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## **Towards better policing: achieving norm internalization and compliance with persuasively designed technology**

Louis, L.B.

### **Citation**

Louis, L. B. (2024, September 17). *Towards better policing: achieving norm internalization and compliance with persuasively designed technology*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/4083571>

Version: Publisher's Version

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**Note:** To cite this publication please use the final published version (if applicable).

## INTRODUCTION

This chapter addresses sub-question 3:

*Which legal and ethical norms dealing with racist or sexist behaviour should law enforcement officers adhere to, and how can such norms be made to influence behaviour?*

Due to existing cultural norms, sexist myths and implicit bias, women and members of racial minorities suffer prejudicial treatment. This has the effect of eroding their relationship with the police and thereby stultifying their capacity to access a remedy. Since the behaviour under scrutiny can be subtle, almost invisible and in some instances unintentional or at the very least lacking in malice, it becomes even harder to eradicate or reduce such prejudicial and discriminatory behaviour. Hence, there is a necessity to design effective interventions that can bring about a change in the beliefs and norms that actuate this behaviour, and a resultant change in attitudes. Accordingly, this chapter sets out the elements for designing such interventions – a set of norms that, if imbibed, would lead to the desired change and the mechanism by which such law enforcement could be persuaded to act according to these norms.

S. 4.1, pertaining to the first half of the sub-question, describes the legal and ethical norms that law enforcement organizations are subject to, and which they are therefore expected to be regulated by. While the promulgation of legal standards alone has not been adequate thus far to prevent this behaviour, nevertheless, the extant legal standards and their juridical interpretations form the overarching legal framework that law enforcement personnel hold themselves to. These take the form of binding legal obligations (hard law) and more detailed protocols and guidelines governing everyday actions (soft law). In addition to laws other modalities such as norms play an important role in regulating behaviour. S. 4.2 explains the role and relevance of ‘norms’ in influencing everyday behaviour, thus further contextualizing the use of norms and their value in addressing discriminatory behaviour. This is done with a brief analysis of how ‘norms’ currently function in upholding our existing social structure. With the utility of norms for addressing discriminatory behaviour established, and building on the legal standards from S. 4.1, S. 4.3 derives a set of desirable norms that should be adhered to in order to achieve the overall intended outcome of legal provisions against discrimination. S. 4.4 sets out various methods by which norms can be communicated, how the

target audience can be persuaded of the norms' value and how those norms, can be used to influence behaviour. Several mechanisms by which norms shape behaviour are analysed, including through social learning, persuasion, by appeals to their social identity, through internalisation, and activation. Finally, S. 4.5 concludes this chapter, answering sub-question 3 and reviewing the findings arrived at throughout the chapter.

#### 4.1 LEGAL RULES ON SEXISM AND RACISM REGULATING THE BEHAVIOUR OF LAW ENFORCEMENT

This section deals with the main legal instruments, provisions, and frameworks already in place to address discriminatory behaviour arising from racism or sexism. S. 4.1.1 begins the analysis with a comprehensive review of binding obligations, from supra-national and regional bodies, setting out the cherished goals of society with respect to equality. S. 4.1.2 reviews the relevant fundamental rights and guarantees promised by national laws and expounds on their aims with regard to discriminatory behaviour. S. 4.1.3 completes the legal framework by an exploration of examples from policy-making and standard-setting organisations that are propounding guidelines to address this behaviour. This comprehensive overview of the overarching legal framework contained in S.4.1.1 – S. 4.1.3, thus serves as a foundation from which more granular norms to change behaviour are derived and rooted in.

##### 4.1.1 Relevant International and Regional Legal Provisions

The primary source of legal instruments that prohibit discriminatory or unfavourable behaviour on the grounds of race and sex can be found in international human rights treaties, regional human rights laws, and national constitutions or laws guaranteeing fundamental rights. While the general guarantees can be found in these overarching instruments, at a more detailed level, explicit and specific prohibition on discriminatory behaviour can also be found in national laws on anti-discrimination.

Protection against discrimination and the right to equality in Europe can be found in a number of instruments, that have originated from the European Union and the Council of Europe as can be seen in Table 2.1. European instruments have been chosen as legal standards to start from they reflect universal standards, albeit with more detail as they are newer in comparison to international instruments. The following legal standards on the right to equality and against non-discrimination are analysed (i) Charter of Fundamental Rights

of the European Union,<sup>652</sup> (ii) Treaty of the European Union,<sup>653</sup> (ii) Treaty on the Functioning of the European Union<sup>654</sup> (TFEU) (iv) European Convention on Human Rights<sup>655</sup> (v) The Convention on preventing and combating violence against women and domestic violence,<sup>656</sup> and (vi) Directive 2000/43/EC.<sup>657</sup>

Table 4.1: Overview of legal rules proscribing discrimination on the basis of race and sex in Europe

<i>Legislation</i>	<i>Provision / Paragraph Number</i>	<i>Brief Content</i>
Charter of Fundamental Rights of the European Union (CFR)	Article 20	Guarantee of Equal treatment before the law.
	Article 21	Specific prohibition on the basis of protected characteristics, including race and sex.
Treaty of the European Union (TEU)	Article 2	Emphasis on equality, non-discrimination and respect for minorities as a founding value of the Union.
	Article 3(3)	Combatting social exclusion, discrimination and promotion of equality between men and women.
	Article 9	Right of all citizens to equal attention from public bodies.
Treaty on the Functioning of the European Union (TFEU)	Article 10	Enshrines that the Union should aim at combating discrimination based on race or sex.

652 European Union, *Charter of Fundamental Rights of the European Union*, [2012] OJ C 326/02.

653 European Union, *Consolidated version of the Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, [2008] OJ C115/13.

654 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012.

655 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

656 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011.

657 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180.

<i>Legislation</i>	<i>Provision / Paragraph Number</i>	<i>Brief Content</i>
	Article 19	Specifically envisions that the Council of the European Union and the European Parliament can take specific actions to combat discrimination on the basis of race and sex.
European Convention on Human Rights (ECHR)	Article 14	Secures that all rights in the Convention should be guaranteed without discriminating on the grounds of race or sex.
Protocol 12 to the ECHR	Article 1	Specifies that in order to safeguard non-discrimination, all persons are entitled to equal protection of the law.
The Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)	Article 1	Highlights a specific obligation to prosecute and thereby eliminate violence against women, with additional obligations.
	Article 4	Mandates state parties to adopt legislative and other measures to punish discrimination against women.
	Article 6	Necessitates adoption of measures that are sensitive to the realities of sex-based violence and discrimination.
	Article 7	Calls on state parties to place the rights of the victim at the center of its efforts to prevent violence.
Directive 2000/43/EC (Racial Equality Directive)	Preamble paragraph 13	Exhorts member states to adopt measures whereby both direct and indirect discrimination is countered.
	Preamble paragraph 14	Recognizes that the principle of equal treatment is a component of the right to equality.
	Preamble paragraph 19	Recognizes that those who may have been subjected to discrimination should have access to adequate means of legal protection.
	Preamble paragraph 20	Recognizes that effective implementation of equality demands adequate judicial protection.

Legislation	Provision / Paragraph Number	Brief Content
	Article 2	Expands on preambular paragraph 14 and acknowledges that ‘equal treatment’ is the overarching principle governing the rights against discrimination.

A significant point to be noted from Table 4.1 above, is the evolution of ‘equality’ as a concept – from a generic ‘right to equality’, (Article 20 of the CFR) typically expressed as a ‘prohibition on discrimination’ (Article 21 of the CFR) to a ‘right to equal treatment’ and a specific right to equal enjoyment of other rights. Thus, the guarantee of equal treatment and general prohibition on discrimination found in a foundational treaty like the CFR is expressed in more proactive terms in other pieces of legislation such as the TFEU. This can be seen in its mentioned provisions, such as Article 19, which envisions that the Council of the European Union and the European Parliament should take specific actions to combat such discrimination. Similarly, while the TEU enshrines equality and respect for minorities as a ‘value’, it recognizes that adhering to such values requires that all citizens have equal attention from public bodies (Article 9). A similar acknowledgment is found in the ECHR, wherein Protocol 12 recognizes that all persons are entitled to the equal protection of the law as a consequence of the right to non-discrimination. Protocol 12 to the ECHR, specifically to safeguard non-discrimination, highlights that all persons are entitled to equal protection of the law. Article 1 of the Protocol reaffirms the general principle that the rights set forth by laws should be secured without discrimination on the basis of race or sex (among other protected grounds). Thus, while Article 20 and 21 of the CFR and Article 14 of the ECHR prohibit ‘discrimination on the basis of... sex, race.. etc’, prohibiting all forms of intentional discrimination rooted in protected grounds, Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States, expands the scope of the prohibition of discrimination to *equal treatment in the enjoyment of any right, including rights under national law*.

Realistically therefore, this expanded scope of the prohibition demands that citizens feel encouraged in the role of law enforcement personnel as protectors and defenders of that right. Finally, the observed trend of the right of equality and non-discrimination necessitating better treatment and additional provisions can also be noticed in the Istanbul Convention and the Racial Equality Directive. Both pieces of legislation, with their specific areas of focus, advance the legal protections against discrimination on the basis of race and sex further. This advanced legal protection be noticed in the mandates of the Istanbul Convention to adopt additional measures of punishment of discrimination, recognizing that it is an inextricable element for the

achievement of equality between men and women (Article 4). Article 1 of the Istanbul Convention specifically acknowledges the importance of law enforcement's role and prosecution in addressing violence against women while articles 6 and 7 of the Istanbul Convention mandate states to take extra steps to account for the particularities of sex-based violence and to ensure victims are treated with empathy. The Racial Equality Directive also takes the fundamental guarantees further, by mandating states to take measures to counter indirect discrimination. (Preamble paragraph 13). While preamble paragraph 14 reiterates the principle of equal treatment, as a component of the right to equality, preamble paragraphs 19 and 20 recognise that the effective implementation of equality demands adequate judicial protection for those who may have suffered discrimination.

Thus, the treaties and instruments dealing with discrimination in particular, as noted above, go further from a broad right to equality. They recognize that equality's goals necessarily demand measures to ensure the state's institutions are able to substantively secure the right to equality. The aforementioned progression in the legal framework relating to equality, functions as a foundation from which the more specific obligation to act without prejudice or bias can be drawn.

Theoretical debates surrounding equality<sup>658</sup> are beyond the scope of this thesis, but it is relevant to note here that the legal concept of 'equality', i.e non-discrimination between individuals on the basis of race and sex in the context of European legislation and policy, includes 'substantive' equality.<sup>659</sup> Full (substantive) equality acknowledges differences in starting positions which might necessitate differential treatment in order to obtain substantive equal treatment.<sup>660</sup> At the same time, the vulnerable position of persons belonging to minorities also necessitates heightened attention for equal access issues and effective participation in economic, social and cultural life as well as in public affairs to achieve this goal of 'equal treatment'.<sup>661</sup> Among the domains that necessitate such extra attention is access to justice, as it implicates and influences the enjoyment of other rights. Despite its essential role for the effective enjoyment of rights by individuals,<sup>662</sup> access to justice is too often hampered

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658 Policy, law and scholarship today make the distinction between formal equality (or equality as consistency), which requires that everybody be treated in exactly the same way on the one hand, and substantive, or real or full equality on the other hand.

659 Marc De Vos, 'The European Court of Justice and the March towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 *International Journal of Discrimination and the Law* 62, 64–66.

660 Kristin Henrard, 'Equal Rights Versus Special Rights: Minority Protection and the Prohibition of Discrimination' (Directorate-General for Employment, Social Affairs and Equal Opportunities, European Commission 2007) 5.

661 *ibid* 4,13.

662 Doina Ioana Straisteanu, 'Towards Guaranteeing Equal Access to Justice for Women: Report of the 3rd Conference of the Council of Europe Network of National Focal Points on Gender Equality' (Council of Europe 2015) 5.

by both practical and legal obstacles. The lack of legal information, the lack of trust in the authorities and the impact of the economic crisis on legal aid significantly contribute to the persistence of barriers to access to justice.<sup>663</sup> Reports by the European Fundamental Rights Agency found that people from minorities did not report to the police between 57% and 74% of incidents of assault or threats.<sup>664</sup> Research into the reasons for such under reporting has further shown that it is due to lack of trust in the authorities and the fear of further victimization, including fear of abuses by the police.<sup>665</sup> The ‘right to be free of discrimination’, the right to ‘equal treatment’ and its necessary corollary, the right to access to justice as essential for the enjoyment of these rights, has been taken to emphasize the importance of adequate training of police officers, and measures that can counter racist or sexist behaviour.<sup>666</sup> Moreover, the *failure to investigate*, ergo a dismissive attitude, has also been identified as a deterrent to reporting, thus frustrating access to justice and negating the ability to enjoy other rights.<sup>667</sup> The right to non-discriminatory treatment on the basis of sex and race, forms the overarching source of legal standards in Europe that law enforcement, being public officials, are bound by.

#### 4.1.2 Relevant National Legal Codes That Regulate Law Enforcement

National legislation, using these standards and domestic constitutions as a normative basis, is more detailed with respect to discrimination on the basis of sex and race. For instance, in the Netherlands, while basic human rights are laid down in the Constitution, they are frequently further detailed in specific legislation. Article 1 of the Dutch Constitution,<sup>668</sup> conferring the right to be treated equally in equal circumstances, is further elaborated in legislation such as the Equal Treatment Act,<sup>669</sup> and the Equal Treatment (Men and Women) Act.<sup>670</sup>

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663 Viorel Riceard Badea, ‘Equality and Non-Discrimination in Access to Justice’ (Council of Europe, Parliamentary Assembly 2015) Doc 13740 3.

664 ‘European Union Minorities and Discrimination Survey – Main Results Report’ (European Union Agency for Fundamental Rights, EU – MIDIS 2009) 16.

665 *ibid* 7,75.

666 Fair Trials, ‘Addressing Possible Gaps in the Racial Equality Directive’ (2022) Response to a European Commission consultation to help identify possible gaps in the Racial Equality Directive <<https://www.fairtrials.org/articles/legal-analysis/addressing-possible-gaps-in-the-racial-equality-directive/>>.

667 Badea (n 663) 9.

668 *Grondwet*, Artikel 1.

669 *Algemene wet gelijke behandeling*

670 *Wet gelijke behandeling van mannen en vrouwen*

In the UK, for example, the Equality Act of 2010<sup>671</sup> replaced separate legislation that was passed in 1975<sup>672</sup> and 1986 to counter discrimination on the basis of race and sex. Sex Discrimination Acts 1975<sup>673</sup> and 1986 and the Race Relations Act 1986 form the basis of legislation specifically passed. Accession to the European Community introduced the European standard of equal treatment, prompting developments such as the Equal Pay (Amendment) Regulations 1983, which introduced the concept of equal pay for work of equal value.

In the US, the primary sources of anti-discrimination law, particularly regarding race, include the Equal Protection Clause,<sup>674</sup> and statutes, such as the Age Discrimination in Employment Act (ADEA)<sup>675</sup>; Title VII of the Civil Rights Act of 1964 (Title VII), codified with subsequent amendments.<sup>676</sup> With respect to discriminatory behaviour based on sex, the US Constitution itself encompasses only very narrow sex equality guarantees, in that it confers limited substantive rights that are judicially enforceable against state actors. Major federal statutes proscribing discrimination based on sex, such as Title VII of the Civil Rights Act of 1964,<sup>677</sup> which prohibits an employer from treating persons differently, or less favorably, because of their sex, the Pregnancy Discrimination Act (PDA),<sup>678</sup> Title IX of the Education Amendments of 1972<sup>679</sup> and the Equal Pay Act (EPA),<sup>680</sup> among others, are highly relevant sources of legal rules to prevent unfavourable discrimination on the basis of sex in addition to the Constitution's Equal Protection Clause.

Legal restrictions on discriminatory behaviour based on a 'prohibition of discrimination', however, are limited in their scope and capacity to handle many of the actual instances of discrimination that occur. For instance, the 'Sex Discrimination Act of 1975' in the UK prohibited unfavourable treatment based on sex (primarily in employment scenarios). But for the duration of it being in force, plaintiffs in discrimination cases encountered grave difficulties of proof, and 'direct discrimination' was notoriously difficult to prove, as defendants can offer any other plausible account of their treatment of the plaintiff and escape liability. With respect to 'indirect discrimination', i.e., discrimination proved by unfavourable results, plaintiffs faced considerable technical difficulties in terms of the identification of relevant pools for com-

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671 Equality Act 2010.

672 Sex Discrimination Act 1975.

673 Race Relations Act 1976.

674 U.S. CONST. amend. XIV, § 1.

675 29 U.S.C. §§ 621-634 (2012)

676 42 U.S.C. §§ 2000-2000e-17 (2012)

677 42 U.S.C. §§ 2000e - 2000e17

678 42 U.S.C. §§ 2000e et seq.

