the sources of Islamic law, see Ahmed Souaiaia, *On the Sources of Islamic Law and Practices*, 20 J.L. & RELIGION 123 (2004).

¹²³Consumers routinely fail to read or understand the substantive terms of contracts. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 841-42 (2006); Jeff Sovern, *Toward a New Model*

- Evidence that obscenity laws have impacted either the demand for pornography or the frequency of rape and other forms of aggression against women is at best equivocal.¹²⁴

- Military disciplinary rules failed to prevent the torture of prisoners at Abu Ghraib.

- Only a small percentage of Jews and Catholics comply with religious laws on dress, diet, prayer and ritual. Islamic religious laws on dress, diet, prayer and ritual have become political rallying points for fundamentalism and theocratic rule.

- An industry of predatory “consumer credit counseling” businesses that used deceptive tactics to sell debtors “debt management plans” was given additional leverage over consumers by BAPCPA’s credit counseling requirement,¹²⁵ and the number of consumer bankruptcies is again rising rapidly despite BAPCPA.¹²⁶

- Public support for the British royal family—and presumably, therefore, the impact of royalty as a motivator for compliance with law—is at a new low.¹²⁷

Though widely used, motivational law often fails. Moreover, where the linkage between motivational and regulatory law is weak or ambiguous, or where the regulatory law is not perceived as yielding benefits commensurate with the burdens imposed by motivational law, social tensions result. Abu Ghraib, the controversy concerning obscenity laws and pornography, and the debate within Islam over the wearing of *hijab* are three examples.

One common barrier to motivational law’s effectiveness is what might be termed the “dilution” problem. The Pledge of Allegiance that most American public schools require students to recite at the beginning of the school day often provokes giggles rather than patriotism because it is not integrated into a system of motivational laws that pervades students’ lives. Any motivational effect is lost, diluted beyond recognition by the other 99% of the school day’s activities.

Many other barriers exist to motivational law’s effective use in governance in the United States, of which the following are a few:

1. The “hard law” tradition of regulation. A tradition of command-and-control and “hard law” regulation, though changing, still prevails in many regulatory agencies.

2. The cult of notice. American laws rooted in the concept of due process emphasize the giving of notice rather than its effectiveness in generating motivation.

of Consumer Protection: The Problem of Inflated Transaction Costs, 47 WM. & MARY L. REV. 1635, 1657-59 (2006).

¹²⁴See *supra* note 21.

¹²⁵Gross & Block-Lieb, *supra* note 45, at 554-59. In fairness, the predatory practices long predated BAPCPA, and BAPCPA purported to regulate the industry by giving the Executive Office of U.S. Trustees approval authority over credit counseling agencies. However, regulation was a hollow promise, since the approval process relies heavily on certification by trade organizations rather than effective monitoring of the business practices of credit counseling agencies. *Id.*

¹²⁶Case filings by individuals or households with consumer debt increased 48.34% to 391,105 for the six months ending June 30, 2007, compared to 272,602 cases filed in the six months ending June 30, 2006. AMERICAN BANKRUPTCY INSTITUTE UPDATE (Am. Bankr. Inst.), Aug. 16, 2007.

¹²⁷See *supra* note 59.

An extreme example of this cult of notice is the fine print disclosures of credit terms flashed on the television screen for impossibly brief moments, all in compliance with the Truth in Lending Act.¹²⁸

3. The pictorial superiority effect. Studies of cognition demonstrate that the written word is less effective than pictures to communicate concepts and motivate a response.¹²⁹ American regulators, however, consistently use the written word to motivate consumers. Product warning labels are notoriously ineffective, in part because they use words rather than pictures to convey information about the product.

B. Does Religious Motivational Law Work? The Hellfire Controversy

Probably no aspect of motivational law's effectiveness has undergone more study by social scientists than whether observance of religious law motivates people to refrain from violating criminal laws. Six principal hypotheses have been advanced by sociologists concerning religiosity and delinquency:

The Hellfire Hypothesis posits that a belief in supernatural punishments and rewards deters criminal behavior and promotes normative behavior.¹³⁰ Religious belief, though not necessarily religious activity, should be associated with a reduction in delinquency with respect to crimes disapproved of by religious teachings.

Social control (or social bonding) theory:¹³¹ Religion promotes compliance even with laws that are not a topic of religious teachings. Participation in religion is a form of attachment, commitment and involvement which increases the stakes in conformity and encourages the belief that societal norms should be obeyed.

The "anti-asceticism" theory: Religiosity, measured by participation in religious activities, has a stronger inverse effect on actions such as alcohol and drug use that run counter to religious traditions of asceticism but are condoned or only ambiguously condemned by secular influences.¹³²

¹²⁸Truth in Lending Act, 15 U.S.C. §1601 (1968). See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 432-33, 446 (2002) ("Businesses . . . know[] that consumers reliably, predictably, and completely fail to read the terms employed in standard-form contracts. . . . Businesses also can create boilerplate that is difficult to read by using small print, a light font, and all-capital lettering and by burying important terms in the middle of the form."); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983) ("[C]onsumers may not understand the legal relationships that their purchase contracts create because they do not read the language in those contracts. Firms have an incentive to exploit this ignorance by using 'hidden' terms that will disadvantage consumers if circumstances cause these terms to be invoked.").

¹²⁹This is called the "pictorial superiority effect." See Douglas L. Nelson et al., *Pictorial Superiority Effect*, 2 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 523, 523-528 (1976); ALLAN PAIVIO, *IMAGERY AND VERBAL PROCESSES* (1971); ALLAN PAIVIO, *MENTAL REPRESENTATIONS: A DUAL CODING APPROACH* (Oxford psychology series; no. 9 1990).

¹³⁰See generally *infra* note 137.

¹³¹TRAVIS HIRSCHI, *CAUSES OF DELINQUENCY* (1969). Notably, Hirschi in 1990 moved away from social control theory and proposed a "self-control" theory that has not gained as much acceptance. *Id.*

¹³²John K. Cochran & Ronald L. Akers, *Beyond Hellfire: An Exploration of the Variable Effects of Religiosity on Adolescent Marijuana and Alcohol Use*, 26 J. RES. IN CRIME &

Theory of secular social disorganization: “[W]hen secular moral guidelines are unavailable, in flux, or have lost their authority and hence their power to compel, the salience of religious proscriptions is enhanced.”¹³³ Religion should have negligible additional impact on delinquency if secular social condemnation of an act is strong, but should make a difference if secular social condemnation is nonexistent or ambiguous.

Arousal theory: Religious activity satisfies the individual’s neurobiological need for stimulation and prevents the boredom, or lack of neurological arousal, that leads individuals to engage in criminal activity.¹³⁴

“Moral community” theory:¹³⁵ Religiosity has greater effect on individuals who are surrounded by, or affiliated with, a “moral community” in which their moral behavior will be reinforced and delinquency will result in shame and embarrassment.¹³⁶

In 1969, the first major empirical study of the relationship between religiosity and delinquency gave no support to any of these hypotheses. In *Hellfire and Delinquency*,¹³⁷ Hirschi and Stark concluded that neither church attendance nor professed belief in supernatural sanctions bore a statistically significant relationship

DELINQ. 198 (1989).

