Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition For A Modern Society

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Law is one of the ways that groups of people cohere and form a society.[1] Religion is another.[2] The complex intersection of these two ways of social formation in the Judaic tradition is a critical part of the Jewish understanding of "religious human rights."

This chapter focuses first on the legal process Jewish law[3] uses to form communities and to exclude people from them.[4] It addresses the

[1] For a review of the recent literature on this issue see, Lawrence M. Friedman, "The Law and Society Movement," *Stanford Law Review* 38 (1986): 763.

[2] For a detailed discussion of the impact religion has had on the formation of society, see Jerold S. Auerbach, *Justice Without Law* (Oxford, 1983). The thesis of Auerbach's book—that many religious systems can create justice without any formal system of law—is quite debatable, and beyond the scope of this paper. It is clear that Jewish law is not such a system, although, as Auerbach notes, it is a system of justice without lawyers, which is not the same as a system of justice without law. Justice without law and justice without lawyers are by no means identical, although to those involved in the common law model of justice it might appear that they are the same. The Jewish legal system certainly had all of the apparent indicia of a legal system (unlike the Amish, who, Auerbach maintains, lack a legal system) although the Jewish tradition had no lawyers as part of its legal system. For more on this issue see, my forthcoming work *The Jewish Perspective on Practicing Law* (Yeshiva University Press, 1995). The confusion that results from comparing a system of law without lawyers (such as Jewish law), with a system of justice without law (such as Amish society) can sometimes be found in Auerbach's book.

[3] Jewish law (called *halacha* in Hebrew) is the term used to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the *Torah*) is the historical touchstone document of Jewish law, and according to Jewish legal theory was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 300 B.C.E. From the close of the canon until 250 C.E. is referred to as the era of the *tanaimim*, the redactors of Jewish law, whose period closed with the editing of the *mishnah* by Rabbi Judah the Patriarch. The next five centuries was the epoch in which the two Talmuds (Babylonian and Palestinian) were

sources within Jewish law for the power to shun or excommunicate[5] people and the goals of such practice. It then discusses the Jewish legal problems raised when excommunication and shunning are used in a modern secular community, whose primary means of self-classification is not normally through religion.

This chapter then analyzes illustrative American, British, and Canadian cases that have reviewed the use of such excommunication and shunning. None of these legal systems, ultimately, provides satisfactory protection for the right and rite of excommunication. The chapter thus proposes a number of changes in prevailing secular laws to protect the community's right to form itself and to define its membership, and the

written and edited by scholars called *amoraim* ("those who recount" Jewish law) and *savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Palestinian Talmud, and is a more complete work.

The post-talmudic era is conventionally divided into three periods: the era of the *gaonim*, scholars who lived in Babylonia until the mid-eleventh century; the era of the *rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and the *achronim* (the latter authorities), which encompass all scholars of Jewish law from the fifteen century up to this era.

From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Caro, called the Shulchan Aruch, as the basis for modern Jewish law. Many significant scholars—themselves as important as Rabbi Caro in status and authority—wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the Shulchan Aruch (Vilna, 1896) contains no fewer than 113 separate commentaries on the text of Rabbi Caro. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day.

For a more literary history of Jewish law, see Menachem Elon, *Jewish Law: History, Principles and Sources* (Philadelphia, 1994); and for a shorter review of the literary history of Jewish law, see Suzanne Last Stone, "In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1992): 813, 816 n.13.

[4] Classically, this is known as shunning and excommunication. The term "excommunication" has its origins in the exclusion of a person from the Christian right to communion, and thus, the term is not itself of Jewish origins. See James H. Provost, "Excommunication," in Mircea Eliade, ed., *Encyclopedia of Religion* (New York, 1987), 5:218. Notwithstanding its origins, it has become the accepted term to use to refer to this status. The adoption of legal phrases with origins antithetical to a particular religious practice of rabbinic Judaism, and then their subsequent incorporation into the literature of rabbinic Judaism has precedent; see, e.g., Aaron Kirschenbaum, "The Good Samaritan: Monetary Aspects," *Journal of Halacha & Contemporary Society* 17:83 (1989): 84-87.

[5] In Hebrew, the word *cherem* means to destroy; see Exodus 22:19 and Deuteronomy 13:16. However, in modern and rabbinic Hebrew it means to excommunicate; see Rabbi Jacob Karo, Shulchan Aruch, *Yoreh Deah* 334:1. This isolation is sometimes also expressed as through the term *nidui* or *shamta*. The precise linguistic differences between these various terms is beyond the scope of this paper. For more on this, see "Cherem," *Encyclopedia Talmudit* (Jerusalem, 1976), 16:326.

individual's right to leave such communities. Current secular law doctrine in these three countries does neither well.

The conclusion notes that exclusions from religious sub-communities are not only fundamental to the ways in which a religious community forms itself, but profoundly compatible with general moral and legal notions of minority rights, and represents the most equitable way a religious community can form itself in a modern society.

Jewish Law on Excluding

Classical Jewish law offers a broad variety of penalties for those who violate the law. The Bible has four different types of death penalties[6] for a variety of offenses, some of which one could hardly describe as "criminal."[7] Generally, those offenses for which death is not the prescribed punishment, were punished by whipping according to Jewish law.[8] A small number of offenses were punished by *karet*, a divinely-mandated punishment which humans had no hand in. Some violations were not punished at all.[9] Beyond those penalties found explicitly in the Bible, a Jewish court had available *makot mardut*, literally the whipping of a rebel—a process that allowed the court to punish a person who defied the law—through judicially-mandated beatings.[10] So, too, a Jewish court had available the *kipah*, a Jewish version of "three strikes and you're out," where a repeat offender could be (informally) killed if he violated the law with impunity.[11]

Despite these classical formulations, Jewish law has not had the judicial authority to inflict any of these punishments for nearly two thousand years.[12] Indeed, Jewish law has functioned for the past two millennia

[6] Stoning, burning, slaying and strangling; see Deuteronomy 17:17; Leviticus 10:2; and Deuteronomy 13:16.

[7] See Maimonides, *Sanhedren* 14:1 and 15:3, Isodore Twersky, trans. (Jerusalem, 1976), who lists the 36 different offenses for which there is a death penalty.

[8] See, e.g., ibid., 16:1, 18:1-2 listing 207 different violations for which lashes are mandated. The codifiers after Maimonides declined to cite these punishments in their codes precisely because they felt them to be inapplicable in modern times. Thus, no listing of death penalty or lashing cases is even found in the classical code of Jewish law, the Shulchan Aruch.

[9] Ibid., 18:1-3.

[10] See Rabbi Chezkeya Demedina, *Sedai Chemed* 4:287-288 (New York, 1960) for more on this issue. As a matter of legal theory, Jewish courts might still be entitled to use this punishment; see Menachem Elon, *Principles of Jewish Law*, (Jerusalem, 1974), 534-35. However, it is clear that Jewish courts do not *ever* order this punishment in modern times, and it is thus considered a punishment no longer applicable.

[11] Babylonian Talmud, *Sanhedren* 81b. This penalty is also inapplicable in modern times.

[12] Formal jurisdiction ended forty years prior to the destruction of the Second Temple. Ibid., 41a. While

with only two real jurisdictional bases to punish violations—the "pursuer" grant of jurisdiction, and excommunication or shunning.[13] The pursuer rationale (*rodef*) is the jurisdictional source of power for a Jewish court or community to intervene to prevent a murder—by force if need be, and even if that use of force violates the rules of the host country.[14] This area of Jewish law is widely known and much written about.[15] It is irrelevant to the formation of a sub-society in modern times, since the cases it governs are crimes that are nearly always also violations of basic general moral principles and thus subject, on a practical level, to concurrent jurisdiction of the secular government. Thus the normal response—even in a very insular, fastidiously observant, Jewish society—to a murder would be to call the police.[16]

The remaining power Jewish courts are left with to address the routine problems involved in formation of a sub-society is that of excommunication and shunning.[17] The power to form a sub-community and to exclude people from that sub-community is a power that can frequently

Jewish community in Spain in the 1300s and in various other times in Jewish history by the civil government, even that jurisdiction was not directly based on Jewish law and involved punishments unheard of in Jewish law. For a further discussion of this issue, see Elon, *Principles of Jewish Law*, 529.

[13] Perhaps there is also some emergency jurisdiction, although this author is inclined to view this form of jurisdiction in post-Talmudic times as a broad manifestation of the pursuer rationale. See further, H. Ben-Menahem, *Judicial Deviation in Talmudic Law* (Boston, 1991). Essentially complete civil jurisdiction is still part of Jewish law, and is beyond the scope of this paper.

[14] Thus, for example, if one saw "A" going to murder "B" in Atlanta, Jewish law would allow one to kill "A" if that is the only way to prevent the crime. In fact, the scope of the pursuer rationale is quite a bit broader than that case, and it perhaps provides the governing jurisdictional grant (and perhaps the substantive laws) for such areas of abortion, spousal abuse, armed robbery and other violent crimes; for more on this, see *Shulchan Aruch, Choshen Mishpat*, 425:1-3 (Jerusalem, 1992).

[15] See further, Marilyn Finkelman, "Self-Defense and Defense of Others in Jewish Law: The Rodef Defense," *Wayne State Law Review* 33 (1987): 1257.

[16] See, e.g., *People v. Drelich*, 506 N.Y.S.2d 746 124, A.D.2d 441 (2d App. Div. 1986).

