BRILL
NIJHOFF

JOURNAL OF LAW, RELIGION AND STATE
11 (2023) 90–119

JLRS
brill.com/jlrs

Choices and Allocation of Costs for Religious Preferences and Practices: Insights from an Israeli Test Case

Amos Israel-Vleeschhouwer
School of Law, Sapir Academic College, Sderot and West-Negev Regional Council, Israel
Aisrael@mail.sapir.ac.il

Received: 29 August 2022 | Accepted: 20 August 2023 |
Published online: 11 December 2023

Abstract

Internalization of costs of religious preferences fits the religious self-perception and ideology of many religious communities and is in their long-term interest. It also strengthens the external value of religious communities, norms, and institutions for the wider society.

Many forces press religious communities to reduce the costs of religious preferences. Within a community, costs are reduced by limiting the available choices or shifted to its weaker members; outside the community, costs are shifted to other groups or the state. Incentives influence the allocation of costs, which in turn shape internal communal choices and the religious vitality and sustainability of the community. The allocation of costs also affects the external relations of communities. This article suggests that the allocation of costs is yet another aspect of religious and ideological communities in liberal states that deserves investigation at the constitutional, legal, and regulatory levels.

Keywords

internalization – cost-shifting – allocation of costs – vitality – sustainability – Church-State relations – Israel – ultra-Orthodox

Published with license by Koninklijke Brill NV | DOI: 10.1163/22124810-11010007
 | ISSN: 2212-6465 (print) 2212-4810 (online)

In memoriam of Prof. Amitai Etzioni (1929–2023)
A *mensch* and inspirational public intellectual

∴

Many people and organizations would be happy for others to pay some of their expenses.[1] In the context of religious life, this cheaper option often contradicts the value of bearing the costs of your religious preferences. From within religion, the choice between the cheap and costly options is very significant, with practical, moral, and even theological consequences.[2] Considering the allocation of costs is therefore an important perspective, affecting religious communities in (liberal) non-religious states and multicultural societies.

Recognizing that the state and other stakeholders influence cost allocation, the article focuses on the consequences of various forms of cost allocation for subsequent choices. The goals of the article are to identify forms of cost and risk allocation, suggest some elements that influence them, describe the resulting complex dynamics by discussing real examples, and suggest considerations for future research.

I argue that (a) internalization of costs is crucial for maintaining religious ideological vibrancy, adaptability to changing conditions, and ensuring sustainability; these characteristics are important not only for the religious community but also for liberal states, which may gain from non-coercive, sustainable religious communities; (b) states and other stakeholders influence religious groups through allocations of costs, which therefore should be taken into consideration in negotiations and policy decisions; and (c) shifting costs of religious preferences may cause internal ideological degeneration and corruption, therefore, allocation-of-cost analysis is important both for the religious communities and other stakeholders. The interactions of the state with the Jewish ultra-Orthodox community in Israel serve as the test case for these arguments.

The article is structured as follows: Part 1 discusses hard ideological choices and argues that internalized costs are important for vibrant, sustainable,

1 I thank Menachem (Menny) Mautner, Neta Barrak-Koren, Gideon Sapir, Zvi Zohar, participants at the conference on Religious Freedom and Religious Minorities (2018) and at the Religious Extremism workshop (2019) – both at Bar Ilan University and Alon Harel, Riwi (Rivka) Weil and participants in her amazing constitutional challenges workshop at Reichman university. I also thank my friends at Sapir College, the reviewers and the editorial team at the Journal of Law, Religion and State for their critique.

2 Compare Dietrich Bonhoeffer, *Nachfolge* (*The Cost of Discipleship*) (1937), distinguishing between cheap and costly grace.

non-coercive religious communities. It adds a weaker argument for the positive roles such communities may play in public civil discourse. Parts 2 and 3 are dedicated to the second argument, describing the effect of the state and other entities on cost and risk allocation and the subsequent influences of these allocation matrices. Part 2 focuses on the strategic choice of religious communities between persuasion and coercion. Specifically, cost/risk matrices created by the state and other entities at the constitutional level affect religious choices, offering an additional explanation for choosing between the two options. Cost allocation can suggest an additional explanation for the different ways in which coercive and persuasive religious communities balance the will to grow and striving for purity with the challenge of human variation and of fostering voluntary compliance with the religious norms. Part 3 opens with a brief discussion of methodology, and introduces the Israeli test case, its use, and limitations. The Israeli example serves to identify some less evident forms of cost reduction and cost shifting. This part contains a discussion of incentives, which may result in (re)internalization of costs and its possible consequences. It ends with a rich description of the possible effects of the various allocations, based on a real scenario. Part 4 focuses on the detrimental effects that the cost shifting has on Church-State relations, among others, by fostering extremism, and on its negative effect on ideological religious communities, especially ideological degeneration. I conclude by discussing some implications of the focus on cost allocation on research and policy.

1 The Value of Hard Choices

This part offers three intertwined arguments: (a) that hard choices are valuable for religious groups; (b) that the value of hard choices depends on the internalization of costs; and (c) that internalization of costs is a condition for a combination of ideological vitality and sustainability. Finally, I suggest considering the merit of non-coercive religious communities that routinely engage in such hard choices, for civil discourse in multicultural societies.

1.1 *The Value of Ideological Hard Choices*

Ideological choices are voluntary acts in which individuals bear costs for preferring one course of action over another.[3] Weighing the value of

3 See Philip E. Tetlock, "Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors", 109(3) *Psychological Review* (2002), 451; Philip E.

conflicting positive options (e.g., having many children vs. environmental concerns or enjoying a night out with the family vs. donating the money and time to charity) is crucial for ideological life. Routinely making such significant choices and living according to the resulting decisions is an important part of the self-identity of ideological individuals, which shapes their life. In the words of Dumbledore after Harry Potter exits the chamber of secrets, "It is our choices, Harry, that show what we truly are". When many individuals choose based on a common ideology, or leaders of ideological communities decide for a community, the aggregated choices constitute the self-perception of the community as well as its boundaries, culture, and institutions.

Choices are often time- and condition-sensitive. Choosing is therefore an ongoing process, often requiring the recalibration of preferences, negotiations between community members, groups, and their leaders. These result in the adjustment of rules, customs, or institutions, or in the decision to maintain them as they are. The inherently uncertain result of any decision and of the complexity of reality requires non-trivial processes of assessment and decision making. All decisions and their implementation reconstitute the value system of the community. The aggregated experience gained from these choices, often formulated in mythology, literature, or legal rules, serves communities in making future choices between strategies and options.[4] Experience optimizes both processes and institutions for future choices, enabling ever-better coping with internal and external challenges. Publication of the decisions and public expressions of the chosen behaviors express the choices to members and the world.

1.2 *Bearing Costs and the Quality of Choices: Sustainability and Vitality*

Bearing costs is important for ideological choices. Freely choosing a costly option clearly expresses one's obligation to a set of values. Self-transcendence is expressed by volunteering, helping, and giving (to charity), being satisfied with little. Living a virtuous, moral ("value-able") life comes with the cost of foregoing other valuable things like money, comfort, time, health, and even one's life.

Bearing costs has other benefits as well. To optimize decisions, all relevant costs and benefits should be considered. For communal decisions, "internalizing all costs" "helps promote […] understanding of the way things

Tetlock, Barbara A. Mellers & J. Peter Scoblic, "Sacred vs. Pseudo-Sacred Values: How People Cope with Taboo Trade-Offs", 107(5) *American Economic Review* (2017), 96.

4 Laurence R. Iannaccone & Eli Berman, *Religious Extremism: The Good, The Bad, and The Deadly* (2005).

are connected."[5] When fully accounting for all considerations, decision makers can take necessary precautionary measures, negotiate better,[6] and formulate better ideological arguments for decisions. Such decisions improve the probability of leading to the expected positive results, *ex ante*. Even if wrong, paying attenuation to the considerations heightens the chances that *ex post*, the decision will be quickly reconsidered.

Additionally, if one of the costs of a choice is giving up another important value, reluctance to do so may induce innovation. Leaders and bottom-up processes then find, create, and choose new (or "new") cultural, legal, and political options. They may reevaluate the relative importance of values, reinterpret the conditions, or make different political choices. Communities may even learn from the experience of other, even far-away communities.[7]

Religious cultures and legal systems tend toward conservatism, traditionally opposing change. At the same time, they also have a proven ability to change and adapt.[8] The dual ability to resist change and to change, honed through centuries of historical challenges,[9] constitutes one of the bases of the resilience and endurance of religious communities. Religious communities and leaders ably chose between these strategies and others, based on their accumulated

5 Graeme Garrard, *Rousseau's Counter-Enlightenment: A Republican Critique of the Philosophes* (SUNY, 2003), 46.

6 Gideon Sapir & Daniel Statman, *State and religion in Israel: A Philosophical-Legal Inquiry* (Cambridge University Press, 2019), 49, 56. Public choice theory leads to the same conclusion in a different way. See Gordon Tullock, "Public Choice", in *The New Palgrave Dictionary of Economics* (2nd Edition, 2008); for a public choice argument that alignes with the argument presented here, see Anthony Gill, "The Comparative Endurance and Efficiency of Religion: A Public Choice Perspective", 189 *Public Choice* (2021), 313.