¹³³Charles R. Tittle & Michael R. Welch, *Religiosity and Deviance: Toward a Contingency Theory of Constraining Effects*, 61 SOC. FORCES 653, 672 (1983).

¹³⁴John K. Cochran, Peter B. Wood & Bruce J. Arneklev, *Is the Religiosity-Delinquency Relationship Spurious? A Test of Arousal and Social Control Theories*, 31 J. RES. IN CRIME & DELINQ. 92 (1994) (finding arousal and social control theories explained levels of delinquency better than religiosity); Lee Ellis, *Religiosity and Criminality from the Perspective of Arousal Theory*, 24 J. RES. IN CRIME & DELINQ. 215 (1987).

¹³⁵Moral community theory is derived from three sources. Under “rational choice” theory, religious individuals are more likely to feel ashamed as a result of criminal acts and, due to their involvement in a religious community, are more likely to be embarrassed if those acts become known; hence they rationally will be deterred from criminal activity. Under differential association theory, religious individuals will tend to select peers who share their religiosity, and this, in turn, will tend to socialize them in ways that promote kinds of behavior valued by their religion. Reference group theory posits a similar dynamic as differential association theory, but adds that the reference group in which the individual is a member may start as a non-religious group and take on religious characteristics as individuals within it become more religious, or it may start as a religious group and lose its religiosity. In other words, religious belief and observance will tend to spread throughout the reference group once introduced by a member; or conversely, secular or anti-religious belief and behavior will tend to spread once introduced by a member.

¹³⁶Social control, “rational choice,” differential association and reference group theories are not inconsistent as applied to religion. Religious individuals instilled with an internal moral compass feel ashamed if they break the law and, to the extent that they are involved in religious institutions and a religious community, they will be embarrassed if word of wrongdoing gets out to members of that community. The prospect of shame and embarrassment, in turn, acts as a deterrent against breaking the law. Differential association and reference group theories are a way of putting the same concept into the form of a process, though with greater emphasis on the processes by which non-religious individuals and groups may become religious.

¹³⁷Travis Hirschi & Rodney Stark, *Hellfire and Delinquency*, 17 SOC. PROBS. 202 (1969).

to delinquency. Since *Hellfire and Delinquency*, social scientists have produced an average of more than two studies per year on the subject of the effect of religious belief and observance on crime,¹³⁸ with wildly inconsistent outcomes.¹³⁹ Most studies have found some impact,¹⁴⁰ though usually either minor or confined to particular types of crime or particular religious denominations.

A meta-analysis of 60 earlier U.S. studies of religiosity and crime, conducted by Baier and Wright in 2001, which for the most part excluded non-Christian subjects,¹⁴¹ lent support only to the moral community¹⁴² and anti-asceticism¹⁴³ theories.¹⁴⁴

¹³⁸Colin J. Baier & Bradley R.E. Wright, "If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime, 38 J. RES. IN CRIME & DELINQ. 3, 3 (2001).

¹³⁹Some studies concluded that religious belief and observance have no impact on crime. See, e.g., Lee Ellis & Robert Thompson, *Relating Religion, Crime, Arousal and Boredom*, 73 SOC. & SOC. RES. 132 (1989). Other studies found a dominant impact. See, e.g., Bruce Chadwick & Brent Top, *Religiosity and Delinquency Among LDS Adolescents*, 32 J. FOR SCI. STUDY RELIGION 51 (1993); John Rohrbaugh & Richard Jessor, *Religiosity in Youth: A Personal Control Against Deviant Behavior*, 43 J. PERSONALITY 136 (1975).

¹⁴⁰Even Rodney Stark, one of the authors of *Hellfire and Delinquency*, 15 years later recanted his position and announced that "religion has truly potent effects [on delinquency]." Rodney Stark, *Religion and Conformity: Reaffirming a Sociology of Religion*, 45 SOC. ANALYSIS 273, 273 (1984). Stark recanted in dramatic fashion, in his presidential address to the Association for the Sociology of Religion. *Id.*

¹⁴¹Baier and Wright claim, "[i]n analyses not shown here, we found that type of religion measure had no significant effect on studies' estimation of the religion-crime association." Baier & Wright, *supra* note 138, at 13. A review of the 60 studies included in their meta-analysis reveals that most if not all excluded Jews and other non-Christian subjects, making their claim dubious. Whether non-believers who regularly attend synagogue or mosque for social reasons, or believers who rarely set foot in a mosque or synagogue, would manifest the same tendencies as Christian church-goers and Christian believers to commit fewer crimes remains an open question.

¹⁴²The difference in crime between church members who go to church regularly and/or believe in the tenets of the church and church members who do not attend services or believe in church tenets is greater than the difference in crime between members of the general population in a generally secular region, the Pacific Northwest, who attend services and/or believe in religious tenets and members of the general population who do not. This, Baier and Wright argue, supports the moral community hypothesis, that the deterrent effect of religion on crime is heightened by living among others who share one's religiosity. *Id.* at 14.

¹⁴³As predicted by the anti-asceticism theory, religious behavior and/or beliefs (again Baier and Wright fail to distinguish between them) exert a stronger deterrent effect on victimless crimes than on crimes against persons or property. *Id.* Other scholars have argued that this outcome confirms the secular social disorganization hypothesis, that the effect on victimless crimes "is the result of religious institutions acting in relative isolation to deter nonvictim crimes, whereas many social institutions, both religious and secular, act together to deter person and property crimes." *Id.* at 6 (citing Steven Burkett, *Religiosity, Beliefs, Normative Standards and Adolescent Drinking*, 41 J. STUD. ON ALCOHOL 662, 663 (1980); Steven R. Burkett & Mervin White, *Hellfire and Delinquency: Another Look*, 13 J. FOR SCI. STUDY RELIGION 455 (1974)).

¹⁴⁴Baier and Wright also found that religious behavior and/or beliefs tend to exert a stronger deterrent effect on crime among women than men, and a stronger deterrent effect on

Most studies of religiosity and delinquency suffer from a Christian bias. They largely represent the work of believers in the Hellfire Hypothesis, for whom the *Hellfire and Delinquency* findings “represented a formidable challenge . . . and thus inspired renewed research activity.”¹⁴⁵ Overwhelmingly, their subjects have been Christians living in the United States, usually students. Most have excluded non-Christians from the results and have measured religiosity solely by church attendance.¹⁴⁶

The few studies on religiosity and delinquency that compare adherents of non-Christian religions¹⁴⁷ or non-Christians with Christians, all conducted outside the United States, provide only equivocal support for any of the theories of motivational religious law. Israeli studies found that far fewer religiously observant Jews are imprisoned than non-religiously observant Jews,¹⁴⁸ and that religiosity tends to reduce aggression among Jewish adolescents.¹⁴⁹ However, a 1993 study in the

crime among non-whites than among whites. Baier & Wright, *supra* note 138, at 15.

¹⁴⁵John K. Cochran & Ronald L. Akers, *Beyond Hellfire: an Exploration of the Variable Effects of Religiosity on Adolescent Marijuana and Alcohol Use*, 26 J. RES. IN CRIME & DELINQ. 198, 219 (1989). Cochran and Akers implied that many or most of the believers in the Hellfire Hypothesis who conducted post-1969 studies that contradicted Hirschi and Stark’s findings were themselves committed Christians whose personal beliefs were challenged by what Hirschi and Stark found.