[17] One other significant power is present, which is the religious authority to exclude people from the privileges Jewish law mandates that one adherent extend to another. For example, in a society where the secular law does not mandate that one return lost property to its rightful owner, Jewish law directs that one nonetheless return such property to a fellow Jew who observes Jewish law. This type of privilege also can be used to create communities and exclude individuals. This author has argued elsewhere that these privileges are in fact quite similar in purpose—to create a community committed to a similar level of observance—to excommunication, but are used on a much higher level. See Michael J. Broyde and Michael Hecht, "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity," *Jewish Law Annual* (forthcoming). Thus, as will be shown later in this chapter, excommunication and shunning were used only to prevent public defiance of community norms, whereas these remaining reciprocal privileges were used to distinguish personal observance. This is a quite difficult topic, and the conclusion found in that paper could be contested.

encourage conduct in ways that formal law itself either cannot or will not accomplish. Jewish law and culture was quite aware of that fact, and designed within its legal and ethical system rules that relate to the use of social pressure.

A recent case arising in the rabbinical courts of Israel demonstrates this well, and presents itself as a modern—but classical—example of the power of a Jewish court to order social shunning of a person whose conduct is not in full compliance with the ethical dictates of Jewish society. The Supreme Rabbinical Court in Israel is discussing what to do in a situation where a divorce seems proper, and is desired by the wife, but yet the husband will not co-operate in the processing of the divorce.[18] The court states:

> In the appeal[19] which was presented before us on January 7, 1985, the court did not find sufficient cause to compel[20] the husband to divorce his wife. The Court did, however, try to persuade the man, who is religiously observant, that he follow the proper path and to obey the decision of the court [that it is proper for him to issue the divorce], for it is a good deed to heed the words of the Sages who religiously obliged him to divorce his wife and that he has chained his wife needlessly.[21]

The court gave the husband an extension of three months within which to grant a divorce to his wife. However, when the Court saw that three months passed without a response, they declared:

> [W]e instituted the separations of Rabbenu Tam as found in the Sefer HaYashar (*Chelek HaTeshuvot* 24) which states: Decree by force of oath on every Jewish man and woman under your jurisdiction that they not be allowed to speak to him, to host him in their homes, to feed him or give him to drink, to accompany him

[18] For more on this topic, see Irwin H. Haut, *Divorce in Jewish Law and Life* (Targum, 1983), 18 and Irving Breitowitz, "The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment," *Maryland Law Review* 51 (1992): 312.

[19] For a discussion of the appellate process in Jewish law, see Eliav Shochetman, *Civil Procedure in Jewish Law* (Jerusalem, 1994), 443-71.

[20] In Jewish divorce law, a court has three choices. It can compel the issuing of a divorce (and in such a situation, Jewish law would allow court-ordered compulsion to force a bill of divorce to be written). However, there are few grounds for such an order—essentially adultery or serious marital misconduct. Alternatively, a court can rule that one is "religiously obliged" to participate in a divorce. In such a situation, judicial force cannot be used. The grounds for such an order are numerous, and that was the order in this case. Finally, it can rule that a divorce is not mandated by Jewish law, and should only be given with the full and complete consent of both parties. See generally *Shulchan Aruch Even Haezer*, 154.

[21] Jewish courts, unlike common law courts, not only decide cases but give moral advice based on the teachings of Jewish law and ethics. See Menachem Elon, *Jewish Law: History Sources, Principles IV* (Philadelphia, 1994), 1863-71.

> or to visit him when he is ill. . . .
>
> We added to these strictures that no sexton of any synagogue in the area where the husband resides be allowed to seat him in the synagogue, or call him to the Torah, or ask after his welfare, or grant him any honor. All people are to distance themselves from him as much as possible until his heart submits and he heeds to voices of those instructing him that he grant his wife a divorce.
>
> And so it was done, at which time the husband submitted and granted his wife a divorce.[22]

This case involved the use of the communal sanction of mild shunning to encourage a person who wished to be part of the religious community in Israel[23] to obey the mandates of Jewish law and ethics. A person who felt no desire to belong to the community, and thus was not threatened by the possibility of exclusion from it, would not have reacted in the manner this person did. The sanction would have had no effect.

One should not think that such methods of persuasion occur only in Israel. For example, in the case of *Grunwald v. Bornfreund*[24] the plaintiff sought an injunction from a United States District Court prohibiting the "Central Rabbinical Congress of the United States and Canada, its Rabbinical Court and its members (the 'Rabbinical Congress'), and defendants from making any efforts to have plaintiff withdraw his action from this Court and submit it to a rabbinical or ecclesiastical court and from temporarily or permanently excommunicating plaintiff, his counsel, and staff."[25] Modern rabbinical courts can and do excommunicate. Indeed, excommunication and its lesser cousin, shunning, remain valid expressions of religious will within the Jewish community to this very day, and they are used to express communal disdain for a person's actions.

[22] Like many opinions of the Supreme Rabbinical Court, this case was initially published as part of the Responsa literature of its judges, see Rabbi Obadiah Yosef, *Yabia Omer*, VII:23 (Jerusalem, 1993) (Even HaEzer) and Rabbi Eliezer Waldenberg, *Tzitz Eliezer*, VII:53 (Jerusalem, 1989).

[23] Note how the court states: "We did, however, try to persuade the man, *who is religiously observant*, that he follow the proper path and to obey the decision of the court, for it is a mitzvah to heed the words of the Sages who obliged him to divorce his wife. . . ." *Yabia Omer* VII: 23 (emphasis added).

[24] 696 F. Supp. 838 (E.D.N.Y 1988).

[25] The affidavit submitted described the consequences of this excommunication as follows: "plaintiff may be totally excluded from the community, he will not be able to shop at the stores of members of the community, his zizzitt, a fringed garment worn by observant Jews, may be cut off, the mezuzah, religious verses in a container, may be removed from his door, and there will be no religious prohibition on injury to his property or, indeed, his murder." Ibid. at 839. The movant's affidavit is clearly incorrect as a matter of Jewish law. As noted by the Court, it mixes the legal sanctions for excommunication with that of informing, a far more serious violation of Jewish law and ethics. The Jewish tradition simply excluded people when excommunication was ordered. No other penalty should be imposed.

The Power and Purpose of Exclusion. The Talmud discusses the legal rules related to shunning in some detail,[26] and over time the legal rules have grown in detail and purpose.[27] One overarching theme emerges from the legal discussion: unlike the many forms of punishment found in classical Jewish law, the purpose of the exclusion process is to deter future violations of Jewish law—primarily by other members of society, but also by the excluded person. Punishment and retribution as aims were not thought to be part of the process, as they were in classical Jewish criminal law.[28]

Any analysis of the rules relating to excluding people raises two questions. First, may one shun or excommunicate a person when the shunning process might (or will) drive this person completely away from the religious community or religious observance?[29] Second, may one shun or exclude the relatives of a person in order to encourage the person to cease his or her activities? These two questions are central to the seminal issue of this chapter: *what is the purpose of excluding people from the community?*

The problem of excluding people from the community when they will abandon religious observance in response is part of a very important discussion as to whom Jewish law is seeking to deter through the process of excommunication. Is it the person who is flaunting community standards, or is it the community at large that will witness the person's exile from the community, and thus be deterred? If it is the former, then one does not shun a person who will abandon the faith when shunned. If it is

[26] Babylonian Talmud *Mo'ed Katan* 14b-17b.

[27] Perhaps one could suggest that as other remedies were abolished in response to societal concerns, the uses of exclusion to form a community increased. Thus, it is quite reasonable that Rabbi Asher ben Yecheil (Spain, 1300s) can essentially abandon the use of exclusion as a punishment (see *Responsa of Asher* 43:9) as the Jewish community in Spain at that time had criminal jurisdiction over the Jewish community, including the statutory authority to execute. See *Responsa of Asher* 17:1 (Jerusalem, 1991); *Responsa of Yehuda ben Asher*, 75 (New York, 1957).

[28] See generally Elon, *Principles of Jewish Law*, 469-475.

[29] At first glance this might seem like a peculiar question. After all, is not the goal of excommunication to remove the person from the community? It is clear that in Talmudic times that was not the goal. For example, the great sage, Rabbi Eliezer was excommunicated by the Talmudic Sages for defiance of the majority on a particular issue. Notwithstanding his excommunication, he remained one of the premier Talmudic scholars of his time, to whom other scholars went to hear lecture—all the while making sure that they stayed more than four cubits away from him, as required by Jewish law. He was excommunicated to indicate that his view on a particular topic was wrong, and his defiance was unacceptable. However, he clearly remained in the faith-group of rabbinic Judaism. For more on this, see *Bava Metzia* 59a-b.

the latter, then that factor is not relevant. Indeed, this discussion reflects the ultimate reality concerning all shunning cases: in modern times and in democratic countries, the penalty of exclusion works on the one being shunned only if the person desires the approbation of the faith that is excluding him or her.

This fact itself reflects a profound historical change in the purpose of excluding people from the community. Classical Jewish law held "that a person on whom an excommunication ban lies can be regarded as dead."[30] Indeed, flogging was perceived as a more merciful punishment than excommunication in classical Jewish law.[31] In a closed and tightly knit community, surrounded by a generally hostile society, exclusion from the Jewish community was a very severe penalty. Many classical Jewish law authorities would thus not shun or excommunicate under any circumstances.[32] This has changed in post-emancipation times. As noted by a secular critic: "Shunning and excommunication became so common in the later centuries that they no longer made any impression and lost their force [to the uncommitted]. They became the standard rabbinic reaction to all forms of deviation or non-conformity considered incompatible with or dangerous to Orthodoxy. As such, they are sometimes imposed by extreme Orthodox authorities at the present day, but as neither the person afflicted nor the public at large regard them as bound by them, they have ceased to be a terror or have much effect."[33] Particularly today, a person who is shunned can simply leave the community and join a different community adhering to different religious principles.