7 Faced with the challenge of exile, of enduring without reliance on territory and sovereignty, the Dalai Lama approached Jewish leaders to learn how to adapt to the new conditions. See Roger Kamenetz, *The Jew in the Lotus: A Poet's Rediscovery of Jewish Identity in Buddhist India* (New York 1995). Innovation and cultural borrowing are an important strategy for legal and cultural innovation. Menachem Mautner, *Law and Culture* (Tel Aviv, 2008) (Hebrew).

8 Mautner explains that culture is like a brick wall in which replacing bricks doesn't ruin the wall and even strengthens it. Mautner, Law and Culture, *supra* note 7, at Ch 2, 11.

9 Jewish law and thought adapted after the destruction of the second temple and the subsequent exile. Benyamin Lau, "Raban Yohanan Ben Zakai", in *The Sages I*, (2010), 335–348; Idem, "The Desciples of Raban Yohanan", in *The Sages II*, (2012), 23–46. Similarly, Vatican II is a major adaptation of the Catholic church to the changing world, in the aftermath of the two world wars. vatican.va/archive/hist_councils/ii_vatican_council/index.htm. In both cases, major changes in law, practice, ideology, and weltanschauung served to preserve the culture, law, institutions, and communities, even as they evolved.

experience of repeatedly making decisions.[10] All these processes together facilitate the sustainability of the community.[11]

Finally, bearing the costs of religious preferences requires religious fervor,[12] commitment to religion, religious innovation, or a combination of these. The positive consequences of the ideological tensions associated with the hard choices involved are referred to as religious vitality.[13] Internalization of the costs of choices signals ideological sincerity and commitment, both toward the ingroup (e.g., by the leadership) and the relevant outgroups.[14] If the costs of a choice are allocated to others, the act does not impose costs on the chooser. The choice becomes "easy" and in many cases, it is no choice at all.[15] One does not have to choose between value A and value B but can satisfy both, without additional cost. Such "choices" are naturally legitimate but promote less ideological vibrancy and vitality. Giving to charity using other people's money does not require personal contemplation, spousal consultation, or religious fervor; it is easy.[16] Consequently, it also fails to invoke deep feelings or

10 For the integration of multiple factors in the complexity of religious decision making, see Amos Israel-Vleeschhouwer, "Pesikat Halacha as a Cognitive Event", in Avinoam Rosnak (ed.), *Jewish Law as an Event* (Magness, 2015), 96–133. [English draft available from author].

11 Britannica, "Sustainability" ("the long-term viability of a community, set of social institutions, or societal practice … long-term (economic) growth … design features that suit social systems for long-term survival, including robustness, resiliency, redundancy, and adaptability").

12 Nilay Saiya & Stuti Manchanda, "Paradoxes of Pluralism, Privilege, and Persecution: Explaining Christian Growth and Decline Worldwide", 83(1) *Sociology of Religion* (2022), 60, https://doi.org/10.1093/socrel/srab006 (pluralism and persecution heighten religious vitality, while privilege reduces vitality).

13 Vitality not only denotes the attractiveness of religious membership, but the centrality of religious values to the individual and the community in shaping life choices. Jörg Stolz & Mark Chaves, "Does Disestablishment Lead to Religious Vitality? The Case of Switzerland", 69(2) *British J. of Sociology* (2017), 412; Detlef Pollack, "Explaining Religious Vitality: Theoretical Considerations and Empirical Findings in Western and Eastern Europe", in Anuel Franzmann, Christel Gärtner & Nicole Köck (eds.), *Religiosität in der Säkularisierten Welt* (2006), 83; Traunmueller, Richard et al., "Religious Diversity and Religious Vitality: New Measuring Strategies and Empirical Evidence", 9(3) *Interdisciplinary Journal of Research on Religion* (2013), 2. For a review on vitality as a psychological concept, see Olga Lavrusheva, "The Concept of Vitality: Review of the Vitality-Related Research Domain", 56 *New Ideas in Psychology* (2020).

14 Lenin argued for the need of a small dedicated self-sacrificing leadership/group to lead any possible revolution. Vladimir Ilyich Lenin, "What is to be Done? Burning Questions of Our Movement" (1901–1902), available at marxists.org/archive/lenin/works/1901/witbd/.

15 Sapir & Statman, *supra* note 6, at 49–50, 57.

16 Consequences of allocation of costs are evident in the development in the Jewish laws of the Sabbath. The prohibition to create and do work on the Sabbath created tensions

commitment. Such choices do not provoke communal debates, commitment to tradition, accountability by the leadership, conservatism, or innovation.[17]

1.3 *Cost Allocation and the Contribution of Hard Communal Choices to the Public Debate*

Religious communities are part of the vibrant fabric of most pluralist societies.[18] Many religions whose institutions, laws, and culture constitute complex and dynamic systems[19] have survived for a long time.[20] Seen from inside the religious communities, the survival of the religion (its sustainability and the protection of its interests) is paramount. For many religions, the reputation and status of the system as an alternative in the eyes of "others" is of great importance, second only to survival.[21]

When religious people, freely choosing to adhere to hard choices, are happy and flourish, their choice may challenge others in society and arouse

with opposing values – e.g., caring for the sick or celebrate the sabbath itself if the lights went out. Jewish law developed an option to transfer the work to a non-Jew ("Shabbos Goy") who is not commanded to keep the Sabbath laws. Taken to its extreme this solution could squash all need for deliberation and consequently reduce the value, and change the experience, of the shabbat. This may be why rabbis reinternalized part of the costs by instituting a (weaker) prohibition to instruct the non-Jew to do the prohibited act. This weaker prohibition recreated the need to deliberate between values, with lower but still significant internal costs (Jacov Katz, *The "Shabbes Goy": A Study in Halakhic Flexibility* (JPS, 1989)). See also below, Ch. 3.B.

17 Interestingly, the long-term impact of such choices resembles those of coerced behavior, which isn't based on choice, as will be argued below, in Ch. 3.

18 As the ECtHR stated, religious freedom is "a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it", *Kokkinakis v. Greece* (14307/88), May 25, 1993, at 31.

19 Amos Israel-Vleeschhouwer, "A Structural, Dynamic and Complex Analyses of Interaction of Jewish and Other Legal Systems", 25 *Jewish Law Association Studies* (2014), 1.

20 A system's preservation is its paramount goal. A. D'Amato, "International Law as an Autopoietic System", in R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty Making* (New York: Springer, 2005), 335–399; N.T. Lyons, "Autopoiesis: Evolution, Assimilation, and Causation of Normative Closure:, in T. Kaye (ed.), *Law, Justice, and Miscommunications. Essays in Applied Legal Philosophy* (Lake Mary: Vanderplas Publishing, 2011).

21 For Jewish law see Aviad HaCohen, "Lama Yomru HaGoyim: Israel's Image and Reputation in the Eyes of Gentiles as a Legal Consideration in Jewish Law" in Beni Lau (ed.) *Am Levadad: Moledet Upezura* (Jerusalem 2006), 88–123; For International law see Andrew T. Guzman, *The Limits of International Law: Reputation and International Law*, 34 *Ga. J. Int'l & Comp. L.* (2006), 379.

their interest.[22] Of special interest are sustainable communities of such people, whose members' children voluntarily stay in the fold and others join voluntarily. These individuals and communities present a cultural alternative to society as a whole. They enrich the social matrix and the ideological discourses in broader society.[23] Etzioni stressed the special value of illiberal moderates, religious groups and leaders who oppose coercion and violence while holding non-liberal ideologies, values, and worldviews.[24] Going beyond Etzioni and Sapir and Statman, who focus on the challenge for individuals, I suggest that such sustainable religious communities deserve special attention because they may offer viable, thought-provoking, alternative options to the "good life" and the social order.[25]

Communities that are sustainable present an attractive alternative for organizing society, contributing significantly to the public discourse.[26] Communities that shift a significant part of the costs of their way of life on others, lose some of the sustainability or vitality (or both), and therefore arguably diminish their potential contribution as alternatives.[27]

2 Persuasion v. Coercion in Church-State Relations: The Allocation-of-Cost Analysis

Many religious communities believe that they hold the truth, or at least a best approximation to it. Thus, they may not be tolerant of diversity in their

22 Menachem Mautner, *Human Flourishing, Liberal Theory, and the Arts: A Liberalism of Flourishing* (Routledge, 2020).

23 Sapir & Statman, *supra* note 6, at 49.

24 Amitai Etzioni, "The Global Importance of Illiberal Moderates", 19(3) *Cambridge Review of International Affairs* (2006), 369 (In the global context discussed by Etzioni – the more extreme a religious person or community is, while being non-coercive, the more politically important these illiberal moderates are). For a more recent version of Etzioni's argument see his *Happiness is the Wrong Metrics* (2018), Ch. 12 (189–200).