¹⁴⁶These studies also define the dependent variable, crime, inconsistently as including general index crimes (crimes against persons or property), victimless crimes, or both. The crimes used in the studies have represented types of conduct prohibited by both religious and secular law, and the studies have relied extensively on self-reporting of criminal acts, a precarious method of gathering data about such conduct as domestic abuse and drug use.

¹⁴⁷One of the rare studies of the relationship between religiosity and delinquency to compare different non-Christian religions compared Jewish and Muslim adults in Israel, and found that while religiously observant Jews and Muslims are generally consistent with each other in their assessment of the seriousness of offenses, secular Jews and Muslims are inconsistent. Sergio Herzog, *Religiosity and Perception of Crime Seriousness by Jewish and Muslim Respondents in Israel*, 24 DEVIANT BEHAV. 153 (2003). For example, secular Muslims viewed shop robbery and apartment burglary as less serious than either secular Jews or religiously observant Muslims or Jews, but secular Jews viewed drug selling and illegal abortions as less serious than either secular Muslims or religiously observant Jews or Muslims. On the other hand, Muslims regard wife assault and tax evasion as less serious crimes than Jews, and among Muslims, the religiously observant actually regard wife assault as *less* serious than secular Muslims. *Id.* at 163.

¹⁴⁸A study of Jewish male prisoners in Israel, where there is a clear division of the Jewish population into secular and religious groups, found that only 3.7% of Jewish inmates were religiously observant compared to about 20% among the general population. Sarah Ben-David & Leonard Weller, *Religiosity, Criminality and Types of Offences of Jewish Male Prisoners*, 14 MED. & LAW 509 (1995).

¹⁴⁹Religiosity reduced all forms of aggression as well as victimization to physical aggression among girls, and reduced verbal and indirect aggression but not physical aggression among boys. Age was the primary factor in reducing physical aggression among boys. Jewish girls of Eastern (primarily Middle Eastern) origin displayed more aggression than Jewish girls of Israeli and Western origin, but among boys ethnic origin made no significant difference. Simha F. Landau et al., *The Effect of Religiosity and Ethnic Origin on Direct and Indirect Aggression Among Males and Females: Some Israeli Findings*, 28

Netherlands by Junger and Polder of 12 to 17-year-old boys from four ethnic groups—Moroccans, Hindustanis, Creoles (Surinamese) and Dutch—did not support the notion that membership in a moral community reduces delinquency.¹⁵⁰

A pair of multinational studies using the same data reached different conclusions about the relationship between religiosity and crime. Church attendance correlated negatively with tax fraud acceptability in 24 of the 37 nations,¹⁵¹ particularly in nations in which over 50% of the population is religiously affiliated, but in Japan religiosity showed no relationship to tax fraud acceptability. Among residents of India and China, self-defined religiosity, but not formal religiosity, had a significant though weak relationship with the unacceptability of tax fraud.¹⁵² Yet, in a different study, frequency of prayer or meditation among Chinese respondents correlated *positively* with *approval* of buying stolen goods, failing to report a hit and run accident and drug use.¹⁵³ The latter study, however, did not distinguish between respondents who consider themselves to be affiliated with a moral community and actively participate, and those who do not.

AGGRESSIVE BEHAV. 281 (2002).

¹⁵⁰The authors used a three-factored scale of religiosity that included a question about attendance at the family's place of worship and questions about parental prayer and parental religious attendance. Marianne Junger & Wim Polder, *Religiosity, Religious Climate, and Delinquency Among Ethnic Groups in the Netherlands*, 33 BRIT. J. CRIMINOLOGY 416 (1993). While religiosity did affect delinquency within the moral community of Moroccan Muslims living in the Netherlands, the same was not true for Turkish Muslims or for Hindus from India, yet religiosity did reduce delinquency in the predominantly-secular Dutch Christian population. Thus, in what one would expect to constitute moral communities of Turkish Muslims and of Hindus from India, religiosity was not linked to compliance with the law. Others studying this issue, however, have criticized the use of children as subjects due to their uncertain religiosity. See Harold G. Grasmick, Karyl Kinsey & John K. Cochran, *Denomination, Religiosity and Compliance with the Law: A Study of Adults*, 30 J. FOR SCI. STUDY RELIGION 99-100 (1991). Many children attend religious services because their parents want them to rather than out of personal religious commitment. Turkish, Surinamese and Hindustani children living in the Netherlands appear to be more assimilated and from better educated families than Moroccans—26% of the Moroccan children in the study had lived in the Netherlands less than five years, compared with 12% among the Turks and 11% among the Surinamese, and 37% of Moroccan fathers never went to school compared to 11% of Turkish fathers in the Netherlands. Immigrant parents, less assimilated than their children, may compel them to attend religious services in an attempt to preserve a connection to their homeland rather than out of religious conviction. The Junger-Polder study loses force as a consequence. Even if the study had used adult subjects, religious dress and observance of religious dietary laws and holidays would have been better criteria for measuring Muslim religiosity than mosque attendance.

¹⁵¹Steven Stack & Augustine Kposowa, *The Effect of Religiosity on Tax Fraud Acceptability: A Cross-National Analysis*, 45 JOURNAL FOR THE SCI. STUDY OF RELIGION 325, 347 (2006).

¹⁵²*Id.* at 346.

¹⁵³Stark, a co-author of the original *Hellfire and Delinquency* study, speculated that this correlation might have something to do with the fact that the religious sector in China is largely government-controlled and infiltrated, so that persons willing to acknowledge religious practice, except for a few brave souls, might tend to be unsavory characters. Rodney Stark, *Gods, Rituals, and the Moral Order*, 40 J. FOR SCI. STUDY RELIGION 619, 624 (2001).

Among Christians, alcohol abuse has no statistically significant relationship to religiosity in any denomination.¹⁵⁴ Religious homogamy, where spouses share religious affiliation, and frequency of church attendance are both inversely related to domestic violence.¹⁵⁵ Parental religiosity reduces delinquency among the adolescent children of conservative Protestants if both parents share their religiosity, but this effect is significantly reduced if only one parent self-identifies as a conservative Protestant.¹⁵⁶ However, the same study found adolescent boys generally tend to join in delinquency rather than avoid it when their parents are devoutly religious, though adolescent girls do not display the same tendency.¹⁵⁷

Overall, the data, though weak, suggest that delinquency correlates with religiosity among respondents who consider themselves to be affiliated with a moral community and actively participate, while persons unaffiliated with a moral community will be affected more by other factors even if they consider themselves religious individuals.¹⁵⁸ Even this evidence is tainted by methodological problems, including a Christian bias in most studies. Among adults, religiosity seems to reduce delinquency and the tolerance of delinquency to the extent that (a) the individual is affiliated with a religious community, (b) that religious community disapproves of the type of delinquent act at issue, and (c) the delinquent act at issue is not also resoundingly disapproved of by the larger society. However, in predominantly Christian societies, the relationship between formal religiosity and reduction in delinquency is more tenuous than the relationship between self-identified religious belief and reduction in delinquency.