Rabbi Moses Isserless, one of the codifiers of Jewish law, writing in his glosses on *Shulchan Aruch*, resolves the issue of the purpose of exclusion by stating:

> We excommunicate or shun a person who is supposed to be excommunicated or shunned, even if we fear that because of this, he will bring himself to other evils [such as leaving the faith].[34]

[30] Elon, *Principles of Jewish Law*, 543.

[31] Jacob ben Asher, *Tur Yoreh Deah* 334 (Jerusalem, 1992).

[32] See Rabbi Jacob Moellin, *Minhagai Maharil*, 34 (Jerusalem, 1991).

[33] Haim Cohen, quoted by Elon, *Principles of Jewish Law*, 544. It is worth noting that (notwithstanding their ineffectiveness) the British Mandate law governing Palestine appeared to outlaw these pronouncements as a form of criminal conspiracy; see *Criminal Ordinances of Palestine* Sect. 36. I am inclined to disagree with Cohen's thesis as to the cause of the ineffectiveness of the current penalties. While Cohen appears to maintain that the penalty became ineffective because of overuse by the "extreme Orthodox," I am inclined to maintain that the penalty became ineffective due to the emancipation and the general change in social status of the Jewish community. Once one can legally move out of the Jewish district/ghetto and avoid the community's sanction, excommunication becomes a much weaker penalty.

[34] *Yoreh Deah* 334:1.

The rationale for this is explained clearly by later authorities. The purpose of the shunning or excommunication is to serve notice to the members of the community that this conduct is unacceptable, and also, secondarily, to encourage the violator to return to the community. In a situation where these two goals cannot both be accomplished, the first takes priority over the second.[35] This is true even in situations where there is a reasonable possibility that the person will leave the Jewish faith completely and simply abandon any connection with the community to avoid the pressures imposed on him. The shunning and excommunication can be said to have accomplished its goals in such a situation—even if the shunned person continues in the path of defiance and leaves the faith community.[36] Not unexpectedly, the vast majority of civil suits related to excommunication involved people who have left the faith community in response to their exclusion.

It is worth noting that there is a minority opinion to the contrary which rules that one should not shun or excommunicate a person who will leave rather than be excommunicated. Rabbi David Halevi, writing in his commentary *Turai Zahav*, states that he disagrees with the approach of Rabbi Isserless, and in his opinion it is prohibited to shun a person when one suspects that the person shunned will withdraw from the Jewish community in response.[37] However, many commentators, while noting his remarks, make a crucial distinction as to why people might be excluded. They note that while as a matter of theory one could be shunned or excommunicated merely for violating any law, or even for avoiding a financial obligation,[38] in fact, that is not how and why exclusion is used. Exclusion, these authorities state, is used as a deterrent, to

[35] See comments of Rabbi Shabtai ben Meir Hacohen, *Nekudat Hakesef*, 334:1; Rabbi Yair Bachrach, *Responsa Chavat Yair*, 141 (Jerusalem, 1968); Rabbi Yakov Emden, *Responsa Yavetz*, 1:79 (Lemberg, 1887); Rabbi Avraham Yitzchak Kook, *Da'at Cohen*, *Yoreh Deah* 194 (Jerusalem, 1983); Rabbi Moses Feinstein, *Iggrot Moshe Yoreh Deah*, 1:53, OC 2:33 (New York, 1959); Rabbi Yizchak Isaac Herzog, *Hechal Yitzchak OC*, 30(3) (Jerusalem, 1961) and *Pitchai Teshuva* commenting on *Yoreh Deah*, 334(1).

[36] These dual goals of shunning and excommunication are found in religions other than Judaism. For example, a recent court case discussed the process of withdrawal of fellowship from the Church of Christ. It noted: "Withdrawal of fellowship is a disciplinary procedure that is carried out by the entire membership in a Church of Christ congregation. When one member has violated the church's code of ethics and refuses to repent, the elders read aloud to the congregation those scriptures which were violated. The congregation then withdraws its fellowship from the wayward member by refusing to acknowledge that person's presence. *According to the Elders, this process serves a dual purpose: it causes the transgressor to feel lonely and thus to desire repentance and a return to fellowship with the other members; and secondly, it ensures that the church and its remaining members continue to be pure and free from sin." Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766 n.2 (Okl. 1989) (emphasis added).

[37] Commenting on *Yoreh Deah*, 334:1.

[38] Indeed, this is quite clearly stated in *Shulchan Aruch Yoreh Deah*, 334:1.

prevent other people from violating the law, and is no longer used as a method of punishment. Thus, these authorities note that Rabbi Halevi's point is true, but inapplicable. In a case where a person is violating the law, and the punishment imposed will drive him further away—but there is no other community value at stake—it might be that Rabbi Halevi's point is correct that it is prohibited to punish by exclusion. However, such is no longer the purpose of shunning and excommunication; inevitably, more is at stake than this single person's violation.[39]

The process of shunning or excommunicating individuals relates not solely to their violation of religious law, but also to their apparent status as members of the community in good standing. For example, Jewish law reserves the right, as a matter of jurisdiction, to assert that any Jew who willfully deviates from Jewish law may be excluded. However, the law is established that such shunning or excommunication does not, in fact, occur unless it is actually pronounced by a Jewish court, and such pronouncements are not forthcoming unless the person started as a member of the faith community and now is publicly deviating from it in a way designed to hinder communal organization.[40] Thus, in modern times vast numbers of Jews are distant from any version of traditional Judaism, happy with that status, and yet are not under any decree of excommunication;[41] the few who are excluded, appear to be people who are deeply insiders within the faith but yet are actively dissenting.[42]

The legal status of a "non-member" of the Jewish community is considerably better than that of one who joins and is expelled or wishes to leave.[43] This is consistent with the essential purpose of shunning and ex-

[39] Indeed, this remark is part of a broader posture of modern Jewish law that the punishment of criminals for any reason other than deterrence of future crime is no longer within the jurisdiction of Jewish law. Just as the pursuer rationale permits only the use of force to prevent crime, and not to punish it, so too, the essential goal of the shunning process is to deter future violations (either by this person or others). It is not to punish.

[40] See *Shulchan Aruch* 334:12 and commentaries ad locum; see also comments *of Nekudat HaKessef* on *Taz Yoreh Deah*, 334(1).

[41] For a discussion of levels of observance in the Jewish community, see Harold Dellapergola and Uziel Schmelz, "Demography and Jewish Education in the Diaspora," in H. Himmelfarb and S. DellaPergola, eds., *Jewish Education Worldwide: Cross Cultural Perspectives* (Lanham, MD, 1989), 43, 55.

[42] Thus, for example, the three court cases discussed in this paper that address legal aspects of excommunication within the Jewish tradition all are clearly concerned with insiders who are flouting the will of the community, and yet wish to remain part of that community.

[43] Within the Jewish tradition, one who was never part of the community almost inevitably has the status of a "child who was kidnapped" from the faith, and is thus excused from any penalty for his violation based on his complete lack of familiarity with the faith. The Jewish tradition directs that one must befriend such persons to bring them closer to the faith; certainly such people cannot be shunned. See further Maimonides, *Mamrim*, 3:3 and Rabbi Abraham Isaiah Karletz, *Chazon Ish, Yoreh Deah*, 1(6), 2(160), and 2(28) (Bene Brak, 1962).

communication in the Jewish tradition—to establish a religious community. Non-members do not disrupt such a community: dissenters do.[44]

The second issue that needs to be addressed within the Jewish tradition is whether one may shun the relatives of a person in order to encourage the person to cease his disruptive activities. This situation also crystallizes the purpose of this treatment. As a general matter, classical Jewish law prohibits punishing an innocent person as a way of punishing another person for a violation of the law.[45] Thus, the question is whether shunning is really a form of punishment, or is it some other type of activity not bound by the jurisprudential rules of punishment?

Once again, Rabbi Isserless adopts the legal rule that posits that punishment is not the goal. He states:

> It is within the power of a Jewish court to order [as part of a shunning] that a violator's children not be circumcised, that his dead not be buried, that his children be expelled from the school, and that his wife be removed from the synagogue until he accepts the ruling of the court.[46]

Thus, Rabbi Isserless endorses exclusion not only of those who defy the community, but also recognizes that people can be excluded from the community when their inclusion, through no fault of their own, will prevent the formation of the community.[47] Letting the close family of an excluded person participate in the religious sub-community—using its synagogue, cemetery, or schools—still allows the "excluded" person to be part of the community although he is "excluded."

This is, by no means, the only ruling, possible. Commenting on this phrase, Rabbi David Halavi, writing in his classical commentary Turai Zahav, states: "Heaven forbid this. The world is only in existence because of the studies of children in school. It makes sense to prohibit circumcising children, as that obligation is solely the father's;[48] the same is true for burying his dead. . . . However, studying by children has no restitution. . . . So, too, to exclude his wife from the synagogue is impro-

[44] This is hinted at in Robert Bear's recounting of his exclusion from the Reformed Mennonite Church. He states "Because I have been excommunicated I am considered to be more sinful than if I had never known 'the truth'." Robert Bear, *Delivered Unto Satan* (Philadelphia, 1974), 10.

[45] Deuteronomy 24:16.

[46] *Yoreh Deah*, 334:6, quoting from a responsa of Rav Palti Gaon (9th century).

[47] It is important to realize that Rabbi Isserless is not discussing the exclusion of the relative who assists in the disruption. Rather he permits the exclusion from the community of people who, if allowed to remain, will cause disruption through their mere presence.