679 20 U.S. Code § 1681

680 29 U.S.C., § 206(d)

parison, adequate statistics and proving detriment.<sup>681</sup> Similar problems have been faced in the US, in adjudication of laws purporting to advance equality between the sexes. Jurisprudence has taken a restrictive and narrow conception of what constitutes discrimination, considering it mostly as the actions of an individual bad actor who consciously and demonstrably acts to discriminate against women or members of a racial minority. This restricts the scope of the prohibition of discrimination to identifiable actors consciously and overtly acting out of animus against women and minorities. This contributes to a legal culture which understands discrimination narrowly and makes it difficult to perceive discrimination when it happens.<sup>682</sup> While the law (and technicalities) of the prohibition on discrimination are not the focus of this thesis, the historical difficulty faced in getting 'indirect discrimination' to be treated as a barrier to equality, and the 'tests' used to prove that in court, speak to the limitations of legislation as the only normative tool to extract desirable behaviour. In fact, even if legislation and constitutional guarantees are fairly broad, restrictive interpretations of discrimination law like the one discussed above promotes an understanding that equates discrimination with conscious, observable animus and law itself participates in suppressing knowledge of discrimination, especially when discrimination is more broadly understood to capture more subtle forms of bias.<sup>683</sup> The limits of legislation to counter sexism has been recognized<sup>684</sup> by the European Institute of Gender Equality, tasked with advancing equality between the sexes. They acknowledge that despite the plethora of legal frameworks available, sexist behaviour such as women being left out of decision making, primarily responsible for care work, and paid less than men, is rampant. However, while some sexist behaviour may breach these anti-harassment and anti-discrimination rules, some does not reach that threshold.<sup>685</sup> Using only positive legal proscriptions to mitigate or tackle discriminatory behaviour, therefore, has two kinds of limitations. The first is proof, in that it is hard to prove discrimination occurred under the legal tests used by courts in applying anti-discrimination law. The second is the threshold, as much of the conduct that has similarly devastating impacts on the lives of individuals, may not even 'qualify' as harassment or discrimination even if proven. While providing the basic standards that public servants are

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681 Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411, 415.

682 Deborah L. Brake, 'What Counts as Discrimination in Ledbetter and the Implications for Sex Equality Law Symposium: The Roberts and Equal Protection: Gender, Race, and Class – Gender' (2007) 59 *South Carolina Law Review* 657, 661.

683 *ibid.* 668.

684 European Institute for Gender Equality, 'Sexism at Work: How Can We Stop It? Handbook for the EU Institutions and Agencies' (Publications Office of the European Union 2020) 6 <<https://eige.europa.eu/publications-resources/publications/sexism-work-how-can-we-stop-it-handbook-eu-institutions-and-agencies#>>.

685 *ibid.*

to be held to, positive, anti-discrimination and equal treatment laws need to be further buttressed by other pro-active measures against discriminatory or biased behaviour.

Legislative measures also include going beyond the ‘prohibition of discrimination’, actively mandating that public servants are trained in a manner that they are less likely to engage in biased and prejudiced behaviour. While examples of such legislation are few and far between, Article 2, Chapter 1, Title 4 of Part 4 of the Californian Penal Code<sup>686</sup> provides an illuminating example. It mandates a ‘Commission on Peace Officer standards and training’ which is tasked with developing and disseminating guidelines and training and development of effective, non-combative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment, that will foster mutual respect and cooperation between law enforcement and marginalized groups. Significantly, paragraph 5 of this law highlights that the intent behind this legislation is to address the practice of racial or identity profiling. The mandates envisioned by this legislation go further, and require that the curriculum developed by the commission should include and examine evidence-based patterns and practices, and protocols that make up such profiling, including implicit bias and considering the negative impact of intentional and implicit biases, prejudices, and stereotyping on effective law enforcement. It also envisions that such a curriculum should enumerate the obligations of law enforcement in preventing, reporting, and responding to discriminatory or biased practices by fellow officers.<sup>687</sup>

#### 4.1.3 Regulatory instruments or ‘Soft’ Commitments

The legislation and legal standards enumerated in the previous section, enshrining the broad right of equal and non-discriminatory treatment comprise the foundational legal norms that proscribe and constrain racist or sexist behaviour by public actors, including law enforcement. At a more granular level, rules and laws specifically regulating policing are also relevant. In the US, the Law Enforcement Code of Ethics, by the International Association of Chiefs of Police, includes a pledge that police officers will not ‘permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence...their decisions’.<sup>688</sup> Individual cities, counties, districts, states, or regions, depending on how law enforcement in the country is organized, have their own versions of such codes of ethics or principles, which vary only

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686 Standards and Training of Law Enforcement Officers, Cal. Penal Code § 13519.4. et seq.  
687 [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=13519.4&lawCode=PEN](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=13519.4&lawCode=PEN)

688 International Association of Chiefs of Police, *Law Enforcement Code of Ethics* at <https://www.theiacp.org/resources/law-enforcement-code-of-ethics>

slightly. For example, the Los Angeles Police Department is subject to the Code of Ethics and Statement of Approved Principles for Public Service in the Government of the City of Los Angeles. This Code mandates in Article XIV that persons in public service 'shall not discriminate on the basis of race, color, national origin, ancestry, sex...'.<sup>689</sup>

Beyond the duty to not discriminate put forward in some codes of ethics, statements of principles go further, recognizing the unique position of law enforcement organizations and the vitality of trust in them for the rule of law. For example, the statement of 'core values' of the Federal Bureau of Investigation in the U.S emphasizes respect for the dignity of all whom law enforcement protects, which in turn reminds those who wield law enforcement powers to do so with restraint and to recognize the 'natural human tendency to be corrupted by power' and to 'become callous in its exercise'. The statement reiterates that fairness and compassion in the exercise of its powers ensures that law enforcement personnel treat everyone with the highest regard for constitutional, civil and human rights. It underlines that personal and institutional integrity reinforce each other and are owed in exchange for the trust and authority conferred upon such organizations, demanding of its personnel that those who enforce the law must not merely obey it, but have an obligation to set a moral example.<sup>690</sup>

Most police organizations have a form of code of ethics such as the ones highlighted above and they usually include, in addition to the basic legal duties, the following elements:

- obeying the laws of the country and the regulations of the police department;
- impartial and professional behaviour and action; not allowing personal feelings, prejudices, animosities or friendship to influence a decision;
- respecting the confidentiality of the office and the information gathered on citizens;
- enforcing the law courteously and appropriately;
- not intimidating citizens or suspects, using self-restraint and watching out for the welfare of others;
- never using excessive force or violence;
- compassion and fairness.<sup>691</sup>

S. 4.1.1, thus, began with a review of the international and regional human rights that provide the basic justification for equal treatment irrespective of race or sex followed by relevant legal prohibitions at the national level. S. 4.1.2 in its review of internal rules and regulations above demonstrates that the

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689 The provision continues with enumerating other protected grounds.

690 Federal Bureau of Investigation, *Core Values* at <http://www.fbi.gov/values.htm>.

691 ACE, The Electoral Knowledge Network, *Code of Conduct for Law Enforcement* at <https://aceproject.org/main/english/ei/eie12c1.htm>

current legal prohibition on direct, maliciously motivated discrimination on the basis of race or sex is not the only human rights-oriented standard that law enforcement officers are held to. As envisioned by some of the international and regional instruments, securing substantive equality on the basis of race and sex requires more than what laws have laid down. In addition to the broad norms and commitment to equality, knowledge of the nature of biased and discriminatory behaviour has grown, as have policy and regulatory responses to it. Thus, internal codes and regulations express that law enforcement officers are expected to not just abstain from intentional and blatant discrimination, but to carry out their duties without allowing their 'personal prejudices or biases' to influence them, act with 'compassion and fairness', and enforce the law 'courteously and appropriately' without intimidating citizens. In addition to binding legal restrictions, these codes of conduct function as an additional source of principles and standards to uphold.

The shift from generic prohibitions of discrimination to internal codes that extoll standards of behaviour like 'compassion' reflects a growing acknowledgment that substantive change demands more than prohibitions. This realization forms the basis for the analysis in S. 4.2, wherein additional norms relevant to the problem under scrutiny will be adduced and their role in regulating behaviour, both generally and in the specific case of discrimination, will be explained.

## 4.2 THE POTENTIAL OF NORMS TO FILL A GAP

S. 4.1 laid out international, national and regional legal provisions securing equality and non-discrimination, as well as regulations that seek to implement these provisions. However, despite this plethora of legal provisions, discriminatory behaviour has continued necessitating a shift to 'value based' standards as seen in the examples of internal regulations. For too long, hierarchical top-down organizational structures, as well as more rules, regulations and dictates have been considered useful approaches to achieve policy goals in policing.<sup>692</sup> Difficulties in implementing these policy priorities and recurring problems of discriminatory behaviour have woken up policy makers to the limitations of such organizational models and leadership styles.<sup>693</sup> The failure to gain support for initiatives announced by police and policy leaders and the need to ensure voluntary compliance of officers with the regulations, have raised questions about the benefits of further rule propagation in terms of its

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692 Gau and Gaines (n 449) 47.

693 Nicole E Haas and others, 'Explaining Officer Compliance: The Importance of Procedural Justice and Trust Inside a Police Organization' (2015) 15 *Criminology & Criminal Justice* 442, 443.

impact on officer behaviour.<sup>694</sup> This inability of legal prohibitions to effectively capture certain kinds of behaviour raises the necessity for an additional influence on human behaviour. Therein comes the role of norms, which influence everyday actions and behaviours at a granular level. Accordingly, S. 4.2.1 begins with a general analysis of the importance of norms in influencing and shaping human behaviour and how 'norms' interact with laws. This overview of the function of norms serves as the theoretical foundation for the analysis in S. 4.2.2, which justifies the use of norms rather than only rules to combat discriminatory behaviour.

The analysis carried out in Chapter 3 demonstrates that policing without bias requires tackling not just direct discrimination, but also beliefs, myths, and attitudes that, in turn, influence behaviour of law enforcement professionals towards certain population groups, or certain classes of victims. Thus, implicit associations about racial minorities being more likely to engage in crime, more likely to be carrying a weapon, or in general to be implicated in law and order disruptions results in discriminatory policing. In the same vein, widespread belief in rape myths,<sup>695</sup> in the non-credibility of the victim, and harsh treatment of victims of sexual violence and domestic violence<sup>696</sup> are actuated by sexism<sup>697</sup> – i.e., ideologies and practices that identify and denigrate certain capacities and dispositions as gendered attributes<sup>698</sup> and beliefs around the fundamental nature of women and men and the roles they should play in society.<sup>699</sup> While several definitions of rape myths exist in the literature, a more composite one, encompassing its various facets may be articulated as follows: Rape myths are 'descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay, or justify sexual violence that

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694 Lorie A Fridell, Jon Maskaly and Christopher M Donner, 'The Relationship between Organisational Justice and Police Officer Attitudes toward Misconduct' (2021) 31 *Policing and Society* 1081, 1081.

695 Barbara E Johnson, Douglas L Kuck and Patricia R Schander, 'Rape Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis' (1997) 36 *Sex Roles* 693, 694, 706. The study found acceptance of rape myths across multiple demographics, with demographic groups and different attitudes varying along the type of myth. The study also identified core dimensions of rape myths.

696 Christina E Riley and Niwako Yamawaki, 'Who Is Helpful? Examining the Relationship between Ambivalent Sexism, Right-Wing Authoritarianism, and Intentions to Help Domestic Violence Victims' (2018) 8 *Sage Open* 1, 7–8.

697 Kristine M Chapleau, Debra L Oswald and Brenda L Russell, 'How Ambivalent Sexism Toward Women and Men Support Rape Myth Acceptance' (2007) 57 *Sex Roles* 131, 131.

698 Pauline Johnson, 'Sexism' in Ruth S Chadwick (ed), *Encyclopedia of Applied Ethics* (2nd edn, Elsevier Academic Press 2012) 84–87.

699 Chiara Rollero and others, 'Enjoyment of Sexualization in Men and Women: Relationships with Ambivalent Sexism and Body Image Coping Strategies' (2022) 26 *Sexuality & Culture* 1403, 1406.

men commit against women'.<sup>700</sup> Such beliefs and ideologies cannot merely be tackled by legal proscriptions and sanctions, and this is where norms, and their informal, if pervasive influence on human behaviour come into play.

#### 4.2.1 Setting the Stage: The Role of Norms in Behavioural Regulation

It has generally been accepted that when society wishes to encourage behaviour that has certain characteristics, or is likely to generate particular results, we can select among various avenues of social regulation to bring about that result.<sup>701</sup> The role of 'norms' in sustaining the institutional structures of our society is nothing new. As discussed in detail in S. 2.3.1,<sup>702</sup> in the analysis of the four modalities of regulation of an entity or a form of behaviour is achievable (and being achieved) not just through law, but through the modalities of laws, markets, architecture, and norms. How architecture – in the physical world and digital world shapes behaviour, as well as the three other modalities was examined in S.2.3.1 and S. 2.3.2. Here, we turn to another modality – norms. Legal scholars have long noted that three factors determine the institutional framework of our society – formal rules; informal norms of behaviour, conventions, and codes of conduct; and their enforcement characteristics.<sup>703</sup> In fact, some have contended that exaggerating the reach of law underrates two other major sources of order – internally enforced norms (socialization) and externally enforced norms.<sup>704</sup> Key legal scholarship delving into increasing compliance with the law identifies this as the 'romance of instrumentalism' – an overblown belief in the ability of sanctions and strict discipline to promote law abiding behaviour.<sup>705</sup> Rather, it has been increasingly recognized that people comply with legal mandates when they possess supportive values and attitudes towards them.<sup>706</sup> Intentions to perform behaviours of different kinds can be predicted with high accuracy from attitudes toward the behaviour, subjective norms, and perceived behavioural control. According to another popular theory of predicting and

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700 Gerd Bohner and others, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Miranda AH Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan Publishing 2013) 21.

701 Tom R Tyler, 'Trust and Law Abidingness: A Proactive Model of Social Regulation' (2001) 81 *Boston University Law Review* 361, 362–363.

702 Generally described as 'Lessig's model' or 'the pathetic dot theory'.

703 C North Douglas, 'Cognitive Science and the Study of the "Rules of the Game" in a World of Uncertainty', *Norms and the Law* (Cambridge University Press 2006) 55.

704 Robert C Ellickson, 'Law and Economics Discovers Social Norms' (1998) 27 *The Journal of Legal Studies* 537, 539.

705 Rick Trinkner and Tom R Tyler, 'Legal Socialization: Coercion versus Consent in an Era of Mistrust' (2016) 12 *Annual Review of Law and Social Science* 417, 431.

706 *ibid* 418.

modelling social behaviour, the theory of planned behaviour, attitudes, subjective norms, and perceived behavioural control are shown to be related to appropriate sets of salient behavioural, normative, and control beliefs about the behaviour.<sup>707</sup> Considerable sociological work has posited that socialization brings about the internalization of norms, which an individual then self-enforces through feelings like guilt and pride. Those who internalize legal norms experience guilt when they defy them, because guilt is a response to the belief that they have done what they should not have.<sup>708</sup> Further, and more relevant for the purposes of our analysis, some scholars contend that much of social normative compliance does not come from law enforcement, it relies on informal enforcement of social mores by bystanders, acquaintances, family and partners who may use punishments such as ostracism and negative gossip to punish such violations.<sup>709</sup> In fact, such scholars go so far as to point out that ignoring other relevant factors that shape our society, in focusing on legal rules alone will produce unforeseen and unpredictable results.

Importantly, what *is* a norm? Definitions vary depending on discipline and for what purpose the concept of norms is being used. One definition used by Robert Axelrod, a political scientist and public policy scholar widely cited on the role of norms in society, defines a norm in relation to its determinability—i.e., a ‘norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way’.<sup>710</sup> Alternatively, law and economics scholars, use a definition oriented around on *how* it is enforced – thus norms are defined as ‘regularities within the society to which we believe members of the society ought to conform and that are enforced through mechanisms other than legal sanction’<sup>711</sup> or that a ‘norm can be understood as a rule that distinguishes desirable and undesirable behaviour and gives a third party the authority to punish a person who engages in the undesirable behaviour’.<sup>712</sup> However, the second part of this definition must not be taken to mean that the rule-like nature of a norm should not be confused with a law. Generally, when people observe certain behaviour, they may spontaneously approve or disapprove, and then reward or ignore or punish the doer. They may do this because they believe a certain norm to be in place, or they might derive such a norm by observing others’ reactions in several similar cases.<sup>713</sup> Consider, e.g., citizen’s

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707 Ajzen (n 138) 189–192.

708 Rebecca Stone, ‘Legal Design for the Good Man’ (2016) 102 Virginia Law Review 1767, 1782.

709 Ellickson (n 704) 539–540.

710 Robert Axelrod, ‘An Evolutionary Approach to Norms’ (1986) 80 American Political Science Review 1095, 1097.

711 Clayton P Gillette, ‘Lock-in Effects in Law and Norms’ (1998) 78 Boston University Law Review 813, 832.

712 Eric A Posner, ‘Law, Economics, and Inefficient Norms’ (1996) 144 University of Pennsylvania Law Review 1697, 1699.

713 *ibid.*

complaints or recommendations for law enforcement personnel on the basis that they were either rude, or dismissive or brusque, reflecting an expectation that they expect police personal to be polite, sensitive and compassionate. The evaluation from citizens on these aspects of police behaviour establish that there is an expectation of a different norm that police must be adhering to.