25 Compare Jenn Paul Carvalho & Michael McBride, "The Formation of Religious Beliefs and Preferences", in Jenn Paul Carvalho, Sriya Iyer & Jared Rubin (eds.), *Handbook of Labor, Human Resources and Population Economics* (Springer, Cham 2022) (religious capital & religious transmission).

26 Fostering variation in civil society is enriching, but also has costs. The more communities there are, and the more extreme and different they are, the higher the costs of communication and negotiation. Communities that present attractive or creative alternatives, justify higher costs.

27 Other reasons can obligate protecting religions. See Sapir & Statman, *supra* note 6, at Ch. 5. Note, however, that unlike assessing the social contribution of all religions as the same, the allocation of cost criteria rates the potential contribution of religious communities, but without assessing the religion itself, nor assessing it according to liberal or other values.

community or in their relations with other communities or with the state, if these are not committed to the same truth. The basic choice of religious communities coping with this challenge is between coercion[28] and persuasion. This choice is affected by the allocation of actual and potential risks and costs. The arguments presented here arise from Jewish sources and the Israeli context but seem relevant to other religions and contexts as well.

2.1 *The Religious Policy Choice behind the Veil of Ignorance*

At the constitutional level of Church-State relations, religious leaders must choose between two constitutional options. In one, the "winner takes all" and enforces its perception of "the good life" on all. In the other, constitutional rules restrain all "winners" to respect the choices of others and commit whoever wins to provide a nourishing, pluralistic public sphere and a rational, public civil debate. According to Rawls[29] and D'amato,[30] rational[31] religious leaders never choose a constitutional regime that includes its potential legitimate annihilation. Facing the dilemma between the two options, they prefer the second regime, giving up the possibility to use state power to enforce their norms.[32]

The late Rabbi Menachem Shach (1899–2002) instructed the ultra-orthodox (UO) political representatives in Israel to oppose any policy that may lead, even in very low probabilities, to the destruction of the world of Torah.[33] To preserve freedom of religion, he was ready to support freedom from religion, as part of the political deal. Recently, Prof. Rabbi Broyde offered the same rationale in an argument regarding the Jewish stand on abortion, stating: "Freedom in matters of personal conscience is a better alternative for America, American Jewry as

28 As opposed to below (Ch. 3), I use coercion in a broader sense, like Etzioni, *supra* note 24. Governments can coerce by threats and offers, see David Zimmerman, "Coercive Wage Offers", 10 *Philosophy and Public Affairs* (1981), 121; Scott Anderson, "The Enforcement Approach to Coercion", 5 *Journal of Ethics and Social Philosophy* (2010), 1. Note that communities can coerce no less than governments, but the later are much more powerful.

29 John Rawls, *Political Liberalism* (New York: Columbia Univ. Press, 1993).

30 See *supra* note 20.

31 In this article I'll assume Berman's claim that given the religious preferences, religiously-based decisions are rational (At least pseudo-rational), see: Eli Berman, *Radical Religious and Violent: The New Economics of Terrorism* (2009); Idem, *supra* note 4. Berman's article regarding UO in Israel was published in Hebrew in the economic quarterly, Aug. 2000.

32 This argument has been developed by S. I. Strong, *Transforming Religious Liberties: A New Theory of Religious Rights for National and International Legal Systems* (2017).

33 Avishai Ben Haim, *A Man of Vision* (*Ish HaHashkafa*)*: Ultra Orthodox Ideology according to Rabbi Shach* (2004) (Hebrew); Benjamin Brown, "Rabbi Shach: Ha'aratsat Haruach, Bikoret Haleumiut VeHahachraot Hapolitiyot Bemedinat Yisrael", *Dat Veleumiut Beyisrael VeBamizrach Hatichon* (2003), 278 (Hebrew).

a whole, and American Orthodoxy in particular, than one which suppresses people's liberty by enforcing a particular view [...] Within the ordinary ambit of secular law, Orthodox Jewry should seek to increase religious, social, and cultural freedoms even though this will lead to violations of Jewish or Noahide Law. The alternative reduces our communities' ability to function consistent with Jewish law."[34]

This is true, however, only if these are the only options. A third option may change the strategic constitutional choice. Assume a third option, in which religious parties could enforce their beliefs on society by state power if they won but be protected by freedom of religion if they lost. After the potential (devastating) costs have been eliminated, the choice matrix changes, and that may change the fundamental choices of the community.[35] Rational extremists may then try to use state power to enforce their beliefs on others. The same can happen if religious representatives assume that, because of politics, demography, or other reasons, they cannot lose. Arguably, this can explain the current (2023) unprecedented wave of proposals for religious legislation in Israel.[36]

2.2 *Religiously Mandated Persuasion and Internalization*

Rabbi Eliezer Melamed[37] presented an internal religious legal argument why, although coercion achieves obedience and compliance quicker and at a lower cost, a ruling religious majority should sway non-believers by the more expensive and slower power of persuasion through setting personal and communal examples. He started by stating that according to Jewish law, a religious majority may use state coercion to enforce its truth.[38] But he argued

34 Michael Broyde. "What Does Jewish Law Think American Abortion Law Ought To Be?". 2022. Lehrhaus. Retrieved 31 Aug. 2023, https://thelehrhaus.com/timely-thoughts/what-does-jewish-law-think-american-abortion-law-ought-to-be/.

35 The choice to coerce or not would depend on the internal religious attitudes regarding the value of coercion versus voluntary adherence – and not on the externally imposed rules of the game. Some would argue that the third option described in the text is likely to be perceived as realistic (end even desirable) in liberal democratic states.

36 Judy Maltz. "Will Israel Become a Theocracy? Religious Parties Are Election's Biggest Winners. 2022. Haaretz. Retrieved 31 Aug. 2023, haaretz.com/israel-news/elections/2022-11-03/ty-article/.highlight/will-israel-become-a-theocracy-religious-parties-are-elections-biggest-winners/00000184-3db9-dc3c-a1ac-bfbb83b40000.

37 Born in 1961.

38 Both are explicit edicts in Jewish legal treatises, which might also be inapplicable due to other reasons. See Eliav Shochatman, *Al Hakefia Lekayem Mitsvot*, 311 *Parashat Shavua* (2008), http://www.daat.ac.il/mishpat-ivri/skirot/311-2.htm) (Hebrew); Eliezer Hadad, *Miutim Bemedinat Yisrael Be Heibetim Datiim* (IDI, 2010).

that this was true only in utopian reality: if the Jewish religion were widely accepted, its justice would be self-evident and its truth undeniable.

Until then, he argued, religious communities should actively pursue social perfection. Such perfection would lead almost all others to voluntarily "see the truth" and join the community of faith.[39] If and when every reasonable person voluntarily accepts the rule of Jewish law, its norms can be forced upon a remaining rebellious minority.[40]

Melamed and the UO rabbi and jurist Isaac Breuer[41] challenged Orthodox communities to achieve persuasive communal perfection without coercion,[42] by nurturing ever-intensifying religious fervor and dedication. They both noted the role of willingly bearing the costs of religious preferences in this challenging process.

Yet, with such an ideal goal, there is a danger that the efforts to perfect society would collapse toward internal violent enforcement.[43] Such perceived need for internal coercion may be present in small communities (sects), but often coincides with the growth of the community.

2.3 *Population Size, Purity, and Human Variation: The Internal Challenge for Voluntary Compliance*

It is difficult to voluntarily adhere to extreme norms while bearing the full costs. For any such set of norms, human variation limits the number of people who sincerely identify with the ideological demands. Therefore, internalizing the costs of preferences places a limit on the potential scale of voluntary extreme

39 Eliezer Melamed, *Peninei Halacha: Issues of the People and the Land* (2005), 108–109 (Hebrew).

40 When most non-Jews or non-believers voluntary accept the discrimination against them as the good order of the world or choose to convert – you may "enforce" these norms on the rare few who obstruct the world order, not seeing the self-evident widely accepted truth. Compare Breuer, below.

41 Rabbi Breuer stresses that the ideal Jewish Tora-State, subservient to law and dedicated to serve, will never abuse state power. See Amos Israel-Vleeschhouwer, "The Mandate System as a Messianic Alternative in the Ultra-Religious Jurisprudence of Rabbi Dr Isaac Breuer", 49 *Israel L. Rev.* (2016), 339. Breuer, more than Melamed, argues for the universal relevance of this argument.

42 Other rabbis condone corporal punishments for Jews to create such a perfect society which could then rule the world. They justify this coercion by assuming theoretical acceptance by all reasonable people, citing (BT BB, 48a): "you coerce him till he says I want to do this". Melamed explicitly leaves any coercion only to a utopic future.

43 Failing to achieve perfectness, communities might also engage in denial, misrepresentation or blaming.

religious communities: there is an inherently inverse correlation between voluntary extremism and community size.[44]

As cohesive, extreme ("pure") communities grow, the human variety within them grows and voluntary compliance by all becomes a challenge. To accommodate growth while maintaining voluntarism, communities can choose less-extreme norms, tolerate growing internal variance (or both),[45] or seek to reduce, shift, or externalize costs.

