EAST OF EDEN: A CONTRACTUAL LENS FOR AN UNSETTLED AREA OF FIRST AMENDMENT SHUNNING JURISPRUDENCE

BY: AUSTIN J. ROGERS†

ABSTRACT

The Free Exercise Clause was enacted for the purpose of protecting diverse modes of religious practice. One practice that numerous religious traditions observe is shunning—the expulsion and social exclusion of noncompliant individuals from a religious community. Yet because shunning usually involves concomitant harm to religious congregants, plaintiffs often bring religious-tort claims against religious entities for the injuries they suffer. This implicates free-exercise concerns for both the plaintiff and the religious-entity defendant. Despite the utmost importance of religious freedom in American jurisprudence, courts analyze religious-tort claims in widely disparate ways. And they typically rely on consent and membership as the basis for judicial decisionmaking.

But these analytical lenses are flimsy and lead to unpredictable outcomes. At times, they are underprotective of religious plaintiffs; at others, they penalize religious entities and chill religious practices. In order to clarify a muddled sphere of free-exercise jurisprudence, courts should adopt a contract paradigm for analyzing shunning claims. A contract paradigm would lead to cleaner results and would uphold the integrity of religious institutions, which are necessary for religious individuals to thrive.

† Duke University School of Law, J.D. expected 2019; Duke Divinity School, M.Div. 2016; Wheaton College, B.A. 2013; Southeastern University, B.S. 2012. I thank Professor H. Jefferson Powell for his valuable feedback and guidance in thinking legally and religiously about the topics in this Note. Professor John Witte also deserves special thanks in this vein, as he fostered my desire to think deeply about the theological foundations of the law. I thank my fellow *Duke Law Journal* editors who provided me with patient, trenchant edits and who helped me draw out important arguments that were previously at the periphery of my Note. And finally, I thank my family for their steadfast love and support throughout my entire education—especially my grandparents; this Note is dedicated to them.

"If anyone has caused grief, he has not so much grieved me as he has grieved all of you. The punishment inflicted on him by the majority is sufficient."[1]

"And this I believe: that the free, exploring mind of the individual human is the most valuable thing in the world. And this I would fight for: the freedom of the mind to take any direction it wishes, undirected. And this I must fight against: any idea, religion, or government which limits or destroys the individual."[2]

INTRODUCTION

John Donne incisively remarked: "No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less."[3] A question that jurists have grappled with for centuries is what recourse should be granted in tort, if any, when religious communities force their members to become islands through their disciplinary practices.[4] The human is a social animal[5] and, as such, social exclusion can have traumatic consequences—psychological, economic, spiritual, and even physical.[6]

---

1. 2 Corinthians 2:5–6.

2. JOHN STEINBECK, EAST OF EDEN 131 (Penguin Books 2002) (1952).

3. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 89 (Anthony Raspa ed., Oxford University Press, 1st ed. 1987).

4. These practices include, but are not limited to, excommunication, shunning, and disfellowshipping. This Note will use the term "shunning" as an umbrella term. Although there are various permutations of shunning, it often involves the removal of social, sacramental, or ritual contact from the shunned person. For example, in Jehovah's Witness and Amish communities, shunning "involves the complete withdrawal of social, spiritual, and economic contact from a member or former member of a religious group. The shunned person can lose, among other things, her spouse, children, business, and standing in the community." Justin K. Miller, Comment, *Damned If You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 272–73 (1988); *see also* Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d 1, 6 (Ct. App. 1989), *vacated*, 499 U.S. 914 (1991) (detailing the disciplinary methods of the Church of Scientology toward former members).

5. ARISTOTLE, THE POLITICS 59–61 (Betty Radice ed., Trevor J. Saunders trans., Penguin Books rev. ed. 1981) (n.d.).

6. *See* Baugh v. Thomas, 265 A.2d 675, 677 (N.J. 1970) ("We believe that expulsion from a church or other religious organization can constitute a serious emotional deprivation which, when compared to some losses of property or contract rights, can be far more damaging to an individual."); E.M. Seidel et al., *The Impact of Social Exclusion vs. Inclusion on Subjective and Hormonal Reactions in Females and Males*, PSYCHONEUROENDOCRINOLOGY 2925, 2926–27

These consequences are particularly acute for those subjected to religious disciplinary practices like shunning.

For millennia, shunning has served as a forceful tool through which religious communities advance their goals.[7] Although diverse in expression and application, shunning often involves the expulsion of a member from her religious community, followed by the concomitant practices set in motion by the expulsion.[8] Yet many courts refrain from granting excommunicants redress in tort, even amid serious allegations of abuse.[9] Unfortunate as this may seem, various constitutional considerations constrain a secular court's discretion to award damages caused by religious discipline.

Chief among these considerations is the Free Exercise Clause. Many courts understandably fear that tort liability will chill longstanding religious practices. However, courts advance wildly disparate applications of free-exercise principles to shunning cases. Some favor the state's interest in granting claimants recourse in tort;[10]

(2013) (discussing the physical and psychological effects of social exclusion and drawing attention to the disparate impact such exclusion can have on males and females).

