Freedom of Disassociation and Religious Communities: A Jewish Model for Associational Rights

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Abstract

*"Freedom of association" as a right is a misnomer. Really, the right is about the "freedom of **disassociation**," and the right of one group to exclude individuals from the circle of its community or association. Granting the right to form a group, without granting the right of that same group to exclude others from the group, is a worthless right. Indeed, the proper contours of associational rights have been a significant problem in all democracies, as has been well demonstrated by the recent United States Supreme Court five to four decision in Boy Scouts of American v Dale (530 U.S 640 2000) -- deciding when a group has the right to exclude others remains a deeply deeply dividing issue in society. What makes these rights so problematic is that (unlike other rights) they involve an act of exclusion or expulsion towards another. In that sense the exercise of this right more directly impinges on other people's rights than for example, religious freedom rights or free speech rights.*

The first section of this paper will focus on the legal process Jewish law uses to form communities and to exclude people from its community.[2] It will address the legal basis within Jewish law for the power to shun or excommunicate people and the goals of such a practice. It will then discuss the problems raised (internal to Jewish law) through the use of excommunication and shunning in a modern secular community where one's primary means of self-classification is not normally through religion.

This paper will then address modern American, British and Canadian law responses to various religions excluding people from their sub-communities. A complete review of the problems posed in tort law will be provided, as well as recommendations for modification of tort law doctrines to allow for greater religious freedom to reinforce religious community values.

The conclusion to this article notes that associational rights allowing the formation of religious sub-communities is not only fundamental to the ways in

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2. Classically, this is known as shunning and excommunication. The term "excommunication" has its origins in the exclusion of a person from the Christian right of communion, and thus, the term is not itself of Jewish origins; See "Excommunication," *Encyclopedia of Religion* 5, Mircea Eliade ed.(1987): 218. Notwithstanding its origins, it has become the accepted term to use to refer to this status; for a discussion of the origins of the uniquely Hebrew terms.

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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.

I. Jewish Law on Disassociating

Classical Jewish law offers a broad variety of penalties for those who violate the law. The Bible has four different types of death penalties[1] for a variety of offenses, some of which one could hardly describe as "criminal.[2]" Generally, those offenses for which death is not the prescribed punishment, were punished by whipping according to Jewish law.[3] A small number were punished by *karet*, a divinely mandated punishment which humans had no hand in, and some violations were not punished at all.[4] 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.[5] So too, a Jewish court had available the *kipah*, a (sort of) Jewish version of "three strikes and your out," where a person who was a repeat offender could be (informally) killed if he violated the law with impunity.[6]

All this is no more. Jewish law has not had the judicial authority to punish people in any of the manners described above for nearly two thousand years.[7] Indeed, Jewish law has functioned for the past two

1. Stoning, burning, slaying and strangling; see Deuteronomy 17:17; Leviticus 10:2; and Deuteronomy 13:16.
2. See Maimonides, *Sanhedren* 14:1 and 15:3 who lists the 36 different offenses for which there is a death penalty.
3. See for example, Maimonides, *Sanhedren* 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.
4. Maimonides, *Sanhedren* 18:1-3.
5. See Rabbi Chezkeya Demedina, *Sedai Chemed* 4:287-288 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.
6. *Sanhedren* 81b. This penalty is also inapplicable in modern times.
7. Formal jurisdiction ended forty years prior to the destruction of the Second temple; Sanhedren 41a. While perhaps some sort of criminal jurisdiction might have been granted to the Jewish community in Spain in the 1300's 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* (Jerusalem 1974): 529.

millennia with only two real jurisdictional bases to punish violations: the "pursuer" jurisdictional grant, and excommunication or shunning.[1] The pursuer rationale (in hebrew: *rodef*) is the jurisdictional source of power for a Jewish court or community to intervene[2] to prevent a murder or other forms of physical harm.[3] That area of Jewish law is widely known and much written about,[4] and irrelevant to the formation of a sub-society in modern times, as the class of 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 within secular society and its organs of government. Thus the normal response -- even in a very insular, fastidiously observant, Jewish society -- to a murder would be to call the police.

This paper concerns itself with the remaining power Jewish courts are left with to address the routine problems involved in formation of a sub-society -- the right of disassocation through excluding people from the sub-society, typically through excommunication and shunning.[5] The ability to form a sub-community, and to exclude people from that

1. 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; for more on this, see H. Ben-Menahem, *Judicial Deviation in Talmudic Law*, (Boston University, 1991). Essentially complete civil jurisdiction is still part of Jewish law, and is beyond the scope of this paper.
2. By force if need be, and even if that use of force violates the rules of the host country.
3. Thus, for example, if one saw "A" going to murder "B" in Atlanta, Georgia, Jewish law would allow one to kill "A" to stop the murder 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.
4. For more on this area, see "Self-Defense and Defense of Others in Jewish Law: The Rodef Defense," Wayne State Law Review, 33:1257 (1987).
5. Actually 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" forthcoming, *Jewish Law Annual*. Thus, as will be shown later in this paper, 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.