Other communities forgo the voluntary aspect and use various forms of coercion, like the violence employed by ISIS, the Taliban, and *Mishmarot Hatsniut,* the chastity posse of the Israeli UO community.[46]

3 Cost Reduction, Cost Shifting, and Externalization

This part will discuss and analyze cost-management strategies, and their effect on religious dynamics. The support for the argument mainly relies on Jewish religious sources and Israeli reality. But the argument may also apply to other ideological communities, groups, and systems.

3.1 *Allocation of Costs: Scope, Limits, and the Israeli Test Case*

Allocation of costs can help explain the actions of many ideological communities and their interactions with liberal states. Berman and Etzioni have implied the relevance of such allocation to many religions (Berman) and ideological groups (Etzioni) or institutions.[47] I focus on religion because

44 UO communities since enlightenment until recently, as well as Anabaptist communities (like the Amish) and the early Kibbutzim in Israel, are examples of relatively small communities that mostly internalize(d) the costs of their ideology. See for UO communities, Jonathan Boyarin, *Circumscribing Constitutional Identities in Kiryas Yoel*, 106 *Yale L. J.* (1997), 1537.

45 Compare Nuno Garoupa & Pedro P. Barros, "An Economic Theory of Church Strictness", 563 *UPF Economics & Business Working Paper* (August 2001).

46 Yair Ettinger. "Police Believe They've Exposed Haredi Modesty Patrol". 2008. Haaretz. Retrieved 31 Aug. 2023, haaretz.com/2008-09-01/ty-article/police-believe-theyve-exposed-haredi-modesty-patrol/0000017f-dc1e-d3ff-a7ff-fdbeb5b30000. The text presents three examples, without comparing them.

47 Iannaccone & Berman, *supra* note 4, at 30. Etzioni, *supra* note 24. I've mentioned ISIS and Kibbutzim above. Regarding institutions, After enjoying governmental bailout, too-big-to-fail capitalist companies are much less convincing as sustainable examples for capitalism. See Daniel Indiviglio. "Too Big To Fail: A Problem For Capitalism". 2009. The Atlantic. Retrieved 31 Aug. 2023, theatlantic.com/business/archive/2009/07/too-big-to-fail-a-problem-for-capitalism/22167/.

of the resurgence of religion and religious communities, which is causing a recalibration of Church-State relations in many countries.

This article suggests adding the allocation of costs as an analytical tool because it is relatively less value-laden or dependent than other criteria and analytical concepts. But because the antecedents and effects of cost-allocation are sensitive to circumstances, every analysis requires a rich, detailed, and nuanced exposition of the dynamics and its context in each particular case. For the following Israeli ultra-Orthodox (UO) test case, a brief introduction of the UO community in Israel is in order.

Israel is a post-colonial state with established state-mandated power allocated to religious sects, a weak separation of Church and State, and a high level of Jewish religious influence in the public sphere, mitigated by some freedom from religion in the private sphere.[48] The Jewish UO society in Israel contains many communities that, despite their differences, share many features,[49] all amounting to a complete alternative *Weltanschauung*, a coherent holistic way of looking at life and the world.[50] UO religious authority in Israel is relatively centralized and hierarchical.

Most members claim that they chose or would choose their current way of life. This ethos of choice is strong in Jewish UO lore.[51] Berman argues that some of the features of UO communities in Israel, like voluntary poverty, dedication to religious study at the expense of work for men, and having many children, are costs that signal a sincere commitment to membership in a close-knit community from which they derive various benefit.[52] Revered role models of the community are often characterized by their self-sacrifices. Israeli media described the late UO leaders, rabbis Aurbach, Elyashiv, and Steinman, as powerful examples. They led hundreds of thousands of adherents while living piously in modest houses and dedicating themselves to learning, teaching, and serving others. The communal lore stresses the choice to bear the costs as proving that these are sincere and authentic choices, maintained by the rabbis over a long lifetime. Their example challenges their adherents to higher

48 For a detailed description and analysis, see Sapir & Statman, *supra* note 6. See also Shlomo Fischer, "Intolerance and Tolerance in the Jewish Tradition and Contemporary Israel", 2 *J. of Human Rights* (2010), 65.

49 Benjamin Braun, *Madrich LaHevra HaHaredit* (IDI, Jerusalem, 2017) (Hebrew).

50 Compare David A. Westerbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", 33 *Virginia J. of Int'l L.* (1993), 819.

51 See Rabbi Eliyahu Dessler, "Kuntras HaBehira" (An Essay on Choice), *Mihtav Me'Eliyahu* I, (1965), 278; Tamar Ross, "Ha'Adam VeKoach Behirato HaMusarit BeMishnat Harav Dessler", 12 *Da'at* (1984), 111.

52 Iannaccone & Berman, *supra* note 31.

standards, also posing an alternative way of life for individualistic parts of Israeli society, oriented toward material success.[53]

According to the UO worldview, the prominent goal of the communities is to ensure the long-term sustainability of the faith. According to its ideology, all Jews should belong to UO society,[54] therefore, setting an example for all Jews and Israeli society – sanctifying God's (*Kidush Hashem*) name and enhancing the reputation of the religious way of living – is part of the *reason d'être* of the UO communities.[55]

Consequently, UO communities have three reasons to systematically internalize the costs of their religious practices and preferences: signaling a sincere commitment to receive the advantages of community membership, following the example of their spiritual leaders, and portraying the long-term sustainability of their community to persuade others that their choices are viable – even when all will have adopted their beliefs.

3.2 *Easing Choices by Social Isolation*

The contemporary preference of UO Jews in Israel is for living separately. UO communities moved out of cosmopolitan Tel-Aviv to neighboring Bnei Brak, as well as established entirely new, "pure" UO cities.[56] They largely opted out from

53 For an inner-UO perspective see e.g., Yisrael Cohen. "Mikan Munhag Hatsibur HaHaredi: Hatsatsa LeBateihem Shel Gedolei Yisrael". 2016. Kikar Hashabat. Retrieved 31 Aug. 2023, kikar.co.il/212616.html; Rabbi Aurbach passed away on 19 Feb. 1995, an estimated 300,000 were at his funeral (see Wikipedia (Hebrew)); For Rabbi Elyashiv, see haaretz .co.il/1.1780401; ynet.co.il/articles/0,7340,L-4257553,00.html (18 Jul. 2012); for Rabbi Steinman, see ynet.co.il/articles/0,7340,L-5055646,00.html (12 Dec. 2017); Regarding Aurbach and Steinman, see idi.org.il/articles/20318.

54 Coercion of religious norms on secular Israelis and on the public sphere is a major issue in Israeli politics. See David Stav, "A Friendlier Judaism will Enable Greater Israeli Unity. 2021. Jerusalem Post. Retrieved 31 Aug. 2023, jpost.com/israel-news/a-friendlier-judaism-will-enable-greater-israeli-unity-opinion-679824; Shuki Friedman, "Is Israel like Iran? Hardly". 2019. IDI Website. Retrieved 31 Aug. 2023, https://en.idi.org.il/articles/28295. However, UO influence is in no way restricted to coercion.

55 Amos Israel-Vleeschhouwer, "Bikoret Haredit Shel Ribonut, Individualism VeMusag Zchuyot Ha'adam: Hagut Leumit Ubein Leumit Datit Shel Harav Dr. Isaac Breuer", 15 *Hamishpat* (2010), 607 (Hebrew).

56 Throughout history, Jews didn't isolate themselves from "others" and tended to live in cities – places where different people meet and coexist. Jacques Gutwirth, "Hasidism and the Urban Life", 38 *Jewish Journal of Sociology* (1996), 105; Michael Lewyn, "Suburban Sprawl, Jewish Law, and Jewish Values", 13 *Southeastern Envt'l L. J.* (2004), 1; See Tamar Arieli & Amos Israel-Vleeschhouwer, "Borders and Bordering in Jewish Geopolitical Space", 24(4) *Geopolitics* (2018), 969. Note however, that these others mainly were non-Jews, the threat from non-UO Jews to the identity and practice of community members is higher. See Jacov Rosenberg, *The Club Model and the UO Community* (2001) (Hebrew), available at

the job market and limited the contact of their members with secular people. Habits of living in "pure" environments quickly led to a real inability to tolerate differences and otherness. Such spatial and social separation eliminates intimate knowledge of alternatives, reducing the need and possibility to choose.[57]

UO representatives have argued that merely witnessing the desecration of the Sabbath (e.g., seeing Jews driving cars) hurts their personal religious feelings and harms their community by presenting an educational challenge for community members. Therefore, they fought to close off main roads to traffic on the Sabbath.[58] But one of the revered sages in the Jewish tradition, Rabbi Meir, is described, in a similar situation, as learning from his former rabbi who had left the fold. Although the teacher rides a horse next to the pupil's synagogue on the Sabbath, Rabbi Meir walks along to learn. He is quoted as saying: "I ate the content (of the fruit) and threw away the peel" (I can use the good while insulating myself from negative aspects).[59]

Rabbi Meir makes hard choices leading him to complex and challenging conclusions. Contemporary UO take the easier way out, reducing the cost of internal persuasion by hiding other forms of Jewish living (and the positivity of heretics) from their constituency. Arguing that separation is ideal requires cultural amnesia regarding the story of Rabbi Meir, and it may be regarded as a sign of cultural degeneration.