7. These goals include the desire to keep a religious community pure, the desire to bring a sinner to repentance, the desire to uphold certain truth claims, and even the desire for retribution. *See, e.g.*, Michael J. Broyde, *Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 203, 209–14 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (noting that one purpose of Jewish exclusion, among others, is to "deter future violations of Jewish law—primarily by other members of society, but also by the excluded person"). This highlights the bilateral goals often present in shunning, which is intended to benefit both the community and the religious dissident. *See* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 795 (Okla. 1989) (Hodges, J., dissenting) (noting that the "twofold purpose[s] of the Church['s] disciplinary practice" are "(1) to cause a disobedient member to miss the fellowship and to desire to repent, and (2) to purify the church and to prevent the sin from spreading, thus, operating as a deterrent to other members from committing the same sin" (citation omitted)).

8. *See* text accompanying *supra* note 4.

9. *See, e.g.*, Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 3 (Tex. 2008) (denying recovery on free-exercise grounds when church members had forcibly held teenage plaintiff's arms down for long periods of time despite her demands to be freed during an exorcism).

10. *See, e.g.*, *Guinn*, 775 P.2d at 786 (holding that the Free Exercise Clause does not bar recovery for a church's disciplinary actions taken after a former congregant had withdrawn her membership); Bear v. Reformed Mennonite Church, 341 A.2d 105, 107 (Pa. 1975) (noting that the shunning practice "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" that "the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment" (emphasis in original)).

others remain agnostic under the First Amendment's shadow.[11] So it is difficult to extrapolate guiding principles from case law. Neither has the scholarly literature on religious shunning provided much direction.[12] This dearth of careful discourse is glaring in light of the volume of religious-discipline cases and the importance of free-exercise values. This Note therefore addresses some of the most pressing legal issues that shunning practices raise and proposes an analytical framework to aid courts in their resolution.

When resolving claims arising from religious discipline, courts and commentators typically rely on concepts like membership status and ex post consent. With membership, for example, courts look to a claimant's membership status to determine if her religious affiliation subjected her to the religious entity's judicature.[13] Under a consent framework, by contrast, courts merely examine whether a person consented to the community's disciplinary measures in order to determine if those measures were actionable.[14] Courts should avoid nebulous categories like these. Not only do they render muddled legal analyses, but more importantly, they fail to strike the appropriate balance between individual and organizational free-exercise rights.

---

11. *See, e.g.*, Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 883–84 (9th Cir. 1987) (abstaining from reaching the merits of plaintiff's tort claim under the Free Exercise Clause).

12. Student notes provide the most thorough treatment of this topic, and many were written over fifteen years ago. *See, e.g.*, Miller, *supra* note 4, at 271; Nicholas Merkin, Note, *Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause*, 34 COLUM. J.L. & SOC. PROBS. 369, 397 (2001). Shunning has also received passing and episodic attention from a handful of legal scholars, also over fifteen years ago. *See, e.g.*, Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579 (1993) (proposing a consent theory for religious cases involving claims for intentional infliction of emotional distress); Daryl L. Wiesen, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291, 301–03 (1995) (discussing religious shunning as a subset of religious torts). Professors Wiesen and Hayden only include shunning as a tangential aspect of their overall theses, however.

13. *See, e.g.*, *infra* notes 79–86 and accompanying text. The term "judicature," as courts have employed it, is vague and obscures the overall analysis. *Compare Guinn*, 775 P.2d at 773–83 (noting that church practices are not immune from "secular judicature") *with* Hadnot v. Shaw, 826 P.2d 978, 987–90 (Okla. 1992) (using the term "judicature" to describe the church's disciplinary practice). From what can be surmised, it means something like "jurisdictional authority to punish" or "ecclesiastical jurisdiction." This Note will replace "judicature" with "jurisdiction" or "disciplinary authority" when possible, as these will be more idiomatic and produce similar, albeit clearer, meanings. However, "judicature" will necessarily be employed in light of its prevalence in shunning law.

14. *See, e.g.*, *infra* notes 96–98.

Religious practices find meaning in, and are therefore worth protecting for, religious communities and traditions. In the most problematic applications of consent and membership, courts penalize communal religious practices for the sake of individual dissenters who assumed the risk of harm. In the most thoughtful applications of consent and membership, religious communities are left uncertain about civil penalties altogether, which thereby chills religious customs of enduring importance. Because religious institutions are essential to the flourishing of the free exercise of religion, both results are repugnant to the Free Exercise Clause. Consent and membership, therefore, fail to afford religious communities the protection that the First Amendment demands.

Reliance upon consent and membership can also fail to protect individuals where protection might otherwise be warranted. These frameworks encourage mechanical application when the dynamics of congregations and excommunicants are anything but mechanical. The more dispositive membership and consent become, the greater the risk of overlooking factual nuance—for example, whether a congregant abused her membership to contravene the law or undermine public policy. Such cases may be infrequent, but they are no less important for courts to get right.