community is a power that can frequently 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 disassociation with a person whose conduct is not in full compliance with the ethical dictates of Jewish society. The Supreme Rabbinical Court in Israel (an authorized court of the government) 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.[1] The court states:

> In the appeal[2] which was presented before us on January 7, 1985, the court did not find sufficient cause to compel[3] 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.[4] 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 response, we instituted the separations of Rabbenu Tam as found in the Sefer HaYashar (*Chelek HaTeshuvot* §24) which states that 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

1. 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 51:312 (1992).
2. For a discussion of the appellate process in Jewish law, see Eliav Shochetman, *Civil Procedure in Jewish Law* (Jewish Law Institute, 1994): 443-71.
3. 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, the grounds for such an order are few and far between, and essentially limited to adultery or serious marital misconduct. Alternatively, it 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.
4. Jewish courts, unlike common law courts, not only decide cases, but give moral advice based on the teachings of Jewish law and ethics; for more on this, see Menachem Elon, *Jewish Law: History Sources, Principles IV* (Jewish Publication Society 1994): 1863-71.

> drink, to accompany him 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.[1]

This case involved the use of the communal sanction of mild disassociaiton to encourage a person who wished to be part of the religious community in Israel[2] 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 only can disassociate from people who want to associate with you, but whom you do not wish to associate with.

One should not think that such methods of persuasion occur only in Israel. For example, in the case of *Grunwald v. Bornfreund*[3] the plaintiff sought an injunction from the Federal 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.[4]

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1. 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, *Yabi'a Omer*, VII:23 (Even HaEzer) and Rabbi Eliezer Waldenberg, *Tzitz Eliezer*, 17:53.
2. 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 . . . (emphasis added)
3. 696 F.Supp. 838, (E.D.N.Y 1988).
4. 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. 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. As noted infra at page , the Jewish tradition simply excluded people when excommunication was ordered. No other penalty should be imposed.

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, exactly for the sam reason that the Boy Scounts of America excluded Dale from their organization.[1]

Three different issues must be addressed, each of which is central to the question of why and how Jewish law exclude people from its religious sub-community:

> 1) The functioning of the power to exclude in Jewish law;
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> 2) The balance developed in Jewish law between the right to form a community of like- minded people and the right of those who wish to deviate from the practice of society;

and finally

> 3) The insistence of American and Canadian constitutional law that civil and criminal authority not be given to insular religious groups to be used by those groups to control its members and prevent religious deviation -- and how Jewish law responds to that directive.

The Talmud discusses the legal rules related to shunning in some detail;[2] as time passed the legal rules have grown in detail and purpose.[3] One over-arching theme emerges from a review of the legal discussion: unlike the many forms of punishment found in classical Jewish law, the purpose of the exclusion process was 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.[4]

Any analysis of the rules relating to excluding people from the Jewish community, immediately draws one to two major issues constantly raised in the Jewish law discussion of disassociation. These two issues

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1. Supra note . Even a brief review of the literature indicates that such practices are common to many faiths; see for example, "Excommunication", *supra* note , which discusses briefly the practices of many different faiths and text accompanying note , note , and note .
2. Babylonian Talmud *Mo'ed Katan* 14b-17b.
3. 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, 1300's) 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; *Responsa of Asher* 17:1; *Responsa of Yehuda ben Asher* 75.
4. See generally, Elon, "Penal Law," *Principles of Jewish Law*, (Jerusalem, 1974): 469-475.

demonstrate the purpose of exclusion:

> 1) 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?[1]

and

> 2) 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 paper: When should a community exercise its right of disassociation, and what should be the response of the legal community to exercising these rights?

The problem of excluding people from the community when they will abandon religious observance in response to such treatment is part of a very important discussion as to whom Jewish law is seeking to deter through the process of disassociation. 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 the latter, then that factor is not relevant. Indeed, this discussion reflects the ultimate reality concerning all such cases: in modern times and democratic countries, the penalty of exclusion only works on the one being shunned if he or she desires the approbation of the faith that is excluding him.

This fact itself reflects a profound historical change in the purpose of excluding people from the community. In other historical eras, it has been remarked that: "it is said that a person on whom an excommunication ban lies can be regarded as dead."[2] Indeed, flogging was perceived as a more merciful punishment than excommunication in classical Jewish law.[3] In a closed and tightly knit community, surrounded by a generally hostile society, exclusion from the Jewish community was a very severe penalty.

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1. 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 premiere 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.
2. Elon, *Principles of Jewish Law*, 543.
3. Jacob ben Asher, *Tur Yoreh Deah* 334.