¹⁵⁴Religiosity was measured by church or synagogue attendance, self-identification as “religious,” and membership in religious organizations. E. Wilbur Bock, John K. Cochran & Leonard Beeghley, *Moral Messages: The Relative Influence of Denomination on the Religiosity-Alcohol Relationship*, 28 SOC. QUARTERLY 89 (1987). Another study conducted in 1970 concluded that church attendance had a more dramatic impact in reducing drinking among blacks than among white Protestants. Paul C. Higgins, Gary L. Albrecht and Maryann H. Albrecht, *Black-White Adolescent Drinking: The Myth and the Reality*, 25 SOC. PROBS. 215 (1977).

¹⁵⁵Christopher G. Ellison, John P. Bartkowski and Kristin L. Anderson, *Are There Religious Variations in Domestic Violence?*, 20 J. FAM. ISSUES 87 (1999).

¹⁵⁶Mark D. Regnerus, *Linked Lives, Faith, and Behavior: Intergenerational Religious Influence on Adolescent Delinquency*, 42 J. FOR SCI. STUDY RELIGION 189, 200 (2003). Regnerus measured religiosity by three criteria: attendance at religious services, religious affiliation (conservative Protestant vs. all others), and whether subjects considered religion “very important” or “not very important.”

¹⁵⁷*Id.* at 200.

¹⁵⁸Stack and Kposowa found that among religiously-affiliated individuals, religiosity, measured both by frequency of religious service attendance and by what they called “intrinsic religiosity,” had a significantly stronger negative relationship with tax fraud acceptability than among non-religiously-affiliated individuals. Stack and Kposowa, *supra* note 151, at 347.

C. Motivational Law's Unfortunate Successes

1. Motivational Law, Authoritarianism and Repression

While it is common wisdom that “institutionalizing the rule of law [is] a precondition to democracy,”¹⁵⁹ institutionalizing the rule of motivational law can have the opposite effect. Compelled by law to read censored news and propaganda, participate in mass rallies, and attend Hitler Youth meetings, the citizens of Nazi Germany were regimented through motivational law. Surrounded by co-religionists doing and saying the same things, members of cults are susceptible to authoritarian control and indoctrination. In the close-knit Mormon community of 19th century Utah, Mormon motivational laws on church attendance and on the treatment of and respect for church leaders preserved community cohesion but also reinforced the Mormon community’s exclusionary policy towards blacks for over one hundred years.¹⁶⁰

A similar dynamic can be seen in urban gangs, which one might call “immoral communities,” in which criminal acts may be viewed positively as a way to elevate an individual’s status within the group. Institutionalizing the rule of law may be a precondition to democracy, but where the rule of law can also reinforce the totalitarian tendencies of a moral community, in which case institutionalization merely makes the misapplication of the rule of law more powerful.

Motivational law is a morally neutral tool that can propel a community or a nation toward authoritarianism. Authoritarian regimes use censorship laws to motivate citizens to comply with their dictates.¹⁶¹ Nazi laws requiring “Aryan” children to join the Hitler Youth served a motivational purpose of ensuring their indoctrination and obedience. Islamic laws on *hijab* (modest dress for women) are motivational laws that exist to motivate men to obey laws forbidding adultery and molestation of women, but women who refused to conform to the stringent rules of the Taliban theocracy on the wearing of the *burqa* were flogged regardless whether they were genuinely at risk of being adulterers or inspiring others to molest them.¹⁶²

¹⁵⁹Robert Eli Rosen, *Complicating Law's Legitimation Processes*, 25 LAW & SOC. INQUIRY 973, 977 (2000).

¹⁶⁰In 1863 Brigham Young pronounced it the “law of God in regards to the African race” that if a white Mormon man had sex with a black woman, “the penalty under the law of God is death on the spot. This will always be so.” G.D Watt & J.V. Long, *The Persecutions of the Saints-Their Loyalty to the Constitution-The Mormon Battalion-The Laws of God Relative to the African Race*, 10 J. OF DISCOURSES DELIVERED BY PRESIDENT BRIGHAM YOUNG, HIS TWO COUNSELLORS [sic], THE TWELVE APOSTLES AND OTHERS 104–11 (1865). Mormon religious law excluded blacks from the priesthood and temple ordinances until 1978, when church leaders claimed to have received a “revelation from God” discontinuing the practice. Spencer W. Kimball N. Eldon Tanner & Marion G. Romney, 148th Semiannual General Conference of The Church of Jesus Christ of Latter-Day Saints, Official Declaration 2 (Sept. 30, 1978), available at <http://scriptures.lds.org/od/2>.

¹⁶¹See *supra* note 41.

¹⁶²*Women in Afghanistan: The Violations Continue*, AMNESTY INT’L, Oct. 30 1978, available at [http://web.amnesty.org/library/pdf/ASA110051997ENGLISH/\\$File/ASA1100597.pdf](http://web.amnesty.org/library/pdf/ASA110051997ENGLISH/$File/ASA1100597.pdf) (“In December 1996, Taleban[sic]-controlled Radio Voice of Shari’a announced that a group of 225 women had been rounded up and punished in Kabul for violating Taleban[sic]

Authoritarian regimes standardize and ritualize¹⁶³ motivational laws into a talisman of power.

Because religions tend to use motivational law to achieve compliance, one might predict that extremely religious individuals would display authoritarian tendencies. Adorno¹⁶⁴ attributed several characteristics to the authoritarian personality, among them conventionality, intolerance of deviance, a desire to utilize state power to suppress nonconformity, distrust of human nature, belief that man is inherently evil, a belief that strong authority is needed to keep men's evil drives in check, submissiveness to authority, and repressed sexuality coupled with a preoccupation with sex. Religion and Adorno's description of the authoritarian personality overlap in certain respects; for example, religions tend to adopt strong notions of conventionality and to be intolerant of deviance.¹⁶⁵ Religions also tend to advocate submissiveness to authority; indeed, the word "Islam" means "submission," referring to submission to Allah.

rules on clothing. The radio announcement warned women once again to wear the *burqa* and respect the *Shari'a* (Islamic law) or 'face punishment'. Sources state that punishment of the 225 women consisted of being lashed on the back and legs after the sentence was handed down by a tribunal enforcing the Taleban[sic] interpretation of Islamic law. . . . On at least one occasion, such punishments have taken the form of bodily mutilation. A woman in the Khayr-Khana area of Kabul in October 1996 was reported as having the end of her thumb cut off by the Taleban[sic]. This 'punishment' was apparently meted out because the woman was caught wearing nail varnish." The tendency to ignore the motivational purpose of *hijab* and regard it as a talisman is not confined to Taliban Afghanistan or the Iranian theocracy. The debate within the European Union regarding *hijab* reflects confusion about the motivational purpose of *hijab* in Islam as well as the assumption that the motivational purpose is pretextual and that *hijab* has been hijacked by fundamentalists in Europe as a political symbol. If *hijab* were regarded merely as a set of rules of modesty intended to motivate Muslims to resist the temptation to commit adultery or engage in premarital or extramarital sex, rather than as a declaration of identity as an Islamic fundamentalist, it is doubtful that it would have elicited such strong reactions. "[T]he very construction of *hijab* issues as those of 'religious identity', sustained by the use of Article 9 ECHR as the primary legal basis for such cases, has given shape to a number of counterproductive trends. These are: deference to local knowledge (either the national courts' or the school's); obfuscation of Muslim women's agency; explicitly antagonistic counter-positioning of the 'conflicting priorities' of 'cultural diversity' and 'gender equality'; and, less obviously, the moralistic fervour enfolding the debate." Anastasia Vakulenko, *Islamic Dress in Human Rights Jurisprudence: A Critique of the Current Trends*, 7 HUM. RTS. L. REV. 719 (2007).