A contract paradigm more aptly resolves shunning cases because it strikes the right balance between individual and organizational rights. Under a contract template, courts would look to contract principles to determine if the requisite informed consent to church discipline was exhibited at the *outset* of a parish-parishioner relationship. If so, then courts would hold religious participants and communities to the express and implied terms of their covenants, regardless of ongoing consent or membership status. If a valid contract never formed, then the appropriate remedy might very well be tort liability. And if a parishioner breaches an implied covenant, then religious discipline might be warranted. This is not to suggest that a contract paradigm would solve *all* of the legal issues presented by religious shunning. However, a contract framework is better suited to address religious-discipline cases than the prevailing frameworks.

Such an approach would not involve inquest into religious doctrines and practices, as some might fear.[15] Nor would it cause courts

15. For scholarship expressing concern over judicial inquest into religious doctrines, see James D. Gordon, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1262 (1989) (highlighting instances of judicial inquest into religious sincerity);

to become bogged down by questions concerning whether a parishioner consented to a church's shunning practices as an ongoing matter. Instead, a contract framework would invite courts to examine a parish-parishioner agreement to determine what sort of risk a parishioner might have assumed through her participation in the life of the parish. Thus, by placing the locus of judicial analysis on ex ante manifestations of consent, a contract paradigm prevents excessive focus on peripheral issues and facilitates more principled decisionmaking.

More importantly, a contract framework would protect the integrity of religious institutions. It would do this by granting wider latitude to religious entities and allowing them to predict how courts will adjudicate their practices. This does not subordinate the individual's free-exercise rights; rather, it tempers them to comport with the free-exercise values that animated the First Amendment's enactment. By treating the individual and community as equals ex ante, individual liberties are kept from trumping institutional liberties. At the same time, protecting institutional rights in fact enables the individual exercise of religion. Thus, contract principles strike a more appropriate balance between congregants and congregations.

This Note therefore critiques current iterations of shunning jurisprudence and advances a contract paradigm for the resolution of shunning cases. To this end, it proceeds in three Parts. Part I sketches the doctrinal underpinnings of shunning jurisprudence, tracing its development and shedding light on its difficulties. Part II uses this account to frame the issues presented in two paradigmatic religious-tort cases—*Westbrook v. Penley*[16] and *Hadnot v. Shaw*.[17] These cases, decided by sister state supreme courts, illustrate the shortcomings of the prevailing analytical frameworks—membership and consent—in the modern era. Finally, Part III synthesizes these cases and argues that applying a contract template to religious-tort claims would yield more coherent results and reduce tension among First Amendment values.

Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781, 828 (2007) (arguing that inquests that "draw government actors into assessments of religious tenets" inhibit religious liberty).

16. Westbrook v. Penley, 231 S.W.3d 389 (Tex. 2007).

17. Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992).

I. LEGAL BACKGROUND: FIRST FORAYS INTO SHUNNING JURISPRUDENCE

Given the harm that shunning inflicts upon a congregant,[18] a clash of state common law and free-exercise jurisprudence often results: Victims sue religious groups for their shunning practices, and religious groups seek refuge from state intrusion under constitutional shelter. Yet courts vary widely in how far to extend this shelter, and religious-tort decisions are heavily driven by their factual intricacies.[19] Thus, in the "eternal youth" of the common law,[20] ad hoc First Amendment judgments will only continue to perpetuate unpredictability in an area of great constitutional import. Before delving into shunning jurisprudence, however, the free-exercise origins that led to this confusion must be traced.

A. Free-Exercise Jurisprudence: An Arc Toward Heightened Protection

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[21] The Free Exercise Clause's language is capacious and First Amendment jurisprudence has often been forced to toe the line between ensuring religious liberty on the one hand and abstaining from religious establishment on the

18. *See supra* note 6 and accompanying text.

19. *See* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701–02 (1986) ("Contemporary constitutional law just does not know how to handle problems of religion."). *See* John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 848 (1984) (arguing that the Supreme Court's jurisprudence on the religion clauses has become "obscured by the incantation of verbal formulae devoid of explanatory value").

20. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (discussing the evolutionary and accretive nature of common-law doctrine amid shifting "[p]olitical, social, and economic" climates).

21. U.S. CONST. amend. I. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the First Amendment's Free Exercise Clause was first applied to the states through the Fourteenth Amendment. *See id.* at 303 ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." (citation omitted)).

other.[22] As *Lemon v. Kurtzman*[23] tersely summarizes, the religion clauses are designed to "prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other."[24]

Early attempts to address government interference with religion distinguished between belief and action in order to allow the government to restrict religious behavior it disfavored.[25] For powerful reasons,[26] however, this dichotomy proved to be misplaced and unworkable, and courts ultimately jettisoned the belief-action doctrine.[27] Along the way, courts articulated principles that expanded the ambit of the Free Exercise Clause, bridling it only when the

22. *See, e.g.*, David E. Fitzkee & Linell A. Letendre, *Religion in the Military: Navigating the Channel between the Religion Clauses*, 59 A.F. L. REV. 1, 72 (2007) (discussing this dual concern in the military context and observing that "military attorneys wrestle with a complex array of constitutional tests . . . to navigate the narrow channel between the free exercise of religion by military members and establishment of religion by the military . . . a feat compared to navigating the narrow channel between the Scylla and Charybdis in Greek mythology"). Additionally, the Constitution protects the free-exercise interests of both religious institutions and individuals, making this area of constitutional law rife with conflicting interests and challenges. *See, e.g.*, Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 790 (Okla. 1989) (Wilson, J., dissenting in part and concurring in part) (discussing the competing free-exercise interests of religious organizations and individuals).