Due to its severity, many classical Jewish law authorities simply would not shun or excommunicate under any circumstances.[1] 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.[2]

Particularly in our modern society, a person who is shunned can simply leave the community and join a different community adhering to different religious principles.[3]

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1. See Rabbi Jacob Moellin, *Minhagai Maharil*, 34.
2. Haim Cohen, writing in 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* §36.
   This author is inclined to disagree with Cohen's thesis as to the cause of the current penalties ineffectiveness. While Cohen appears to maintain that the penalty became ineffective because of overuse by the "extreme Orthodox," this author is 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.
3. The basic difference between shunning when there is no option to leave and shunning when there is, is well demonstrated in recent times by Utah's history. There were numerous attempts to exclude non-Mormons from the economic development of Utah from 1855 to 1870. The Utah Supreme Court recently summarized one such incident as follows:
   Economics, in particular, became a crucial issue following the organization of Zion's Cooperative Mercantile Institution ("ZCMI"). ZCMI was designed to be "the sole merchandising facility for members of the Mormon Church wherever their number was large enough to justify a branch." *Mormon merchants could either join ZCMI or leave the territory and the Mormon Church. As Brigham Young said regarding those Mormons who did not join the cooperative, "[W]e shall leave them out in the cold, the same as the gentiles [non-Mormons], and their goods shall rot upon their shelves." To the non-Mormon merchants, the cooperative was a threat to their very existence.* As feared, ZCMI was a success from the outset with its opening followed by a sharp decline in the sales for non-Mormon and noncooperating Mormon merchants. In response, non-Mormons and excommunicated Mormons known as the "Godbeites" formed a temporary alliance resulting in the establishment of the Liberal Party in 1870.
   Society of Separationists, Inc v. Whitehead, 870 P.2d 916, 925 (Utah, 1993) (citations and footnotes omitted, emphasis added).Once those who were excommunicated organized themselves to form an independent economic unit that was self-sufficient, the threat of excommunication became much less powerful. Id.

Rabbi Moses Isserless, one of the codifiers of Jewish law, writing in his glosses on Shulchan Aruch,[1] 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].

The rationale for this is explained clearly by later authorities. The purpose of the disassociating 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.[2] 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 disassociating 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.[3] Not unexpectedly, the vast majority of civil suits related to excommunication involved people who have left the faith community in response to their exclusion.[4]

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

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1. *Yoreh Deah* 334:1.
2. See comments of Rabbi Shabtai ben Meir Hacohen, *Nekudat Hakesef*, 334:1; Rabbi Yair Bachrach, *Responsa Chavat Yair*, 141; Rabbi Yakov Emden, *Responsa Yavetz*, 1:79; Rabbi Avraham Yitzchak Kook, Da'at Cohen, *Yoreh Deah* 194; Rabbi Moses Feinstein, *Iggrot Moshe Yoreh Deah*, 1:53, OC 2:33; Rabbi Yizchak Isaac Herzog, *Hechal Yitzchak OC*, 30(3) and Pitchai Teshuva commenting on *Yoreh Deah*, 334(1).
3. 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).
4. See section IV.

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.[1] 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,[2] in fact, that is not how and why exclusion is used. Exclusion, these authorities state, is used as a deterrence, to 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.[3]

It is important to note one other factor. 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.[4] 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.[5] Thus, in modern times vast numbers of

1. Commenting on *Yoreh Deah*, 334:1.
2. Indeed, this is quite clearly stated in *Shulchan Aruch Yoreh Deah* 334:1. See also section III of this paper.
3. See sources cited in note . Indeed, this remark is part of a broader posture of modern Jewish law that the punishment of criminals for any reason other deterrence of future crime is no longer within the jurisdiction of Jewish law. Just like 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.
4. For more on this, see *infra*, at section IV.
5. See *Shulchan Aruch*, 334:12 and commentaries ad locum; see also comments of Nekudat HaKessef on *Taz Yoreh Deah*, 334(1).

Jews are distant from any version of traditional Judaism, happy with that status, and yet are not under any decree of excommunication;[1] the few who are excluded, appear to be people who are deeply insiders within the faith but yet are actively dissenting.[2]

Other religions adopt similar postures regarding who should be excommunicated. For example:

> The Church [Jehovah's Witnesses] has four basic categories of membership, non-membership or former membership status; they are: members, non-members, disfellowshiped persons, and disassociated persons. "Disfellowshiped persons" are former members who have been excommunicated from the Church. *One consequence of disfellowship is "shunning," a form of ostracism*. Members of the Jehovah's Witness community are prohibited -- under threat of their own disfellowship -- from having any contact with disfellowshiped persons and may not even greet them... . "Disassociated persons" are former members who have voluntarily left the Jehovah's Witness faith... . disassociated persons were to be treated in the same manner as the disfellowshiped.[3]

The status of "non-member" is considerably better as a matter of legal status than that of one who joins and is expelled or wishes to leave, at the

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1. 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 & S. DellaPergola, eds., *Jewish Education Worldwide: Cross Cultural Perspectives*, (University of America Press, 1989): 43, 55.
2. 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.
3. *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875, 876-877 (9th Cir, 1987). In fact, the status of disassociated persons has changed within the ecclesiastical law governing Jehovah's Witnesses. Initially, such people were viewed as non-members. However, in 1981 the church effectively changed the status of such people from identical to "non-members" to identical to disfellowed members. id. Other faiths have similar rules. Amish society has clear rules of shunning called *meidung*.
   Meidung requires that members receive no favors from the excommunicated person, that they do not buy from or sell to an excommunicated person, that no member shall eat at the same table with an excommunicated person, and if the case involves husband or wife, they are to suspend their usual marital relations.
   J. Hostetler, *Amish Society*, (1963): 63.
   See also *Quiner v. Quiner*, 59 Cal. Rptr. 503, (Ct. App. 1967) (exclusion as practiced by the Plymouth Brethren); *In re Marriage of Hadeen*, 619 P.2d 374 (1980) (exclusion as practiced by the First Community Church).