Cost reduction by social isolation is also evident in separate religious education. In a community where choice is ideologically valuable, children should be expected to *choose* to join, from multiple ways of life, the ideal community they grew up in. Religious obligations and cultural rights can

---

https://econ.biu.ac.il/sites/econ/files/working-papers/club.pdf) (Reacts to Berman, 2000 and argues that the main benefit is distancing from the outside, not signaling).

57 Yishai Blank, "Kehilla, Merhav, Subject: Tezot al Mishpat Umerhav", 2 *Din Udevarim* (2006), 19 (Hebrew); Idem, "Mamlachtiut Mevuzeret: Shilton Mekomi, Hipardut Ve'i Shivyon Bahinuch Hatsiburi", 28 *Tel Aviv L. Rev.* (2004), 347 (Hebrew) (separation fosters discrimination).

58 HC 5434/98, *Horev* V. *Ministry of transportation* (1997) (closing streets in the vicinity of UO communities on the Sabbath); see Sapir & Statman, *supra* note 6, at Ch. 6 (religious feelings, discussing Horev at 105), 13 (shabbat). See also Daphna Barak Erez, *Outlawed Pigs: Law, Religion, and Culture in Israel* (2007) (discussing special regulation of selling pork). A spatial analysis can add another explanation to the controversy. The UO community lives on both sides of the road – thus they see the road from one side to the other – as a local plaza. The drivers use the road lengthwise connecting the entrance to the city with far away neighborhoods – and see it as a major throughway.

59 PT Hagiga 2:1; Yehuda Eisenberg, "Elisha Ben Avuya: Talmid SheSarach", 3 *Bisde Hemed* (1998), available at daat.ac.il/daat/kitveyet/sde_chem/elisha.htm.

support parents' efforts to educate children to follow their beliefs.[60] This, however, does not necessarily imply restricting the children's knowledge or their ability to choose. The Supreme Court of Canada offered such a perception of religious education, admitting its costs:

> Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents, amounts to a rejection of the multicultural reality of Canadian society and ignores the [...] government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of [...] the Canadian Charter.[61]

In Israel,[62] all religious schools (including UO schools) isolate children from social contact with others. Thus, children and later, adults are exposed to few and limited choices throughout life. UO education for boys does not include vocational training and does not prepare its graduates for professional or academic studies. Early marriage and immediate procreation are encouraged. Less realistic alternatives and high exit costs reduce the demand from the community and parents for constant positive religious fervor.[63] In addition to the reduced fervor, the range of choices for children is arguably suboptimal.[64]

---

60 Sapir & Statman, *supra* note 6, at Ch. 10 (Religious Education). For the general right see Edna Ulman Margalit, "Not Only the Right, but the Obligation to Educate", in Yishai Menuchin & Yuval Yirmiyahu (eds.), *Will Tolerance Win? Moral Education in a Varied World* (2005), 23; *UN Convention on Economic, Social and Cultural Rights*, art. 10, 13 (1966). There are additional arguments for separation, like preserving the children's "purity", innocence, and keep them from temptations and sinning.

61 *S.L.* v. *Commission scolaire des Chênes*. SCC 7, 1 S.C.R. 235., para. 40 (2012). See Kornel Zathureczky & Jack Laughlin, "Religion, Education, and Law, The Convergence of Normativities in the Ethics and Religious Culture Program in Québec", 5(2) *Law, Religion and State J.* (2016), 148.

62 Since the enlightenment UO communities in Europe and America created separate education systems, each teaching its kids according to its ethos and norms. Until recently most alumni of those systems went to work and actively participate in their respective professional circles.

63 Note that the same can be said for secular education in Israel, which doesn't give exposure nor enough resources for its alumni to choose a religious way of life.

64 For boys the dropout rate from schools is triple the rate of the other population in Israel, see https://en.idi.org.il/articles/32924 (Retrieved Dec. 2022, pre COVID-19 data for 2018).

My argument concerns the internal effects of the tendency to ease the choice for the adherents, not on the external consequences or the normative position of the state vis-à-vis these decisions. The argument focuses on the tension between cost reduction that is the result (and possibly the goal) of the isolation and internal UO values like the importance of choice and self-sufficient sustainability.

The separate education systems, which reduce education costs for all communities (secular, religious, UO, Muslim, Christian), and separate living create overall social costs like decreased social cohesiveness and increased tensions between graduates of separate systems that have not met or learned to coexist.[65] Alternative, less costly religious education systems[66] could adopt Sapir and Statman's suggestions, the Canadian option (with various adaptations), or merely add internalizing a portion of the costs, e.g., by reducing the exit cost from the community, for example, by fully funding the additional exit costs members must incur because of their restricted education (by the state or by the community).[67]

3.3 *Choice, Cost Allocation Insights about Double Minorities, and the Importance of Internal Debate*

Religious preferences might lead to discrimination of outgroups or of their members. These practices shift the costs of religious preferences on the discriminated and on the larger society. Nachshon Perez recently argued that when religious institutions discriminate while enjoying governmental support,[68] "unless the religious association accepts some cost-internalization

65 For the impact of UO education on Israel's GDP see Eyal Argov & Shay Tsur, "A Long-Run Growth Model for Israel", *Bank of Israel Discussion paper* 2019.4, https://www.boi.org.il/en/Research/Pages/pd201904e.aspx (Retrieved Dec. 2022). Compare George Hunston Williams, *The Radical Reformation* (3rd ed., Truman State University Press 2000); Donald B. Kraybill (ed.), *The Amish and the State* (2nd ed., 2003), p. 10, 269 (I thank Dr. Rivka Neria-Ben-Shahar for this reference).

66 The request or demand for religious education in Israel to be state funded (with non-UO carrying most of the costs) but separate and limiting, places double costs on non-UO parts of society – paying for the education that supports cheaper UO sustainability and carrying much of the consequent costs. Ruth Gabison, "Misgeret Diyun Lema'archot Hinuch Bechavarot Rav-Tarbutiyot", in Dan Inbar (ed.), *Likrat Mahapecha Hinuchit?* (2006), 230; Michael Walzer, "Hinuch, Ezrahut VeRav Tarbutiyut", in Penina Peri (ed.), *Hinuch Behevra Rav-Tarbutit* (2007), 27; in the US see *Wisconsin v. Yoder*, 406 US 205 (1972) and subsequent literature, and for Jews Kiryas Yoel, *supra* note 48, and nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html (Retrieved Dec. 2022).

67 See leshinuy.org/en/who-are-we/ (Retrieved Dec. 2022).

68 Nahshon Perez, "Governmental-Funded Religious Associations and Non-Discrimination Rules: On Immunity and Public Funding" 33(2) *Canadian J. of Law & Jurisprudence* (2020), 341.

framework, the association shifts the cost of the discrimination to the taxpayer – in that they fund the general activities of the association – and to the victim." Thus, the state sanctions not only the religious preference but also its consequences. This phenomenon has been amply analyzed in recent literature, therefore I focus here on a different form of discrimination, which shifts the costs within the religious community.

Two well-researched examples of the infringement of women's rights show the effect of internalized costs and risks on the religious community and its implications for the relations between the religious communities and the state. The case of preserving graves illustrates these internal religious dynamics and serves as the basis for an argument to refrain from coercing certain solutions on religious communities.

3.3.1 Double Minorities: Shifting Costs on the Weak in the Community

Many states allow or tolerate discrimination against weak populations within religious communities (women, children, people with disabilities, foreigners) because the costs of religious preferences are ostensibly internalized by the community. But it is often not those who decide and benefit who bear the cost. This is a form of internal cost shifting.