According to social norms theory, people are often negatively influenced by inaccurate perceptions – as when people misperceive of how other members of their social group act or think.<sup>714</sup> When people make decisions about their behaviour, they either consciously or unconsciously take into account what ‘most people’ in their social position appear to be doing.<sup>715</sup> Social norms interventions, thus, are attempts to reduce risky behaviour in a population by persuading people that the majority of those within the population engage in desirable behaviour.<sup>716</sup> In contrast to laws, therefore, normative behaviour tends to follow the script of what people perceive to be acceptable. While wrong perceptions can actuate non-compliance, information that others are likely to comply with a norm is, therefore, bound to incentivize compliance in the individual receiving said information. This is an aspect of behaviour that is of particular significance in an era of technological ubiquity, and which will be returned to in S. 5.1.1 and S. 5.1.6, dealing with feedback technologies and socially influencing technologies.

Moreover, scholarship on effects of social norms observes that existing social norms generate a kind of ‘rhetorical asymmetry’ between two opposing positions, which accords to one side an automatic upper-hand in an argument. Put another way, one side is likely to win, simply because in light of existing norms, that side has a rhetorical advantage. Thus, social norms in favour of protecting the environment, expressing patriotism, acting courteously, refraining from racist jokes, norms in favour of altruism, sacrifice, generosity are likely to be formed and intensified as a result of the asymmetry in favour of existing norms.<sup>717</sup> Further, in group dynamics, existing norms tend to have an advantage in shaping behaviour. Studies on the effects of ‘group deliberation’ on social norms also reveal that in group settings, a given norm becomes ‘more pronounced’ or intensified. Thus, it has been noted that if in a group, doctors are more likely to engage in ‘more’ heroic measures to save patients. Moreover, in contrast to individuals, groups are more likely to divide money equally among strangers, suggesting that the norms of altruism and

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714 Alan D Berkowitz, ‘Applications of Social Norms Theory to Other Health and Social Justice Issues’ in H Wesley Perkins (ed), *The Social Norms Approach to Preventing School and College Age Substance Abuse: A Handbook for Educators, Counselors, and Clinicians*, vol 1 (Jossey Bass 2003) 259–260.

715 Christopher Kilmartin and others, ‘A Real Time Social Norms Intervention to Reduce Male Sexism’ (2008) 59 *Sex Roles* 264, 264.

716 *ibid* 265.

717 Cass R Sunstein, ‘Damages, Norms and Punishment’ in John N Drobak (ed), *Norms and the Law* (Cambridge University Press 2006) 42.

generosity also ‘grows’ in groups. While this ‘intensification’ effect can serve to strengthen both pro-social and antisocial norms, it nevertheless still confirms the power of norms in groups.<sup>718</sup> This is of particular significance in this thesis because, as discussed in Chapter 3, much of the behaviour under scrutiny has its roots in the culture of policing. In our current social setup, therefore, norms play a considerable and significant role in modulating behaviour – both individually, and in groups.

In general, therefore, norms already play a role in influencing our social interactions to a far greater extent than laws and regulations. This is particularly relevant in the problem of prejudiced or discriminatory behaviour by law enforcement, since such behaviour and actions are too ‘minute’ to be regulated in detail by regulations. S. 4.2.2 further substantiates why a focus on norms is justified to correct this problem.

#### 4.2.2 Benefits of Using Norms for Legal Outcomes

S. 4.2.1 illustrated the influence of norms on everyday behaviour and social standards. But despite their ubiquity, using norms – arguably, an intangible and more amorphous guide to human behaviour rather than the already existing legal framework outlawing racist and sexist bias, may seem an unwarranted shift in focus. This section illustrates why using ‘norms’ as the basis for advocating change in behaviour may have an advantage over the rules, regulations, codes, and trainings meant to enforce this prohibition.

Laws and norms interact with each other in a complex and mutually reinforcing fashion to design and regulate modern society.<sup>719</sup> Recent thought in law and economics has rediscovered the importance of legitimacy and ‘cooperation’ in studying compliance with the law, and a recognition that moral, social and legal norms are crucial in sustaining the very high level of cooperation our societies demand.<sup>720</sup> Regulatory theory posits that ‘compliance’ is affected by a mix of sanctions, capacity, motivation, and the perceptions of legitimacy and moral purpose associated with particular rules.<sup>721</sup> This idea of legitimacy ties back to the notion of procedural justice, but a focus on law’s effectiveness takes a broader view of the function of law.<sup>722</sup> Regulatory theory, therefore, acknowledges that while much of

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718 *ibid* 41.

719 Saul Levmore, ‘Norms as Supplements’ [2000] *Virginia Law Review* 1989, 1997–2002.

720 Klaus Abbink and others, ‘Peer Punishment Promotes Enforcement of Bad Social Norms’ (2017) 8 *Nature Communications* 1, 2.

721 Kelly Gallagher-Mackay, ‘Teachers’ Duty to Report Child Abuse and Neglect and the Paradox of Noncompliance: Relational Theory and “Compliance” in the Human Services’ (2014) 36 *Law & Policy* 256, 256.

722 Nicoletta Rangone, ‘Making Law Effective: Behavioural Insights into Compliance’ (2018) 9 *European Journal of Risk Regulation* 483, 491–493.

regulation can be understood in terms of the Command and Control model, other models and avenues of regulation can be equally effective.<sup>723</sup> Command-and-control refers to the traditional approach to managing resource problems, which has been through government measures (legislation) with which individuals and corporate entities are expected to comply.<sup>724</sup> However, extensive work in the field of law and economics have started to add further credence to the idea that regulatory aims can be achieved by other means, for example through market forces or self-regulation.<sup>725</sup> Regulation through norms is one such alternative means.

Legal theorists have now posited that, in addition to using sanctions, law affects behaviour 'expressively' by what it says, or 'expresses' rather than by what it does.<sup>726</sup> Accordingly, some writers have noted that law can alter behaviour by signalling the underlying attitudes of a community or society. As generally known, people are motivated to gain approval and avoid disapproval, and what is indeed approved of by society is learnt through the information signalled by legislation and other law, which then affects their behaviour.<sup>727</sup> Laws can, therefore, have more subtle effects on our behaviour that cannot be captured in the simple 'sanctions' model. Expressive theories of legal compliance postulate that a 'rational person internalizes a norm when commitment to the norm conveys an advantage relative to the original preferences and the changed preferences.' When individuals reflect on those altered preferences, individual values can be changed.<sup>728</sup> Some authors opine that by expressing social values, law can tip a system of social norms into a new equilibrium, either with or without changing individual values.<sup>729</sup> Depending on the law, it may directly bring to the forefront cooperation norms and induce law-abiding behaviour if the law is perceived as a public expression (a 'deliberate reminder') of what one ought to do.<sup>730</sup> Thus, some people may be

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723 See, for example, Nathan Harris and Jennifer Wood, 'Governing Beyond Command and Control: A Responsive and Nodal Approach to Child Protection', *Surveillance and Governance: Crime Control and Beyond* (Emerald Group Publishing Limited 2008) 328–329.

724 Derrin Davis and Donald F Gartside, 'Challenges for Economic Policy in Sustainable Management of Marine Natural Resources' (2001) 36 *Ecological Economics* 223, 224.

725 Darren Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19 *Law & Policy* 529, 530–532.

726 Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503, 1533–1534.

727 Richard H McAdams, 'An Attitudinal Theory of Expressive Law' (2000) 79 *Oregon Law Review* 339, 340–341.

728 Robert Cooter, 'Expressive Law and Economics' (1998) 27 *The Journal of Legal Studies* 585, 585–586.

729 *ibid* 594–596.

730 Jean-Robert Tyran and Lars P Feld, 'Achieving Compliance When Legal Sanctions Are Non-Deterrent' (2006) 108 *Scandinavian Journal of Economics* 135, 138.

induced to obey, or rather change their actions to suit the 'deliberate reminder',<sup>731</sup> a function served by legal forms of such norms.

Law's 'expressive function', therefore, does not impose a new standard from a legislator or a person of authority, but rather *relies* on enforcing and concretizing existing norms<sup>732</sup> and conveying expectations about the same,<sup>733</sup> while depending on the already present mechanisms of compliance with the norm to achieve legal and regulatory norms. The value of the expressive theory of law is not merely in a reminder of law's ability to influence behaviour outside of sanctions. Rather, the work of legal theorists on this highlights that many times existing social norms find expression and more force through law, wherein law acts as a 'focal point' for these long-standing social norms and their imperatives.<sup>734</sup> Many laws are merely an 'expression' of desirable norms and values – and therefore to achieve their intended aims, the underlying social norms will need to be complied with. Norms generally thus precede laws, but then are maintained, supported and strengthened by laws.<sup>735</sup> Relatedly, laws can function only as a supplement,<sup>736</sup> and not a replacement, for informal enforcement of a norm – in the complete absence of a normative imperative, laws will fail.<sup>737</sup> Consequently, a law that does not in fact reflect changed social preferences will suffer the disadvantage of not being perceived as an expression of social approval and be ignored or complied with to a lesser extent.<sup>738</sup> The 'gap' seen, between the numerous laws and regulations prohibiting discrimination on the basis of race and sex, and the reality of individuals' experiences as reviewed in Chapters 1 and 3, suggests that the legal rights accorded do not affect individual behaviour in everyday contexts.

Moreover, because of the nature of the law, i.e., its open character, detail in the norm is sacrificed. This open character may lead to an impression that conformity with the law is the limit of one's social obligations.<sup>739</sup> As seen in S. 4.1, however, mere formal legal conformity with anti-discrimination obligations is insufficient to prevent damaging and harmful discriminatory behaviour on the basis of race and sex. Furthermore, norms are found to be

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731 *ibid* 139.

732 Richard H McAdams, 'The Focal Point Theory of Expressive Law' [2000] *Virginia Law Review* 1649, 1712–1713.

733 Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 229–231.

734 McAdams, 'The Focal Point Theory of Expressive Law' (n 732) 1666.

735 Richard H McAdams, 'The Origin, Development, and Regulation of Norms' (1997) 96 *Michigan Law Review* 338, 340, 349–350.

736 'Norms and the Law' in Kenneth J Arrow and Michael D Intriligator (eds), *Handbook of Law and Economics*, vol 2 (Elsevier 2007) 1589–1590.

737 Axelrod (n 710) 1106.

738 Matthew A Christianson, 'A Great Schism: Social Norms and Marijuana Prohibition' (2010) 4 *Harvard Law and Policy Review* 229, 247–248.

739 Axelrod (n 710) 1107.

particularly effective as devices for social control, relative to law, especially when individual – as opposed to group – violations of the norm are too trivial, or the difficulty of enforcing sanctions is too great.<sup>740</sup> This is echoed by other scholarship on norms, reiterating that social norms are often best at preventing minor deviations where resources for enforcement are low.<sup>741</sup> This is because they do not require legislation, are pervasive and have potentially unlimited resources for enforcement.<sup>742</sup> At the same time, social norms as a tool to change behaviour require less resources for enforcement.<sup>743</sup> In an age of technological ubiquity, increasing the pervasiveness of norms, i.e., their relevance in everyday life, and consequently their impact is made even more possible. It has also been argued that these informal systems of social control are far more important than law in some contexts, particularly where ‘interacting parties have a continuing relationship and little at stake’.<sup>744</sup> Hence, there is a compelling case to use detailed norms to address discriminatory behaviour because individuals have to rely on law enforcement throughout their lives, but police officers themselves have considerably less to lose.

Further, while legal codes typically rely on consistent, individual enforcement to be followed, a norm generates its effects because it (i) embodies a practice mostly followed by persons in that situation where following it is possible, (ii) each person in that situation prefers that other similarly situated people would follow it, and (iii) everyone in that situation *expects* that others similarly situated will conform.<sup>745</sup> With norms, the disapproval of others is provoked not just by the fact that everyone is assumed to have a preference for complying, but also by the fact that everyone in that situation knows that everyone else is assumed to comply. With norms, therefore, since their sustenance is based on sufficiently many others sharing that commitment, an additional commitment may be involved among some norm followers to punish transgressions of the norm.<sup>746</sup> This aspect of compliance with norms as opposed to laws is especially significant for the other prong of this thesis – namely the use of technology. The discussion above lays out the argument for why we must look to norms governing racism and sexism, rather than merely black letter law generally. In addition, a reason for compliance with

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740 Richard A Posner and Eric B Rasmusen, ‘Creating and Enforcing Norms, With Special Reference to Sanctions’ (1999) 19 *International Review of Law and Economics* 369, 380.

741 Axelrod (n 710) 1107.

742 Deborah A Prentice, ‘The Psychology of Social Norms and the Promotion of Human Rights’ in Ryan Goodman, Derek Jinks and Andrew K Woods (eds), *Understanding Social Action, Promoting Human Rights* (Oxford University Press 2012) 23.

743 Jeffrey J Rachlinski, ‘The Limits of Social Norms’ (1998) 74 *Chicago Kent Law Review* 1537, 1537–1538.

744 Ellickson (n 704) 540.

745 Gillette (n 711) 833.

746 Abbink and others (n 720) 2.

a norm is that one accepts that others will also follow the norm, expects themselves to do so, and believes that their normative expectations are well founded.<sup>747</sup> Since norm compliance simultaneously depends on others both complying with the norm as well as expecting others to do so,<sup>748</sup> the task of providing accurate information about the group that may dispel a false impression. To elucidate, literature on social norm compliance has reflected that people often tend to operate on inaccurate impressions about others behaviour to decide on their own.<sup>749</sup> The crucial task of conveying accurate information about compliant behaviour, in a manner that is persuasive and will be received, can therefore be carried out by technology. The ubiquity of technology here provides an added advantage in ensuring that proper information about group compliance is delivered. The next step in using norms to address racist and sexist behaviour requires the enumeration of the specific norms that have utility for the problem at hand, which is done in S. 4.3.

#### 4.3 RELEVANT NORMS IN COMBATting RACISM AND SEXISM IN LAW ENFORCEMENT

As illustrated in S. 4.1, there is already a substantial body of law and regulation that is meant to obviate racist and sexist behaviour, embodying an overarching prohibition against racism and sexism, upheld as cherished values in our societies. However, as reviewed in Chapter 3, sex and racially prejudicial behaviour seems to abound, particularly in mild forms that do not merit legal sanction. To combat this behaviour, therefore, more detailed norms derived from and further fleshing out the overarching norm against racism and sexism are needed. This section analyses and distils such norms from three dimensions – socio-legal literature on police reform; already existing guidelines for policing which set out recommendations; and literature on human rights. The conclusion of S. 4.3, therefore, contains a set of norms that are then sought to be communicated and imbibed in law enforcement personnel.

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747 Cristina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge University Press 2005) 23.

748 *ibid* 152.

749 An example may be made here of cyber-security behaviours. Individuals tend to believe not everyone is taking all the precautions necessary, which in turn shapes their own complacency. Technology has been proposed as a solution to this issue – of halting the false belief about how the group actually behaves. See James Nicholson, Lynn Coventry and Pam Briggs, 'Introducing the Cybersurvival Task: Assessing and Addressing Staff Beliefs about Effective Cyber Protection', *Proceedings of the Fourteenth Symposium on Usable Privacy and Security* (USENIX – The Advanced Computing Systems Association 2018).

### 4.3.1 Procedural Justice and Its Utility in Improving Citizen – Police Interactions

A fundamental requirement of a stable society is the recognition that the threat of punishment is not the only model of social control, and it is difficult for a legal institution to effectively shape behaviour solely by the threat and use of power and coercive measures.<sup>750</sup> In other words, it is important that most citizens comply with the law and its enforcers voluntarily most of the time. Legitimacy in this context describes a quality that encourages cooperation and compliance and is defined as a 'property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority.... A legitimate authority is one that is regarded by people as entitled to have its decisions and rules accepted and followed by others.'<sup>751</sup> Legitimacy can be more narrowly defined for this particular context as the 'property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed'.<sup>752</sup> Understanding how legitimacy is attained, as detailed in this section, gives a picture of what individuals expect from policing, and, thereby, serves as a source of normative expectations of police officers.

Police legitimacy has traditionally been conceptualized along instrumental and normative aspects. The instrumental framework,<sup>753</sup> so called as it refers to instrumental evaluations of three aspects of police conduct, notes that support is enjoyed by the police suggests that police enjoy support from the public when they (a) effectively control criminal behaviour (performance), (b) create a credible risk of detection and sanction for law-breakers those, and (c) fairly distribute police services across people and communities (distributive justice). However, subsequent cumulative research on supportive public behaviour indicates that a normative approach to assessing police legitimacy is more accurate.<sup>754</sup> This approach argues that 'the legitimacy of police is linked to public judgments about the fairness of the processes through which the police make decisions and exercise authority'.<sup>755</sup> This perspective suggests that if police used fairness in their dealings with citizens then people would

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750 Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375, 393.

751 Skogan and Frydl (n 547) 297.

752 Jason Sunshine and Tom R Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37 *Law & Society Review* 513, 514.

753 Lyn Hinds and Kristina Murphy, 'Public Satisfaction With Police: Using Procedural Justice to Improve Police Legitimacy' (2007) 40 *Australian & New Zealand Journal of Criminology* 27, 28.

754 Tom R Tyler and Jeffrey Fagan, 'Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities' (2008) 6 *Ohio State Journal of Criminal Law* 231, 252–253.