very least in terms of the need to shun this person.[1] This is consistent with the essential purpose of shunning and excommunication in the Jewish tradition: to establish a religious community. Non-members do not disrupt such a community: dissenters do.[2]

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.[3]) Thus, the question is, whether shunning really is 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 violators 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.[4]

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

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1. 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 a person to bring them closer to the faith; certainly such people cannot be shunned. For more on this see Maimonides, *Mamrim*, 3:3 and Rabbi Abraham Isaiah Karletz, *Chazon Ish Yoreh Deah*, 1(6), 2(160) and 2(28).
   Such is, by no means, the posture of all faiths. In modern Cannon law there are a number of violations that result in immediate excommunication from the Church independent of the seriousness, the public nature of the offence or the status of the sinner. Included in that category is performing or allowing to have performed on oneself an abortion; see "Excommunication," *supra* note . In such a system the role of excommunication is clearly different. For more on this, see section IV.
2. 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.
3. Deuteronomy 24:16.
4. *Yoreh Deah*, 334:6, quoting from a responsa of Rav Palti Gaon (9th century).

prevent the formation of the community.[1] 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."

By no means, however, is this 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;[2] 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 improper; **If he sinned, what was her sin?**[3]

Clearly this approach assumes that the use of excommunication and shunning is a form of judicial punishment, subject to the general rules regulating the fairness and propriety of any given punishment. Indeed, this ruling by Rabbi Halevi is consistent with his analysis, discussed above, which prohibited exclusion when the person will leave the community in retaliation.[4] 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 not hurt, but because on a philosophical level, exclusion is not punishment. Such an approach is recounted in a recent article by Rabbi Hershel Schachter, where he agrees with Rabbi Isserless's ruling. He states:

> He [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**

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1. It is important to realize that Rabbi Isserless in 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.
2. Until children reach adulthood, the primary obligation to circumcise is limited to the father; see *Shulchan Aruch Yoreh Deah* 360:1.
3. 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.
4. See text accompanying note .

children as leverage is not to be confused with punishing them unjustly.[1]

The question is why is leverage not to be confused with punishment? Certainly from the perspective of the children or spouse, they are -- for all apparent purposes -- being punished. The point that is being made goes to the purpose of the shunning or excommunication, rather than its apparent impact. The purpose is 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 *de facto* admit the person to the community, such conduct is prohibited.[2]

In summary, Jewish law has an institution called shunning and excommunication whose goal is to exclude people from the community 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-society.

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 laws, that govern many matters in their society. There is quite a literature discussing the establishment of practices within the community when the "community" is made up of members with different customs, traditions and laws. 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 follows the strictures of the Oriental (*Sefardic*) community were he to reside in such a community. Of course, Jewish law

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

2. See Schachter, *supra* note .

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.[1]

This section demonstrates that associational rights were used primarily to create communal unity. In the next section, further proof is adduced to that proposition by a review of the grounds found in Jewish law to exclude. It will be shown that the types of violations that exclusion was warranted for are those that relate to community formation. It was not the seriousness of the offense that determined whether one was excluded; it was the communal effect.

II. Shunning: For What Offenses

Having established the legal basis for shunning and excommunication, it is now necessary to determine for what one is shunned.[2] As noted above, the theoretical talmudic law is clear: "one who violates any prohibition may be shunned.[3]" 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.[4] 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.[5]

The classical code lists specific offenses that shunning is proper for, and the major characteristic for these violations is not their seriousness, or their

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1. For a recent Hebrew work on the issue of interactions between various communities in Israel, see Tal Doar, *Tal Amarti*, (**Jerusalem**, 1992): 1-26.
2. This article will not discuss the technical due process procedural issues involved in issuing a decree of excommunication according to Jewish law. Suffice it to say that many safeguards are in place; see "Cherem", *Encyclopedia Talmudic*, *supra* note .
3. *Shulchan Aruch Yoreh Deah*, 234:1.
4. See comments of Rabbi Shabtai ben Meir Hacohen, "Seftai Cohen", *Yoreh Deah*, 334:2.
5. *Shulchan Aruch Yoreh Deah* 334:38 and see comments of Rabbi David Halevi (*Taz*) at 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.

religious importance; rather it is their breach of community discipline. Thus, for example, the classical code lists as one who ought to be shunned one 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 declining to accept the jurisdiction of the Jewish court system[1] to resolve disputes with members of the community, and conduct which desecrates God's name.[2] Each of these offenses (as well as all the others listed in Shulchan Aruch) share the central characteristic that they are violations that appear to hinder the creation or maintenance of a community, and which can destroy the community if not stopped.

In this significant way the Jewish tradition differs much with the classical fundamentalist Christian and Mormon practice of using shunning to enforce observance of the details of the law and to supervise the private conduct of its members.[3] That was never its use in the Jewish tradition. Adultery, polytheism, sabbath violations, ritual violations and other central tenets of the faith 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.