¹⁶³I use the term "ritualized" in the sense in which it is used in the study of neurobiology and animal behavior, to refer to the evolution of a routine functional behavior into a signal or symbol. See Sir Julian Huxley, *A Discussion on Ritualization of Behaviour in Animals and Man*, 251 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 249 (1966).

¹⁶⁴THEODOR W. ADORNO, *THE AUTHORITARIAN PERSONALITY* (1950). Adorno's work has been exceedingly influential despite criticisms from both the right and the left. See, e.g., J.J. Ray, *The Old-Fashioned Personality*, 43 HUM. REL. 997 (1990); J.J. Ray, *Why the F Scale Predicts Racism: A Critical Review*, 9 POL. PSYCH. 671 (1988); John L. Martin, *The Authoritarian Personality, 50 Years Later: What Questions are There for Political Psychology*, 22 POL. PSYCH. 1 (2001).

¹⁶⁵See J. Keith Abrams & L. Richard Della Fave, *Authoritarianism, Religiosity, and the Legalization of Victimless Crimes*, 61 SOC. & SOC. RES. 68, 70-71 (1976).

Consistent with this prediction, studies have found a strong correlation between authoritarianism and religious fundamentalism.¹⁶⁶ As among studies of religiosity and delinquency, the Christian bias problem crops up in many of the studies, but a study of non-Christian subjects reached similar conclusions.¹⁶⁷ However, studies that have examined the relationship among authoritarianism, Christian religious fundamentalism, and prejudice¹⁶⁸ also have found that if authoritarianism is factored out, religious fundamentalism actually has an inverse relationship with prejudice. In other words, non-authoritarian religious fundamentalists tend to be less prejudiced than non-authoritarian people who are not religious fundamentalists, while authoritarian religious fundamentalists tend to be more prejudiced than authoritarian non-fundamentalists.¹⁶⁹

2. Cults and Concealment

Motivational law seems to work most effectively in communities that use it pervasively, but membership in an insular moral community held together by pervasive motivational law also confers a degree of anonymity and immunity vis-à-vis the outside world, and an incentive to protect the community by concealing wrongdoing.¹⁷⁰ Such communities are susceptible to authoritarianism in their operation, and easily become cults.¹⁷¹ In cults, motivational laws become central to

¹⁶⁶Bob Altemeyer & Bruce Hunsberger, *Authoritarianism, Religious Fundamentalism, Quest, and Prejudice*, 2 INT'L J. FOR PSYCHOL. RELIGION 113, 118 (1992) (defining "fundamentalism" as a style of belief that is characterized by a militant belief system, a sense of one absolute truth, and a sense of a special relationship with God); Bruce Hunsberger, *Religious Fundamentalism, Right Wing Authoritarianism, and Hostility in Non-Christian Religious Groups*, 6 INT'L J. FOR PSYCHOL. RELIGION 39 (1996); L. Wylie & J. Forest, *Religious Fundamentalism, Right Wing Authoritarianism and Prejudice*, 71 PSYCHOL. REP. 1291 (1992); Brian Laythe et al., *Religious Fundamentalism as a Predictor of Prejudice: a Two-Component Model*, 41 J. SCI. STUDY RELIGION 623 (2002).

¹⁶⁷Hunsberger, *supra* note 166.

¹⁶⁸The studies have focused on both racial prejudice and homophobia. Studies regarding homophobia, like those regarding racism, have found right-wing authoritarianism to be related to prejudice. Christopher R. Stones, *Antigay Prejudice Among Heterosexual Males: Right-Wing Authoritarianism as a Stronger Predictor than Social-Dominance Orientation and Heterosexual Identity*, 34 SOC. BEHAV. PERSONALITY 1137 (2006); Wayne W. Wilkinson, *Religiosity, Authoritarianism and Homophobia: a Multidimensional Approach*, 14 INT'L J. FOR PSYCHOL. RELIGION 55 (2004); Jo-Ann Tsang & Wade C. Rowatt, *The Relationship Between Religious Orientation, Right-Wing Authoritarianism and Implicit Sexual Prejudice*, 17 INT'L J. FOR PSYCHOL. RELIGION 99 (2007).

¹⁶⁹Laythe et al., *supra* note 166, at 624.

¹⁷⁰Brietzke, *supra* note 112, at 350.

¹⁷¹I use the term "cult" to refer to religious sects that are characterized by the following: (1) The sect demands total commitment from its followers, claiming all of their time, energy and thoughts and regimenting daily existence. (2) The sect subordinates its followers to the authority of its leaders. (3) Sect members are isolated from non-sect members, often living in a remote location and being cut off from outside communications. See Note, *Conservatorships and Religious Cults: Divining a Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247, 1250-51 (1978).

members' existence, with much time being consumed by ritual and other practices intended not only to motivate members to adhere to religious law, but to adhere to the law of the leader in matters of daily life.

The evils of pervasive motivational law in religion are not limited to cults. The problem of domestic abuse within the ultra-Orthodox Jewish community has largely gone unaddressed, though not unnoticed.¹⁷² Catholic priests who abused boys enjoyed immunity for years from the government and from civil liability, yet the religious laws governing the priesthood should have made them highly vulnerable to shaming. They were able to persist in their abuses only because some in the Church hierarchy chose to keep the abuses a secret, placing avoidance of collective shame—the reputation of the Church itself—above duty to the victims or their responsibilities under secular law.

The tendency of motivational law to coincide with authoritarianism and concealment has structural underpinnings. Motivational law can generate an organizational infrastructure the complexity of which corresponds to the complexity of the motivational laws themselves. Complex prayer services and rituals require people to organize, administer and lead them, to train others to do so, and to decide issues that arise in the course of applying the motivational laws that mandate and govern them. A well-organized and well-financed religious group has the means to take effective action vis-à-vis other populations. If motivational laws work effectively within that group, the group's organizational capacity can be energized and turned to extreme forms of action.

Religious educational systems may elevate the risks of pervasive motivational law. Major religions including Islam, Judaism and Catholicism have spawned elaborate systems of religious education, necessitated by the complexity of their religious legal systems, including motivational laws. For Muslim children to learn to apply the *Qur'an*, *Sunnah*, *ahadith* and *fiqh* is a full-time task, as it is for Hasidic Jewish children to learn to pray in Hebrew and to apply the *Tanach*, the *Talmud* and the medieval codes and commentaries. The need to learn complex motivational laws and practices contributes to the isolation of observant children from the mainstream of secular life.

Pervasive motivational practices also contribute to the marginalization of Muslims and Orthodox Jews when they live as a religious minority among people of different religions. Muslim women who wear *hijab* such as the Iranian *chador* and Afghan *burqa*,¹⁷³ and traditional Orthodox¹⁷⁴ Jewish men who wear *yarmulkes* and

¹⁷²For a lengthy bibliography on this issue, see Marica Cohn Spiegel, *Bibliography of Sexual and Domestic Violence in the Jewish Community*, <http://www.mincava.umn.edu/documents/bibs/jewish/jewish.html#id2354008> (last visited Nov. 6, 2007).