755 Sunshine and Tyler (n 752) 514.

view police as being more legitimate and would be more supportive of police as a result.<sup>756</sup> The actions of individual police can, therefore, have a direct and fundamental impact by either enhancing or lowering people's judgments of police legitimacy.<sup>757</sup> Thus, grounded in the social psychological concept of legitimacy, the concept of 'procedural justice' in policing has emerged.<sup>758</sup> Sometimes referred to as 'rightful policing', procedurally just / rightful policing attempts to account for what people say that they care about when assessing individual police specifically and police agencies in general.<sup>759</sup> Prior research on citizen compliance has highlighted the influence of procedural justice in encouraging good behaviour.<sup>760</sup>

Rightful / procedurally just policing differs from lawful policing and efficient policing in at least two ways. First, rightful policing does not seem to depend only on the actual lawfulness of police conduct. Instead, rightful policing is assessed in terms of procedural justice or fairness of the way police conduct themselves.<sup>761</sup> The rationale for this approach arises from the trust established in the dynamic. Trust in this context may be articulated as a belief in the goodwill as well as benevolence of the institutions interacting with them.<sup>762</sup> When people believe that the police have good intentions their willingness to comply increases.<sup>763</sup> Public trust in the police therefore is reliant on the perception of citizens that the police treat people equally and respectfully, are open to citizen input, and explain their decisions. *By linking these behaviours to a conceptualization of trust in the police, an imperative for police to behave procedurally just emerges.*

Second, as stated rightful policing does not only depend on an assessment of the police's performance in fighting crime. However, rightful policing, it has been found, often leads to more legal compliance and therefore lower crime rates.<sup>764</sup> Research into policing and its impact has consistently indicated that people evaluate police legitimacy based on the way police treat them, *inde-*

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756 Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 317–319.

757 Natasha S Madon, Kristina Murphy and Elise Sargeant, 'Promoting Police Legitimacy among Disengaged Minority Groups: Does Procedural Justice Matter More?' (2017) 17 *Criminology & Criminal Justice* 624, 626.

758 Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (n 756) 284.

759 Tracey L Meares and Peter Neyroud, *Rightful Policing* (US Department of Justice, Office of Justice Programs, National Institute of Justice 2015) 3.

760 Mazerolle and others (n 546) 33–34.

761 Tracey Meares, 'The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing (and Why It Matters)' (2013) 54 *William and Mary Law Review* 1865, 1865–1866.

762 Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation 2002) 62–63, 67–68.

763 Maarten Van Craen and Wesley G Skogan, 'Trust in the Belgian Police: The Importance of Responsiveness' (2015) 12 *European Journal of Criminology* 129, 130.

764 Meares (n 761) 1866.

pendent of people's views about how well police perform their job.<sup>765</sup> Research on implementation of this approach indicates that when police treat citizens in a procedurally fair way, citizens infer good intentions of the police from such conduct.<sup>766</sup>

This section explores the components of 'procedural justice', i.e., what is required for an entity to be seen as procedurally just, what procedures and attitudes enable it, and what values and norms underpin the processes that lead to procedural justice. This interaction – that of procedurally just policing inspiring trust, and thereby facilitating compliance and cooperation with the police – continues to underpin research on improving police-citizen interaction. In the context of interactions between people and law-enforcing institutions such as the police, trust is defined as people's judgments about whether or not public institutions have benevolent motives. It is rooted in inferences by people about the motivations of police officers, a quality crucial to the legitimacy of public institutions, and consequently increases people's tendency to trust in said institutions and cooperate with them and comply with their directives.<sup>767</sup> If citizens believe they will be treated well, their willingness to cooperate or comply with police is enhanced over time because the effects of increased trust and confidence.<sup>768</sup> The tendency to cooperate and even to comply with the law is powerfully shaped by moral alignment with the police and their perceived legitimacy, which in turn strengthens the obligation to obey them.<sup>769</sup> These mediating factors, in turn, have been observed to shape compliance and cooperation.<sup>770</sup> Procedural justice and trust, thus, play an important role in stimulating citizens' compliance with the police and the law. As the body of work on procedural justice has grown, the impact of procedural justice as it is perceived by citizens on their trust in the police, and its influence on compliance, has been confirmed by different studies in jurisdictions as different as the United Kingdom,<sup>771</sup> Australia,<sup>772</sup> Israel,<sup>773</sup> and

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765 Hinds and Murphy (n 753) 29.

766 Maarten Van Craen, 'Understanding Police Officers' Trust and Trustworthy Behavior: A Work Relations Framework' (2016) 13 *European Journal of Criminology* 276.

767 Tyler, 'Trust and Law Abidingness' (n 701) 363.

768 Kristina Murphy, Lorraine Mazerolle and Sarah Bennett, 'Promoting Trust in Police: Findings from a Randomised Experimental Field Trial of Procedural Justice Policing' (2014) 24 *Policing and Society* 405, 419–421.

769 Mike Hough and others, 'Procedural Justice, Trust, and Institutional Legitimacy' (2010) 4 *Policing: A Journal of Policy and Practice* 203, 204–205.

770 *ibid* 206.

771 Jonathan Jackson and Ben Bradford, 'What Is Trust and Confidence in the Police?' (2010) 4 *Policing: A Journal of Policy and Practice* 241.

772 Adrian Cherney and Kristina Murphy, 'Policing Terrorism with Procedural Justice: The Role of Police Legitimacy and Law Legitimacy' (2013) 46 *Australian & New Zealand Journal of Criminology* 403.

773 Tal Jonathan-Zamir and David Weisburd, 'The Effects of Security Threats on Antecedents of Police Legitimacy: Findings from a Quasi-Experiment in Israel' (2013) 50 *Journal of Research in Crime and Delinquency* 3.

Ghana<sup>774</sup> and of course, the United States.<sup>775</sup> It has been advanced, therefore, that part of the solution to the tension between the two competing roles of the police – on the one hand as enforcers of law and order, and on the other as protectors of the community – is to use ‘procedural justice’. That is, by treating citizens fairly, with respect for their dignity and in a way that it reinforces their status within society and a positive sense of self-identity irrespective of the outcome.<sup>776</sup>

People systematically focus on a few dimensions when evaluating the police. Important factors that people consider when deciding whether they have received procedural justice are whether they are treated in a *fair* way, whether they are treated with *respect* and *dignity*, and whether they perceive that the police are acting in good faith.<sup>777</sup>

The three dimensions mentioned above – of fairness, respectful treatment, and perception of rightful policing – can be further broken down into four measures that the public are observed to use in assessing the police. Scholarship on procedural justice has thus identified the following four parameters in police decision-making as crucial to shoring up police legitimacy.<sup>778</sup> These parameters in turn, indicate normative standards that the behaviour of law enforcement personnel must strive to, in order to treat people fairly and equitably and are therefore briefly detailed below.

*Firstly*, participation,<sup>779</sup> i.e., active participation in discussions prior to police decision-making (i.e., people being given the opportunity to explain their views/behaviour before police decide on a course of action). When people have an opportunity to explain their situation and their perspective on it, they report higher levels of satisfaction.<sup>780</sup>

*Secondly*, people place importance on the fairness of decision making by legal authorities.<sup>781</sup> That is, they look to indicia of decision-maker neutrality, objectivity and factuality of decision making, consistency in decision making, and transparency.<sup>782</sup> Police decision-making that is perceived as neutral and

774 Justice Tankebe, ‘Police Effectiveness and Police Trustworthiness in Ghana: An Empirical Appraisal’ (2008) 8 *Criminology & Criminal Justice* 185.

775 Tom R Tyler, ‘Enhancing Police Legitimacy’ (2004) 593 *The Annals of the American Academy of Political and Social Science* 84.

776 Meares, Tyler and Gardener (n 545) 311.

777 Committee on Proactive Policing: Effects on Crime, Communities, and Civil Liberties and others, ‘Community-Based Proactive Strategies: Implications for Community Perceptions and Cooperation’ in David Weisburd and Malay K Majumdar (eds), *Proactive Policing: Effects on Crime and Communities* (National Academies Press 2018) 230.

778 Tyler and Fagan (n 754) 242.

779 Hinds and Murphy (n 753) 29.

780 Tyler, ‘Enhancing Police Legitimacy’ (n 775) 94.

781 *ibid.*

782 Meares (n 761) 1875–1876.

objective, enhancing a sense that that police treat everyone in a like manner),<sup>783</sup> therefore is likely to evoke greater levels of satisfaction.

*Thirdly*, people care a great deal about how figures of authority treat them. The quality of the interaction in their interpersonal communication in turn influences perception of fairness. Specifically, people desire to be treated with dignity, having their rights acknowledged, and with politeness. Being treated with dignity and respect – for their identity as well as their rights, is crucially important.<sup>784</sup>

*Fourthly*, in their interactions with authorities, people want to believe that authorities are acting out of a sense of benevolence toward them and that their motivations are sincere and well intentioned. Hence, people attempt to discern why authorities are acting the way they do by assessing how they are acting.<sup>785</sup>

These parameters comprise a model of procedural justice, which influences legitimacy of the police, and which has a significant effect on whether police actions are perceived as racially motivated i.e., whether their actions are attributed to racial bias and profiling or not.<sup>786</sup>

Procedural justice, thus, comprises multiple components: opportunities for representation of the individual or citizen's viewpoint; willingness to correct on the part of the officer; perception of the officer's motivation, honesty, and ethicality; the overall quality of the officer's decision; and any obvious bias exhibited by the officer in reaching a decision.<sup>787</sup> These elements give us a clearer picture of what norms and practices need to be prioritized in order to have police officers discharge their duties in a procedurally just way.

The above discussion establishes the necessity for the police to exercise procedural justice in their work order to increase legitimacy as well as ensure their interactions with citizens are compliant with the rights of citizens to be treated fairly. But achieving this change in policing behaviour is not possible without a review of the role played by the organization itself.

The success of hierarchical institutions like the police depends on the existence of a cadre of police personnel willing to voluntarily obey and implement policies developed by police leaders.<sup>788</sup> But research in organizational

783 Hinds and Murphy (n 753) 29.

784 Steven L Blader and Tom R Tyler, 'A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29 *Personality and Social Psychology Bulletin* 747, 755.

785 Meares (n 761) 1876.

786 Tom R Tyler and Cheryl J Wakslak, 'Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority' (2004) 42 *Criminology* 253, 273–274.

787 Tom R Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Review* 103, 128.

788 Joseph A Schafer, 'The Role of Trust and Transparency in the Pursuit of Procedural and Organisational Justice' (2013) 8 *Journal of Policing, Intelligence and Counter Terrorism* 131, 132.

theory suggests that organizations which are perceived as burdensome by their employees are more likely to experience employee misconduct. In the context of policing, therefore, organizational commitment to procedural justice could spawn police misconduct.<sup>789</sup> Scholarship on policing thus, notes that responsibility for officer misconduct ultimately resides at the institutional level.<sup>790</sup> Organizational injustice (e.g., perceived unfair policies or burdensome requirements) has, thus, been found to play a role in perpetuating misconduct. This is unsurprising, as the insistence on arbitrary performance measures to assess policing engendering problematic behaviour was already illustrated in S. 3.2.1. Under pressure to increase certain metrics, as seen in S. 3.2.1, police officers resorted to discriminatory behaviour and shortcuts that disproportionately affected citizens on the basis of race and sex. The corollary of this observation, however, is that when the police organisation itself implements procedural justice, outcomes for citizens improve.

The work on procedural justice, thus far, suggests that 'fair treatment' and 'fair decision making' enhances the legitimacy and normative status of an authority, and promotes commitment to its values and enhances their legitimacy.<sup>791</sup> The usefulness of the 'procedural justice' framework and the normative standards it advances in order to cement legitimacy has already been validated by research reflecting the benefits of authority figures behaving in a procedurally just way.

Following from the research conducted on police–citizen contacts on the one hand, and employees' behaviour in non-police organizations on the other, the role of organizational procedural justice in preventing misconduct has been examined. Recent findings on the extent to which officer compliance with applicable regulations is linked to the quality of interaction and communication between supervisors and officers reveals important implications for organizational procedural justice. A survey assessing the extent to which procedural justice norms within the police organization would result in greater compliance bore this out, finding that perceived fairness and trust increase officers' compliance with supervisors and policies of the organization.<sup>792</sup>

Similarly, a study conducted on police integrity in the Philadelphia Police Department found that officers who viewed the department as distributing decisions fairly, engaging in procedurally just managerial actions, and interacting in a polite and courteous manner toward subordinates were more likely to have been involved in few incidents of police misconduct. Specifically, perceptions of organizational justice were associated with lower likelihoods

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789 Scott E Wolfe and Alex R Piquero, 'Organizational Justice and Police Misconduct' (2011) 38 *Criminal justice and behavior* 332, 333.

790 Sanja Kutnjak Ivkovic, 'Rotten Apples, Rotten Branches, and Rotten Orchards: A Cautionary Tale of Police Misconduct?: Police Misconduct' (2009) 8 *Criminology and Public Policy* 777, 780.

791 Bradford and others (n 13) 112.

792 Haas and others (n 693) 453.

of officers having citizen complaints filed, internal investigations instigated, or disciplinary charges brought against them.<sup>793</sup> Over time, where police agencies have in fact achieved procedural justice within the organization, it has been associated with less officer misconduct – such misconduct ranging from discrimination to corruption to excessive use of force.<sup>794</sup> Extrapolating from these observations, there have been suggestions that there should be a focus on developing policies that are procedurally fair, transparent communication and opportunity to provide feedback.<sup>795</sup> The implication of this research suggests that organizational environments with certain behavioural mechanisms that may currently engender misconduct, can in turn be so designed so as to control against the proliferation of behaviour. Building on this research, the requirements and imperatives of procedural justice provides a roadmap to ensure officer compliance through alternate avenues especially when it comes to preventing discriminatory police behaviour. Thus procedural justice and trust also play a role in stimulating officers' compliance with supervisors and the policies of the organization.

In summary, procedural justice has been validated as a reliable model to be followed in citizen police interactions. Being procedurally just requires that citizens are (a) treated with fairness – in treatment and in decision making, (b) treated with dignity and respect (c) are given reason to believe that the police are well intentioned and (d) are given a chance to give their own input.

#### 4.3.2 From Legal Regulations to Model Policies, Principles and Norms

Relevant norms can be found in instruments propagated by legal authorities and standard setting organizations as well. As the above overview of legal, statutory and regulatory standards shows, legal and ethical norms relating to racist and sexist behaviour range from general, foundational rights to specific, defined proscriptions. Thus, the legal prohibition on discrimination starts from a generic 'right to equality' as enshrined in international and supranational treaties, to a more defined prohibition against discrimination on the basis of protected grounds. Prohibition of discrimination on protected grounds evolved to an even more detailed 'right to equal treatment' and 'substantive equality' in national constitutions and legislations. The necessary implication of the right to equal treatment (and the underlying normative goal of this right) gives rise to a duty placed on law enforcement officers to act without prejudice

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793 Wolfe and Piquero (n 789) 346.

794 Paul Reynolds and Richard C Helfers, 'Organizational Injustice and Police Misconduct: Predicting Organizational Defiance Among Police Officers' (2019) 20 *Criminology, Criminal Justice, Law & Society* 53, 53.

795 Angela L Workman-Stark, 'Justice Climates in Police Organizations' in Angela L Workman-Stark (ed), *Inclusive Policing from the Inside Out* (Springer International Publishing 2017) 95 <[https://doi.org/10.1007/978-3-319-53309-4\\_5](https://doi.org/10.1007/978-3-319-53309-4_5)>.

or animosity and behave with professionalism and compassion. Put together, from binding legal obligations (hard law) to standards, duties and protocols laid down by implementing authorities, the legal provisions and standards that regulate racist and sexist behaviour by law enforcement officers are many and form a cascading regime. Awareness of the role of bias in behaviour, how it impacts trust, and the capacity for individual citizens to exercise their rights has grown. For example, the International Association of Chiefs of Police (IACP), whose code of ethics is used as a model by other law enforcement organizations, has recognized that ethical obligations require more than pledges, and has developed a model policy on 'Bias-Free Policing' that recognizes the pervasive influence of bias on policing. It defines 'biased policing' (as opposed to discriminatory policing) as 'discrimination in the performance of law enforcement duties or delivery of police services, based on personal prejudices or partiality of agency personnel toward classes of people based on specified characteristics'.<sup>796</sup> It mandates that those who report biased policing should not be subject to retaliation and that those who do violate this policy (i.e., engage in biased policing) should receive remedial intervention that could include training, counselling, or other interventions. It also requires that even otherwise basic and periodic training on subjects related to fair and bias-free policing, to include legal aspects and the psychology of bias should be provided. It acknowledges the limitations of training by requiring that the impact of such training on changes in officers' attitudes, knowledge, and behaviour, should be tested. It further goes on to recommend that if such training was found not to have the intended impact, or instead produces unintended consequences, alternative training or retraining should be considered.<sup>797</sup>

– *Norm-Propounding Policies and Standards Relevant to Sexist Behaviour*

A prominent normative source is the Guidance by the US Department of Justice on Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence.<sup>798</sup> Released in 2015, and updated in 2022, this guidance was designed to advance bias-free policing and help agencies to more fairly and effectively respond to crimes and allegations of sexual assault and domestic violence. It recognized that sex-specific bias, whether explicit or implicit, can severely undermine law enforcement's ability to protect survivors of sexual and domestic violence and hold offenders

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796 Law Enforcement Policy Center, 'Bias-Free Policing – Model Policy' (International Association of Chiefs of Police 2020) 1 <<https://www.theiacp.org/sites/default/files/2020-06/Bias-Free%20Policing%20January%202020.pdf>>.

797 *ibid* 2.