Thus, 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 cases[4] that deal directly with a suit related to an excommunication or a shunning by a

1. Professor Jessica Litman of Wayne State University School of Law questioned whether the principles of this paper are genuinely applicable to a case of exclusion when the exclusion is ordered by a Jewish court for an economic violation, such as violating a non-competition agreement. I initially responded that the rules of this paper where not applicable, but upon reflection I realize that my initial response is incorrect. A Jewish court would not order exclusion as an economic remedy for such a violation -- indeed, it cannot; see *Shulchan Aruch* CM 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. With that relaxation in mind, exclusion remains the proper remedy for defiance of judicial process.
2. *Yoreh Deah* 334:43.
3. See note for a discussion of Mormon practice and note for a discussion of Church of Christ practice.
4. As of August 1, 2000.

Christian denomination, five allege that a religious denomination publicized the sexual practices of one of its congregants or former congregants in the process of excommunication,[1] four allege alienation of affection from spouses based on religiously motivated abandonment because of one partner's lack of observance which resulted in excommunication,[2] four 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;[3] four allege financial 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).[4] Four are excommunications as a result of attempts to fire the pastor.[5]

1. *Ventimiglia v. Sycamore View Church of Christ*, 1988 WL 119288, (Tenn. Ct. App., 1988) (excommunication resulting from adultery); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Ok. 1989) (excommunication based on fornication); *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 (CA Ct. App. 1989) (excommunication based on adultery); *Smith v. Calvary Christian Church*, 592 N.W. 2d 713 (MI, Ct. App., 1999) (excommunication based on adultery);
2. *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).
3. *Molko v. Holy Spirit Association for the Unification of World Christianity* 252 Cal.Rptr 122 46 Cal. 3d 1092, 762 P.2d 46 (Cal., 1988) (allegation of financial fraud as the cause of an excommunication); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (Pa., 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); *Marks v. Hartgerink*, 528 N.W. 2d 539 (Iowa, 1995) (same).
4. *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).
5. *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); *Decker v. Tschetter Hutterian Brethren*, 594 N.W. 2d 357 (South Dakota, 1999) (same); Korean Presbyterian Church of Seattle v. Lee, 880 P.2d 565 (Ct. App., Washington, 1994) (same)

Only one is a general challenge to the practice of shunning without a specific allegation of impropriety.[1] Each of the cases reflects the routineness of the excommunication process in these denominations, and how it is a method of governance of the community. Only one case reflect communitarian issues.[2]

Only two reported cases in the American legal system discuss the Jewish excommunication process, and both of them reflect the different interest associated with the Jewish use of excommunication. In one case, a member of a Chasidic Jewish community was suing (under RICO) the educational institution of his community alleging a fundamental systemic pattern of corruption on the part of the institution against the government and various students.[3] He was excommunicated for bringing forth that violation.[4] 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 so did.[5] 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 on shunning reflects 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 process of disassociation to enforce discipline among the already committed?[6] 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

1. *Paul v. Watchtower Bible and Tract Soc. of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987, (excommunication resulting from disfellowship of parents).
2. *O'Connor v. Diocese of Honnolulu*, 885 P.2d 361 (Hawaii, 1994) (excommunication of newspaper editor for views published in paper).
3. *Grunwald v. Bornfreund*, 696 F. Supp 838 (E.D.N.Y. 1988).
4. *Grunwald* at 696 F. Supp 839.
5. *In re Fuhrer*, 419 N.Y.S. 426 (1979). A third case, *Neiman, Ginsburg & Mairanz P.C. v. Goldburd* 684 N.Y.S.2d 405 (Sup. Ct, N.Y. 1998)
6. *Guinn*, 775 P.2d at 768-69.

public defiance of the church.[1] Classical Judaism adopted yet a third policy. It removed from community 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. Rather, as stressed above, excommunication and shunning were designed to exclude people from the community who did not accept and vocally disagreed with the communitarian tenets of the group.[2]

The choices a religion makes concerning the exclusion policy it enforces affects 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 American law has had on religious doctrines concerning shunning and the section after that will address British and Canadian responses to the same problem.

III. Associational Rights, Shunning and Excommunication in American Tort Law

The application of religious doctrines do not live in a vacuum. The way American tort law rewards or punishes certain behavior -- including religious behavior -- very much affects the frequency of the behavior. This section surveys the various theories advanced in American tort law cases that are used to discuss causes of action for harm inflicted through religions' excommunication or shunning. The Ninth Circuit Court of Appeals notes an obvious truth about the relationship between tort law doctrines and religious practices when it states:

> 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

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1. 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* (1989) and Ari L. Goldman, "O'Connor Warns Politicians Risk Excommunication Over Abortion", *N.Y. 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.").
2. See note for a discussion of diversity within the Jewish tradition.

to abandon part of its religious teachings.[1]

The Jewish tradition frequently confronted this issue in the many Eastern European communities where the government 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.[2]