23. Lemon v. Kurtzman, 403 U.S. 602 (1971).

24. *Id.* at 614.

25. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164–66 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions . . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). The Court used this logic to uphold the criminality of polygamy. *Id.* at 168. The issue, of course, is that the First Amendment is devoid of a "free belief" clause.

26. *See* Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 818 (1958) (asserting that the Framers' intent was not for the government to exercise unbridled authority over conduct while merely leaving beliefs intact); *see also* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 85 (2017) ("[T]he government has powerful reasons, rooted in free exercise values, to want to spare citizens the cruel choice of deciding whether to disobey either the government or their God."). Professor Fallon's article argues that Establishment Clause jurisprudence should appropriate free-exercise doctrine to foster greater clarity. Fallon, *supra*, at 60–62. Although his thesis primarily concerns the Establishment Clause, he provides vigorous discussion of, and nuanced insights into, free-exercise doctrine. *Id.* at 106–12.

27. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219–20, 236 (1972) (observing that in "the Amish mode of life and education . . . belief and action cannot be neatly confined in logic-tight compartments" before granting the Amish an exemption from a state compulsory-education law); *see also id.* at 247 (Douglas, J., dissenting) ("The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the [belief-action] teaching of [Reynolds].").

religious conduct at issue posed a threat to the peace of society.[28] Over time, this expansive trajectory ripened into strict scrutiny for free-exercise challenges.

For example, in *Sherbert v. Verner*,[29] a Seventh Day Adventist woman was fired from her job because she refused to work on Saturdays in accordance with her religious tradition's Sabbath.[30] Although she was offered several subsequent jobs, they also entailed Saturday work.[31] Persistent in her refusal to work on her Sabbath, she applied for state unemployment benefits but was denied.[32] She therefore alleged that South Carolina's rejection of her application violated her free-exercise rights.[33]

The Supreme Court agreed, stating that regulation burdening free-exercise rights must serve a "compelling state interest" and generally will not be upheld unless the religious conduct in question "pose[s] some substantial threat to public safety, peace or order."[34] The Court further observed that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests'" permit the limitation of free-exercise rights.[35] Thus, in the wake of *Sherbert*, the Court's free-exercise jurisprudence has exhibited an arc toward applying strict scrutiny to free-exercise challenges.[36] Cases involving

28. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304, 311 (1940) (suggesting a trajectory toward strict scrutiny and noting that the state "raised no such clear and present menace to public peace and order as to render [Cantwell] liable to conviction of the common law offense in question").

29. Sherbert v. Verner, 374 U.S. 398 (1963).

30. *Id.* at 399.

31. *Id.*

32. *Id.* at 401. The South Carolina Unemployment Compensation Act stated that a claimant was ineligible for compensation if she "failed, without good cause . . . to accept available suitable work when offered." *Id.* at 400 n.3 (quoting S.C. CODE ANN. § 68-114(3)(a)(ii) (1962)).

33. *Id.* at 401.

34. *Id.* at 403. Although strict scrutiny has typically applied, courts have often refracted the test through *Sherbert*'s triadic "safety, peace or order" language. *See, e.g.*, Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 882 (9th Cir. 1987) (using "safety, peace or order" triad in applying strict scrutiny); *see also* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (including the triad in its application of strict scrutiny in order to allow Amish families to remove their children from public education in accordance with their religious tradition).

35. *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

36. For the sake of brevity, this Note will not include a sustained discussion of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which upheld the state's denial of unemployment benefits for Native American church members using peyote because Oregon's law was neutral and generally applicable. Although certainly important in the grand scheme of free-exercise jurisprudence, *Smith* does not functionally change this Note's analysis. Nor should *Smith* be interpreted as established doctrine in free-exercise jurisprudence.

shunning, however, present particularly complex issues in this area of constitutional law and demonstrate why other First Amendment frameworks might be inapposite for religious-discipline cases.[37]

Indeed, unlike other cases involving government regulation, shunning cases often implicate competing First Amendment rights: those of the religious group and those of the shunned party. That is, the Free Exercise Clause secures the freedom of a religious group to worship as it sees fit (including through disciplinary practices), just as it secures the freedom of the individual to worship as she sees fit (including through her dissociation from the community). Which liberties should trump? Courts and commentators differ in their responses.[38] Adding a layer of complexity to this inquiry is the state's interest in protecting citizens by granting them redress in tort. In this context, state interests and constitutional interests are often weighed, balanced, and ultimately pitted against each other.[39] Thus, shunning produces multiple layers of constitutional analysis that are not often present in other free-exercise contexts.[40]

Furthermore, shunning cases often raise questions of parishioner consent and ecclesiastical jurisdiction; which is to say, religious groups often take courses of action against *former* congregants, even after they have been excluded from the community. This raises two questions: first, whether the former member consented to this sort of behavior even when she no longer participates in the life of the community; and second, whether legal interference with a religious group's disciplinary measures inhibits the group's free-exercise rights. Courts have

---

See, e.g., Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (No. 16-11), 2017 WL 4005662, at *6 ("*Smith*'s rule . . . has not become embedded in the law."). Indeed, the Court interpreted *Smith* in but one abbreviated instance. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (discussing *Smith*). The facts there demonstrated such clear animus that the Court would have ruled the same way regardless of the standard it employed. *See id.* at 542 (discussing the City of Hialeah ordinances which purposefully targeted Santeria religious practices).