[48] Until children reach adulthood, the primary obligation to circumcise is limited to the father; see *Shulchan Aruch Yoreh Deah*, 360:1.

per; if he sinned, what was her sin?"[49] Clearly this approach assumes that excommunication and shunning are a form of judicial punishment, subject to the general rules regulating the fairness and propriety of any punishment. This ruling is consistent with Rabbi Halavi's analysis, discussed above, which prohibited exclusion when the person will leave the community in retaliation. It is predicated on a judicial model of exclusion bound by the rules of punishment.

Rabbi Isserless, and those authorities who follow his view, simply assume that the normal rules regulating judicial punishment do not apply in the case of shunning and excommunication—not because on a practical level the innocent person is unhurt, but because on a philosophical level, exclusion is not punishment. Rabbi Hershel Schachter, agreeing with Rabbi Isserless's ruling, states that the one being shunned "would agree to obey the law, in the particular area which he is remiss, in order to afford his wife and children a proper religious environment. *Using the children as leverage is not to be confused with punishing them unjustly.*"[50]

The question is why is leverage not to be confused with punishment? Certainly the children or spouse would feel that they are—for all apparent purposes—being punished. Rabbi Schachter's point goes to the purpose of the shunning or excommunication, rather than to its apparent impact—to compel communal cohesiveness and to exclude people who prevent it. In a situation where shunning relatives would have no impact on the conduct of the principal and would not admit the person to the community, such conduct is prohibited.[51]

In summary, Jewish law has an institution called shunning and excommunication whose goal is to exclude from the community people who seek to dissent from central tenets of the community. However, it is not used as a form of punishment and does not have its origins in any judicial institutions. It is designed to encourage people to conform to communal norms or cease to be part of the religious sub-community.[52]

[49] Actually, he is quoting from the works of the Rabbi Shlomo Luria, *Yam Shel Shlomo*, a major scholar of Jewish law who lived two generations prior to Rabbi Halevi.

[50] Rabbi Hershel Schachter, "Synagogue Membership and School Admission," *Journal of Halacha and Contemporary Society* 12(50) (1986): 64 (emphasis added).

[51] Ibid.

[52] This raises the issue of recognized diversity within a particular religious faith. Within Judaism there are certain well-established differences of practice, custom, and law that are based on the historical separation and isolation of certain geographical groups. Thus, for example, there are Eastern European Jews, commonly called *Ashkenazim* and Oriental Jews, commonly called *Sefardim*; these two groups have their own customs, and frequently also their own laws, that govern many matters. There is a considerable body of literature discussing the establishment of practices within the community when the "community" is made up of members with different customs, traditions and laws.

Shunning: For What Offenses. Having established the legal basis for shunning and excommunication, it is now necessary to determine the offenses that merit such exclusion. As noted above, the theoretical Talmudic law is clear: "[O]ne who violates any prohibition may be shunned."[53] That is, however, only the beginning of the rule. One of the commentators immediately notes that this is limited to a situation where the person has already been formally warned that his public conduct violated Jewish law.[54] So, too, one may not excommunicate or shun a person who unintentionally violated Jewish law; indeed, one may not—Jewish law rules—shun a person who is aware of what the rule of law is, tries to observe it, and occasionally slips.[55]

The classical code lists specific offenses for which shunning is proper. All involve breaches of community discipline. For example, the classical code lists as one who ought to be shunned a person who denigrates a community scholar, or an agent of the Jewish court while he is doing his job, or a person who mocks—not who violates—one of the rules of Jewish law. Other offenses include desecration of God's name[56] or refusing to accept the jurisdiction of the Jewish court system.[57] Such offenses hinder

In a nutshell, Jewish law recognizes not only the right of a community to exclude people from the sub-society who are in deviation from the basic tenets of the community in violation of Jewish law, but also to compel members of a different recognized Jewish community to adhere to the norms of the majoritarian Jewish practice in the community where they reside. Thus, for example, a Jew of Eastern European descent who would normally follow the rites and laws of the *Ashkenazic* Jewish community must publicly follow the strictures of the Oriental (*Sefardic*) community were he to reside in such a community. Of course, Jewish law would recognize the right of this person to form his own community following the Ashkenazic rite when a mass of such people were present. However, the Jewish tradition clearly grants to the majority community the right to insist that all of the participants in its community adhere to the same public rites on significant issues—or leave the community to form its own religiously separate community (which is perfectly proper). It matters not at all whether the deviation from communal norm is one that is "historically legitimate" or not. For a recent Hebrew work on the issue of interactions between various communities in Israel, see Tal Doar, *Tal Amarti* (Jerusalem, 1992), 1-26.

[53] *Shulchan Aruch, Yoreh Deah*, 234:1.

[54] See comments of Rabbi Shabtai ben Meir Hacohen, *Seftai Cohen, Yoreh Deah*, 334:2.

[55] *Shulchan Aruch, Yoreh Deah* 334:38, and see comments of Rabbi David Halevi (*Taz*), n.18. The classical example of that is the case of a person who is aware that it is wrong to use God's name in vain, generally abstains from so doing, but occasionally in moments of frustration does so. Such a person cannot be excluded.

[56] *Yoreh Deah*, 334:43.

[57] A Jewish court would not order exclusion as an economic remedy for such a violation—indeed, it cannot. See *Shulchan Aruch Chosen Mishpat* 13. It would only order exclusion if the one who lost the case defied the court and declined to implement the economic remedy ordered by the Jewish court. In that case, exclusion might be ordered; it, however, is not an economic remedy, but rather a form of contempt of court, whose punishment bears no relationship to the underlining issues in the case.

the creation or maintenance of a community, and can destroy the community if not stopped.

The Jewish tradition thus differs significantly from various Christian practices of using shunning to enforce observance of the details of the law and to supervise the private conduct of its members. That was never its use in the Jewish tradition. Adultery, polytheism, Sabbath violations, ritual violations, and other central tenets of the faith, which were grounds for excommunication from the Christian community, were never subject to shunning by the Jewish tradition unless the person engaged in this conduct in a public manner intended to indicate defiance of the Jewish tradition.

The differences between Jewish and Christian views of shunning can be seen in cases brought before American courts by disgruntled excommunicants. While there are a wealth of American tort cases involving shunning and excommunication by various Christian denominations, these cases are categorically different from excommunication cases involving Jewish law. A brief summary of the allegations contained in these cases is itself worthwhile, as it highlights uses by different faiths of exclusion and excommunication. Of the reported American cases[58] that deal directly with a suit related to an excommunication or a shunning by a Christian denomination, four allege that a religious denomination publicized the sexual practices of one of its congregants or former congregants in the process of excommunication.[59] Four cases allege alienation of affection from spouses based on religiously-motivated abandonment because of one partner's lack of observance which resulted in excommunication.[60] Three cases allege that the church engaged in financial slander against a member when it publicized an alleged fiscal impropriety of the member in the process of excommunication.[61] Four cases allege financial

[58] As of September 1, 1994, on Westlaw.

[59] *Guinn*, 775 P. 2d at 775 (excommunication based on fornication); *Ventimiglia v. Sycamore View Church of Christ*, 1988 WL 119288 (Tenn. Ct. App. 1988) (excommunication resulting from adultery); *Hadnot v. Shaw*, 826 P.2d 978 (Okla., 1992) (excommunication based on fornication); *Synder v. Evangelical Orthodox Church*, 264 Cal. Rptr. 640, 216 Cal. App. 3d 297 (Cal. Ct. App. 1989) (excommunication based on adultery).

[60] *Hester v. Barnett*, 723 S.W.2d 544 (Miss. Ct. App. 1987) (alienation of affections suit resulting from excommunication ordered by pastor); *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) (alienation of affections suit resulting from excommunication ordered by denomination); *Radecki v. Schuckardt*, 361 N.E. 543 (Oh. Ct. App. 1976) (same); *Carrieri v. Bush*, 419 P.2d 132 (Wash. 1966) (alienation of affections suit resulting from excommunication ordered by church).

[61] *Molko v. Holy Spirit Association for the Unification of World Christianity*, 252 Cal.Rptr 122 46 Cal. 3d 1092, 762 P.2d 46 (1988) (allegation of financial fraud as the cause of an excommunication); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) (financial ruin resulting from allegation of fraud leading to excommunication); *Lide v. Whittington*, 573 S.W.2d 614 (Tex. Ct. App. 1978) (excommunication resulting from an allegation of business misconduct and slander).

claims relating to misappropriating church funds by church officials, resulting in excommunication by the one alleging the impropriety (or otherwise protesting a fiscal practice of the church).[62] Two cases deal with excommunications as a result of attempts to fire the pastor.[63] Only in one case does the plaintiff pose a general challenge to the practice of shunning without a specific allegation of impropriety.[64] The cases reflect both the routineness of the excommunication process in these denominations, and its general use as a method of governance in the community.