¹⁷³*Hijab* is an Arabic term that refers to modesty in dress, including obligatory head coverings for married women. See Mary C. Ali, *The Question of Hijab: Suppression or Liberation*, in THE INSTITUTE OF ISLAMIC INFORMATION AND EDUCATION BROCHURE SERIES, available at <http://www.usc.edu/dept/MSA/humanrelations/womeninislam/whatishijab.html>. The *chador*, a Farsi word, is a full-length semicircle of fabric, usually black, with a head opening traditionally worn by women in Iran. The *burqa* is similar to a *chador* but has a mesh that covers the face. See *A Good Life: Lifting the Veil* (Radio Netherlands Worldwide broadcast Jan. 21, 2003), available at <http://www.radionetherlands.nl/features/development/burqa030123.html>.

¹⁷⁴There is a movement within Orthodox Judaism called "Modern Orthodoxy" in which

black hats and ritual fringes (*tzitzit*), do not assimilate easily into secular society in the West. The frequent obligatory prayers—five times a day in Islam, three times in Judaism—also distinguish adherents of these religions from their peers in the workplace or wherever they may be when the time arrives for prayer. In turn, because they remain marginalized populations—often immigrants, and ethnic and religious minorities—Muslims and Orthodox Jews are more likely to maintain their traditions and observe motivational laws, but motivational laws also keep them marginalized.

3. Ritualization and Standardization

Motivational law easily can become ritualized, in the sense that it assumes non-motivational functions that displace or are substituted for its original motivational purpose.¹⁷⁵ Ritualized motivational law both exerts resistance to social change and can engender or exacerbate social, and even international, tensions.

In a theocracy, ritualization creates an impetus toward standardization. Where religious authorities control the coercive power of the government, line-drawing to decide whether motivational law has been violated becomes more critical since the decision now determines the administration of punishment. Motivational law not only takes on new functions but is standardized.

The wearing of *hijab*, for example, serves as a symbol of religiosity in Turkey, but in Iran it symbolizes allegiance to the existing Islamic political regime, enforced by religious police. In such cases, ritualized motivational law on *hijab* slows the pace of social and religious change, becoming an instrument of oppression, yet may also inspire resistance among women who resent having what elsewhere is a motivational device forced upon them. It also becomes necessary to prescribe what constitutes *hijab*. In drawing lines, religious authorities, confronted with ambiguity regarding a commandment thousands of years old, tend to build what one Talmudic authority referred to as a “fence” around the divine rule;¹⁷⁶ hence the *burqa* and *chador* become mandatory.

Observance of motivational laws also takes on secondary meaning where religious identity is related to social status. Often the same practices that are intended to engender motivation to comply with regulatory religious law are also the most visible to the world outside the moral community. Indeed, their very visibility can be necessary to their effectiveness as a motivator. One Jewish rabbi avoids “road rage” because the *kippah*—skullcap or *yarmulke*—on his head makes him “a representative of the Jewish people” and causes him to control himself.¹⁷⁷ Similarly, Sikhs wear the “five K’s” to keep themselves under control, including *kesh* (uncut hair wrapped in a turban), *kanga* (ritual comb), *kaccha* (special underwear that is supposed to engender self-control), *kara* (a steel slave bangle to remind Sikhs to

adherents sometimes eschew the required head coverings and other motivational practices. I use the term “traditional Orthodox” here to distinguish this movement.

¹⁷⁵ See *supra* note 163.

¹⁷⁶ THE BABYLONIAN TALMUD, *Pirkei Avot* (“Ethics of the Fathers”), 1:1. The original language is, “Build a fence around the Torah,” meaning to err on the side of being overly strict in case of ambiguity regarding a Biblical—or in Islam, Koranic—commandment.

¹⁷⁷ Rabbi Alan Lew, *quoted in* ROSENBERG, *supra* note 2, at 38.

remember the Guru before taking action), and *kirpan* (a dagger to remind Sikhs to defend the weak against oppression).¹⁷⁸

A scene in the film *Europa, Europa*¹⁷⁹ illustrates the relationship between motivational law and social status. A Jewish boy passing himself off in Nazi Germany as an Aryan member of the Hitler Youth tries to reverse his circumcision to avoid detection. The circumcision, originally a Biblical motivational law which like the commandment to wear ritual fringes¹⁸⁰ was intended to remind Jewish males to keep God's commandments,¹⁸¹ became in the Third Reich a deadly mark of inferior social status.

Because observance of the requirements of motivational law is frequently the most visible manifestation of religious practice, such observance can mark the fault lines of religious conflicts, even where many members of the groups in conflict do not share in that observance. Muslim men with full beards attract more hostility from bigots than Muslim men who are clean-shaven and wear suits. Recent anti-Semitic caricatures of Jews¹⁸² often portray them wearing a *kippah* or hat, a full beard,¹⁸³ and sometimes, a ritual shawl (*tallit*) with fringes (*tzitzit*); observance of motivational law makes Jews targets.

V. A THEORY OF THE EFFICACY OF MOTIVATIONAL LAW

A. Conditions for Motivational Law to Improve Compliance with Regulatory Law

Motivational law seems to perform well as a motivator of compliance with regulatory law only if two conditions are met: (1) either the motivational law itself is enforced by sanctions and threat of sanctions sufficiently severe to have a deterrent impact or the motivational law is consistent with the self-interest of those being regulated,¹⁸⁴ and (2) the linkage between the motivational law and regulatory law is evident to those persons who are supposed to comply with the motivational law. Failure of either condition can cause a failure of motivational law to achieve compliance with regulatory law.

¹⁷⁸See generally BBC—Religion & Ethics—Sikhism: The Five Ks, <http://www.bbc.co.uk/religion/religions/sikhism/customs/fiveks.shtml> (last visited Oct. 29, 2007).

¹⁷⁹EUROPA, EUROPA (Central Cinema Company 1990).

¹⁸⁰See *supra* notes 34-35.

¹⁸¹See the discussion formerly available at <http://www.jtsa.edu/community/parashah/archives/5761/lekhlekha.shtml>.

¹⁸²See, for example, those collected by Tom Gross, Cartoons from the Arab World, <http://www.tomgrossmedia.com/ArabCartoons.htm> (last visited Nov. 6, 2007). See also JOËL KOTEK & DAN KOTEK, AU NOM DE L'ANTIZIONISME: L'IMAGE DES JUIFS ET D'ISRAËL DANS LA CARICATURE DEPUIS LA SECONDE INTIFADA [IN THE NAME OF ANTIZIONISM: THE IMAGE OF JEWS AND ISRAEL IN CARICATURE SINCE THE SECOND INTIFADA] (Éditions Complexe 2003).

¹⁸³Traditionally observant Jewish men, like Muslim men, grow beards. Ultra-Orthodox boys wear *payos*, forelocks.

¹⁸⁴In terms of cognitive dissonance theory, individuals must first establish a commitment to the behavior required by motivational law. Unless they have a predisposition to that behavior, they will not establish the necessary commitment without compulsion by the threat of sanctions. See *supra* Part III.B.