There are two basic issues that are worthy of being raised when one ponders the proper secular legal response to excommunication and shunning. The first is the applicability of the tort of intentional infliction of emotional distress[3] and other tort law doctrines that impose liability in response to non-physical damages.[4] The second is the applicability of First Amendment protection to provide positive immunity to religious groups that engage in conduct otherwise prohibited by tort law doctrines. 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, and 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

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1. *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 and since Borntrager was not a member in good standing in the Amish community any longer, and would not be assisted by the Amish communal welfare system should he need it, he is not entitled to social security exemption.
2. 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 in the preface and in section 42. In this author's 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 on *Choshen Mishpat* indicates that this was his method of speaking exclusively to the censor. His actually 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.
3. See note for the text of the Restatement (Second) of Torts on the intentional inflection of emotional distress.
4. Such as alienation of affection or interference with a contractual relationship.

Scientology of California at one point -- and perhaps still[1] -- 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][2] may be tricked, sued or lied to or destroyed.[3]

The State interest in protecting an excommunicated or shunned 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 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.[4]

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.[5]

This section of the paper will start with a categorization of the legal principles used in the various cases that discuss religious

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1. See *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 16 Cal. Rptr.2d 705, (CA Ct App. 1993) which discusses the doctrine of "fair game" in some detail.
2. Brackets are in the original opinion.
3. *Wollershein v. Church of Scientology*, 212 Cal. App. 3rd; 260 Cal. Rptr. 331 (1989).
4. *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875, 877 (9th Cir, 1987). 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.
5. *Shulchan Aruch Yoreh Deah* 334:2-11. Exclusion in the Cannon Law tradition contains within it a number of different levels of varying severity, none of which permit violence against the person. See Green, *supra* note .

discipline,[1] and will then propose a general theory of how American tort law should interact with religious groups that shun and excommunicate.

Numerous cases that address the problems of religious exclusion, shunning and excommunication apply one of three categories of legal rules:

> 1) 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.[2]

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 term of tort law treatment.[3]

The essential failure of this theory, in this author's 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.[4] 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

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1. It is vitally important to clearly separate the various types of cases. As noted by Professor Hayden in his fine article "Religiously Motivated Outrageous Conduct: 'Intentional Infliction of Emotional Distress' as a Weapon against Other People's Faiths'," William & Mary Law Review, 34 (1993): 579, the cases really break down into three different categories, only one of which is relevant to this paper. The first category is indoctrination cases, where a Church uses fraud or other unsavory methods to entice a person to join the movement or give it money. The problems posed in such cases is quite different from his second category, church discipline, which this paper focuses on. Both of these categories are even more distant from his third category, which is torts related to religious counseling. Each of these categories of cases creates its own tort law problems and would appear to call for their own separate solution.
2. See *Guinn v. Church of Christ*, 775 P.2d 766, 767-69 (Okla. 1989).
3. See Comment, "Religious Torts: Applying the Consent Doctrine as Definitional Balancing," University of California at Davis Law Review 19:949 (1986): 975-83 (1986) 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).
4. 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*, at 768.

community is formed by publicly establishing norms of conduct. Such cannot be done under this legal rule, as the moment a person resigns from the church, the church loses any ability to announce their exclusion.[1]

> 2) Some courts have held that the "religiously motivated disciple is entitled to First Amendment Protection and cannot form the basis[2]" for a suit in tort.[3]

These courts, including the Ninth Circuit Court of Appeals, 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...[4] precludes the plaintiff from prevailing. The defendants have a constitutionally protected privilege to engage in the practice of shunning.[5]

The most significant failure with this approach is that it places outside the scope of governmental regulation potentially egregious conduct.[6] 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, and indeed such immunization of religious organizations from general doctrines of law are itself suspect.[7] Whatever the merits of *Employment Division v. Smith*[8] in the context of criminal law, one could see very significant problems developing were religions to be granted general tort law immunity for all conduct which is religiously directed or compelled.[9] Even limiting such an immunity to "intangible or emotional

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1. For additional criticism of this rule, see text accompanying notes to .
2. *Religiously Motivated Conduct*, *supra* note , at 642-43
3. *Paul v. Watchtower Bible & Tract. Society*, 819 F.2d 875 (9th Cir. 1987) and *Burgess v. Rock Creek Baptist Church* 734 F. Supp. 30 (D.D.C. 1990).
4. The court here discusses the constitutional law of the State of Washington, as this case was heard though diversity jurisdiction.
5. *Paul*, *id*. at 876.
6. See *infra* page for further development of these ideas.
7. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
8. 494 U.S. 872 (1990).
9. 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. Indeed, this is clearly noted by Douglas Laycock, *The Remnants of Free Exercise*, Supreme Court Review (1990:1): 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).

harm[1]" provides a level of immunity to a religious practice that would leave many uncomfortable.[2] Notwithstanding one commentator's endorsement of this "First Amendment" approach of complete immunity,[3] the fact remains that the granting of immunity in the face of religiously motivated tortious conduct can produce profoundly negative consequences and gives religion a license to injure enjoyed by no one else.