One example is gender separation and discrimination. Instead of assuming a secular liberal baseline of a mixed society and equality, I identify the cost shifting from a historical perspective. In the past, gender separation in UO communities in Israel was mild, but recently it has become radicalized. Male religious authorities perceive male members to be religiously disturbed or sexually aroused by the presence of modest women from within their community. The men in power solve this problem by imposing gender separation and direct restrictions on women, burdening them with the costs. One salient example is the creation of gender segregation in public transport, relegating women to the back of the buses.[69]

The designation of these practices as cost shifting can be seen in the following story about R. Shlomo Zalman Auerbach (1910–1995, Jerusalem), often told to justify the discriminating practice. When the rabbi rode on a bus, a woman, in some versions of the story, immodestly dressed, sat down next to him. The old rabbi stood up and got off the bus three stops before his destination so that the woman would not think he moved away because of

69 Tzvia Greenfield, *Is It Really So Benign? Gender Separation in Ultra-Orthodox Bus Lines*, 1 *Law & Ethics in Human Rights* (2007).

her. Despite his old age, he walked the rest of the way.[70] While the story may indeed support the norm of not sitting next to a woman, the rabbi's practice to internalize the cost of a religious preference stands in contradiction to placing the burden on women.[71] Auerbach preserved both his religious preference and the dignity of the women by internalizing the cost. Shifting the cost of religious preference reduces and trivializes it, leading to ever-radicalizing norms to revive the religious fervor, whose costs are again shifted, in a recurring vicious cycle. The cost shifting is evident when compared with the various ways UO men and leaders could have internalized the costs. The community may invest more or differently in the education of boys and men, it could assign men to the back of the bus, allowing women to sit conveniently at the front, and more.

3.3.2 Women's Suffrage: A Partial Example of Internalization of Costs

In the 1920s, a debate raged in the Jewish population in Palestine about women's right to vote and be elected. The official religious position was[72] a total prohibition on active and passive voting rights for women. This prohibition was severe, designated as a matter of "life or death," not to be done under any

70 For the story with the normative message for internalizing the cost (told by former chief Rabbi Israel Meir Lau), makorrishon.co.il/nrg/online/1/ART2/324/011.html (6 Jan. 2012) (Hebrew).

71 Internalization by representatives can be used to offset some of the problem of public choice. E.g., in most of Israel, there is no public transportation on the Sabbath, a concession of secular politicians to the religious parties. The representatives who agreed to this concession and the affluent constituency have a car to drive where they want, while the concession imposes a high cost for the poor. Israeli Member of the parliament (Knesset) Tamar Zandberg introduced a bill that government-owned cars (of ministers, parliament members and high officials) will be prohibited from moving on the Sabbath if there is no public transportation for all (this 2015 bill was rejected). See jpost.com/Israel-News/MK-Zandberg-submits-bill-forbidding-ministers-from-using-govt-owned-cars-on-Shabbat-397964 (13 Apr. 2015).

72 A religious (minority) opinion, sanctioning women's political right to vote and be elected, existed during the original debate, but was only published after the compromise. The opinion, penned by the then-future Sephardi (eastern) chief rabbi Uziel, was self-censored during the initial debate (Responsa Rabbi BZ Uziel, translation available in 1 *Edah Journal* edah.org/backend/journalarticle/1_2_debate.pdf). See Zvi Zohar, "Traditional Flexibility and Modern Strictness: Two Halakhic Positions on Women's Suffrage", in Harvey E. Goldberg (ed.), *Sephardi and Middle Eastern Jewries* (Indianapolis: Indiana University Press, 1996), 119. This opinion is not mentioned in the public mainstream debate, mainly being of academic interest. Note also that Rabbi Uziel's responsa explicitly also allows women to be elected. Note also that UO women were recently elected for the public office of Judge, in the US in 2016, en.wikipedia.org/wiki/Rachel_Freier; in Israeli in 2018, timesofisrael.com/israel-appoints-first-female-ultra-orthodox-judge/.

circumstances.[73] When the Zionist institutions decided that women would have full political power and rights, the UO community split (although not only because of this issue). A small faction decided to separate itself from the growing Jewish political ("Zionist") entities while the majority opted in. The non-religious majority accommodated this choice[74] (was coopted) by allowing the existence of religious parties without female delegates and by agreeing to assign double weight to each vote at UO polling stations. The result was that the UO recognized the theoretical political power of women as long as it was the men who cast these votes "for" their partners.[75]

After no more than two elections, and certainly by the 1940s, the election committee prohibited this "innovative" solution. Religious leaders had to decide whether the religious principle was important enough to lose half of their political power. A small minority joined the separatist faction. The majority chose to continue taking part in the political process and adjusted to it; UO women have voted ever since, indeed, they were and are encouraged to vote and religiously obligated to do so. Religious advertisements command women to cast their vote. When forced to bear significant costs, the UO community enabled a radical change by normative innovation, from a severe prohibition to a "biblical" commandment.

Note that this was a two-stage compromise: first a "deal" in which the UO acknowledged the theoretical right of women in return for a significant democratic procedural concession and the secular concession regarding female representatives, followed by the UO accepting active voting by women. Regarding the passive right, UO parties exclude women from positions of power to this day, having only male candidates. In the early years, this was not so noticeable because males dominated all parties, and the religious parties were small. In recent years, it has become a public issue, with repeated proclamations by the religious representatives that women's right to be elected is denied "by a biblical commandment," and UO women are voluntarily

73 Yehezkel Cohen, "HaMahloket bein HaRabanim Kook VeUziel Al Matan Zechut Behira LeNashim", 5 *Hagut* (1983), 83; Margalit Shilo, "Kolot Nashi'yim Bedvar Shivyon Megdari VeTovat HaUma BeMa'avak al Zehut HaBehira Bayishuv", in Margalit Shilo, Eyal Katvan & Ruth Haplrin-Kadari, *Huka Ahat U'mishpat Ehad La'Ish VeLaIsha: Nashim, Zehuyot VeMishpat Betekufat HaMandat*, (2011), 221; Menahem Elon, "Ma'amad HaIsha: Mishpat VeShiput", *Masoret U'tmura* (2005), 51; Menahem Friedman, *Hevra VeDat* (Jerusalem, 1978), 166.

74 The position of the UO regarding the national institutions was considered crucial for the Zionist efforts in the international arena under the British mandate and the international commissions of the league of nations.

75 Margalit Shilo, *The Struggle for the Vote: The Women in Palestine and the right to Vote, 1917–1926* (Hebrew, Ben-Zvi Institute and BGU, 2013).

refraining from political posts because of their religious conviction. Based on the above precedent, I suggest that if the Israeli political system had banned male-only party lists, this decision would have forced an internal debate and most likely an adjustment. This indeed happened on a smaller scale, in the election for the world Zionist organization in 2015.[76]

Consider that internally, the current norm can be maintained at low cost, and therefore requires little effort or debate. It is possible to imagine an internalization of costs even without changing the norm but promoting the positive consequences of debate and choice. Each community could choose a way (out of many options) to periodically reaffirm the preference of most of its members, including women, to continue the discriminatory practices, ensuring the internal expression of opinion. Communities could either initiate or at least agree to multiple options of costless exit for the non-voluntary voiceless – those who want female representation. This, too, would provide an incentive for the community to invest in persuading members of the advantages of the current policy.[77]

Arguably, some of this cost shifting from the deciding (male) leaders to the women of the community is non-voluntary, making it an externalization within the group, rather than an internalization. The analysis does not presuppose an external normative baseline toward women's rights, from which one can discern cost-shifting. In both examples all options exist within religious history, literature, and actions. The analysis does not prefer one over the other but offers to reveal the effects of the allocation of costs and the need to choose between different internal community dynamics.

3.3.2. The Value of Religious Choices: Comparing the Effects of Coerced Internalization with Those of Incentives to Internalize (with a Margin of Appreciation)

The next example starts with a real event and offers a theoretical extrapolation from it. The analysis reveals the adverse consequences of coercing religious communities to internalize the costs of their preferences in a certain precise

76 See Yair Ettinger, "For First Time, Ultra-Orthodox Shas Party Includes Women in Delegation to World Zionist Congress". 2015. Haaretz, Retrieved 31 Aug. 2023, haaretz.com/jewish/2015-10-26/ty-article/.premium/setting-precedent-shas-sends-women-to-wzc/0000017f-e649-dea7-adff-f7fb18e30000.

77 For voice and exit see Eyal Benvenisti, "Exit and Voice in the Age of Globalization", 98 *Mich. L. Rev.* (1999), 167, available at: https://repository.law.umich.edu/mlr/vol98/iss1/4; For the argument compare Brian Barry, *Culture and Equality* (Polity, 2001), 150.

way.[78] I follow by suggesting more positive consequences of providing multiple options for internalizing the costs of religious preference.

Preservation of graves has gained importance in the Israeli UO community, resulting in massive, extreme, and even violent demonstrations to protect them.[79] Actions that express honor for ancestry served as grassroots recruiting events for some UO communities, aiming to ensure radicalized commitment.[80]

Barzilai Hospital in Ashkelon, within rocket range from Gaza, serves a large community. The government decided to build a new rocket-proof ward, with operating, emergency, and delivery rooms. While digging the foundations, the workers discovered ancient graves.

Scenario 1: Cost shifting vs. external coercion

A small extreme Jewish UO group, with a high profile and disproportionate influence, protested the removal of the "maybe Jewish" graves.[81] The UO Deputy Minister of Health suggested moving the planned building to preserve the graves (accommodate the demonstrators). The expected costs of this preference meant (a) about $40 million in expenses, (b) a delay of 2–3 years in providing a better and secured hospital, and (c) the permanent disadvantage of a greater distance between the new planned emergency room and intensive care units, and the rest of the hospital.[82] The choice before the government, as perceived in the public debate, was as follows: to move the graves and hurt the

78 I use Nozick's definition – threatening the other to act or refrain from acting in a specific way. Robert Nozick, "Coercion", in White Morgenbesser (ed.), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (1969), 440. I thank one of the reviewers for this suggestion.