The examples given earlier in this Article of motivational laws that fail to accomplish their purpose can be explained by failure of one of these conditions. For example, there is no punishment associated with making a gratuitous promise. The risk of punishment for violating obscenity laws is mild at best, given the difficulty of prosecution,¹⁸⁵ and those who produce or perform in pornography typically see no connection between their conduct and rape or sexual abuse.¹⁸⁶ Violations of religious motivational laws in Western democracies carry no penalty other than a divine one that has credence mainly among those who would comply with those laws anyway. Punishment for violating military disciplinary rules is far more certain, but the linkage between obeying a rule to keep one's bunk neat or to salute a superior officer and overcoming fear of death to obey an order to advance on the battlefield may seem tenuous to many soldiers. If a debtor fails to obtain a briefing on available credit counseling before filing a bankruptcy petition, the debtor's bankruptcy case can be dismissed, but a 2006 study of credit counseling funded by the Consumer Federation of America and American Express and conducted by professors from Georgetown and Purdue Universities found an *increased* likelihood of a subsequent bankruptcy or derogatory public record among people who obtained credit counseling compared to others with the same credit bureau risk scores who did not obtain credit counseling.¹⁸⁷

If these two conditions are satisfied, on the other hand, motivational law can act as a stepping stone to, or reinforcement of, compliance with regulatory law. Typically, violations of motivational law are regarded as less egregious and are punishable by lesser sanctions than regulatory law. For instance, a teenaged boy in Nazi Germany would not suffer quite so severely for failure to comply with a law requiring his attendance at Hitler Youth meetings—a law aimed at motivating him to submit to the military training and indoctrination to obey orders that the Hitler Youth organization administered—as he would for disobeying an order once he was drafted and put on the battlefield. The flogging of women in Taliban Afghanistan and Ahmadinejad's Iran who fail to comply with a version of *hijab* mandating that they

¹⁸⁵Melanie Pearl Persellin, Note, *Sticks and Stones May Break My Bones, But Your Words are Sure to Kill Me: a Case Note on United States v. Alkhabaz*, 50 DEPAUL L. REV. 993, 1038 (2001) ("In general, obscenity prosecutions are quite rare due to the difficulty in establishing material as obscene under the *Miller* test" (citing Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 370 (1997))).

¹⁸⁶One article quotes adult video producer Veronica Hart, "I'm not sending out the message to a bunch of guys that it's okay to go out and abuse chicks because that's what they really want. . . . Even when the chick wants . . . to be taken by a bunch of guys, it's very clear in *my* movies that it's *her* wish." Sean Hannon Williams, *The Parallel Trends of Increased Adult Content in Mainstream Media and Harder Core Pornography: A Tale of Market Failure?* 1 THE CARCERAL NOTEBOOKS 61, 71 (2006) (emphasis in the original), available at, <http://www.thecarceral.org/pornography.pdf>.

¹⁸⁷MICHAEL E. STATEN & JOHN M. BARRON, EVALUATING THE EFFECTIVENESS OF CREDIT COUNSELING 25 (May 31, 2006), http://www.consumerfed.org/pdfs/Credit_Counseling_Report_061206.pdf, (last visited Nov. 14, 2007) ("[E]ven after controlling for risk scores at the outset, the regression model estimates . . . indicate that those who visited a counseling agency had an increased likelihood of a subsequent bankruptcy or derogatory public record.").

completely cover themselves in order to avoid arousing men to entice them into adultery or to commit rape or sexual abuse, is far less severe than the supreme punishment meted out to women who commit adultery, and in the perverse logic of fundamentalist Islam, women often are blamed, and punished severely, even for their own rape and abuse.¹⁸⁸

B. The Allure of Motivational Law as “Regulation Lite”

Motivational law often fails to improve compliance with regulatory law, yet lawmakers nevertheless find it alluring. Lawmakers commonly perceive motivational law as a stepping stone to compliance with regulatory law, as “regulation lite.” It is a way to improve the odds of securing compliance with regulatory law by compelling people to engage in behavior by which they remind themselves of their obligations under regulatory law, or by developing a habit of complying with a class of commands that includes regulatory commands of a similar form or emanating from the same source of authority.

Motivational law not only is perceived as heightening the odds of compliance with regulatory law; it also is less onerous and subjects people to lesser punishment in case those commands are not obeyed. It is both easier and less risky to compel soldiers to attend drills in which they are trained to obey orders, and to fine them or confine them to quarters if they don’t show up, than it is to shoot them if they disobey an order in battle.

Yet, motivational law also provides cover in case of a failure of regulatory law. A municipal legislator wishing to appear tough on rape and sexual abuse may propose an anti-obscenity ordinance, then when the incidence of rape and sexual abuse remains high, point to it as evidence the legislator took action. In religious communities, a defrauder may maintain a reputation for righteousness by virtue of his compliance with the laws of his religion on religious dress, diet and ritual, or by coming to church every Sunday, using as camouflage motivational laws that are supposed to motivate him to obey religious and secular laws that require honesty.¹⁸⁹

¹⁸⁸See Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan From a Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287, 288-90 (1997) (according to fundamentalist Islamic doctrine, absent four male eyewitnesses to a woman’s having been raped, the victim is presumed to have had consensual sex out of wedlock, making her an adulteress (*zina*) subject to punishment by imprisonment or the death penalty); S. Douki et al., *Violence Against Women in Arab and Islamic Countries* 6 ARCHIVES WOMEN’S MENTAL HEALTH 165, 165 (2003) (attributing indifference to domestic abuse in Islamic countries to “attitudes that domestic violence is a private matter and, usually, a justifiable response to misbehaviour on the part of the wife.”); Manar Waheed, Note, *Domestic Violence in Pakistan: The Tension Between Intervention and Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT’L L. 937, 946 (2004) (“any disobedience or even rumor of disobedience is enough to dishonor a man and killing that symbol of disobedience will restore a man’s honor”).

¹⁸⁹In one case in the 1980s handled by the author’s law firm, a businessman made a stir in his local Jewish community by pledging, in a very public forum, a million dollars for Israel. Using the reputation for uprightness he had gained by seeming to comply with Jewish laws on *tzedakah* (charity), he convinced many members of that community to invest in a limited partnership of which he was general partner. The limited partners later discovered the partnership was insolvent and that the businessman had misappropriated partnership funds. Finally, they learned the businessman had never honored his million-dollar pledge for Israel. Then, and only then, did they sue him.

Both because enforcing motivational law is less onerous than having to enforce regulatory law and because it cloaks a lawmaker with the appearance of having tried to improve compliance with regulatory law, lawmakers often use motivational law even in contexts in which there is little or no evidence that it actually works. I have discussed several examples—obscenity laws appear to have little effect on the incidence of rape and sexual abuse of women, the requirement of consideration for contracts does not prevent people from making contracts that they don't really intend to perform, the credit counseling requirement for consumer bankruptcy does not seem to make debtors more likely to honor their contractual obligations in the future, and compliance with religious rules on church attendance has only a marginal effect on the incidence of violation of criminal laws among church-goers. Yet, in each of these cases, those who make and construe the law have opted to use motivational law.

Despite its limited efficacy in most cases, motivational law holds particular appeal among religions, which generally use it more extensively than secular authorities.¹⁹⁰ Lacking the power to punish adherents through formal sanctions in most cases, religious authorities rely heavily on rules regarding religious liturgy and ritual, dress and diet both to reinforce moral communities and to motivate people to comply with religious regulatory laws.¹⁹¹ These rules, however, have much more powerful impact in contexts, such as most Islamic countries, in which motivational law is enforceable through sanctions imposed by the state.