The only two American cases that discuss the Jewish excommunication process reflect the different interest associated with the Jewish use of excommunication. In one case, a member of a Chasidic Jewish community was suing the educational institution of his community alleging systemic corruption on the part of the institution against the government and various students.[65] He was excommunicated for bringing forth that violation.[66] The second case involved a witness in a grand jury proceeding who was set to testify against a Jewish institution, alleging systemic fraud by the institution. He wished to avoid testifying, based on the fact that he would be excommunicated if he did so.[67] Both of these cases raises the specter of "community issues" that go far beyond the question of the propriety of an individual person's conduct. These cases are typical of the issues that result in removal from the community. *Exclusion is not for the "garden variety" sin in the Jewish tradition.*

Indeed, the differing approaches to exclusion reflect a deeper difference concerning the more general issue of non-compliance with religious obligations by members of one's faith. How does a faith go about forming its own sub-community? Does it, as the Church of Christ does, seek only to have the already committed join the faith, and then use the proc-

[62] *Lozanoski v. Sarafin*, 485 N.E.2d 669 (Ind. App. 1985) (excommunication resulting from church financial dispute); *Macedonia Baptist Foundation v. Singleton*, 379 So.2d 269 (La. App. 1979) (excommunication resulting from inter-church dispute about fund-raising matters); *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 852 P.2d 640 (Mont. 1993) (allegation of fraud and breach of fiduciary duty leading to excommunication resulting from medical injury in a church building); *St. John's Greek Catholic Hungarian Russian Orthodox Church of Rahway v. Fedak*, 96 N.J.Super. 556, 233 A.2d 663 (N.J.Super. A.D. 1967) (excommunication resulting from property dispute in church).

[63] *Bowen v. Green*, 275 S.C. 431, 272 S.E.2d 433 (S.C. 1980) (excommunication resulting from attempt to fire pastor); *Bentley v. Shanks*, 48 Tenn.App. 512, 348 S.W.2d 900 (Tenn. App. 1960) (excommunication resulting from firing of pastor).

[64] *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987) (excommunication resulting from disfellowship of parents).

[65] *Grunwald*, 696 F. Supp. at 838.

[66] Ibid., 839.

[67] *In re Fuhrer*, 419 N.Y.S. 426 (1979).

ess of shunning and excommunication to enforce discipline among the already committed?[68] Or does it adopt the policy of the modern Catholic Church which automatically excommunicates for serious violations, and in addition, reserves the right to excommunicate for political or public defiance of the church.[69] Classical Judaism adopted neither of these policies. It excommunicated *only* for public violations of the law and only when these violations were designed to undermine the community or the ability to form a community. Thus, as a general matter, Jewish communities are made up of people of various levels of observance. Shunning and excommunication are not used as a method to encourage observance, but to exclude people from the community who did not accept and vocally disagreed with the communitarian tenets of the group.

Exclusion and Secular Law

The choices a religion makes concerning the exclusion policy it enforces affect the nature of the community that is formed. So too, does the secular law of the society it lives in. The next section of this article will address the impact of American, British, and Canadian law on Jewish (and, by comparison, other religious) doctrines concerning exclusion.

Exclusion and American Tort Law. Religious doctrines do not live in a vacuum. The way American tort law rewards or punishes certain behavior—including religious behavior—affects the frequency and form of the behavior. As the United States Court of Appeals for the Ninth Circuit put it: "Permitting prosecution of a cause of action in tort, while not criminalizing the conduct at issue, would make shunning an 'unlawful act.' Imposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings."[70] Jewish communities frequently confronted this issue in Eastern

[68] *Guinn*, 775 P.2d at 768-69.

[69] Thomas J. Green, "Future of Penal Law in the Church," *The Jurist* 35 (1975): 212-275. See generally, The National Conference of Catholic Bishops, *Resolution of National Conference of Catholic Bishops* (Washington, 1989) and Ari L. Goldman, "O'Connor Warns Politicians Risk Excommunication Over Abortion," *New York Times* (June 15, 1990): A1, B2 ("Catholics in public office must also have this commitment to serve the state; but service to God must always come first.").

[70] *Paul*, 819 F.2d at 877. There are a few examples of excommunications having unquestioned secular law consequences. One such case is *Borntrager v. Commissioner*, 58 T.C.M. (CCH) 1242 (1990) which involved the rights of an excommunicated member of the Old Order Amish to keep his religious exemption from Social Security benefits, taxes or even having a Social Security number. The court ruled that the statutory exemption of the Amish was at least in part based on the Amish community's self-sufficiency in caring for its members; since

Europe, whose governments generally outlawed the use of excommunication and shunning. Not surprisingly, when confronted with significant governmentally-imposed sanctions against this practice, the Jewish authorities ceased using exclusion as a method of community formation or maintenance.[71]

American cases on excommunication and shunning have raised two related issues: (1) may courts impose damages against religious communities for torts such as the intentional infliction of emotional distress that impose liability for a plaintiff's non-physical damages, such as alienation of affection or interference with a contractual relationship? or (2) do the First Amendment religion clauses immunize religious groups from such tort suits? These two doctrines are the counterbalances that form American tort law in this area.

The reader is entitled to one caveat. The religious parameters relating to excommunication and shunning differ from religion to religion. It is vitally important to grasp that these same terms mean drastically different forms of treatment towards shunned and excommunicated individuals depending on the faith group. For example, the Church of Scientology of California at one point—and perhaps still[72]—adopted a policy of "fair game" towards individuals who are excommunicated. One court described the doctrine as follows: "Under Scientology's 'fair game' policy, someone who threatened Scientology by leaving the church may be deprived of property or injured by any means by a Scientologist. . . . [The targeted defector] may be tricked, sued or lied to or destroyed."[73] The state interest in protecting an excluded member from such practices clearly is greater than the interest in protecting a person from the more common version of religious shunning, which the Ninth Circuit described as follows: "Members of the Jehovah's Witness community are prohibited—under threat of their own disfellowship [shunning]—from

not be assisted by the Amish communal welfare system should he need it, he is not entitled to social security exemption.

[71] For a Jewish law discussion of the issues raised by a governmental ban on excommunication, see Rabbi Yecheil Michael Epstein, *Aruch HaShulchan Yoreh Deah* 334 (preface and section 42) (Habokin, 1992). In my opinion, the material in the preface is not an authentic representation of the position of Jewish law, but was placed there for the purpose of permitting the publication of the work in response to censorship by the Czarist government. An examination of the *Aruch HaShulchan Choshen Mishpat* indicates that this was his method of speaking exclusively to the censor. His actual explanation for the legal basis for not using the power to exclude when prohibited by the secular government from using it, is found in *Yoreh Deah* 334:42, buried among other issues in a way that the censor, most likely not completely familiar with Hebrew, would not find.

[72] See *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 16 Cal. Rptr.2d 705 (Cal. Ct. App. 1993) which discusses the doctrine of "fair game" in some detail.

[73] *Wollershein v. Church of Scientology*, 212 Cal. App. 3rd; 260 Cal. Rptr. 331 (1989) (brackets are in the original opinion).

having any contact with disfellowshiped persons and may not even greet them. Family members who do not live in the same house may conduct necessary family business with disfellowshiped relatives but may not communicate with them on any other subject."[74] Indeed, this is similar to the manner a person would be treated if excluded from the Jewish community, which sought to punish only through the removal from the community.[75]

The numerous cases that address the problems of religious exclusion, shunning and excommunication apply one of three categories of legal rules. First, some courts hold as a matter of law that religious discipline can never be actionable when the disciplined member remains a member of the religious organization that is disciplining him or her.[76] In this theory, consent proves to be the underlying defense to allegations of tortious misconduct by a religious organization. Absent membership in the faith, or after withdrawal from membership, the activities of the church are no different from any other organization in terms of tort law treatment.[77]

The essential failure of this theory, in my opinion, is that it focuses on the status of the person being injured and misses one of the fundamental purposes of church discipline: to inform the faithful that a person's conduct violated the religion's tenets, and thus they have been excluded.[78] To allow lawsuits, particularly for the intentional infliction of emotional distress or similar torts for the use of this information (even after resignation), deprives the religious organization of its ability to standardize the conduct of its members by publicizing cases of exclusion. The community is formed by publicly establishing norms of conduct. Such cannot be done under this legal rule, since the moment a person resigns from the church, the church loses any ability to announce their exclusion.

Second, some courts have held that the "religiously motivated disciple is entitled to First Amendment Protection and cannot form the basis"[79] for a suit in tort.[80] These courts, including the United States Court of Appeals for the Ninth Circuit, rule that: "Because the practice of shunning is a part of the faith of [a religion], we find that the 'free exercise' provision of the United States Constitution . . . precludes the plaintiff from prevailing. The defendants have a constitutionally protected privilege to engage in the practice of shunning."[81]

The most significant failure of this approach is that it places outside the scope of governmental regulation potentially egregious conduct. Indeed, a very strong case can be made that the current interpretation of the First Amendment does not require that government immunize religion from tort laws that are generally applicable. Whatever the merits of *Employment Division v. Smith*[82] in the context of criminal law, one could see very significant problems developing were religions granted general tort law immunity for all conduct which is religiously directed or compelled.[83] Even limiting such an immunity to "intangible or emotional harm"[84] provides a level of immunity to a religious practice that would leave many uncomfortable and a license to injure enjoyed by no one else. Notwithstanding one commentator's endorsement of this "First Amend-

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[74] *Paul*, 819 F.2d at 877. The court went on to describe how such a person would be treated: "[A shunned person] visited her parents, who at that time lived in Soap Lake, Washington. There, she approached a Witness who had been a close childhood friend and was told by this person: 'I can't speak to you. You are disfellowshiped.' Similarly, in August 1984, [defendant] returned to the area of her former congregation. She tried to call on some of her friends. These people told Paul that she was to be treated as if she had been disfellowshiped and that they could not speak with her. At one point, she attempted to attend a Tupperware party at the home of a Witness. [Defendant] was informed by the Church members present that the Elders had instructed them not to speak with her."

[75] *Shulchan Aruch, Yoreh Deah* 334:2-11. Exclusion in the Catholic canon aw tradition contains within it a number of different levels of varying severity, none of which permit violence against the person. See Green, "Future of Penal Law in the Church."