37. *But see* Wiesen, *supra* note 12, at 292 (arguing that defamation law's definitional approach should apply to free-exercise jurisprudence).

38. For a compendium of the various shunning cases that have addressed this sort of issue, see Richard L. Cupp, Jr., Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949, 954 n.29 (1986).

39. For further discussion, see *infra* Part II.A. (analyzing Westbrook v. Penley, 231 S.W.3d 389 (Tex. 2007)).

40. *See* Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 882–83 n.6 (9th Cir. 1987) (noting that shunning represents a *sui generis* area of free-exercise doctrine).

answered these questions in multivalent ways, producing a complex jurisprudence that warrants attention.

B. Shunning Jurisprudence: A Constellation of Confusion

American courts have applied different frameworks and standards to similar factual scenarios in shunning cases. This variance is perhaps best illustrated by three seminal cases: *Bear v. Reformed Mennonite Church*,[41] *Paul v. Watchtower Bible & Tract Society of New York, Inc.*,[42] and *Guinn v. Church of Christ of Collinsville*.[43] *Bear* represents an early iteration of shunning jurisprudence in which the Supreme Court of Pennsylvania was reticent to grant broad constitutional immunity to a religious practice that harmed church members. *Guinn* and *Paul*, by contrast, represent more developed—yet distinct—iterations of shunning jurisprudence. While the court in *Guinn* exhibited an over-reliance on consent and membership to its detriment, *Paul* advanced a framework more consistent with organizational free-exercise principles. Fundamentally, though, all three cases demonstrate the need for a more searching legal solution to shunning.

1. Bear v. Reformed Mennonite Church*: A Primitive Forerunner*. Shunning is an integral component of the Mennonite faith.[44] In *Bear v. Reformed Mennonite Church*, plaintiff Robert Bear challenged his Mennonite church's shunning practices by suing and alleging that the church collapsed his business and family.[45] Although the lower court took the view that the Free Exercise Clause was an affirmative defense à la *Sherbert*, the Pennsylvania Supreme Court overturned the lower court and maintained that it may be possible for Bear to recover.[46]

Decisive for the court was the fact that, under *Sherbert*, "the 'shunning' practice of appellee church . . . may be an excessive interference within areas of 'paramount state concern,' i.e. the maintenance of marriage and family relationship, alienation of

41. Bear v. Reformed Mennonite Church, 341 A.2d 105 (Pa. 1975).

42. Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875 (9th Cir. 1987).

43. Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989).

44. *See* ROBERT L. BEAR, DELIVERED UNTO SATAN 1–4 (1974) (discussing the various shunning practices of the Reformed Mennonite Church and the importance of shunning to the religious community).

45. *Bear*, 341 A.2d at 106. Bear did not allege that the church violated his free-exercise rights through its practices, as is often the case in shunning lawsuits. *See, e.g.*, *Guinn*, 775 P.2d at 773 (discussing the free-exercise rights upon which the plaintiff staked her claim).

46. *Bear*, 341 A.2d at 108. It consequently sustained the defendant's demurrer. *Id.*

affection, and the tortious interference with a business relationship."[47] Thus, the First Amendment did not provide the church with an absolute privilege against Bear's religious-tort claim. Under *Bear*, then, protecting marital, familial, and business relationships might provide the government with a sufficient basis for curtailing treasured free-exercise interests, even under *Sherbert*'s "compelling interest" standard.[48] So even though *Bear*'s holding is unambitious and its reasoning shallow, it shows that a court might potentially find shunning to constitute an abuse so "grave[]" that not even a heightened free-exercise defense will pass muster.[49]

2. Paul v. Watchtower*: A Near-Absolute Free-Exercise Privilege. Paul v. Watchtower Bible & Tract Society of New York, Inc.*[50] is situated on the opposite end of the First Amendment spectrum from *Bear*. In *Paul*, the Ninth Circuit extended much greater protection to congregational practices and exhibited much less concern for the shunned plaintiff's recovery. However, the facts of *Paul* fail to account for this difference.

In *Paul*, plaintiff Janice Paul—a member of a Jehovah's Witness church—voluntarily withdrew herself from her congregation.[51] This made her a "disassociated person" according to Jehovah's Witness teaching, a status that bore little consequence at that time.[52] Shortly thereafter, the Governing Body of Jehovah's Witnesses changed its previous doctrine concerning disassociated persons, and members were told to treat Paul like a "disfellowshiped person[]"—that is, to

47. *Id.* at 107. The court did not apply strict scrutiny as it has appeared in other free-exercise contexts—for example, the employment context. Instead, the court was merely examining whether the church's practices violated imperative state interests. *Id.* In *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084 (Pa. 2009), the Pennsylvania Supreme Court reaffirmed *Bear*'s "excessive interference" test. *Id.* at 1112.