798 'Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault And Domestic Violence' (Department of Justice 2022) 2 <<https://www.justice.gov/media/1224961/dl?inline>>.

accountable. The guidance identified that bias that is rooted in sexism can manifest in police officers (a) misclassifying or underreporting sexual assault and domestic violence cases; (b) inappropriately jumping to conclusions and labelling sexual assault cases unfounded; (c) failing to test sexual assault kits; (d) interrogating rather than interviewing victims and witnesses; (e) treating domestic violence as a family matter rather than a crime; (f) failing to enforce protection orders; or (g) failing to treat same-sex domestic violence as a crime. Acknowledging the sexist and prejudicial notions that engender this behaviour, principle centric documents such as the guidance from the U.S Department of Justice,<sup>799</sup> thus, lay down several recommendations to guide law enforcement in addressing bias. While some are targeted towards management and organizational policies (to hold officers accountable and act on data relating to such offences), other recommendations embody necessary normative goals from which relevant norms can be distilled:

- Recognize and address biases, assumptions and stereotypes about victims. (Acknowledgment and recognition of bias and stereotypes);
- Treat all victims with respect (Respect);
- Employ interviewing tactics that encourage a victim to participate and provide facts about the incident. (Sensitivity);
- Investigate sexual assault or domestic violence complaints thoroughly and effectively, properly identify the assailant in domestic violence cases and appropriately classify reports of sexual assault or domestic violence. (Sincerity);
- Refer victims to appropriate services (Protection).<sup>800</sup>

The IACP's response to bias in dealing with crimes disproportionately affecting women additionally acknowledges that in order to create an environment in which exemplary investigations and full protection of victims can occur, accurate, evidence-based beliefs about sexual and domestic violence have to be cultivated.<sup>801</sup> A commitment to basing one's beliefs on evidence rather than myths, therefore, is a relevant norm to be adhered to.

– *Norm-Propounding Policies and Standards Relevant to Racist Behaviour*

Similarly, the US Department of Justice has also issued a 'Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity', a version

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799 The Guidance from the Department of Justice, although specific to the US, has been adopted by other standard setting organisations such as the International Association of the Chiefs of Police who have reiterated the recommended principles. See more at <<https://www.theiacp.org/gender-bias>>

800 'Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault And Domestic Violence' (n 798) 8,11,15,19,21,23,26.

801 See Addressing and Preventing Gender Bias at <https://www.theiacp.org/gender-bias>

of which was released in 2014<sup>802</sup> and is progressively updated.<sup>803</sup> which contains further detailed specifications on the standards that law enforcement professionals are expected to adhere to, while also offering a counter to some misconceptions. The 2014 version of the guidance explicitly addresses the argument that overall discrepancies in certain crime rates among certain groups could justify using a listed characteristic as a factor. The guidance explicitly rejects this view and recognizes that profiling by law enforcement on a characteristic that is generally the subject of anti-discrimination laws (such as race or sex) is morally wrong, and does not cohere with law enforcement's core values, and principles of fairness and justice. The guidance acknowledges an oft-repeated argument, about statistical difference in commission of certain offenses among different population groups. Even if that were true, the Guidance warns, extrapolating generalized notions from such a statistical variation and using them in routine police work would be considered stereotyping.<sup>804</sup> It emphasizes that doing so, however 'justifiable' it may seem, amounts to casting suspicion on someone simply because of his or her identity, which offends the 'dignity' of that individual.<sup>805</sup> A negative normative obligation is, therefore, imposed on the law enforcement professional – to explicitly reject forming suspicions based on profiling, however, rooted it may seem in statistics relating to crime, as that violates dignity.

The guidance imposes further 'restrictions' on when using these sensitive characteristics may be permitted in policing. It specifies that while specific descriptions that may correspond to the 'protected' characteristics may be used, they should be tempered. Officers may never rely on generalized stereotypes, but only on specific characteristic-based information. 'Specific' as in specific to particular suspects or incidents, ongoing criminal activities or an active threat. Thus, the guidance unequivocally prohibits officers from using race or ethnicity to make routine or spontaneous law enforcement decisions, unless the race / ethnicity is a listed characteristic in a specific suspect description.<sup>806</sup> Furthermore, the information must be trustworthy, and relevant to the locality

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802 'Fact Sheet: US Department of Justice Racial Profiling Guidance – Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity' (Department of Justice 2014) <<http://soboco.org/wp-content/uploads/2014/12/Guidance-for-Federal-Law-Enforcement.pdf>>.

803 'Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity' (Department of Justice 2023) <[https://www.justice.gov/d9/2023-05/Sec.%209%28e%29%20-%20Guidance%20for%20Federal%20LEAs%20on%20the%20Use%20of%20Protected%20Characteristics\\_FINAL%205.25.23\\_508.pdf](https://www.justice.gov/d9/2023-05/Sec.%209%28e%29%20-%20Guidance%20for%20Federal%20LEAs%20on%20the%20Use%20of%20Protected%20Characteristics_FINAL%205.25.23_508.pdf)>.

804 'Fact Sheet: US Department of Justice Racial Profiling Guidance – Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity' (n 802) 3.

805 *ibid.*

806 *ibid.* 4.

or time frame and reasonably merited in the totality of circumstances.<sup>807</sup> This restriction, in effect, advocates caution and care in forming suspicions or taking action. This is significant, because as reviewed in S. 3.3.3, implicit bias and stereotype threat formation are largely a result of cognitive ‘shortcuts’ that individuals tend to employ. A specific instruction to account for multiple factors before using race/ethnicity as a factor in policing works against such shortcuts. The normative goal embodied by this instruction, to employ patience before acting on mental cues, supports caution as a relevant norm for police to adhere to. Moreover, the updated Guidance in 2023 expands on the prohibition against discriminatory policing, specifically forbidding the use of ‘facially neutral factors’ as a ‘proxy for overtly targeting persons because they possess a listed characteristic’.<sup>808</sup> This additional prohibition anticipates the use of seemingly acceptable indicators to target certain groups, envisaging a more comprehensive mandate against such actions.

Thus, currently, the standard legal prohibition on direct, maliciously motivated discrimination on the basis of race or sex is not the only source of norms that law enforcement officers are held to. Given the vital nature of their role, and the importance of trust and legitimacy in carrying out their function, the principles enunciated in these model policies and policy documents spell out the more specific norms that they are to follow.

#### 4.3.3 Norms Extrapolated from Human Rights and Experimental Evidence

As observed in S. 4.1.1 and S. 4.1.2, the discussed laws and enumerated rights are generally within the umbrella of ‘the right to equality’, or ‘the right against discrimination’. Undoubtedly, meaningful, substantive egalitarian rights, such as the right to non-discrimination, that is the right not to be disadvantaged on the basis of race or sex exist.<sup>809</sup> However, these fundamental rights and laws against discrimination are not sufficient in preventing the behaviour under scrutiny, and further exploration in how they may be built upon is therefore warranted.

Achieving ‘equality’ in a measurable and uniform way has always been an elusive and difficult goal. The reason for this is two-fold. First, ‘equality’ as a norm while laudable continues to be a vague legal concept, constantly needing further substantiation and detailing. Past debates on this have included whether the ‘right to equality’ demands just formal equality, or if it demands

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807 *ibid* 5–7.

808 ‘Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity’ (n 803) 5.

809 Kenneth W Simons, ‘The Logic of Egalitarian Norms’ (2000) 80 *Boston University Law Review* 693, 695.

'prescriptive equality.'<sup>810</sup> Thus, equality has today become widely accepted as a moral axiom, while inequality demands justification,<sup>811</sup> It is easier to explain equality, as a moral axiom, building on Rawlesian principles,<sup>812</sup> but harder to explain what that entails in action. However, the 'threshold' set by anti-discrimination laws is so high that vast swathes of prejudicial conduct would not even be considered to meet the threshold,<sup>813</sup> limiting its utility in achieving true equality, and necessitating a look into the detail of what equality actually requires.

The right to equality and its implications has spawned considerable and rich scholarship on the content and limitations of that right by courts, lawmakers, and jurists. To elucidate, it has now been long established as part of the equality doctrine that when government officials explicitly or implicitly impose *unequal burdens* on the members of a racial minority it would have to be justified under the prevailing rule of equality and would generally be in violation of it.<sup>814</sup> The right to equality, therefore requires that such unequal burdens not be placed on racial minorities by government officials. For example, when a police chief suggests black people may be more 'susceptible' to dying from choke holds than others in regard to deaths during arrests,<sup>815</sup> such a statement is demonstrative of the extreme lack of empathy due to the stigma associated with black people. Stigma represents the breakdown of empathy, excluding those stigmatized from being treated as equals.<sup>816</sup> The treatment of someone with such stigma constitutes such a burden, according to equality scholars.

This is because the right to equality, although vaguely formulated, typically encapsulates the right to equal citizenship. Implicit in the value of such citizenship is the primary value of respect and the notion of *equal membership* in the community.<sup>817</sup> Denial of such equal membership in society does not need to be legal denial. A stigmatic view dissolves human ties prevents others from belonging as 'equals' and erects a barrier to their acceptance into the community.<sup>818</sup> Stigmatization is a process by which the so-called 'normals' differentiate others (the stigmatized ones) from themselves, setting them apart

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810 *ibid* 695–696, 699.

811 Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2021) <<https://plato.stanford.edu/entries/equality/>>.

812 Ronald Dworkin, *Taking Rights Seriously* (A&C Black 2013) 319–320.

813 Brake (n 682) 658–659.

814 Kenneth L Karst, 'Why Equality Matters' (1982) 17 *Georgia Law Review* 245, 275.

815 William Raspberry, 'The Chief and the Choke Hold' *The Washington Post* (17 May 1982) <<https://www.washingtonpost.com/archive/politics/1982/05/17/the-chief-and-the-choke-hold/e17fa90f-c692-43c2-935f-463da9cab500/>>.

816 Karst (n 814) 249.

817 *ibid* 248.

818 RA Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' (2004) 79 *New York University Law Review* 803, 809, 815.

and treating them as not quite the same.<sup>819</sup> Stigma, thus, is an attribute of a person with a negative connotation and one that marginalizes the person as a result of the social categorization process.<sup>820</sup> An important citizenship value is respect; a primary harm against which the principle guards is degradation or the imposition of stigma.<sup>821</sup> A citizen, in contemporary political entities, is one who has value in the community's decision making and respected as such while also being accountable to it. These are cherished values in a society that emphasizes 'belonging'. Equality, therefore, demands that we not place unequal burdens on some – since equality encapsulates a demand for equal citizenship and treatment of a group with stigma does, in fact, amount to an unequal burden. Hence, equality demands treatment of all with empathy, so that they are not stigmatized, reduced to being inferior, and thereby denied equal citizenship.

Another derivation of the right to equality, and a fundamental egalitarian norm, is the duty of *equal respect and concern*. Eminent scholars such as Dworkin advanced the idea that equality could be defined as 'a right to equal concern and respect in the design and administration of the political institutions that govern them'.<sup>822</sup> Unlike the more limited formulations of the right against discrimination, the duty to show equal concern and respect helps explain why discriminatory motivations or expressions of selective sympathy violate egalitarian norms.<sup>823</sup>

A fundamental duty of respect, of not stigmatizing an individual or a group, avoiding selective sympathy and showing concern can therefore be derived as normative goals to reduce racially biased and sexist behaviour. But further analysis of such norms with regard to their particular suitability for combatting either racism or sexism, respectively, is indicated since the norms derived thus far may not be equally suited for both kinds of behaviour.

a) *For combating racially prejudicial behaviour*

As reviewed above in S. 4.3.2, among the different types of interventions attempted to improve on implicit bias or racially biased policing, one of the major avenues for improvement that has emerged is the need for police to

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819 Bruce G Link, Jo C Phelan and Mark L Hatzenbuehler, 'Stigma and Social Inequality' in Jane D McLeod, Edward J Lawler and Michael Schwalbe (eds), *Handbook of the Social Psychology of Inequality* (Springer Netherlands 2014) 49.

820 Lisa-Marie Dünnebacke and Kristin Goetze, 'The Refugee as a Stigmatized Individual – Spoiled Identities, Possible Causes and Courses of Action for Social Work' in Kristin Sonnenberg and Cinur Ghaderi (eds), *Social Work in Post-War and Political Conflict Areas: Examples from Iraqi-Kurdistan and beyond* (Springer Fachmedien 2021) 144–145.

821 Kenneth L Karst, 'Foreword: Equal Citizenship under the Fourteenth Amendment Supreme Court 1976 Term, The' (1977) 91 *Harvard Law Review* 1, 6.

822 Dworkin (n 812) 321–322.

823 Simons (n 809) 721.

be ‘courteous and respectful’ and explain their actions to the citizenry.<sup>824</sup> In addition to this substantiated understanding of the right to equality and what it demands beyond formal equality, a few other normative principles, distilled from the research on countering and preventing racially biased policing, are useful. These include active acknowledgement of the existence and impact of such racially biased policing, as opposed to boilerplate reiterations of the prohibition on discrimination, implementing race-based data collection on police work and analysing it for proper performance.<sup>825</sup> A reminder that the right to equality demands that individuals therefore have a duty of equal respect and concern, and stigmatizing a population must be avoided are useful normative standards that can be used in combating behaviour and actions by law enforcement with devastating impact on racial minorities.

A discussion on norms to reduce implicit racial bias or prejudice would be incomplete without acknowledging the resistance<sup>826</sup> that has been experienced to the suggestion of bias. In fact, studies have long shown that telling people they are racist and xenophobic – a threatening message – does not have the intended effect of changing their behaviour or beliefs – social psychology has long established that when people are threatened, they cannot change, they cannot listen.<sup>827</sup> The ‘defensiveness’ that accompanies any attempt to have a conversation about racism or sexism, particularly through ‘anti-racism’ or ‘diversity’ trainings, has also been repeatedly observed.<sup>828</sup> In the decades since there has been work on implicit bias and particularly its influence on racialized policing, a significant amount of money<sup>829</sup> has been devoted to trainings to tackle it. In an unfortunate turn, there is no conclusive evidence

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824 Fridell and others (n 481) 14.

825 “Policy on eliminating racial profiling in law enforcement” *Ontario Human Rights Commission*, Section 4.1.1, Section 5.2.3, Section 6.3, at <<https://www.ohrc.on.ca/en/policy-eliminating-racial-profiling-law-enforcement>>

826 Expert trainers have noted that interventions are often poorly received, with officers behaviour ranging from defensive to downright hostile when the trainers walk into the room. ‘Community Engagement: Interaction Between Communities and Law Enforcement’ (President’s Commission on Law Enforcement and the Administration of Justice 2020) <President’s Commission on Law Enforcement and the Administration of Justice>.

827 German Lopez, ‘Research Says There Are Ways to Reduce Racial Bias. Calling People Racist Isn’t One of Them.’ *Vox* (15 November 2016) <<https://www.vox.com/identities/2016/11/15/13595508/racism-research-study-trump>>.

828 *ibid.*

829 In 2018 only, the NYPD spent \$4.5 million to train all 36,000 New York-based officers and commanders for around two years. Al Baker, ‘Confronting Implicit Bias in the New York Police Department’ *The New York Times* (15 July 2018) <<https://www.nytimes.com/2018/07/15/nyregion/bias-training-police.html>>.

that training can reduce bias<sup>830</sup> and some observations suggest it may actually increase bias.<sup>831</sup> While the reason for this is unclear, some theorize that by being told that a) they are widespread; and b) it is unconscious / unintentional, people who are subjects of implicit bias training may actually accept that bias is unchangeable<sup>832</sup> and become complacent about it.<sup>833</sup> Further, training has been found to sometimes increase biased reactions – as by telling people to suppress the stereotypes, it seems that, in fact, stereotypes get activated in that they became in fact more cognitively accessible and more influential on behaviour.<sup>834</sup> However, this does not in fact imply that bias cannot be changed. Rather, if individuals – having been apprised of the idea that they may be harbouring unconscious bias or prejudice but that this is subject to control – make a conscious, motivated effort to reject bias, they do in fact act in less biased ways.<sup>835</sup> In experiments, individuals resisted attempts to being told to control prejudice, unless they perceived controlling prejudice as a voluntary desire.<sup>836</sup> Motivated rejection of bias – a form of self-regulation, therefore helps individuals to not act on deep-set prejudices, even if they are present. However, moving to motivated rejection of bias is not easy. An experiment found that being presented with evidence of implicit racial bias can conflict with an individual's self-image as egalitarian, motivating them to adopt reasoning that denies the feedback about implicit bias.<sup>837</sup> In fact, research has shown that utilization of the constructs of the self-determination

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830 'Racial Bias Trainings Surged after George Floyd's Death. A Year Later, Experts Are Still Waiting for "bold" Change' (*PBS NewsHour*, 25 May 2021) <<https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change>>.

831 Lisa Legault, Jennifer N Gutsell and Michael Inzlicht, 'Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice' (2011) 22 *Psychological Science* 1472, 1473, 1476.

832 Doyin Atewologun, Tinu Cornish and Fatima Tresh, 'Unconscious Bias Training: An Assessment of the Evidence for Effectiveness' (Equality and Human Rights Commission 2018) 113 21, 36 <[https://www.equalityhumanrights.com/sites/default/files/research-report-113-unconscious-bais-training-an-assessment-of-the-evidence-for-effectiveness-pdf.pdf](https://www.equalityhumanrights.com/sites/default/files/research-report-113-unconscious-bias-training-an-assessment-of-the-evidence-for-effectiveness-pdf.pdf)>.