[76] See *Guinn*, 775 P.2d at 767-69.

[77] See Comment, "Religious Torts: Applying the Consent Doctrine as Definitional Balancing," *University of California at Davis Law Review* 19 (1986): 949, 975-83 for a list of such cases. The earliest of the American cases defends this theory by stating: "[t]hey joined the church, with a knowledge of its defined powers, and as the civil power cannot interfere in matters of conscience, faith or discipline, they must submit to rebuke or excommunication, however unjust, by their adopted spiritual rulers." *Gartin v. Penick*, 68 Ky. (5 Bush) 110, 120 (Ct. App. 1869) (Robertson, J.), quoted in *Chase v. Cheney*, 58 Ill. 509, 539 (1871).

[78] Thus, in *Guinn*, the court held actionable the fact that: "Parishioner was publicly branded a fornicator when the scriptures she had violated were recited to the Collinsville Church of Christ congregation on October 4. As part of the disciplinary process the same information about Parishioner's transgressions was sent to four other area Church of Christ congregations to be read aloud during services." *Guinn*, 775 P. 2d at 768.

[79] Hayden, "Religiously Motivated Conduct," 642-43

[80] *Paul*, 819 F.2d at 875 and *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30 (D.D.C. 1990).

[81] *Paul*, 819 F.2d at 876. I have deleted the court's discussion of the constitutional law of the State of Washington.

[82] 494 U.S. 872 (1990).

[83] Indeed, the United States Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), which states that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" undercuts the whole validity of *Paul*, which compels a religiously motivated exception to a tort law doctrine. See Douglas Laycock, "The Remnants of Free Exercise," *Supreme Court Review* (1990): 45-46. However, the application of these principles to cases that call for the application of general tort law rules is quite unclear. Indeed, a claim could be made that *Smith* has overruled any dicta to the contrary which implies a heightened governmental deference to religious claims in the face of a neutral state law, such as its tort law. Of course, if tort law doctrines were specifically modified to prohibit a particular religious activity, that would lead to a much stronger First Amendment challenge; see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993).

[84] *Paul*, 819 F.2d at 883

ment" approach of complete immunity for religious organizations,[85] the fact remains that the granting of immunity in the face of religiously-motivated tortious conduct can produce profoundly negative consequences.

Third, some courts rule that shunning or excommunication can be—by itself—tortious conduct subject to liability. This theory assumes that the state interest in preventing shunning and excommunication is strong enough to allow state interference in all of these decisions. The first American case to adopt this posture, *Bear v. Reformed Mennonite Church* advanced this argument in its simplest form, arguing that the church's shunning practice[86] "may be an excessive interference within areas of 'paramount state concern,' i.e. the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth may have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment."[87] Other courts have also agreed with this basic approach, and ruled that shunning and excommunication are actionable conduct even when it is unaccompanied by any other activity.[88]

This approach has the potential to limit vastly the scope of religion's right to self-associate and exclude others. If in fact, as *Bear* rules, the Constitution provides no protection from tort law liability for interfering with a spousal relationship when a minister announces that associating with a particular person—even by that person's spouse—violated the rules of the Faith, tort law has accomplished what no other set of legal rules can do under the Constitution. It has prevented a Faith from announcing its opinion on the ethical conduct of a portion of society, even when the faith makes no attempts to coerce compliance with its doctrines or punish adherents of other faiths.

[85] Hayden, "Religiously Motivated Conduct," 653.

[86] The court earlier had described the practice as: "[T]he church and bishops, as part of the excommunication, ordered that all members of the church must 'shun' appellant in all business and social matters. ('Shunning,' as practiced by the church, involves total boycotting of appellant by other members of the church, including his wife and children, under pain that they themselves be excommunicated and shunned.)." Ibid.

[87] *Bear*, 341 A.2d at 105.

[88] *Van Schaick v. Church of Scientology*, 535 F.Supp. 1125 (D.Mass. 1982). This can also be implied from *Christofferson v. Church of Scientology*, 644 P.2d 577 (Or. Ct. App.), petition denied, 650 P.2d 928 (Or. 1982), which held that there was no liability, but implied that liability was possible, as a matter of law. This lack of protection can also be derived from a long line of cases that deny any First Amendment immunity to recruitment practices of faiths; see *Murphy v. I.S.K.Con. of New England, Inc.*, 571 N.E.2d 340 (Mass. 1991); *McNair v. Worldwide Church of God*, 242 Cal. Rptr. 823 (Ct. App. 1987); and *Molko v. Holy Spirit Ass'n*, 762 P.2d 46 (Cal. 1988).

Exclusion and the Financial Ramifications: The British and Canadian Approaches. A much more problematic case of exclusion, and the judicial response to it, occurs when the faith that is doing the excluding bundles religious rights with financial claims. A classical case of that is the division of property by a religious commune when it orders the excommunication of members, and the forfeiture of those members' property rights. There are no United States cases addressing this issue, for the Supreme Court has ruled that ecclesiastical disputes command secular court abstention if called upon to resolve matters of religious belief or governance. As stated in *Serbian Eastern Orthodox Diocese v. Milivojevich*: when "hierarchical religious organizations . . . establish their own rules and regulations for internal discipline and government, and . . . create tribunals for adjudicating disputes over these matters, [then the] . . . Constitution requires that civil courts accept their decisions as binding *upon them*."[89]

Such is not the case in many other common law countries, which will freely review such determinations. Indeed, an example of the problems faced by a court in such a case can be found in *Lakeside Colony of Hutterian Brethren v. Hofer*, issued by Canadian Supreme Court.[90] In this case, the Court confronted the excommunication (and expulsion) of the Hofer family from a colony of the Hutterian Church of Canada for pressing a patent claim against another colony of the Church. Under relevant Church doctrine, which was codified in the articles of incorporation of the commune, expelled members lost their financial claim to the asserts of the commune.[91] After reviewing the actions of the Church for conformity to Canadian corporate law and adherence to its own associational by-laws, the Supreme Court announced that expulsions from these types of religious associations are also governed by "natural justice." The Court stated: "The content of the principles of natural justice is flexible and depends on the circumstances in which the question arises. However, the most basic requirements are that of [1] notice; [2] opportunity to make

[89] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976) (emphasis added). While American courts will hear the fiscal aspect of these cases, they will not (and cannot) review, in any form, the ecclesiastical determinations. See also *Jones v. Wolf*, 443 U.S. 595 (1979).

[90] 97 D.L.R. 4th 17; 36 A.C.W.S. (3d) 512 (1992). This case in an appeal from the judgment of the Manitoba Court of Appeal, 77 D.L.R. (4th) 202, 70 Man. R. (2d) 191, 25 A.C.W.S. (3d) 2, dismissing an appeal from a judgment of Ferg J., 63 D.L.R. (4th) 473, 62 Man. R. (2d) 194, 18 A.C.W.S. (3d) 117, declaring that the defendants were no longer members of a Hutterian community and that there excommunication was valid.

[91] The legality of that contractual arrangement had been affirmed in *Hofer v. Hofer*, 13 D.L.R. (3d) 1 (1970). The dissent in this case indicates that this precedent is ripe to "revisit." Ibid., 64.

representations; and [3] an unbiased tribunal."[92] The Court then determined that the notice provided to the excommunicated members by the Church was insufficient and that the expulsion and excommunication were thus void. The Court ordered the excommunicated individuals returned to the colony as members.[93]

This Canadian approach to the problems of exclusion is no better, in my opinion, than its American counterparts. Under the guise of reviewing a property settlement, the court imposed substantive requirements of "natural justice" that might be completely foreign to any particular religious tradition's system of laws. Based on these laws of "natural justice," the Court will reverse a determination that a particular form of conduct merited excommunication from a particular religious denomination.[94] These types of judicial determinations should, simply put, be beyond the scope of any secular court. To allow procedural review of an ecclesiastical court's determinations in the context of the property rights of the excommunicated has a certain amount of validity, as that property ownership issue is at its core secular. However, the question of membership in the colony of the Church should be beyond review of a secular court. The rights of the faithful to excommunicate for violations of religious doctrine—without conforming to Canadian notions of due process—would seem to be protected. Any restrictions on that religious right should be incompatible with freedom of religion and association guaranteed in the Canadian Bill of Rights.[95] One cannot help but recall the words of the learned Zechariah Chafee who observed: "In very many instances the courts have interfered in these [ecclesiastical disputes], and consequently have been obliged to write very long opinions on questions which they could not well understand. The result has often been that the judicial review of the highest tribunal of the church is really an appeal

[92] Ibid., 36

[93] Ibid., 58.

[94] Indeed, the failures of this three-part test of natural justice is recognized in the Canadian Supreme Court's own discussion of the third prong of the test, the requirement of an unbiased tribunal. The Court stated: "There is no doubt that an unbiased tribunal is one of the central requirements of natural justice. However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question and, given the structure of a voluntary association, it is almost inevitable that the decision-makers will have at least an indirect interest in the question. Furthermore, the procedures set out in the rules of the association may often require that certain persons make certain kinds of decisions without allowing for an alternate procedure in the case of bias." Ibid., 37. These issues are even further compounded when the issues are theological in nature. Is it really possible to produce an "unbiased tribunal" to discuss an issue of theology?

[95] The dissent correctly noted that the proper way to resolve the property claims of the excommunicated would be for that group to make a claim "for a division of the assets and judgment for their share." Ibid., 63-64.

from a learned body to an unlearned body."[96] Such is certainly the case when a court reviews ecclesiastical determinations for conformity with the ethereal requirements of "natural justice."