48. *See supra* notes 34–36 and accompanying text.

49. *Bear*, 341 A.2d at 108 (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

50. 819 F.2d 875 (9th Cir. 1987).

51. *Id.* at 876.

52. *Id.* at 876–77. At the time Paul withdrew her membership from the Jehovah's Witness community, there was "no express sanction" for being a disassociated person. *Id.* at 877. "In fact, because of the close nature of many Jehovah's Witness communities, disassociated persons were still consulted in secular matters, e.g. legal or business advice, although they were no longer members of the Church." *Id.* Indeed, even after Paul moved away from the area, she returned to the community in 1980 and "saw Church members and was warmly greeted." *Id.*

refrain from talking to her altogether.[53] After being rejected and ignored by numerous congregants, Paul sued for "defamation, invasion of privacy, fraud, and outrageous conduct."[54]

Applying Washington state law, the Ninth Circuit affirmed the district court, which granted summary judgment to the church on First Amendment grounds.[55] Analogizing to the First Amendment's treatment under *New York Times Co. v. Sullivan*,[56] the court reasoned that "[i]mposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings."[57] Extending this logic, the court asserted that "[a] religious organization has a defense of constitutional privilege to claims that it has caused intangible harms—in most, if not all, circumstances."[58] According to the court, then, even if Paul did set forth a prima facie tort claim, the defendants enjoyed a complete First Amendment privilege to dignitary torts.[59] Employing the *Sherbert* triad,[60] the court

53. *Id.* at 876–77 ("'Disfellowshiped persons' are former members who have been excommunicated from the Church. One consequence of disfellowship is 'shunning,' a form of ostracism.").

54. *Id.* at 877.

55. *Id.* at 884.

56. *Id.* at 880 (noting the similarity between libel and religious torts in assessing constitutional claims).

57. *Id.* at 881.

58. *Id.* at 883. It is difficult to extrapolate what sort of harm would have led the Ninth Circuit to find liability. The court granted wide latitude to religious entities to exercise their doctrines. *Id.* However, the court did not say much about what sort of *tangible* harms—for example, bodily or economic injury—could give rise to tort liability. But the court's language along these lines was telling:

> The test for upholding a direct burden on religious practices is as stringent as any imposed under our Constitution. Only in extreme and unusual cases has the imposition of a direct burden on religion been upheld. . . . The harms suffered by Paul as a result of her shunning by the Jehovah's Witnesses are clearly not of the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred. Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members.

Id. Cf. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 12–13 (Tex. 2008) (denying plaintiff recovery under *Paul*, even though clergy members held her down and deprived her of sleep during exorcism ceremonies).

59. *See Paul*, 819 F.2d at 879 (declining to rule whether Paul had presented a prima facie tort claim "because the defendants . . . possess[ed] an affirmative defense of privilege").

60. The court eschewed strict-scrutiny language. *See id.* at 882 n.6 (employing a substantial-harm analysis). That said, the court observed that its analysis would be practically identical, whatever test it applied to the claim. *Id.* ("[W]ere we to follow the exemption approach in Paul's case, we would make the same analysis and reach the same result we do in the text.").

further found that shunning did not present a "sufficient threat to the peace, safety, or morality of the community as to warrant state intervention."[61] Accordingly, society must tolerate offensive religious practices (like shunning) in order to afford religious congregations sufficient breathing space for free exercise.[62] Paul, too, had to tolerate the shunning, as she was unable to recover from the church.

Another important feature of the court's analysis was its treatment of membership. Beyond *Paul*, several jurisdictions regard membership as dispositive to a free-exercise analysis.[63] If a person is no longer a member of a religious community—and, as such, is only a *former* member—then a court might be more prone to award tort damages.[64] But to the Ninth Circuit, Paul's former membership status weighed *against* her case for recovery.[65] As long as the church "impose[d] discipline on members or former members," it enjoyed "great latitude" to do so.[66] Membership remains an important component of the constitutional inquiry, but in a way that does not meaningfully differentiate between current and former members. Thus, *Paul* highlights the disparate frameworks that courts apply to religious organizations, as well as the varied criteria that factor into courts' free-exercise calculi. *Guinn v. Church of Christ of Collinsville*[67] further exposes this striking disconnect.

3. Guinn v. Church of Christ Collinsville*: Tort Liability, Sooner or Later*. In *Guinn*, the Supreme Court of Oklahoma examined a church's disciplinary actions against a parishioner who unilaterally withdrew her membership. Parishioner Marian Guinn joined the Collinsville Church of Christ in 1974 and enjoyed a harmonious relationship with the

61. *Id.* at 883. *Compare supra* notes 47–49 and accompanying text (discussing that the *Bear* court, applying the same test from *Sherbert*, concluded otherwise).

62. *Id.* ("Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the [F]irst [A]mendment would be meaningless.").