> 3) The third theory rules 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 case to adopt this posture, *Bear v. Reformed Mennonite Church*[4] advanced this argument in its simplest form:

> In our opinion, the complaint, in Counts I and II, raises issues that the 'shunning' practice of appellee church[5] and the conduct of the individuals 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.

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.[6]

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1. *Paul* at 883.
2. For an example of this, see page .
3. *Religiously Motivated Conduct*, *supra* note , at 653
4. *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Penn., 1975).
5. 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.) Id.
6. *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, as a matter of fact in the particular case at bar, 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).

This approach has the potential in it to vastly limit 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.

It would seem in light of the recent United States Supreme Court decisions (particularly *Boy Scouts of American v. Dale*[1] and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*[2]) these line of cases have no choice but to be discarded in light of the vigorous affirmance of the associational rights inherent in any organization. Indeed, *Boy Scouts of America* -- even as it is a 5-4 decision -- contains clear unequivocal language from all nine Justices affirming the right of association, even in defiance of a states anti-discrimination laws. Even the dissent notes that:

> there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's anti-discrimination laws will have a First Amendment right of association that precludes forced compliance with those laws.... It is an implicit right designed to protect the enumerated rights of the First Amendment.[3]

While in this particular case the Supreme Court split five to four on whether the Boy Scouts of America had actually invested into its moral position enough to allow it to exclude, few would doubt, I suspect, that religious institutions generally would qualify for this exemption. Thus, there is little doubt that the right of association -- including the right of disassociation -- lives on in American law.

IV. 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

1. 99-699; 2000 WL 826941 (June 28, 2000).
2. 515 U.S. 557 (1995).
3. 99-699; 2000 WL 826941 (June 28, 2000) at page 24.

of members, and the forfeiture of those members property rights. There are no United States cases addressing this issue as 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*:

> 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*."[1]

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* of the Canadian Supreme Court.[2] In this case the Canadian Supreme 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.[3]

After reviewing the actions of the Church for conformity to Canadian Corporate law and adherence to its own associational bylaws, the Supreme Court announced that expulsions from these type 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 representations, and [3] an unbiased tribunal.[4]

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1. *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, it will not (and can not) review, in any form, the ecclesiastical determinations.
2. 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.
3. 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, at page 64, indicates that this precedent is ripe for "revisit."
4. Id at 36. The bracketed numbers are by MJB.

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 individual returned to the colony as members.[1]

In this author's opinion, the approach of the Canadian Supreme Court to the problems of excommunication is no better than most of its American counterparts when addressing remedies for excommunication. 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.[2] These types of judicial determinations should, simply put, be beyond the scope of any secular court to make. 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 the review of the Canadian Supreme 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 and any restrictions on that religious right should be incompatible with freedom of religion and association, both values codified in the Canadian Bill of Rights.[3] One cannot help but recall the

1. Id. at 58.
2. Indeed, the failures of this three part test of natural justice is recognized in the Canadian Supreme Courts 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. Id. at 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?
3. 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." Id. at 63-64.

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 from a learned body to an unlearned body.[1]

Such is certainly the case when a court reviews ecclesiastical determinations for conformity with the etherial requirements of "natural justice."[2]

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)*[3] concerning the authority of the Chief Rabbi of Great Briton 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."[4]

Aware of the requirements of "natural justice" enforced by the Canadian court mentioned above, and plaintiff's desire to rely on them, this Court stated:

> [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

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1. Zechariah Chafee, *The Internal Affairs of Associations Not For Profit* (1930), 43 Harv. L. Rev. 993 at p. 1024.
2. *Decker v. Tschetter Hutterian Brethren*, 594 N.W. 2d 357 (South Dakota, 1999) involves a South Dakota Hutterian colony; the approach of the South Dakota Supreme Court is dramatically different than the Canadian court.
3. [1993] 2 All ER 249 (QB).
4. Id. at 253. This religious status granted him certain rights under British law, including the right to perform marriages.

justice in these types of cases,[1] 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.[2] Of course, as noted by the 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 owed by one party to another.[3] Those determinations would be made by the secular courts, independent of the ecclesiastical rules of the Chief Rabbi.

V. What is 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 discussed in section II, the Jewish tradition recognizes two possible theoretical models for religious discipline: punishment of the offender on one hand, and formation of a community through exclusion on the other.[4] The Jewish tradition opted for the second 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 God). Attempts by religious groups to use their many members or their economic might to punish people for violations should

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1. As there is no "right" to be a congregational rabbi.
2. 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; id. at 255.
   This author is 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 Queens Bench.
3. Id. at 255. In this case the Court seems to find that there was no employment contract, and thus no breach of secular law; id at 255-6.
4. Subsumed within this second justification is the possibility that the person will repent and wish to return to the community.

not be protected as a religious value. These are fundamental governmental prerogatives which should not, and may not, be delegated.[1] 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 it 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.* [2]

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 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.[3]

Laurence Tribe in his treatise 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[4] 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.[5]

More generally, government has an interest in preventing religion

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1. See generally *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).
2. *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 890, 260 Cal. Rptr. 331, 343, (CA Ct. App., 1989).
3. *Larkin*, 459 US at 126 n.10.
4. Vesting entanglement is the term used for the problem that results when the government delegates its authority to an ecclesiastical group.
5. Laurence Tribe, *American Constitutional Law*, 2nd ed. (**Publisher**, 1988): 1229 (notes omitted, emphasis in original).