A better example of how a court should address this type of challenge to exclusion can be found in the case of *Regent v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth (Ex parte Wachmann)*[97] concerning the authority of the Chief Rabbi of Great Britain to defrock a clergyman for sexual misconduct. The clergyman appealed the decision to the Queen's courts, which ruled that the ecclesiastical functions of the Chief Rabbi, in determining who was religiously fit and who was not, were religious in nature and thus not subject to any secular review. This is true, the Court ruled, even though the declaration on the unsuitability of the applicant to occupy a position as a rabbi resulted in the applicant being "unemployable as a rabbi and is stripped of all religious status."[98] The Court spurned the plaintiff's arguments from "natural justice": "[Plaintiff] would be prepared to rely solely upon the common law concept of natural justice [to overturn the decision of the Chief Rabbi]. But it would not always be easy to separate out procedural complaints from consideration of substantive principles of Jewish law which may underlie them."

Jewish law does not recognize the elaborate requirements of natural justice in these types of cases,[99] and the British Court rightly recognized that the exclusion of a person from a particular ecclesiastical function, or an exclusion of a person from a particular faith group, is itself not subject to any judicial review external to the faith that makes that determination.[100] Of course, as noted by the British Court, this determination of ecclesiastical exclusion by the Chief Rabbi would have no relevance to a determination of a breach of contract, or other financial rights and duties

[96] Zechariah Chafee, "The Internal Affairs of Associations Not For Profit," *Harvard Law Review* 43 (1930): 993, 1024.

[97] [1993] 2 All ER 249 (QB).

[98] Ibid., 253. This religious status granted him certain rights under British law, including the right to perform marriages.

[99] As there is no "right" to be a congregational rabbi.

[100] Indeed, the essence of plaintiff's claim was that the Chief Rabbi did not conform to the substantive requirements of Jewish law which, in plaintiff's opinion, require that this type of determination be made by three *dayanim*, sitting Jewish law judges, in the context of a formal *beit din*, a Jewish court, and not as an administrative determination by the Chief Rabbi. Ibid., 255. I am inclined to agree with the posture of the Chief Rabbi that such determinations need not be made by a formal *beit din*. The rationale for such an informal procedure is that a determination of actual sexual impropriety and the legal consequences of such conduct can only be made by a Jewish court. However, a rabbi can be defrocked by the much lower mere standard of appearance of impropriety (see Rabbi Moshe Isserless (*Rama*) *Choshen Mishpat*, 25:2), which is an administrative determination. One thing is clear, the British Court correctly realized that the proper standard to use is beyond the determination of the Queen's Bench

owed by one party to another.[101] Those determinations would be made by the secular courts, independent of the ecclesiastical rules of the Chief Rabbi.

The Value of Excluding. This author is inclined to look at the fundamental values encapsulated by the practices of religious discipline, and determine which of these central values are worthy of governmental protection, and limit the privilege to cases where those values are furthered. As noted, the Jewish tradition recognizes two possible theoretical models for religious discipline: punishment of the offender and formation of a community through exclusion.[102] The Jewish tradition opted for the second model as the jurisprudential basis for its practice of exclusion.

Of these two models, only the second is worthy of tort law immunity and First Amendment protection. Punishment of individuals for violations of the law (religious or otherwise) is to be left to the governmental authorities (and to God). Attempts by religious groups to use their many members or their economic might to punish people for violations should not be protected as a religious value. These are fundamental governmental prerogatives which should not, and may not, be delegated.[103] That is not, of course, to say that such conduct is always tortious; rather, as conduct by a religious group it should have no First Amendment protection. The assertion that a person who is punished by his former co-religionists for a violation of religious law is entitled to any less protection of his rights than others is difficult to support. In one case the court stated: "[Plaintiff] did not suffer his economic harm as an unintended byproduct of his former religionists' practice of refusing to socialize with him any more. Instead he was bankrupted by a campaign his former religionists carefully designed with the specific intent to bankrupt him. Nor was this campaign limited to means which are arguably legal such as refusing to continue working at Wollersheim's business or to purchase his services or products. *Instead the campaign featured a concerted practice of refusing to honor legal obligations . . . owed [plaintiff] for services and products they already had purchased.*"[104]

Religious conduct with the intent to punish—if protected by tort or criminal immunity—delegates to the sectarian community a core governmental authority. As noted by the Supreme Court: "At the time of the

[101] *Chief Rabbi*, 2 All ER, 255. In this case the Court seems to find that there was no employment contract, and thus no breach of secular law. Ibid., 255-256.

[102] Subsumed within this second justification is the possibility that the person will repent and wish to return to the community.

[103] See generally *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

[104] *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 890, 260 Cal. Rptr. 331, 343 (Cal. Ct. App. 1989).

Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control."[105] Laurence Tribe in his treatise on American constitutional law elaborates on this problem: "Even if a state ceded power to a church in a way that avoided any ongoing administrative entanglement, the action would be unconstitutional. . . . [Under] the vesting entanglement[106] test, breadth is irrelevant so long as the power remains a traditionally governmental one. . . . Thus, *any* degree of vesting entanglement —not merely excessive entanglement—is prohibited."[107] More generally, government has an interest in preventing religion from punishing people who leave it; absent such protection, the freedoms of the First Amendment appear vacuous. *The right of religious dissent is no less precious than the right of religious conformity.*[108]

In my opinion, a solid middle ground is implied in many of these cases. This middle ground provides a doctrinal basis for discussing secular legal responses to shunning and excommunication that neither protects religious rights to oppress those who scorn or violate the faith, and yet grants legal protection to a faith community's right to form its own insular sub-group and exclude people who violate the rules of the community.

The First Amendment should only protect the right of a faith community to exclude members; thus shunning, excommunication, and other methods of isolation are all protected only when they are used to exclude. However, claims based not on the need of the faith community to exclude, but on its need to convince the "unfaithful" to return, or to punish them for their violation, should be subject to scrutiny of tort and criminal law and enjoy no protection. This approach can be found implicitly in a number of cases, although this distinction is not found as the controlling rule in any single case. For example, in *Guinn*, the Supreme Court of Oklahoma, after ruling that the crucial feature in determining protected status is membership, goes on to note:

[105] *Larkin*, 459 U.S. at 126, n.10.

[106] Vesting entanglement is the term used for the problem that results when the government delegates its authority to an ecclesiastical group.

[107] Laurence Tribe, *American Constitutional Law*, 2d ed. (St. Paul, MN, 1988), 1229 (notes omitted, emphasis in original).

[108] This is consistent with Supreme Court precedent which has repeatedly declined to recognize "religious group rights" as a value higher than the aggregate of individual group rights. See *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). For an article arguing that "religious rights should be recognized as of a higher value", see Fredrick Gedicks, "Toward A Constitutional Jurisprudence of Religious Group Rights," *Wisconsin Law Review* (1989): 99.

> For purposes of First Amendment protection, religiously-motivated disciplinary measures that merely exclude a person from communion are vastly different from those which are designed to control and involve. A church clearly is constitutionally free to exclude people without first obtaining their consent. But the First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline.[109]

A similar result was reached in *Gruenwald v. Bornfreund*.[110] After discussing the protected status of a mere act of exclusion by any religious organization, the Court indicates that were the defendant to have proven that he would suffer "battery, trespass, or theft," or any other tortious act as a result of the excommunication or other conduct by a religious group, it would enjoin this conduct.[111]

The virtues of this "middle ground" approach are clear. First, religious adherents must have the right to form their own sub-society. While the melting pot may be some people's image of an ideal American society, the rights of those who do not wish to melt but wish to keep their own unique identity must be protected. These people have not only the right to avoid governmentally-compelled blending, but also to avoid the internal confusion of allowing multiple voices to speak in the name of its faith-group. However, granting religious groups unfettered rights to stifle internal dissent creates the possibility that religions will use that right to compel religious orthodoxy or adherence to its religious norms. Such action also is contrary to (at the least) the spirit of the First Amendment. Focusing on the purpose of the exclusionary act forces the courts—and thus eventually the faiths themselves—to ask why a particular person is being excluded.[112] Once a clear understanding of why people are excluded is articulated by each faith, tort law can grant or deny protection to those exclusions whose purpose is consistent with the protected First Amendment values of forming a religious sub-community.[113]

Second, this "middle ground" approach is superior in application to any of the three tests found in the various court opinions. It is simply more nuanced than either the blanket First Amendment protection granted by the *Paul* case or the generic non-protection advocated by the *Bear* case. Both of these cases appear to adopt standards that are too easily prone to abuse. *Bear* creates civil liability for core religious functions, and contains the capabilities of destroying any faith's exclusionary policies. Once one allows a civil action for alienation of affection when a minister advises a spouse to leave a marriage on religious grounds (as *Bear* does), there is little sacred religious advice that is not actionable in tort.[114] The potential to destroy religious communities is clear. *Paul* allows religious communities to persecute those who leave a faith. This simply cannot be tolerated in a free society. *Paul* also appears to allow, or at least could be read to allow, such practices as "fair game" or "freeloader debt" that can be used to prevent people from exercising their right to leave a religion and not be part of the community.[115]

More significantly, this test is superior to the more nuanced "consent test" advocated by *Guinn*. There are crucial problems with this test. Most significantly, *Guinn* allows people to be disciplined based on their apparent consent, when they join the Church. While this theory might have a certain amount of validity in a highly organized and well-disciplined church as was the case in *Guinn*, this test has little validity for the many faiths where synagogue or church membership is by no means a commitment to observance of the normative rules of the faith. To assert, for example, that mere membership in the Catholic church would give the local parish the right to publicize who is using a prohibited method of birth control, or membership in a synagogue would give the rabbi the

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[109] *Guinn*, 775 P.2d at 780.