63. *Compare* Westbrook v. Penley, 231 S.W.3d 389, 398 (Tex. 2007) (observing that membership weighs in favor of First Amendment protection over religious activities), *with* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 785 (Okla. 1989) (holding that nonmembership obviated the church's First Amendment privilege).

64. *Guinn*, 775 P.2d at 780–81.

65. *Paul*, 819 F.2d at 883. Indeed, the court noted, "[p]roviding the Church with a defense to tort is particularly appropriate here because Paul is a former Church member. Courts generally do not scrutinize closely the relationship among members (or former members) of a church." *Id.*

66. *Id*.

67. 775 P.2d 766 (Okla. 1989).

church for six years.[68] However, in 1980, pursuant to the church's disciplinary procedures,[69] the elders confronted Guinn several times and exhorted her to discontinue her sexual relationship with a male Collinsville resident.[70] These attempts to elicit repentance were very intrusive. For example, the elders confronted Guinn at a laundromat and even at her own residence, instructing her that "if she did not appear before the congregation and repent of her fornication sin, [they] would 'withdraw fellowship' from her."[71] During the latter "driveway incident," Guinn communicated to the elders that she wished to be left alone and would not confess anything to the congregation; she subsequently ceased to attend church.[72]

The elders then sent Guinn a letter, warning her that they would withdraw her fellowship and inform the congregation of her "fornication" if she did not comply with the church's disciplinary doctrine. In response, Guinn and her lawyer sent the elders letters imploring them not to expose Guinn's private life.[73] Guinn's letter also explicitly withdrew her membership from the congregation.[74] On October 4, 1981, the church elders nevertheless divulged her "fornication" to the Collinsville congregation and four other area congregations.[75]

As a result, Guinn sued the church for intentional infliction of emotional distress and invasion of privacy.[76] After the trial court overruled the defendant elders' demurrers, it submitted the case to the

---

68. *Id.* at 767.

69. *Id.* at 768. This procedure was dictated by a literal interpretation of the Bible:

> [I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.
>
> But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as a heathen man and a publican.

Id. at 768 n.1 (quoting *Matthew* 18:13–17 (King James)). A literal interpretation of this passage has led to numerous ecclesial shunning practices and legal disputes. *See, e.g.*, *infra* note 109 and accompanying text.

70. *Id.* at 768.

71. *Id.* (citation omitted). The withdrawal of fellowship set in motion a series of concomitant church discipline that included announcing the disfellowshipped member's violations to nearby Church of Christ congregations as well as socially ostracizing the disfellowshipped member. *Id.* at 768 n.2.

72. *Id.* at 791 (Wilson, J., dissenting).

73. *Id.*

74. *Id.* at 776.

75. *Id.* at 768–69.

76. *Id.* at 769.

jury, which awarded Guinn actual and punitive damages in the amount of $434,737.[77] On appeal, the Supreme Court of Oklahoma concluded that Guinn could not recover for the church's prewithdrawal disciplinary actions, but she could recover for its postwithdrawal tortious actions.[78]

Membership again played a central role in the case. According to the church's doctrine, members could not disassociate themselves from the church by withdrawing membership—as in a family, they were members for life.[79] Therefore, the church asserted that "[a] court's determination that Parishioner effectively withdrew her membership and thus her consent to submit to church doctrine would . . . be a constitutionally impermissible state usurpation of religious discipline accomplished through judicial interference."[80] The church further argued that its disciplinary procedures were already commenced *before* the plaintiff had withdrawn her membership.[81] Consequently, it was entitled to carry out the remainder of the already-commenced disciplinary practices.[82]

The court disagreed, reasoning that just as the Free Exercise Clause protects a religious institution's free-exercise rights, so too does it secure an individual's right to recede from a religious allegiance.[83] This individual right, the court maintained, cannot be extinguished unless a parishioner manifests a "knowing and intelligent waiver" of it.[84] Because Guinn did not knowingly waive her free-exercise right, she

77. *Id.*

78. *Id.* at 786.

79. *Id.* at 769 (further, "[an] Elder told [Guinn] that withdrawing membership from the Church of Christ was not only doctrinally impossible but it could not halt the disciplinary sanction being carried out against her" (emphasis omitted)).

80. *Id.* at 776.

81. *Id.*

82. *Id.*

83. *See id.* at 779 ("No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts."). To support this conclusion, the court drew upon *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), which upheld an individual's right *not* to worship. *Guinn*, 775 P.2d at 776 & n.38.

84. *Guinn*, 775 P.2d at 775. The court did not discuss what such a waiver would entail, only that it would at least require a parishioner's knowledge of her individual free-exercise rights and the attendant circumstances conditioning those rights, her volitional capacity to relinquish those rights, and her intention to do so—all conspicuously manifested. *Id.* at 777 n.42. Guinn alleged that she was not taught about the church's doctrine that membership is an insoluble, lifetime bond. Therefore, the court concluded that "[t]he intentional and voluntary relinquishment of a known right required for a finding of an effective waiver was never established." *Id.* at 777.

could unilaterally withdraw her membership from the church at any time—albeit only in written form.[85] So for the court, inherent to the individual's right to freely worship is the right *not* to worship.[86] This individual free-exercise right cannot be occluded by the institutional free-exercise rights of the congregation.