833 Frank Dobbin and Alexandra Kalev, 'Why Doesn't Diversity Training Work? The Challenge for Industry and Academia' (2018) 10 *Anthropology Now* 48, 50.

834 Carol T Kulik, Elissa L Perry and Anne C Bourhis, 'Ironic Evaluation Processes: Effects of Thought Suppression on Evaluations of Older Job Applicants' (2000) 21 *Journal of Organizational Behavior* 689, 702–704, 707.

835 Nazar Akrami and Bo Ekehammar, 'The Association Between Implicit and Explicit Prejudice: The Moderating Role of Motivation to Control Prejudiced Reactions: Implicit and Explicit Prejudice' (2005) 46 *Scandinavian Journal of Psychology* 361.

836 Patricia G Devine and others, 'The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond without Prejudice.' (2002) 82 *Journal of Personality and Social Psychology* 835, 845–846.

837 Joseph A Vitriol, 'The (In) Egalitarian Self: On the Motivated Rejection of Implicit Racial Bias' (PhD Thesis, University of Minnesota 2016) 153. *Also see* Jack Glaser and Eric D Knowles, 'Implicit Motivation to Control Prejudice' (2008) 44 *Journal of Experimental Social Psychology* 164, 171.

theory, in attempting to regulate prejudice has greater success in reducing prejudice.<sup>838</sup> Thus, if people were to become aware of the conflict between their biased responses and self-proclaimed egalitarian standards, and were to choose self-regulation – after recognizing their own biases – to avoid the inconsistency, self-regulation can limit the influence of and ultimately reduce the impact of discriminatory outcomes.<sup>839</sup> The aspect of motivation, that is, the desire to not be biased, however unconscious, can be conceptualized as a norm in and of itself. Thus, if a particular individual were to view the rejection of bias as a normative standard, only then would the individual be motivated to do so and be able to act accordingly.

b) *For combatting sexist behaviour*

The efficacy of the norm of equality, or the expectations of anti-discrimination law when it comes to sexist behaviour, however, may be limited. Countering the mistreatment of victims based on sex, therefore, requires a broader palette of norms to be championed and integrated into any approach to correct these issues. Bound-up with the idea of equality, and in some ways being derived from it, is the idea of human dignity. Among the various philosophical frameworks that advanced the idea of equality, it is the arguments based on it being derived from human dignity<sup>840</sup> that have endured.<sup>841</sup> Jurisprudential developments in the United States, and Canada for example have more concretely found dignity as a substantive concept in informing the development of equality rights.<sup>842</sup> This idea of dignity being inextricably linked to equality has been found more useful in recent initiatives against sexist prejudice. Reference may be made to a law against ‘sexism’ passed in 2014 in Belgium, criminalizing sexist behaviour of a particular threshold that does not use ‘equality’ or ‘non-discrimination’ as a parameter, but instead measures whether a particular act sought to impugn or degrade the ‘dignity’ of the person because of their sex.<sup>843</sup>

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838 Legault, Gutsell and Inzlicht (n 831) 1476.

839 Mason D Burns, LR Parker and Margo J Monteith, ‘Self-Regulation Strategies for Combating Prejudice’ in Chris G Sibley and Fiona Kate Barlow (eds), *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge University Press 2016) 511–513.

840 Mark A Lutz, ‘On the Norm of Equality’ (2001) 28 *International Journal of Social Economics* 782, 785.

841 The notion of human rights being derivative of human dignity would eventually find its way into the UDHR itself.

842 Denise G Reaume, ‘Discrimination and Dignity’ (2002) 63 *Louisiana Law Review* 645, 814.

843 Article 2 of the anti-sexism law of 2014 defines the crime of sexism as follows: “every gesture or deed that, in the circumstances stated in article 444 Criminal Code, is clearly meant to express contempt towards a person because of his or her sex, or to consider, for these same reasons, this person inferior, or to reduce this person to his or her sexual dimension, which gravely affects the dignity of that person as a result.”

'Dignity' being used as the basis for protection or non-discrimination has a long and rich history. Historically, arguments for human rights have been made on the basis that we (human beings) have human dignity and, therefore, deserve human rights. The philosopher Emmanuel Kant famously linked equality with dignity, providing an analytical framework to understand the relationship.<sup>844</sup> Human beings are seen as having an equal 'inner worth' – human dignity, which has grounded human rights discourse for some time now. Kant proposed that the inherent dignity of an individual enables a person to 'measure themselves with every other being of their kind and value themselves on a footing of equality with them (others)'.<sup>845</sup> Equality therefore, necessarily involves dignity, which in turn affords all those in possession of that dignity the authority to be demanded with respect.<sup>846</sup> Further he notes that by virtue of the possession of dignity, a person exacts respect for himself from all other rational beings in the world. However, seeing other humans as having 'equal worth' is only achievable through empathy, in sociological terms. Empathy prompts people to see others as equal and, thereby, leads to an acknowledgement of dignity. A neuro-biological understanding of human empathy highlights that empathy essentially involves an affective response to other people that shares or mimics their emotional state and a capacity to take the other's perspective.<sup>847</sup> Human dignity – in fact, well recognized as a facet of the right to equality, (both conceptually<sup>848</sup> and in jurisprudence regarding equality)<sup>849</sup> – is arrived at through the empathetic process of seeing others as being similar, of recognizing that others feel as we do, and that our innermost feelings have some fundamental similarities.<sup>850</sup> Empathy is, thus, intrinsic to dignity, and in fact dignity may be described as an expression of empathy.

It must also be highlighted here that police empathy can be important in the engagement of rape victims in legal prosecution and court processes. It can also significantly influence victim attrition – victims choosing not to take

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844 Lutz (n 840) 785.

845 Stephen Darwall, *Honor, History, and Relationship: Essays in Second-Personal Ethics II* (Oxford University Press 2013) 248.

846 *ibid* 262.

847 Richard T McClelland, 'A Naturalistic View of Human Dignity' (2011) 32 *The Journal of Mind and Behavior* 5, 13.

848 Edu-HRight Research Unit, Faculty of Education Sciences, North-West University Potchefstroom Campus, South Africa and others, 'Human Rights Literacy: Moving towards Rights-Based Education and Transformative Action through Understandings of Dignity, Equality and Freedom' (2015) 35 *South African Journal of Education* 1, 5.

849 Jasmine J Haddad, 'The Evolution of Marriage: The Role of Dignity Jurisprudence and Marriage Equality Notes' (2016) 96 *Boston University Law Review* 1489, 1490.

850 Lynn Hunt, *Inventing Human Rights: A History* (WW Norton & Company 2007) 29.

their complaint forward.<sup>851</sup> Thus, a general commitment to empathy as a normative value is recommended. The reason is that it promotes greater perception and understanding of a distressed person's perspective and assists in gaining some insight in their emotions,<sup>852</sup> and may, thereby, increase the desire to provide assistance. Moreover, an assumption that the high-stress, high-pressure work environment of policing makes empathy difficult is not supported in the literature.<sup>853</sup> However, it must be acknowledged here that while there is strong support for advocating more empathy in law enforcement's interaction with victims of sex-based violence,<sup>854</sup> particularly in light of findings that empathy can protect against burnout for police officers themselves and enhance their well being,<sup>855</sup> it has also been experimentally found to have its limitations.<sup>856</sup>

It is also instructive to note that, arguably, the kind of appeals one must make to reduce racism and sexism may be diametrically different. While racial bias, and racially motivated behaviour with deleterious effects on those in need of police assistance, has generally been observed to flow from 'implicit' (unconscious / subconscious) bias, harmful attitudes of law enforcement towards women flow from more deliberate beliefs. To elucidate, sexist behaviour is found to be engendered by rape myth acceptance – rape myths referring to 'prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists – in creating a climate hostile to rape victims',<sup>857</sup> – i.e., rape myth acceptance,<sup>858</sup> belief in traditional gender roles,<sup>859</sup> and belief in myths about in-

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851 Lucy Maddox, Deborah Lee and Chris Barker, 'Police Empathy and Victim PTSD as Potential Factors in Rape Case Attrition' (2011) 26 *Journal of Police and Criminal Psychology* 112, 115–117.

852 Denise A Hines, Lia RS Bishop and Kathleen M Palm Reed, 'Differential Gender Responses to an Empathy Component of a Sexual Assault Prevention Program' (2019) 34 *Violence and Victims* 397, 409–411.

853 David Turgoose and others, 'Empathy, Compassion Fatigue, and Burnout in Police Officers Working with Rape Victims' (2017) 23 *Traumatology* 205, 210.

854 David Turgoose, Naomi Glover, Chris Barker, and Lucy Maddox, Empathy, compassion fatigue and burnout in police officers working with rape victims, in *Traumatology*. Katie L Pummell, 'Empathetic Cops: The Impact on Victims of Domestic Violence' (The State University of New York 2017) 20–23 <<https://soar.suny.edu/bitstream/handle/20.500.12648/6640/honors/164/fulltext%20%281%29.pdf?sequence=1&isAllowed=y>>.

855 Turgoose and others (n 853) 211.

856 Ruschelle M Leone, Kristen N Oyler and Dominic J Parrott, 'Empathy Is Not Enough: The Inhibiting Effects of Rape Myth Acceptance on the Relation Between Empathy and Bystander Intervention' (2021) 36 *Journal of Interpersonal Violence* 11532, 11545.

857 Martha R Burt, 'Cultural Myths and Supports for Rape' (1980) 38 *Journal of Personality and Social Psychology* 217, 217.

858 Emma Sleath and Ray Bull, 'Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers With and Without Special Training' (2012) 39 *Criminal Justice and Behavior* 646.

859 Kathryn R Klement, Brad J Sagarin and John J Skowronski, 'Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case' (2019) 81 *Sex Roles* 16, 16–17.

intimate partner violence.<sup>860</sup> Reminders of ‘equality’, merely referring to a demand for egalitarian treatment, seem to have the opposite effect than that intended, increasing hostile attitudes towards women.<sup>861</sup> But educational information, i.e., information that debunks the false facts and tropes that give rise to rape myths and stereotypes about intimate partner violence, do have positive effects in reducing acceptance and endorsement of such myths.<sup>862</sup> Relevantly, they only have positive effects when such interventions are longer and more consistent, with the type of presenter also playing a role.<sup>863</sup> Finally, although more research may be warranted to bear out this hypothesis, a few studies have found that positive contact with counter stereotypical women<sup>864</sup> could lead to lesser rape myth acceptance.<sup>865</sup> While appealing to egalitarian notions and empathy may have limited effect in combatting sexism, therefore, a focus on disproving commonly held but damaging myths about women seeking law enforcement’s assistance should be the relevant normative goal.

In the literature reviewed so far, in Chapter 3 as well as Chapter 4 (S. 4.1 and S. 4.2), there have been few successful examples of persuasive or educational strategies that significantly reduced sexism. To the extent that a change in attitude has been achieved, studies on confronting sexism have found that observing a confrontation – wherein an individual acting prejudicially is called out for their actions, reflect limited success. Such a confrontation resulted in more positive feelings toward women and less discrimination in assessments that had both short- and long-term components.<sup>866</sup> Although there was no significant reduction in sexism in the short term, it was found that confronting prejudice reduces a tendency to discriminate and prejudice in an audience in the long term.<sup>867</sup> It is instrumental to highlight that the reduction in prejudice was among the observers, not the targets. The confrontation, therefore,

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860 Celia Serrano-Montilla and others, ‘Assessing Police Attitudes Toward Intervention in Gender Violence: The Role of Training, Perceived Severity, and Myths About Intimate Partner Violence Against Women’ [2023] *Journal of Family Violence* 8–9.

861 Jennifer K Bosson and others, ‘A Dangerous Boomerang: Injunctive Norms, Hostile Sexist Attitudes, and Male-to-Female Sexual Aggression’ (2015) 41 *Aggressive Behavior* 580, 589.

862 Leah N Reddy, Christopher M Campbell and Amber L Morczek, ‘Exploring the Impact of Informal Rape Myth Education in a Nonstudent Sample’ (2022) 37 *Journal of Interpersonal Violence* 1, 36–38.

863 Linda A Anderson and Susan C Whiston, ‘Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness’ (2005) 29 *Psychology of Women Quarterly* 374, 384–385.

864 In the cited experiment, researchers used the following ‘model’ of a woman as ‘counter stereotypical’ to test participant’s reactions and contact – “women in positions of power or authority, or women who are more senior occupationally”.

865 Miriam Taschler and Keon West, ‘Contact with Counter-Stereotypical Women Predicts Less Sexism, Less Rape Myth Acceptance, Less Intention to Rape (in Men) and Less Projected Enjoyment of Rape (in Women)’ (2017) 76 *Sex Roles* 473, 479–481.

866 Amy Hillard, ‘Why Confronting Sexism Works: Applying Persuasion Theories to Confronting Sexism’ (University of Nebraska-Lincoln 2011) 87–88.

867 *ibid* 89–90.

seemed to have an impact in terms of awareness of prejudicial behaviour on observers.

Thus, while confrontation may have limited impact to reducing discriminatory behaviour that harms racial and ethnic minorities, it seems to have marginal utility in addressing behaviour motivated by sexism, and so a general emphasis on confronting may still be included as a usable norm in addressing this kind of behaviour.

Thus, from the three sources of norms for better policing analysed above, a non-exhaustive list of norms relating to racism and sexism can be distilled:

- i Being courteous and respectful to citizens and individuals (from procedural justice, the imperative of equal treatment and extant policy mandates),<sup>868</sup> (hereinafter referred to briefly as norm of courtesy and respect).
- ii Recognizing one's own biases, assumptions and stereotypes (From social experiments to reduce bias, as well as existing policy mandates),<sup>869</sup> (hereinafter referred to briefly as norm of internal rejection of bias).
- iii Unlearning myths about victims (From experimental evidence on trainings as well as international guidelines),<sup>870</sup> (hereinafter referred to briefly as norm of rejection of myths).
- iv Being encouraging of citizen participation in the decision making (From procedural justice),<sup>871</sup> (hereinafter referred to briefly as norm of citizen participation).
- v Treating victims with empathy and in a manner that encourages trust (From experimental evidence on treatment of vulnerable victims),<sup>872</sup> (hereinafter referred to briefly as norm of empathy).
- vi Refrain from acting on stereotypes and generalized assumptions about certain population groups (From existing policy mandates),<sup>873</sup> (hereinafter referred to briefly as norm of conscious rejection of stereotypes).
- vii Giving importance to the dignity of the victim or any individual (from policy guidelines, human rights standards as well as experimental

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868 Blader and Tyler (n 784); Karst (n 814); Law Enforcement Policy Center (n 796). *Also see Supra* S. 4.3.1 and S. 4.3.2.

869 Akrami and Ekehammar (n 835). *Also see Supra* S. 4.3.3.

870 Zoe McKee, Katrin Mueller-Johnson and Heather Strang, 'Impact of a Training Programme on Police Attitudes Towards Victims of Rape: A Randomised Controlled Trial' (2020) 4 *Cambridge Journal of Evidence-Based Policing* 39; 'Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault And Domestic Violence' (n 798). *Also see Supra* S. 4.3.3 and S. 4.3.2.

871 Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (n 756). *Also see Supra* S. 4.3.1.

872 Maddox, Lee and Barker (n 851). *Also see Supra* S. 4.3.3.

873 Glaser and Knowles (n 837); Law Enforcement Policy Center (n 796). *Also see Supra* S. 4.3.3.

- evidence),<sup>874</sup> (hereinafter referred to briefly as norm of acknowledgment of dignity).
- viii Learn to recognize implicit bias and pro-actively work to not base policing decisions on prejudicial or superficial patterns about certain groups (from existing policy mandates),<sup>875</sup> (hereinafter referred to briefly as norm of self-regulation of biased behaviour).

As is evident, these normative standards go beyond legal provisions and instruments into the realm of norms, and necessitate behavioural changes in compliance with the above listed normative goals. These norms, thus, represent behavioural goals and a further issue that needs exploration before reviewing how these norms can be achieved through persuasively designed technology is the mechanism of norm internalization. That is, before a norm can effectively influence behaviour, an individual has to agree with it, and be enabled to act according to the norm. Social and behavioural perspectives on norm internalization illustrate the mechanism by which norms can be made to shape behaviour, which persuasively designed technology could utilize to achieve norm internalization. S. 4.4 therefore, describes the requirements for a norm to influence behaviour, and the methods of achieving the same.

#### 4.4 ACHIEVING COMPLIANCE WITHOUT SANCTIONS: NORM INTERNALIZATION AS AN ALTERNATIVE APPROACH

This section deals with the second part of the research question stated in the beginning of Chapter 4, namely, how the norms enumerated above can be used to influence behaviour. The extent to which police officers obey instructions and policies is a permanent concern to police leaders and the community. The groundwork for advancing a model of achieving individual behaviour change, begins by changing the way one anticipates good behaviour will come about. Rather than promoting behaviour by instilling fear about penalties, persuasion regarding beliefs about norms aims to transform people's belief about the social world, thereby, modifying their understanding of what represents their (personal and/or collective) best interests in such a way that the desired behaviour arises from new, deeply held convictions.<sup>876</sup> The

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874 'Fact Sheet: US Department of Justice Racial Profiling Guidance – Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity' (n 802); Reaume (n 842). *Also see Supra* S. 4.1.1 and S. 4.3.2.