[110] 696 F.Supp. at 839.

[111] Sifton states: "To the extent that the Weg affirmation alleges that plaintiff will suffer battery, trespass, or theft in the absence of a religious prohibition against those acts, plaintiff has failed to show that such injury is imminent or likely. The harm which will give rise to an injunction must be not remote and speculative but actual and imminent."

[112] This fits in well with the purpose of the Restatement also. Once the purpose of the excommunication is not to hurt or punish the person but simply to exclude him, the tort of intentional inflection of emotional distress is inapplicable. *Restatement (Second) of Torts* (1965): 46(1) now states: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

"There are three basic elements that must be shown in order to allow a recovery under this tort: (1) Defendant must have intended to inflict severe emotional distress; (2) The conduct must be 'extreme and outrageous'; (3) severe emotional distress must result."

A religion that announces a violation of its norms of conduct, without any intent to tell the faithful what conduct conforms to the norms of the faith—will never "intend to inflict severe emotional distress" and thus will never be liable under this tort. The purer the religious motives are, the less likely a recovery will be allowed.

[113] Of course, religions with unprotected motives will not likely announce their motives as such. However, once a legal test of purpose is announced, religious exclusion practices—whatever their "true" motives—will have to craft themselves around the fact that excommunication and shunning practices that appear designed to punish will probably not be granted tort law immunity. Eventually, such practices will cease.

[114] Thus, for example, there are situations where Jewish law encourages divorce; indeed, Jewish law categorically prohibits reconciliation in certain circumstances. Accepting the test used in *Bear*, one could easily conclude that a rabbi who informs a congregant of the position of Jewish law, and tells him that the Creator desires him to obey, is liable.

[115] Tribe correctly classifies these rights as "rights of religious autonomy." See Tribe, *American Constitutional Law*, 1154. The crucial insight is autonomy, and not coercion of others.

right to announce who does not keep kosher, misses the fact that these religions do not use membership as a litmus test of full observance. The *Guinn* court has taken a very specific rule of the Church of Christ and turned it into a general rule of law when it should not have.[116]

Moreover, the consent test allows the church to punish violators, even if they clearly do not wish to have that done against them. The whole notion of consent, even in a situation where the church uses membership as a litmus test of observance, is suspect. Thus, even in *Guinn*, it is clear from the facts of that case, that the woman did not wish to have information concerning her sexual life publicized to church members.[117] Whether she was or was not a member at the time of the publication, *it is clear that she did not consent* to be disciplined.

So, too, Professor Hayden's assertion, in defense of the consent rule, is debatable. Professor Hayden writes:

> A second related strength of the consent theory in this context derives from the nature of free exercise itself: individuals should be free to practice one religion or another, or none at all. When a person has chosen one organized belief structure, he should be held to it until he chooses to withdraw, and therefore he should not be able to sue his fellow members for disciplining him in accordance with church doctrine and policy. As soon as that person chooses to leave one religion, however, either to join another or to join none at all, the government has an interest in the individual's free exercise of that choice to leave.[118]

Why should the government allow religions that have organized belief structures to punish people who wish to belong to the faith, and yet violate its rules? It makes more sense to limit the faith's rights to actions which exclude these people and not actions designed to punish them. Carried to its logical conclusion, Professor Hayden's analysis would permit even physical disciplining of members, and not limit immunity to the tort of "intentional inflection of emotional distress" but to such crimes as assault. It is clear that the consent obtained is not genuine.

The consent doctrine, in short, is at best a narrow doctrine suitable for only select faiths, and at worst a fiction that allows religions to publicize private details of people lives against their will. This problem clearly comes to the fore when one examines the difficulties later cases have had in applying the test developed in *Guinn*.[119]

[116] A modified version of the *Guinn* test can be found in Comment, "Religious Torts," 975-83, which argues that membership in a religious faith creates a rebuttable presumption that one consents to the faith's rules. The problem is that this consent is simply untrue when it comes to religious discipline. People rarely if ever consent to public humiliation. Particularly in situations where the one being punished by the faith employs a lawyer to deter the faith's activity, the "consent through membership" doctrine is simply inapplicable.

[117] For example, see *Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Ct. App. 1989) which rules that all discipline is in fact non-consensual.

[118] Hayden, "Religiously Motivated Conduct," 651.

The same values that would seem to preclude most damage awards for excommunication and shunning in tort law would prevent judicial review of the merits of excommunication through the guise of resolving a property law dispute. The approach of the Canadian Supreme Court in *Lakeside Colony of Hutterian Brethren*, which allows for judicial review of orders of expulsion and exclusion to ensure their conformity with natural justice would seem to be unwise, for it evaluates the "correctness" of what are core theological determinations when these same factors can be avoided and the property law dispute be resolved independent of a merit determination of the correctness of the faith's exclusion. A better rule would be either to adopt the American approach enunciated in *Milivojevich* which mandates complete abstention, or the British approach in *Chief Rabbi* which allows formally for review, but with a completely deferential standard of review.

This chapter started with a Jewish perspective on shunning and excommunication, and it argues that Jewish law in this area is respectful of both minority and majority rights and gives each the ability to form its own exclusive community. The common law of torts and constitutional law should aim to do the same. The goals of such doctrines and practices should be to allow the formation of self-selected sub-communities sharing common religious values, which are protected in their right to exclude, but prevented from harassing in the name of religion. The law must reflect both of these goals, and it currently does not.

Conclusions

Painting with a broad brush, certain conclusions can be drawn as to the nature of shunning, excommunication, and other exclusionary practices devised by Jewish and other religious communities to allow them to form a sub-community within modern secular society.

Many religious communities cannot be fully open to any and all conduct by its members. Jewish communities established a mechanism and procedure for the exclusion of members of the faith who reject basic tenets of the community or faith. Such mechanisms include partial shun-

[119] For example, in *Hadnot v. Shaw*, 826 P.2d 978, (Okla. 1992), the Oklahoma Supreme Court had to address the issue of constructive withdrawal and implied consent. Indeed, it appears that the court allowed post-withdrawal action needed to re-enforce discipline under some form of a consent theory, even when it was clear that the disciplined individuals considered themselves free from the religious dictates of the church, and did everything except actually send in a letter of withdrawal.

ning, complete shunning, and in rare situations, excommunication. Others faiths uses comparable processes in different ways to shape their communities. These mechanisms of exclusion should be allowed to affect only people who wish to remain part of the religious sect that issued the shunning. People should be free to leave the faith group and avoid the penalty.

Government has a regulatory interest in governing these religious—and all other—collective groups that engage in activity designed to exclude people from a particular benefit. Government is (or should be) precluded on various freedom of religion grounds, however, from regulating purely ecclesiastical or faith matters.[120] These grounds should also be understood as precluding the government from preventing faith groups from forming their own special sub-communities, which excludes based on religious criteria. In that way, religious groups are entitled to more protection than mere commercial enterprises.[121]

The right to religious exclusion cannot, however, rise to the level of implicit (or explicit) coercion to religious conformity. This issue was clearly noted in a discussion within Jewish law concerning coercion, and minority rights. Writing in the early 1600s, Rabbi Shabtai ben Meir Ha-Cohen protested against a particular form of shunning and asserted that in the social framework of Eastern Europe in the seventeenth century it is tantamount to coercion and should not be allowed.[122] Essentially, he stated that in an insular and thoroughly intertwined Jewish community, which was the norm in the pre-emancipation communities of Eastern Europe, shunning was a form of compulsion and was thus only permitted when actual physical force was legally permitted according to Jewish law. Absent continuous interaction with the community, a single person who wishes to rebel would perish. Shunning was coercion in that social setting. In such a society, religious minority rights disappear if even low level exclusion is allowed, and government must interfere to protect people's freedom of religion.

Such an intertwined society does not exist in America and other democratic polities. Shunning and excommunication as practiced by

[120] *Milivojevich*, 426 U.S. at 724-25.

[121] Thus, for example, government clearly can prevent a non-denominational social club from limiting, based on religious faith, its membership. A religious social club should have that right. See *New York State Club Association, Inc., v. City of New York*, 487 U.S. 1 (1988).

[122] Rabbi Shabtai ben Meir Hachohen, *Gevurat Anashim* 72 cited in *Pitchei Teshuva Even Haezar*, 154:30 (Gush Etzion, 1990). Many commentaries on the *Shulchan Aruch* other than *Pitchei Teshuva* express dissent to *Gevurat Anashim's* rule. See *Aruch Hashulchan, Even Haezer* 154:63; *Maharam M'Lublin* 1 and 39 (Jerusalem, 1960), *Eliyahu Rabbah* 1-3; *Rav Betzalel Ashkenazi* 6 and 10; Chief Rabbi Yitzchak Isaac Halevi Herzog, *Techuka Liyisrael Al Pi Hatorah* III:202 and 209).

many faiths, including Judaism, are no longer designed to compel or force observance by the shunned one. The pressures imposed will no longer prevent a person from functioning or cause him or her to starve. Rather the process of shunning and excommunication creates a choice. It forces people to decide in which society they wish to reside. Only coercion to choose is involved. It does not, in its modern form, actually compel any particular activity. Just as a person has the right to remove himself or herself from a particular religious society, that society has a right to remove itself from him or her. Minority rights in the context of religious freedom has to include the right to leave a sect. It does not, however, include the right to remain part of a group, while defying that group's wishes.

Ultimately, religious freedom has to include the right to choose and to form one's own co-religionists and religious community members. This is the best protection government can give to religious minorities and still maintain a freedom of religion.