79 For the sacredness of spaces (and the possibility to cancel sacredness) see BT, Megilla 26–28; Aviad HaCohen, "Ma Nora Hamakom Haze = Al Mekomot Kedoshim: Bein Dat, Mishpat Ukedusha", 3(2) *Shaarey Mishpat* (2004), 341, and his references to Yoram Bilu. See also the theme issue of *Paamim* 98–99 dedicated to graves and cemeteries in Jewish culture; Sapir & Statman, *supra* note 6, at Ch. 6 (hurting religious feelings).

80 Boyarin, *supra* note 44. This insight explains the usage of the idiom "our ancestors' tradition" (literarily the tradition of Israel our grandfather) as a political source of power. UO representatives position themselves as acting for all previous generations. In the same way they portray themselves to act for future generations. Their perceived constituency is therefore very large, justifying their claim for speaking with the power of the majority.

81 The group is named Atra Kadisha – the [protectors of the] holy places. The graves were found by archaeologists to be pagan graves; See Katharina Galor, *Finding Jerusalem: Archaeology between Science and Ideology* (Uni. Of Cal. Press, 2017), 112; Shmulik Grossman. "Haredim Riot in J'lem Over Graves Removal". 2010. Ynet. Retrieved 31 Aug. 2023, ynetnews.com/articles/0,7340,L-3890422,00.html; Paul Bahn, "Skeletons in the Cupboard", *New Scientist*, 13 Nov. 1986, 58.

82 See ynet.co.il/articles/0,7340,L-3857113,00.html, and ynet.co.il/articles/0,7340,L-3854773,00.html (Hebrew).

(given) religious feelings and preferences of the protestors, with the political ramifications of violent demonstrations, or to respect the (apparent) religious preference and fund the cost by requisitioning 1% of the budgets of all the other ministries, agreeing to a suboptimal building, and endangering public health.

It is possible to argue that respecting the sacred grounds of communities is the baseline from which to judge whether costs should be shifted. To avoid having to define an "objective" baseline, I base the present argument on internal Jewish legal sources. A rudimentary search of "Jewish law," "graves," and "public needs" reveals that the most important codifications of Jewish law have ruled that "one removes Jewish graves for public needs."[83] These legitimate sources were not discussed in the public debate. Moreover, they were not mentioned in the *internal* communal debate. Grave preservation was presented as a worthy cause for an all-or-nothing fight. This perception of the religious position became the accepted preconception of all sides. As always in the "us vs. them" paradigm, both sides treated the conflict as a win-win strategy.[84] In this discussion, I focus on the religious perspective. If the state accommodates, the community gains status and its values are recognized. If the state enforces the alternative option, values remain strong within the community and the struggle promotes internal commitment.

After almost two years of debates, political pressures, and social action, the Prime Minister decided. Under police protection, archeologists removed the graves, facing 48 hours of violent protest. This result did not require a religious choice and the decision was externally imposed. It did not require resolving the tension between religious preferences or setting a precedent for future cases.[85]

Scenario 2: The internal effects of providing an incentive for internalization, with a margin of appreciation.

The government could have announced that it respects the UO preference for grave preservation but does not agree to bear the costs. In an extreme example, the UO community could have been challenged[86] to pay for this

83 Yisrael Rosen, "Pinui Kevarim Mepnei Tsorchei Tsibbur", 18 *Techumin* (1998), 254.

84 Perez, *supra* note 68.

85 As the Hospital serves some UO communities, an internal debate arose in the UO community, regarding the legitimacy using its facilities. This debate (with the result being condoning using the hospital) was discovered by the general media, revealing the rich and nuanced variety of religious positions regarding grave-removal.

86 Note that the hegemonic representative (the agent) has an interest in maintaining the status quo. He gains power from the conflicts, and he shaped the incentives to his favor, as well as for the favor of the community, on his terms. If the agent controls the information

communal preference by reallocating existing state funding for other religious or communal preferences[87] or by raising private funds.

The need to choose would create an internal dilemma and possibly conflict, as various interests and values competed with each other. Some would declare grave preservation not to be their primary preference. Quite likely, in such a debate the Jewish legal source enabling moving the graves, and additional sources, would be discussed in support of moving the graves and leaving funds for other important goals. The debate may also generate innovative new solutions that we cannot imagine, as there was no motivation to create them. Most important, as opposed to state coercion, the result of such an internal debate would probably influence future cases of graves that will be found when digging, for example, in preparation for building highways in the future. Finally, the debates can serve to evaluate the relative importance of various preferences of the living and the dead.

Whether using force to prevent moving the graves or when declaring the community must pay for their preference, the government exerts authority and power over the religious community. The difference is in the internal consequences of the allocation of costs. Among the options to enforce internalization of costs, the state should refrain from coercion that directly coerces specific acts. It should incentivize the religious institutions and authorities to choose between various forms of internalization, with an as wide as possible margin of appreciation.[88]

4 Effects of Allocation of Costs

Cost shifting is not necessarily morally or politically illegitimate. Ideological communities can request others to voluntarily bear their costs. Others can, and sometimes do, accept bearing the costs because of political,[89] moral, and other considerations, including the perceived merit of the community.[90]

---

flow, the debates, and the dynamics – internalization will be hard to achieve. It seems important to contact other players and directly approach the constituency.

87 Note that in this case – most of the critique in Nachshon Perez's thought-provoking article (*supra* note 68) doesn't apply – only if the internalization means privatization of the cost.

88 Note that like governments (Daryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs", 67 *U. Chi. L. Rev.* (2000), 345), religions are only partially influenced by financial internalization.

89 Robert D. Cooter, *The Strategic Constitution* (Princeton, 2000).

90 The community "pays" for the cost shifting by special contribution to society, or by merely maintaining high internal standards to be "worthy" of this investment. The state would fund the sincerely held (proven) preference, as a sign of respect and to encourage diversity

Perez discussed the normative considerations of society to bear the costs of some externalizations.[91] Olson argued that small groups are more easily organized as pressure groups and therefore more often succeed in externalizing on society.[92] Both discussed the costs of externalization on others. Following Sapir and Statman,[93] I present the detrimental consequences of externalization on the cost-shifting community, without addressing the legitimacy of the shifting. Based on Parts 1 and 2, I argue that externalization of costs leads to ideological degeneration. The ratio between externalization, shifting, and internalization is therefore an important internal assessment tool for the community and for those who interact with it.

The consequences I describe do not apply to all UO individuals or to all UO sub-communities. Many individuals are dedicated, creative, open, and highly committed people. Many communities display religious vitality and nurture impressive and inspiring social action. Nevertheless, the phenomena described in this article have appeared in internal religious discourse, in research on the UO community,[94] or both.

4.1 *Co-opting Religion and Its Consequences for the Community*

In the formative years of Israel, secular state leaders considered all religions, and within Judaism, all religious factions and people, as largely "similar."[95] Religiosity was perceived to be – in each religion – a two-dimensional continuum ranging from weak to strong adherence, on a single religious spectrum of belief and practice. Hence the idiom "ultra"-religious.

---

and more freedom. See Nachshon Perez, "Cultural Requests and Cost Internalization: A Left-Liberal Proposal", 35(2) *Social Theory and Practice* (2009), 201.

91 See Perez, op.cit. Accommodating the UO community in Israel due to the destruction of Jewish communities in WW II, can be one example of such social reason.

92 Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups, With a New Preface and Appendix* (Harvard University Press, 1965).

93 *Supra* note 6, at 49, 56–57.

94 Sapir & Statman, *supra* note 6, mention cost shifting and the ideological degeneration as separate phenomena. The present argument adds causal effects and details symptoms and dynamics of degeneration.

95 This is part of a modern attitude to the "religious", not recognizing that religiosity might not be one phenomenon, nor the diversity within religions. Gredd MacGregor, *Introduction to Religious Philosophy* (Boston 1959); This mistaken generalization is strengthened by a trend of religious groups to present unified positions. Eleanor Nesbitt, "Diversity as Ethos in Society: Negotiating Power Relations", in David Chidester, J. Stonier & J. Tobler (eds.), *Diversity as Ethos: Challenges for Interreligious and Intercultural Education* (Cape Town 1999), 116.

Facing Church-State tensions, state representatives were motivated to negotiate with the most extreme religious person with whom a deal can be reached, which would then supposedly apply to all the people "less" observant than this person on the spectrum. The supposed effect of co-opting the religious representative and accepting (some) costs was to mitigate religious extremism and control it.

Yet, the negotiating religious agent is motivated to extremize (maximize demands) and represent all religious edicts as divine, as opposed to decreed by humans, and non-negotiable.[96] The negotiating process also motivates the religious communities and its representatives to hide, suppress, and delegitimize internal diversity. The community is therefore not motivated to innovate because creating additional options or giving space for multiple opinions at the negotiating table weakens its power. Legal options become "hegemonic", due not only to internal Jewish considerations but also due to the incentives inherent to the negotiating process.