875 'Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity' (n 803). *Also See Supra* S. 4.1.1.

876 Stephen Bell, Andrew Hindmoor and Frank Mols, 'Persuasion as Governance: A State-Centric Relational Perspective' (2010) 88 *Public Administration* 851, 863–865.

process of socialisation and the human desire to gain the esteem of others (colloquially understood as ‘status’) and to meet the expectations of others has long been considered a reliable mechanism to extract normatively compliant behaviour.<sup>877</sup> When the status so derived from others’ esteem is associated with norm adherence, this leads to a situation wherein individuals will be deterred from such activity regardless of the possibility of sanction.<sup>878</sup> This section describes how this occurs. Three main approaches to achieving compliance with norms – through social learning, through appeals to one’s social identity, and through persuasion, are analysed. The analysis of these approaches forms the groundwork to the next section, which describes norm internalisation, a necessary prelude to the norm being able to influence behaviour. Norm internalization is the process by which a norm becomes internalized so that individuals then obey the norm not merely because of external sanction, or because they have been trained to do so, but because they have been internally incentivised to uphold the norm. However, internalisation is not always enough to change behaviour. Therefore, a final requirement from a cognitive perspective, norm activation, is analysed to present a complete picture of how norms can influence behaviour.

#### 4.4.1 Obtaining Norm Agreement Through Social Learning and Desire for Conformity

With regard to informal norms of behaviour and their enforcement, it is by now well accepted that typically, most people want to be perceived in a certain way – and in order to protect their reputation or their self-conception – will tend to move with the dominant trend. Social learning theory (SLT) essentially posits that people subconsciously and unconsciously learn from their environment, modelling behaviour that is seen as acceptable, or at the very least as routine, in a given environment.<sup>879</sup> A classical explanation of behaviour, SLT has since been widely used to both explain behaviour as well as devise ways to influence it. In tandem with SLT, another socio-psychological theory that explains individual behaviour in an organizational context is found in the literature, i.e Social Information Processing (SIP) theory. An extension of the SLT, SIP points out that ‘individuals adapt attitudes, behaviour and beliefs to their social context and to the reality of their own past and present behaviour and situation’. The informational and social environment within which

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877 Giulia Andrighetto, Daniela Grieco and Luca Tummolini, ‘Perceived Legitimacy of Normative Expectations Motivates Compliance with Social Norms When Nobody Is Watching’ (2015) 6 *Frontiers in Psychology* 1, 1–2.

878 Saeed Harati, Liliana Perez and Roberto Molowny-Horas, ‘Promoting the Emergence of Behavior Norms in a Principal–Agent Problem – An Agent-Based Modeling Approach Using Reinforcement Learning’ (2021) 11 *Applied Sciences* 8368, 8373, 8384.

879 Albert Bandura, *Social Learning Theory* (Prentice Hall 1977) 22–24, 39, 42–45.

behaviour occurs therefore, is the best context to shape desirable behaviour.<sup>880</sup> In combination with the social information processing theory, the social learning theory notes that individuals act according to norm values that they observe 'collectively' – i.e., from peers and supervisors, as part of the organisational socialization process.<sup>881</sup> This socialization conveys to newcomers what the organisation is all about, their place within the organisation and what is important to the organisation.<sup>882</sup> This observation about behaviour within organizations has been found in several non-policing contexts, with research highlighting how corruption or lack of integrity in management shapes negative behaviour among employees. In policing, a recent analysis found that the existence of officers who were considered 'deviant' had a significant effect on whether other officers had citizen complaints filed against them. Bearing out the hypotheses of the social learning theory, scholars inferred that officers' susceptibility to organizational subcultures highlights the importance of their own peer associations.<sup>883</sup> This, because the organizational subculture and peer associations, as already reviewed may 'facilitate deviant behaviour by transmitting values beliefs, attitudes, definitions, and manners of expression that depart from acceptable behaviour'.<sup>884</sup> It is this that influences their behaviour, since the absorbed influences also influence how they expect to be treated. These perspectives do not completely displace the idea of the 'rational actor', rather, they are intended to act in tandem with and supplementing that idea. Since the status quo relies on discriminatory norms being socially dominant a change in behaviour, and communication about changed behaviour even in a few sections of a police force, therefore, has a possibility of quickly overturning the dominant norms in place.

#### 4.4.2 Influencing Norm Agreement by Focusing on Social Identity

Chapter 2 reviewed the work of Thaler and Sunstein on the concept of nudges, and how it may bring about behavioural change. However, the dynamics of nudging have limitations. Bringing about lasting behaviour change, particularly in a situation where there is an established pattern of resistance or predisposition against the desired behaviour, is no easy task. Conventional domains in which applications of nudges can be observed require a shift of the target's focus and attention towards a decision or choice that is patently in their favour.

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880 Gerald R Salancik and Jeffrey Pfeffer, 'A Social Information Processing Approach to Job Attitudes and Task Design' (1978) 23 *Administrative Science Quarterly* 224, 226.

881 Blake E Ashforth, David M Sluss and Spencer H Harrison, 'Socialization in Organizational Contexts' [2007] *International Review of Industrial and Organizational Psychology* 7, 16–17.

882 *ibid* 17.

883 Chappell and Piquero (n 475) 100–102.

884 Victor E Kappeler, Richard D Sluder and Geoffrey P Alpert, *Forces of Deviance: Understanding the Dark Side of Policing* (2nd edn, Waveland Press 1998) 109–110.

However, in the problem under scrutiny, one aims at a significant shift in motivations, beliefs and attitudes (about prejudices, stereotypes and myths) is the objective which is more difficult to achieve. In addition to nudging therefore, behaviour change is more likely to be enduring where it involves social identity change and norm internalization – an approach that recognizes people are not individual cognitive misers, but members of groups whose norms they internalize and enact.<sup>885</sup> Another way in which social influence is exerted and, therefore, can lead to the most ethical, effective and lasting behavioural change in a particular context challenges the individual's identity. Enduring behaviour change occurs when people perceive a certain action as congruent with their identity, even if difficult, and therefore engage in it.<sup>886</sup> If they perceive a certain behaviour as being necessitated by their moral identity, and if their moral identity is 'activated' they are more likely to adopt said behaviour as it is seen as the 'right thing to do'.<sup>887</sup>

This has been advanced by some authors as the 'social identity' approach, a spin off from the tenets of social identity theory. The social identity theory essentially argues that part of an 'individual's self-concept derives from their knowledge of membership of a social group, along with the emotional significance attached to it'.<sup>888</sup> Group membership provides people with a sense of social identity, therefore group members tend to hold as important the norms they receive from their group. The value of social identity theory is that it focuses on relationships between persons, not just as individuals, but as members of groups within stratified society. The theory states that by categorizing individuals socially and locating them within their wider social relationships, a sense of social identity and selfhood, and hence a basis for social action is achieved.<sup>889</sup> Within this approach, primacy is afforded to principles of social categorization, and identification, as opposed to the view that prejudice is due to unconscious psychological dynamics<sup>890</sup> involved in the character formation of bigoted authoritarian individuals or to a human instinct for aggression in response to aggression (although the role of un-

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885 Mols and others (n 131) 90.

886 Daphna Oyserman and Mesmin Destin, 'Identity-Based Motivation: Implications for Intervention' (2010) 38 *The Counseling Psychologist* 1001, 1033–1035.

887 Michael J Carter, 'Advancing Identity Theory: Examining The Relationship Between Activated Identities and Behavior in Different Social Contexts' (2013) 76 *Social Psychology Quarterly* 203, 218–220.

888 Naomi Ellemers and S Alexander Haslam, 'Social Identity Theory' in Paul AM Van Lange, Arie W Kurglanski and Tory E Higgins (eds), *Handbook of Theories of Social Psychology*, vol 2 (SAGE Publications 2012) 381.

889 Bipasha Ahmed, Paula Nicolson and Chris Spencer, 'The Social Construction of Racism: The Case of Second Generation Bangladeshis' (2000) 10 *Journal of Community & Applied Social Psychology* 33, 34.

890 Bernadette Park and Charles M Judd, 'Rethinking the Link Between Categorization and Prejudice Within the Social Cognition Perspective' (2005) 9 *Personality and Social Psychology Review* 108, 109–110.

conscious psychological processes is not excluded from consideration). Thus, it considers that prejudice and discrimination are generally regarded as having a psychological origin which can be traced back to the fundamental cognitive processes of categorization. Prejudice, in this sense, is a form of prejudgment – a cognitive filing system.<sup>891</sup> While the importance of social identity in cognition can engender and lead to stereotyping and prejudice, the same concept can be manipulated to change behaviour. This is because at any given moment, individuals subscribe to several social categories, and the question of which category dominates their thinking and behaviour is dependent on the situation. Experimental research<sup>892</sup> on the effects of cross-categorization, i.e. when individuals belong to multiple categories has shown that an observer's perception of another,<sup>893</sup> is dependent on whichever identity is most salient to the observer at that time. An appeal to the social identity of the police officer as 'protector' rather than a warrior under threat is, therefore, likely to evoke the officer's internal values rather than an impulsive reaction.

Social identity theory focuses on the relationship between self-definition, on the one hand, and norms, attitudes and behaviour, on the other. Thus, this approach distinguishes between behaviour motivated by individuals acting as individuals, and behaviour that is guided by group membership and group norms. Among the various forms of influence to extract adherence to norms, the power of social identity based on group membership is found to be more pervasive than other strategies.<sup>894</sup> Thus, advocates of the social identity approach to influence note that 'it is not so much the informational quality of a message that determines whether people will be responsive to it, but the social identity that it speaks to. This is because influence is primarily a means for people who share the same collective concerns to coordinate their actions.'<sup>895</sup> Accordingly, for a persuasive message to have its intended impact, it has to redefine the social identity in question in such a way that the desired behaviour becomes regarded as a defining feature of the in-group ('who we are') and its norms ('what we do').<sup>896</sup> This approach can be further implemented, because there is growing evidence that carefully planned identity-

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891 Susan T Fiske, 'Social Cognition and the Normality of Prejudgment' in John F Dovidio, Peter Glick and Laurie A Rudman (eds), *On the Nature of Prejudice: Fifty Years after Allport* (John Wiley & Sons 2008) 36–38.

892 Galen Bodenhausen and Destiny Peery, 'Social Categorization and Stereotyping In Vivo: The VUCA Challenge' (2009) 3 *Social and Personality Psychology Compass* 133, 136, 140.

893 For example, depending on whether the target's race or sex was made salient to the observer, the 'other' social identity (the non-salient one) played a much smaller role in cognitive perceptions.

894 Russell Spears, 'Social Influence and Group Identity' (2021) 72 *Annual Review of Psychology* 367, 372–377, 384.

895 Mols and others (n 131) 88.

896 Craig McGarty and others, 'The Effects of Salient Group Memberships on Persuasion' (1994) 25 *Small Group Research* 267, 272, 285.

based interventions can produce lasting (identity-based) behaviour change in respect to policing.<sup>897</sup>

Making appeals to identity, rather than merely social standards, has several advantages. An individual's identity is bound up with one's internalized values. From internal values flow personal norms – self-based standards or expectations for behaviour that would either enhance the values that one holds dear, or deprecates them.<sup>898</sup> The 'sanctions' for the violation of personal norms, therefore, are also within the self. Studies have shown a significant relationship between observable personal norms and relevant behaviour, even greater than the relationship between social norms and consequent behaviour.<sup>899</sup> Personal norms could, therefore, potentially be an even stronger influence on behaviour than social norms. This approach of focusing on social identity holds particular potential for modulating the behaviour of the proposed subject group, law enforcement, since procedural lapses often occur due to beliefs about conflicting priorities – the desire to be scrupulously accurate versus the necessity to deliver on policing goals. It is also particularly suited, as, as noted above, police officers routinely take up a job that is low-paid, high stress, and even make personal sacrifices, suggesting that they place considerable importance on their role as police.

#### 4.4.3 Achieving Norm Agreement Through Persuasion

Since norms fundamentally relate to 'beliefs', where persuasive technology is sought to accomplish norm-compliant behaviour when there is disagreement with the norm, technologies and strategies that more concretely address individuals' beliefs will be more appropriate. Here, the 'elaboration likelihood' model of persuasion (ELM) comes into play. Elaboration refers to the extent of scrutiny of a persuasive message and its arguments and "the likelihood of elaboration (its success) will be determined by a person's motivation and ability to evaluate the communication presented".<sup>900</sup> The ELM, thus, proposes two relatively distinct routes to persuasion. The first, termed as the peripheral route, is when persuasion is intended through simple cues that the receiver of the message is expected to rely on because they are not highly motivated and/or have low ability. The second is the central route, where the receiver

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897 Mols and others (n 131) 95.

898 Shalom H Schwartz and Judith A Howard, 'Internalized Values as Motivators of Altruism' in Ervin Staub and others (eds), *Development and Maintenance of Prosocial Behavior: International Perspectives on Positive Morality* (Springer US 1984) 234.

899 Shalom H Schwartz, 'Normative Influences on Altruism', *Advances in Experimental Social Psychology*, vol 10 (Elsevier 1977) 271–272.

900 Richard E Petty and John T Cacioppo, 'The Elaboration Likelihood Model of Persuasion' in Richard E Petty and John T Cacioppo, *Communication and Persuasion* (Springer New York 1986) 128.

is motivated and able to carefully and thoughtfully consider the true merits of information presented in support of a relevant proposition, and hence could be more receptive to rational argumentation.<sup>901</sup> When persuasion is sought to be achieved through more direct persuasion, by conveying information or argumentation, it results in more enduring attitude change as well.<sup>902</sup> Where norm agreement is absent, and the target of persuasion enacts behaviour that is consistent with their own beliefs and attitudes but if that behaviour is sought to be changed, strategies that support elaborate, direct persuasion can be used.

#### 4.4.4 Achieving Norm Internalisation – Modelling the Process of Norm Internalization

The development of a social morality with binding force on its subjects – individuals – is one of the distinctive features of the human species. ‘Internalization’ of norms concerns the mechanism of *how* individuals develop these characteristic traits. In the context of behaviour change in compliance with the law, internalisation may be defined as the result of changes in beliefs that affect one’s attitudes towards a subject.<sup>903</sup> The significance of norm internalization becomes more apparent when one considers how humans typically make decisions. Philosopher Michael Bratman developed the BDI model to describe rational human decision making. BDI here stands for Belief-Desire-Intention – a model developed as a means of ‘clarifying the role of intentions in practical reasoning according to the norms of rationality’. In this model, the decision-making process follows a certain structure. Sensory input leads to a revision of beliefs. Beliefs lead to the expression or articulation of desires. On the basis of desires, intentions are generated. In the process of norm internalization, another component is added to this framework, i.e., obligations. Norms have been described as ‘desires of the society’, with obligations the mechanism by which individual desires may be balanced<sup>904</sup> and involves incorporating social rationality into decision making. Obligations mediate beliefs, altering the desires that are articulated.

Norm internalization, thus, represents one of the dominant mechanisms by which an individual becomes ‘accepted’ into wider society. It describes, essentially, the social regulation of individual behaviour, distinguishable from mere coercion,<sup>905</sup> and involves implementing social constraints on individual

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901 *ibid* 132–136.

902 *ibid* 142.

903 Alex Geisinger, ‘A Belief Change Theory of Expressive Law’ (2002) 88 *Iowa Law Review* 35, 66.

904 FPM Dignum, D Kinny and L Sonenberg, ‘From Desires, Obligations and Norms to Goals’ (2002) 2 *Cognitive Science Quarterly* 407, 417.

905 Martin Neumann, ‘Norm Internalisation in Human and Artificial Intelligence’ (2010) 13 *Journal of Artificial Societies and Social Simulation* 12, 13.

behaviour that is not affected through a central controller, but by behaviour restriction within individual agents.<sup>906</sup> In this cognitive process, norms intervene in the process of 'goal generation' which might, or might not, lead to the revision of existing personal goals in favour of normative goals. In the situation under scrutiny, a stronger norm in favour of fair policing may supersede, e.g., personal goals to discharge cases quickly, or achieve a high case solve rate. The general understanding of behaviour is that to comply with norms, individuals need to form normative beliefs and generate goals relativized to such normative beliefs perhaps because of the threat of external enforcement. In the absence of such normative goals, the norm will be violated. However, when the given normative goal no longer relies on external enforcement to be a goal but only depends on the internal normative belief, the norm is internalized.

The idea of norm internalization as a regulator of human behaviour is, of course, not a new or recent idea. The architectural modelling of human decision making discussed herein is quite similar to the work on internalization by Emile Durkheim, who claimed that only through the process of socialization do humans become socially and morally responsible – a process that is carried out by implementing social norms in the original human psyche. Society, in his account, rules much of our behaviour which is initially coercive. However, when the individual no longer perceives this coercion by society, a norm may be said to be internalized.<sup>907</sup> Durkheim and others who mirrored his work conceived of an implicit antagonism between the individual and society, i.e., that society conflicts with our desires, and norms are an external fact that controls the desires of individuals. However, more recent social psychological literature suggests a different picture of human behaviour, which does not always view norms as externally imposed and advances a different mechanism of norm internalization. To understand this, a brief look at the process of norm internalization as proposed by the theory of self-determination is useful.