C. Motivational Law's Innate Conservatism

Motivational law is inherently a conservative force. Codifying motivational practices and enforcing them with sanctions makes them difficult to change. As discussed above,¹⁹² motivational law functions in part through reinforcement of the moral community in the face of modernity and rapid social change. People are more easily motivated to comply with rules that are consistent with existing norms and practices. When motivational law is employed to alter existing norms or to attempt to motivate people to comply with the commands of an authority that is otherwise regarded as illegitimate, it usually functions poorly, unless enforced by strong and credible sanctions as in cults. For this reason, motivational laws often have secondary meaning, identifying those who comply with them as supporters of the status quo within the moral community or reference group.

This conservatism is rooted in part in the cognitive tendency to idealize the past. People tend to rate past events more positively than they rated them when the event occurred ("rosy retrospection" or the "positivity effect").¹⁹³ People also tend to

¹⁹⁰Use of motivational law in religion has ancient roots. *See supra* Part II.B.3.

¹⁹¹*See supra* Part II.A, for the distinction between motivational and regulatory laws. Religious regulatory laws include, for example, most of the Ten Commandments, and other rules governing the relationship between people and between people and their environment.

¹⁹²*See supra* Part IV.C.3.

¹⁹³Terence R. Mitchell & Leigh Thompson, *A Theory of Temporal Adjustments of the Evaluation of Events: Rosy Prospection & Rosy Retrospection*, in 5 *ADVANCES IN MANAGERIAL COGNITION AND ORGANIZATIONAL INFORMATION PROCESSING* 85, 85-114 (Chuck Stubbart et al. eds., 1994); Mara Mather & Laura L. Carstensen, *Aging and Motivated Cognition: The Positivity Effect in Attention and Memory*, 9 *TRENDS COGNITIVE SCI.* 496

remember their choices as better than they actually were (“choice-supportive bias”).¹⁹⁴

Most of the examples of motivational law given in Part II.B of this Article manifest this conservative tendency. Obscenity laws, laws prohibiting abortion counseling, credit counseling requirements for bankrupt debtors, laws establishing the privileges of royalty, military disciplinary rules, and censorship laws all reflect conservative values. Motivational rules of the common law requiring formalities such as consideration or seal of the promisor for a binding contractual promise, the holographic will in lieu of witnesses, and the formalities of Roman civil law such as those required for the *fiducia cum creditore*¹⁹⁵ that are still reflected in the secured credit laws of many civilian jurisdictions,¹⁹⁶ seem quaint relics of the distant past though they remain in use today. Efforts to use motivational law to rehabilitate offenders have been only marginally successful,¹⁹⁷ perhaps because they attempt to use a tool best suited for preserving normative behavior to alter the behavior of people whose norms are different.

Motivational law’s conservatism also manifests itself in religion. “Give me that old time religion” is sung in many Protestant churches. Hasidic Jewish movements continue to require their members to dress in the manner of 17th century Eastern European Jews, and practice a version of Jewish liturgy from the same period. Al Qaeda and its affiliates motivate their followers to commit acts of what they call

(2005).

¹⁹⁴Mara Mather & Marcia K. Johnson, *Choice-supportive Source Monitoring: Do Our Choices Seem Better to Us as We Age?*, 15 PSYCHOL. & AGING 596 (2000).

¹⁹⁵George Long, Mancipium, in A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 727 (William Smith ed., London, John Murray 1875), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Mancipium.html; George Long, Fiducia, in A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 536 (William Smith ed., London, John Murray 1875), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Fiducia.html

¹⁹⁶See Arnold S. Rosenberg, *Where to File Against Non-U.S. Debtors: Applying UCC §9-307(c) [Rev] to Foreign Filing, Recording, and Registration Systems*, 39 UCC L.J. 109, 255-57 (2006).

¹⁹⁷See, e.g., Doris Layton MacKenzie et al., *An Experimental Study of a Therapeutic Boot Camp: Impact on Impulses, Attitudes and Recidivism*, 3 J. EXPERIMENTAL CRIMINOLOGY 221 (2007) (explaining that boot camp releasees had marginally lower recidivism than releasees from prison, and the difference became insignificant when antisocial attitudes or anger management problems were added to the model predicting recidivism); James A. Wilson & Robert C. Davis, *Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program*, 5 CRIMINOLOGY & PUB. POL’Y 303 (2006) (stating that intervention participants performed significantly worse on multiple measures of recidivism after one year); Sheldon X. Zhang & Lening Zhang, *An Experimental Study of the Los Angeles County Repeat Offender Prevention Program: Its Implementation and Evaluation*, 4 CRIMINOLOGY & PUB. POLICY 205 (2005) (stating that juvenile offenders provided with treatment showed lower recidivism rate than control group only for the first six months after release); Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 378 (1995) (“The field of intermediate sanctions is relatively new and there is no proven successful sanction for low-level drug offenders.”).

martyrdom in the struggle to restore the 7th and 8th century caliphate, which they regard as a divine command.

VI. CONCLUSION

Motivational law exists, and prevailing theories of law do an inadequate job of explaining it. Motivational law often lures lawmakers as an alternative or supplement to coercive enforcement of regulatory laws, but without enforcement of the motivational law itself through sanctions or threat of sanctions, it is unlikely to succeed in increasing compliance with regulatory laws. Even with enforcement through sanctions or threat of sanctions, motivational law will fail if its linkage to regulatory law and favorable outcomes is perceived as weak by those who are its subjects. When motivational law does work, it works primarily by establishing a commitment to compliant behavior and strengthening the moral community, allowing peer group influence to reinforce that commitment.

Inherently a conservative force, motivational law is susceptible to abuse by authoritarian regimes, which use censorship laws and forced indoctrination to consolidate their power. However, motivational law acts as a conservative force in the common law tradition as well, reflected in such doctrines as the consideration requirement for contract formation, the rule against admissibility of evidence of subsequent repairs, and the formalities to make a will. Even due process has a motivational purpose: to maintain the legitimacy of the judicial process so as to motivate citizens to accept and obey the judgments and orders it produces.

Religions in democratic countries, lacking coercive power, often use motivational law, though Christianity, a faith-based rather than law-based religion, makes less use of it than Islam and Judaism. This disparity in use of motivational law lies at the core of tension between Islam, rich in motivational law rendered rigid in theocracies through ritualization and standardization, and the predominantly Christian secular democracies. Religious motivational laws, such as church attendance and religious ritual, dress and diet, must be either enforceable through sanctions or clearly connected to favorable outcomes for those to whom they apply, or they will atrophy. Once individuals are committed to religious observance, however, both shaming and the information processing described by cognitive dissonance theory, screening out information that fails to support that commitment, will tend to preserve religious observance.

New Governance theory and “soft law” similarly rely on motivation mediated through regulatory communities. Regulatory communities, however, give the impression of cronyism. When government regulators develop a bond of trust with the industries they regulate, outsiders distrust them for it, and the government’s legitimacy suffers. To the extent that it relies on motivational law not enforceable through sanctions, New Governance may decay into cronyism and will damage the legitimacy of the regulatory process.