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*.[1]

I would suggest that a solid middle ground is implied in many of these cases, and is well grounded in associational rights. 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's freedom of association 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 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 that:

> 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.[2]

A similar result was reached by Judge Sifton writing in *Gruenwald v.*

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1. 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.
2. *Guinn*, 775 P.2d at 780.

Bornfreund.[1] After discussing the protected status of a mere act of exclusion by any religious organization, Judge Sifton 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, he would enjoin this conduct.[2]

The virtues of this approach are clear. 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.[3] 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.[4] Once a clear understanding of why people are excluded is articulated by each faith, tort law can

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1. 696 F.Supp. at 839.
2. 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."
3. For more on this, see pages to .
4. 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 them, the tort of intentional inflection of emotional distress is inapplicable. Section 46 of *The Restatement (Second) of Torts* 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. See *Restatement (Second) of Torts*, (1965): §46(1).
   A religion that announces a violation of its norms of conduct, without any intent to punish the violator, or otherwise cause that person harm, -- but whose motives are merely 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.

grant or deny protection to those exclusions whose purpose is consistent with the protected First Amendment values of forming a religious sub-community.[1]

Secondly, the test advocated by this article 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 *Paul*[2] or the generic non-protection advocated by *Bear*.[3] Both of these opinions 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.[4] The potential to destroy religious communities is clear. So too, a broad First Amendment right of the type advanced by *Paul* allows persecutions of those who leave a faith. This simply cannot be tolerated in a free society. *Paul* 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.[5]

More significantly, this test is superior to the more nuanced membership test advocated by *Guinn*[6]. There are crucial problems with the membership 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*,

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1. This author is not so naive as to think that religions with unprotected motives will 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; see text accompanying note .
2. *Paul*, discussed *supra* in text accompanying note .
3. *Bear*, discussed *supra* in text accompanying note .
4. Thus, for example, there are situations where Jewish law encourages divorce; indeed, Jewish law categorically prohibits reconciliation in certain circumstances. Accepting the test used by *Bear*, one could easily conclude that a rabbi who informs a congregant of the position of Jewish law, and tells them that the Creator desires them to obey, is liable.
5. Tribe correctly classifies these rights as "rights of Religious Autonomy;" Tribe, *American Constitutional Law*, 1154. The crucial insight is autonomy, and not coercion of others.
6. *Guinn*, discussed *supra* in text accompanying note .

this test has little validity once it is removed from that setting and placed into the many faiths where the synagogue or church membership is by no means a commitment to observance. In the context of either Catholicism, mainstream Judaism in any of its denominations, or classical Protestantism, by no means is joining a church or a synagogue any form of an agreement to adhere to the normative rules of the faith. To assert, for example, that mere membership in a 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 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 Oklahoma Supreme 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.[1]

Secondly, the consent rule allows active church discipline designed to punish violations to be practiced against people who 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.[2] 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, that:

> 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,

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1. A modified version of the *Guinn* test can be found in "Religious Torts: Applying the Consent Doctrine as Definitional Balancing," University of California at Davis Law Review 19:949 (1986): 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.
2. 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.

> 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.[1]

is debatable, at the least. 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 much more sense to limit the faith's rights to actions which exclude these people and not actions designed to punish them. If one were to carry Professor Hayden's analysis to its logical conclusion, one 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. Rather 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*.[2]

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 disputes. The approach of the Canadian Supreme Court in *Lakeside Colony of Hutterian Brethren*[3] which allows for judicial review for conformity with natural justice orders of expulsion and exclusion would seem to be unwise, in that 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

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1. *Hayden*, *supra* note , at 651.
2. 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, the court, it appears 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.
3. Supra at text accompanying note .

rule would be either to adopt the American rule of approach *Milivojevich*[1] which mandates complete abstention, or the British approach in *Chief Rabbi*[2] which allows formally for review, but with a completely deferential standard of review.

This article 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. Common law tort law 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.

VI. Conclusion

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

Many religious communities cannot be fully open to any and all conduct by its members. Jewish tradition, as well as other faiths, 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 shunning, complete shunning, and in rare situations, excommunication. Each faith uses this process in different ways, to shape its own community. However, these mechanisms 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. The freedom of assocation has to include the freedom to disassocate.

Government has a regulatory interest in governing these -- 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. These grounds should also be understood as precluding the government from preventing faith groups from forming

1. Supra note .
2. Supra note .

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.[1]

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 1600's, Rabbi Shabtai ben Meir HaCohen 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.[2] Essentially, he states 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 norm in America. Shunning and excommunication as practiced by many faiths including Judaism are no longer designed to compel (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

1. 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).
2. Rabbi Shabtai ben Meir Hachohen, *Gevurat Anashim* 72 cited in *Pitchei Teshuva* Even Haezar 154:30. 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, 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).

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 pick 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.