The theory of self-determination distinguishes between intrinsic and extrinsic motivation.<sup>908</sup> It postulates that as a starting point, people simply do what they want to do, wherein they are intrinsically motivated without any external restrictions. This behaviour, of course, can be undermined by sanctions and incentives. Normatively compliant behaviour begins with extrinsic motivation, but the theory of self-determination claims that extrinsic motivation can be internalized in different degrees through the following 4 steps:

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906 *ibid* 16. Relying on Yoav Shoham and Moshe Tennenholtz, 'On the Synthesis of Useful Social Laws for Artificial Agent Societies', *Proceedings of the tenth national conference on Artificial intelligence* (AAAI Press 1992).

907 Martin Neumann, 'Social Constraint' in Bruce Edmonds and Ruth Meyer (eds), *Simulating Social Complexity: A Handbook* (Springer 2013) 339, 353–354. Relying on Emile Durkheim's work of 1907, Durkheim E ([1907] 1972) *Erziehung und Soziologie*. Dusseldorf: Schwann.

908 Edward L Deci and Richard M Ryan, 'The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior' (2000) 11 *Psychological Inquiry* 227, 234–239.

*Step 1* – involving external coercion, wherein behavioural patterns are only stable in the presence of external regulation and behavioural control in the form of sanctions and incentives

*Step 2* – where behaviour regulation remains partially dependent on external controls, but there is also partial internal regulation. At this stage, this management of behaviour is closely related to an individual's public image, or bound up with emotions such as pride and shame. This phase is called 'introjection' where the desired behaviour is not always manifested but remains dependent on external controls.

*Step 3* – when people start to accept the underlying value of the external behaviour regulation, they start to identify with the regulation itself, although the behaviour remains a means to an end. At this point, the behaviour is still an instrument towards the goal of the self-regulation. *Identification* with the norm is therefore the next step.

*Step 4* – when external guidelines become part of the personal identity to the point where they orient their behaviour around social norms. This stage is referred to as *Integration*, in that norms are integrated with the person's own values and identity.<sup>909</sup>

Once internalized, norms, i.e., behaviours passing through a group thanks to the spreading of a corresponding normative belief, and their influence on behaviour and decision making are explained by social psychologists and behavioural theorists as follows: people typically act on goals established in their minds either because of necessity or on goals they've created through reasoning and learning mechanisms. Influenced by social inputs from society, such goals are relativized to other mental states such as beliefs. A goal may be said to be 'relativized' when 'it is held because and to the extent that a given world state or event is held to be true or is expected'.<sup>910</sup> Hence, under changed social beliefs, new, relativised social, goals are created.<sup>911</sup> If these new goals are positive or prosocial, they are also adopted and internalised by the individual under the influence of changed beliefs. At the stage of goal internalization, goals are no longer 'relativised' to social beliefs but are independent of them. Whatever the initial attitude of the person internalizing the goal towards the state of the world, they end up pursuing a new, internalized, goal – which is not conscious or deliberate.<sup>912</sup> Norm internalization, thus,

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909 Richard M Ryan and Edward L Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being,' (2000) 55 *American Psychologist* 68, 69–73.

910 Giulia Andrighetto, Daniel Villatoro and Rosaria Conte, 'Norm Internalization in Artificial Societies' (2010) 23 *AI Communications* 325, 327.

911 Rosaria Conte and Mario Paolucci, 'Intelligent Social Learning' (31-Jan-01) 14 *Journal of Artificial Societies and Social Simulation* 3, 7, 17–18.

912 Moamin A Mahmoud and others, 'A Review of Norms and Normative Multiagent Systems' (2014) 2014 *The Scientific World Journal* 1, 14–15.

is defined by leading scholars in the field as 'a mental process that takes (social) norms as inputs and gives new goals of the internalizing agent (from now on, the internalizer) as outputs.'<sup>913</sup> Once adopted, the new goals influence behaviour, in this perspective in the following way:

– *Internalized goal* – A given normative belief generates a normative goal i.e. a wanted state of the world that triggers and guides action where the normative goal is not relativized to external enforcement but only to a normative belief, i.e., to be a law enforcement officer who treats all citizens fairly. This internalization of the goal is enabled when the norm addressee realizes that they can achieve a certain goal by complying with the norm. (e.g., better reviews from citizens). It is also greatly facilitated by *norm salience* defined by behavioural theorists as the degree of activity and importance of a norm within a social group and a given context.<sup>914</sup>

– *Internalized intention* – The above forms an intention which is an 'executable' wanted world-state, chosen for execution, no longer relying on the original normative belief but activated by specified perceived events. When the 'goal' is automatically chosen for execution, it becomes an internalized intention. Internalized intentions are formed when the 'internalized goal', dependent on the norm, allows one to answer problems in a time of urgency and when time for decision-making is scarce.<sup>915</sup>

– *Internalized action* – The action is an executed intention – where the output is a conditioned action fired by a trigger, a perceived event. When a norm is salient, explicit, and easily executed, a norm is converted into internalized action.<sup>916</sup> Also relevant here is that under the effect of other perceived events, conditioned actions may be blocked for a period of time required to process the interfering event.<sup>917</sup>

– Over time, legal sociology has advanced different theories of how internalized norms result in changed action from individuals. Proponents of the reinforcement learning theory, e.g., argue that norm internalization can lead to *robust* compliance, provided that external sanctions are not fully absent. An alternative theory views norm internalization as leading to automatic, thoughtless conformity, where people conform blindly to a norm merely because they have done so in the past. In this process, individuals learn how much time to spend thinking about certain norms or rather, learning *not* to

913 Rosaria Conte, Giulia Andrighetto and Marco Campenni, 'Internalizing Norms: A Cognitive Model of (Social) Norms' Internalization' (2010) 2 International Journal of Agent Technologies and Systems 63, 64.

914 Andrighetto, Villatoro and Conte (n 910) 329.

915 Daniel Villatoro and others, 'Self-Policing Through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks' (2015) 18 Journal of Artificial Societies and Social Simulation 2, 7–8.

916 Conte, Andrighetto and Campenni (n 913) 68.

917 John A Bargh and others, 'The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals' (2001) 81 Journal of Personality and Social Psychology 1014, 1016.

think about them.<sup>918</sup> A more detailed version of this theory explains this process as follows – individuals learn what norms are through shared expectations, in certain specific conditions, contexts and relationships and associate them with their own beliefs. Later, when these beliefs are activated by similar circumstances or contexts, the relevant norms will also be activated, and individuals comply with them without thinking too much. The primary advantage of pursuing an approach rooted in norm internalisation rather than sanctions is, of course, the achievement of compliance without external enforcement. It is theorized that individuals who internalize norms continue to comply with them without sanctions because of consistency. Consistency of a new norm with one's previous beliefs, goals and already internalized norms enables the selection of this new norm as desirable by individuals, who then internalize it and later control one's behaviour corresponding to it.<sup>919</sup>

#### 4.4.5 Norm Activation – Activating Internalized Norms

The previous section illustrated how, as a cognitive process, norm internalization leads to new behavioural goals. Further experimental evidence shows that when such a goal exists, unconscious activation of such goals can guide behaviour, and self-reflection effectively.<sup>920</sup> A final issue that must be confronted in using norms for behaviour change, is translating putative change in norms and attitudes, into actual changes in behaviour and responses. Experimental evidence on the influence, and working, of norms has yielded many interesting and usable insights on how a social norm, once presumably internalized, can be used to modulate action (behaviour). The most used concept herein is 'norm activation' whereby activation means directing attention of the individual to social expectations in a way that is sufficient to bring them into the stream of information processing.<sup>921</sup> It has been argued that normative expectations are activated by explicit or subtle communications from others or by the individual's own realization that his behaviour may become known to the others whose behaviour in turn may be altered depending on whether or not he conforms to them.<sup>922</sup> Activation need not, however, only communicate others approval or disapproval. If a norm is internalized and, therefore, becomes a self-expectation, information about

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918 Bryan Druzin, 'Law, Selfishness, and Signals: An Expansion of Posner's Signaling Theory of Social Norms' (2011) 24 *Canadian Journal of Law and Jurisprudence* 5, 7.

919 Martin J Kollingbaum and Timothy J Norman, 'Norm Consistency in Practical Reasoning Agents', *PROMAS Workshop on Programming Multiagent Systems* (Citeseer 2003) 1–2, 9.

920 Bargh and others (n 917) 1024–1025.

921 Schwartz (n 899) 225.

922 Allen D Blay and others, 'The Usefulness of Social Norm Theory in Empirical Business Ethics Research: A Review and Suggestions for Future Research' (2018) 152 *Journal of Business Ethics* 191, 195.

others needs may lead to the activation of these internalized norms advocating helping regardless of external enforcement. Such internalized norms are experienced as feelings of moral obligation,<sup>923</sup> and not deliberated upon consciously, and so the consequent behaviour is motivated by a desire to act in ways congruent with one's values and internal sense of self.<sup>924</sup> The integration of 'activation' as part of the process to motivate behaviour is termed as the Norm Activation Model and, generally, this model uses three variables to explain and therefore used to predict prosocial behaviour. The first is the existence of norms, which would demand a sense of obligation to behaving or refraining from behaving in a certain way. The second is awareness of consequences, that is, the knowledge of negative consequences for others or for other things that the individual values. And the third is the ascription of responsibility, which is the feeling of responsibility for the negative consequences when the individual does not enact the prosocial behaviour.<sup>925</sup> When these three variables are present, and brought to the fore in the cognitive process, norm-consistent behaviour can be expected.

Thus, experiential social psychologists have found substantial evidence that shifting an individual's attention to a specific source of information, or a particular trigger for motivation, will change the individual's responses in a way more 'congruent' with the source.<sup>926</sup> It was observed that people who are temporarily focused on the normative considerations in a situation would be more likely to behave in 'norm-consistent' ways.<sup>927</sup> Thus, norms seem to motivate or 'direct action' primarily when they are activated by being made more 'prominent' in the individual's surroundings (a concept termed as salience in the literature) or otherwise focused upon.<sup>928</sup> Studies using cognitive priming to test out this theory reveal highly relevant insights. Cognitive priming refers to drawing attention to a related concept in order to activate

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923 Johan Jansson and Ellen Dorrepaal, 'Personal Norms for Dealing with Climate Change: Results from a Survey Using Moral Foundations Theory' (2015) 23 *Sustainable Development* 381, 384.

924 Katharine T Bartlett, 'Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination' [2009] *Virginia Law Review* 1893, 1932–1933.

925 Robert B Cialdini, Carl A Kallgren and Raymond R Reno, 'A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior' in Mark P Zanna (ed), *Advances in Experimental Social Psychology*, vol 24 (Academic Press 1991) 204.

926 Robert B Cialdini, Raymond R Reno and Carl A Kallgren, 'A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places' (1990) 58 *Journal of Personality and Social Psychology* 1015, 1015.

927 Linda Steg, 'Values, Norms, and Intrinsic Motivation to Act Proenvironmentally' (2016) 41 *Annual Review of Environment and Resources* 277, 282–283.

928 F Marijn Stok and Denise TD de Ridder, 'The Focus Theory of Normative Conduct' in Kai Sassenberg and Michael LW Vliek (eds), *Social Psychology in Action: Evidence-Based Interventions from Theory to Practice* (Springer International Publishing 2019) 95–96.

thinking about the target concept. A set of experiments run by social psychologists to test what kind of 'actions' may activate norms in others found that:

- i Where interventions focused individuals on 'injunctive norms' (i.e norms which specify what *ought* to be done), there was a distinct shift towards norm consistent behaviour – *even* when the environment favoured descriptive norms (which simply specify what *is* done) in the opposite direction.
- ii This was explicable by the reasoning that injunctive norms transcend across situations – as they pull an individual's focus away from *how* people normally behave to a concern to what others would approve or disapprove of.<sup>929</sup>
- iii In terms of interventions to direct focus on injunctive norms, it is important for the intervention to focus on the disapproval or approval of a behaviour, by highlighting the applicability of interpersonal social sanctions to a particular behaviour.<sup>930</sup>

This may lead to the conclusion that in order for internalized norms to be useful in guiding behaviour, they will necessarily have to be activated in every instance by a reminder of the sanctions associated. However, literature on the effect of norms also supports the idea that people generally try to live up to the expectations of imagined audiences i.e. general society. Termed as the 'symbolic interaction theory', proponents argue (and norm scholars concur) that if an individual is made to focus on a representative of society who may approve / disapprove of another person's behaviour, the individual is likely to conform to the social rules for that behaviour even when alone – as long as the focus remains.<sup>931</sup>

This section dealt with the difficult and complex question of how norms, once derived, can actually be used to influence behaviour, particularly when the existing behaviour is resistant to regulatory mandates. To be capable of changing behaviour therefore, one first has to achieve agreement with the norm, and then have it influence behaviour. Insights from the theory of social learning provided one approach to achieving agreement with the norm. Alternatively, appealing to the social identity of an individual can also achieve norm agreement. Finally, persuasion is explored as a method to obtaining agreement with desirable norms. Once norm agreement is accomplished however, does not mean behaviour will change. The norm has to be 'internalized' by the individual so that they are motivated to be in accordance with the norm even without external sanctions. The process of norm internalization,

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929 Carl A Kallgren, Raymond R Reno and Robert B Cialdini, 'A Focus Theory of Normative Conduct: When Norms Do and Do Not Affect Behavior' (2000) 26 *Personality and Social Psychology Bulletin* 1002, 1007–1008, 1011.

930 Cialdini, Kallgren and Reno (n 925) 226.

931 *ibid* 230.

as articulated by literature in the cognitive sciences and sociology is therefore analyzed. Finally, in recognition of empirical findings that to achieve behavioural change, even an internalized norm has to be made relevant to the individual's decision making, the concept of norm activation is analyzed. Together, the theoretical insights and behavioural literature reviewed above provide a roadmap to achieving norm compliant behavioural change.

#### 4.5 CONCLUSION

This chapter addressed research sub-question 3, i.e., 'Which legal and ethical norms dealing with racist or sexist behaviour should law enforcement officers adhere to, and how can norm internalisation assist them in complying?'

Relevant legal and ethical norms were derived and distilled from three kinds of sources – legal (soft law and hard law), philosophical, and experimental sources. *Firstly*, legal codes – whether through constitutional guarantees, fundamental rights, or anti-discrimination laws form the foundational normative basis that should guide policing. Beyond these, regulations and police codes of conduct as soft law sources provide a more robust grounding for police behaviour, enumerating standards for their conduct from which the required norms as behavioural goals can be derived. *Secondly*, philosophical and jurisprudential thought on the substantive content of the rights of equality, equal treatment, non-discrimination and dignity elucidates norms that must be complied with in order to realize substantive equality and human rights. *Thirdly*, experimental evidence on police behaviour that inspires trust in citizens and ensures their cooperation functions as a source of behavioural norms that all law enforcement personnel should aspire to. From these, the following eight norms for non-discriminatory behaviour are derived:

- Treating citizens with respect and courtesy;
- Acknowledging one's own biases and stereotypes;
- Unlearning myths about victims;
- Facilitating citizen participation in decision-making about them;
- Treating victims with compassion and empathy;
- Refrain from acting on stereotypes;
- Prioritizing the dignity of the individual in interactions with citizens;
- Making a conscious effort to not let stereotypes influence behaviour.

These norms provide more detail to the content of general legal guarantees of equality and non-discrimination and set out precise standards and requirements for policing conduct. They represent actionable behavioural goals that can be effectively realised through technological artefacts designed for such a purpose.

The second half of the sub-research question addresses the detail of how norms can influence behaviour. Norms have always played an important, if

underrated role in regulating human behaviour to legal ends and goals – a phenomenon given increasingly more importance by legal theorists studying legal compliance. Extant regulatory theory and scholarship from the law and economics school of thought acknowledges that norms are inextricably linked to laws,<sup>932</sup> and are frequently necessary to achieve legal outcomes. More relevantly, if a norm is internalized by individuals, they are bound to act in accordance with it, even in the absence of the threat of external sanctions or shame and embarrassment. Achieving internalization of a norm, therefore, is a necessary behavioural goal to achieving compliance with the norm. Internalisation of a norm can be accomplished in three ways. *Firstly*, through social learning, in that individuals typically learn about norms from their surroundings and social groups and strive to comply with it in order to conform with their environment, and to receive approval of it. People derive their knowledge about what the expected norms are from their environment, along with their peers. *Secondly*, by appealing to their social identity, in that individuals are motivated to comply with norms that they perceive as important to their identity. In the context of policing by linking their status as protectors of citizens to calls to behave equitably and fairly to all citizens, irrespective of their race or sex, agreement with these norms can be striven towards. *Thirdly*, agreement with a norm can also be accomplished by elaborative, rational persuasion, focusing on the reasons why such norms are upheld. These approaches towards norm compliance can be effectuated through technology, underscoring their relevance and potential.

Once an individual agrees with or is simply aware of the social expectations of a norm, and starts to try and modify behaviour according to it, the individual begins to internalize the norm. Over time, compliance with the norm in terms of behaviour is more easily accomplished and the conditions for such norm internalization can be created by external artefacts like technology. Even an internalized norm, in order to influence behaviour, has to be ‘activated’ or made relevant to the doer and hence, experimental evidence on norm activation and its requirements is relevant. The next steps, therefore, is to analyse how these approaches can be usefully integrated into technological means to bring about the desired goals, which is examined in Chapter 5.

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932 Daron Acemoglu and Mathew O Jackson, ‘Social Norms and the Enforcement of Laws’ [2017] *Journal of the European Economic Association* 245, 246.