The community tends to align itself according to ever more extreme options.[97] Negotiated compromises are presented internally as temporal and pragmatic concessions and therefore do not require ideological adjustment or innovation, and have no mitigating effect on the community. Indeed, they are used as a call for strict adherence to ever more extreme norms. If successful, the negotiating process positions the aforementioned representative as a recognized hegemonic religious official or leader. In Israel, this religious official received status and institutional power from the state that co-opted him, and he used this status to bolster his position.[98] In the ensuing "us vs. them" paradigm,[99] this power is directed inward to repress minority sub-groups and opinions.

There are only a few potential religious actors who are neither too liberal nor too extreme. The first to negotiate and come to an agreement with the state has a great deal to gain in power, while losing reputation vis-à-vis the

96 See Nesbitt, op. cit.; In Israeli public discourse many Jewish legal positions have been presented as divine, non-negotiable and as if death if preferable to compromise on them.

97 Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L. J.* (2000), 71; Menachem Friedman, "The Market Model and Religious Radicalism", in M. Kahane (ed.), *In the Throes of Tradition and Change: A Collection of Papers in Memory of Arye Lang* (1990), 91–112 (Hebrew); Berman, *supra* note 56. There are other considerations such as reputation and social comparison, etc.

98 The argument in the text was influenced by Madhavi Sunder, "Cultural Dissent", 54 *Stanford L. Rev.* (2001), 495; Idem, "Piercing the Veil", 112 *Yale L. J.* (2003), 1399 (even if she might disagree with the analysis in the text).

99 David Berreby, *Us and Them: The Science of Identity* (2005).

more extreme groups. But he (as it is almost always a man) does not remain in the optimal balanced position owing to which he was chosen. The more extreme ones who remained out of the agreement have strong incentives to delegitimize and accuse him of having been co-opted. Because they are close to him, this pressure has a great effect.

The challenge by the more extreme actors motivates the representative to skew the compromise toward a more extreme position. Because of "sunk costs", politics, and conservatism, the state often agrees to a more extreme compromise with the representative to which it would not have agreed *ex ante* (if that compromise would have been acceptable *ex ante*, the state would have negotiated with a more "extreme" representative). This polarizing process repeats itself as long as both sides are given an incentive to do so by their mutual structural advantages.

4.2 *Political Consequences of Cost Shifting*

To secure accommodation and cost shifting, intra-communal debate and deliberation are inhibited and obscured from outside view. Minority opinions are delegitimized or repressed. Political leaders are chosen for their ability to gain the needed concessions, and ideological leaders are compelled to justify the results of the negotiations in religious terms, instead of *vice versa*.

These self-reinforcing mechanisms of cost shifting and ideological adjustments intensify the dangers of ideological corruption. They create an inherent and ever-growing tension between the ideological discourse and the actions of the political leaders. As the principal-agent problem accentuates, ideology changes. The ability to converse, cooperate, sympathize, and compromise with others (and constructively criticize them), within and outside the community, becomes limited.

Foregoing the hard choices poses the challenge of maintaining the perception of moral and communal superiority. Communities therefore need another way to elevate their group. They can do so in costly ways, like internalizing and returning to hard choices and becoming more extreme, or in a cheaper way, to create superiority by ridiculing, oppressing, blaming, hating, or devaluing "others."

4.3 *Intra-religious Consequences of Cost Shifting*

The state has reasons to coopt religious groups, therefore the cost shifting offer is ever-present. Berman used economic insights to analyze the history of Church-State relations in Israel. He proved that the state repeatedly offered to bear religious costs to coopt the UO community for its needs. The cost shifting reduced the reliability of signals of religious authenticity,

leading to ever more extreme voluntary sacrifices to signal commitment. The changing norms required subsequent ideological argumentation to support them, reinterpreting traditional sources. These processes skewed religious preferences, reinforcing Church-State tensions instead of mitigating them.[100] The following two examples will suffice.

Most Jewish legal opinions mandate that people should earn their keep by working. Preferring religious studies in poverty or relying on miraculous divine support is considered an unachievable utopia or designated an exceptionally pious option for rare individuals.[101] Reliance on support from others is acceptable only by a voluntary arrangement between the direct parties.[102] But for the UO society in Israel, the hegemonic default option for men, as developed in the last 50 years, is to be dedicated to life-long full-time learning.[103] This choice is sustainable only by relying on others who work. Relying on the income of working women requires sanctioning their work outside the home, in the general job market. This decision is both an externalization on women and a change in previous UO religious preference for women to remain within the community. In addition, aside from relying on donors, most UO communities in Israel heavily rely on the state for their expenses, covered mainly by taxes paid by non-UO.

Jewish law commands all able people to enlist in wars to protect the people of Israel from harm. From a Jewish religious perspective, the pious should endeavor to be the first to enlist: owing to the divine protection they enjoy and to divine help they would secure for the army. But not enlisting, opposing the draft to encourage Torah learning, and ensuring social separation has become the hegemonic UO Jewish legal position.[104] It is one of the main political goals

100 Eli Berman, "Sect, Subsidy, and Sacrifice: An Economist's View of Ultra-Orthodox Jews", 115(3) *The Quarterly Journal of Economics* (2000), 905; Iannaccone & Berman, *supra* note 4.

101 BT Brachot 35b (especially according to the more authoritative versions in which the text refers (even) to rabbis).

102 Lilac Torgeman, "The Contract between Rabbi Nathan Amram and Raphael de Picciotto: A Rare Exemplar of an Issachar-Zebulun Agreement", 30 *Jewish Law Association Studies* (2022), 168.

103 Menahem Friedman, *HaHevra HaHaredit: Mekorot, Megamot, VeTahalichim* (1991), Ch. 4–5; Haim Zicherman & Lee Cahaner, *Modern Ultra-Orthodoxy: The Emergence of a Haredi Middle Class in Israel* (2012), available at idi.org.il/media/4911/00886012.pdf; Compare the London UO society in Amiram Gonen, *Bein Limud LeParnasa: Hevrat Halomdim U'Mitparnesim BeLondon* (Research Paper, 2005), https://fips.huji.ac.il/sites/default/files/floersheimer/files/gonen_between_torah_learning_and_earning.pdf.

104 Sapir & Statman, *supra* note 6, at ch. 12 (exemption from the army for religious studies).

of its representatives. Curiously, other reasons for opposing the draft, like a religious objection to human-mandated killing, are suppressed.[105]

Both these religious positions are untenable if the religious ideology and the preferred legal option are accepted by all the citizens of the state. Thus, the promoted legal option inherently relies on having "others" to shift the costs to, therefore forgoing the ideal of convincing all to join the community and the normative value of self-sufficient sustainability.

5 Allocation of Costs: An Analytical and Policy Tool

Allocation of costs is an additional diagnostic and analytic tool for understanding religious communities in their Church-State relations. It can assist in evaluating alternative policy options and help predict results.[106] An important conclusion of the present analysis is that coercing a behavior or an exact form of internalization has limited and non-constructive effects. Parties should strive to create conditions in which the ideological systems themselves seek to voluntarily (re)internalize their costs. Ensuring a multiplicity of options creates an important margin of appreciation of *how* to internalize the costs. The consequent internal processes are crucial for the vitality and sustainability of the community.[107] Thus, it is not the mere allocation of cost but the process of allocation that effects the internal dynamics.

To the extent that external parties seek to influence internal processes, the analysis presented here poses the challenge to develop politically feasible matrices of incentives that have positive consequences with few detrimental side effects.[108] This requires theoretical analysis, modeling, and practical

105 Yuval GoVani, "Pulmus HaGiyus Shel Bnei HaYeshivot: Heibetim Philosophiim VeAherim", 19 *Iyunim Betekumat Yisrael* (2009), 449; Benjamin Braun, "Harav Shach: Ha'Aratsat HrRuach, Bikoret Haleumiut VeHaHachraot Hapolitiot Beyisrael", *Dat U'Leumiot Bemizrah Hatichon* (2002), 278.

106 It could be a policy tool for influencing preferences and behavior regarding inter-community dynamics and church-state relations.

107 A mix of rules and incentives can ensure this margin is not abused to replace one form of cost shifting with another.

108 Developing multiple incentive matrixes with their expected impacts is a dynamic ongoing project. Continuous refinements and adaptations are needed, based on documenting and analyzing real-life dynamics as we did in this article.

political consideration.[109] Such complex matrices can then be used by both internal and external[110] actors to formulate their strategic approach and tactics.

109 To better understand the antecedents and consequences of allocation of costs on diverse religious and ideological communities, more research is needed. Empiric multidisciplinary research should analyze the various phases of the process, their interactions and their relative weights for multiple religions and states.

110 Internally, beyond the ideological leadership, incentives also directly engage the communities, individuals, and other stakeholders.