The court's treatment of consent also raised significant free-exercise questions. Claiming complete consonance with the Ninth Circuit's reasoning in *Paul*, the *Guinn* court stated that the dispositive issue before it was whether Guinn had consented to the church's disciplinary measures.[87] Before Guinn's letter to the church, she had; after her letter, she had not.[88] Because consent was a requisite for the church's disciplinary measures, the court held that she could not be subject to the church's postwithdrawal disciplinary practices and could accordingly recover damages from the church.[89]

Finally, the *Guinn* court distinguished the disciplinary proceedings of the Collinsville Church of Christ from the disciplinary proceedings that took place in *Paul*.[90] It observed that the postresignation measures in *Paul* were passive, whereas the measures from the Collinsville church were invasive and active.[91] The court accordingly reasoned that "religiously-motivated disciplinary measures that merely exclude a person from communion are vastly different from those which are

85. *See id.* at 777 n.43 (recognizing the significance of Guinn's written withdrawal of membership). This writing requirement can also be gathered from the court's inferential chain of reasoning. Even though Guinn halted church attendance and expressed her desire to be left alone, the court found that only her letter severed her membership ties. *Id.* at 784. The express writing requirement the majority imposed is curious and arbitrary; this is highlighted below in Justice Wilson's dissent. *See infra* note 88 and accompanying text.

86. *Id.* at 777.

87. *See id.* at 780–81 (distinguishing *Paul*, where the discipline was passive and did not require consent, from the instant case, where the disciplinary scheme was designed to control and exclude). By contrast, Judge Hodges's dissent points out that the factual situation in *Paul* was very similar. *Id.* at 794 (Hodges, J., dissenting).

88. *Id.* at 784. The court held this despite the fact that Guinn's conduct could have been interpreted as a constructive withdrawal of her membership. *Id.* at 791. (Wilson, J., dissenting).

89. *See id.* at 785 ("Because Parishioner was neither a present nor a prospective church member at the time of the Elders' publication, the members of the Collinsville congregation did not share the sort of common interest in Parishioner's behavior that would render the occasion of the publication privileged.").

90. *Id.* at 780; *see also supra* note 87 and accompanying text.

91. *See id.* at 780–81 ("[T]he Elders continued actively to discipline and punish her for past disobedience of its doctrinal precepts.").

designed to control and involve."[92] The church's measures constituting the latter, its conduct was actionable.

Justice Wilson dissented from the majority's insistence that a formal written statement be a prerequisite for withdrawing church membership.[93] Instead, she argued that words and conduct which clearly express an individual's rejection of doctrine should be sufficient.[94] She therefore advocated a more functionalist view of church membership than did the majority.[95]

For his part, Justice Hodges dissented *in toto* and proposed a contract paradigm for analyzing church membership and consent.[96] He argued that Guinn voluntarily joined the church and, upon doing so, she submitted to its laws and surrendered her religious liberty to the extent that it would grant her relief from church discipline in tort.[97] The elders were therefore entitled to believe that Guinn was a member for life and to carry on their disciplinary proceedings.[98] Thus, Justice Hodges argued that "the Church and the Elders were constitutionally protected under the First Amendment from civil liability to discipline Parishioner by the withdrawal of fellowship proceedings both during her church membership and after her unilateral withdrawal from the Church."[99] This position aligns more with the constitutional reasoning in *Paul* and, hence, more with an institutional lens for free-exercise protection.[100]

---

92. *Id.* at 781 (emphasis omitted). The court's passive-active distinction is specious. Indeed, inactive conduct can be just as potent and effective as active conduct. And even though numerous courts have relied on this analytical distinction, *see, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552–58 (2012) (employing the passive-active rationale to support its holding), jurists are right to criticize it for being too legally and philosophically amorphous. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring) (criticizing the passive-active distinction in a broader critique of the religious status-use distinction). The *Guinn* majority's use of the passive-active distinction to distinguish *Paul* was therefore questionable. For the sake of brevity, however, this Note will not explore the issue any further.

93. *Guinn*, 775 P.2d at 791 (Wilson, J., concurring in part and dissenting in part).

94. *Id.*

95. For an account of why a contract paradigm favors Justice Wilson's functionalist approach, see *infra* notes 254–61.

96. *Id.* at 792, 795 (Hodges, J., dissenting). Justice Hodges's dissent will be utilized to advance the contract framework below.

97. *Id.* at 794.

98. *Id.* at 796.

99. *Id.* at 792.

100. *See supra* notes 57–67 and accompanying text.

To recap, the courts in *Bear*, *Paul*, and *Guinn* reached vastly different conclusions regarding similar instances of shunning, and all staked their holdings on different lines of legal reasoning. These foundational cases typify the way that shunning analysis varies widely from court to court, especially vis-à-vis the concepts of consent and membership. The court in *Bear* found for the shunned person with little attention given to consent or membership; instead, the *Bear* court suggested that protecting individuals through tort liability could serve as a compelling government interest. The court in *Paul*, on the other hand, did not view consent or membership to be dispositive given its robust view of the First Amendment's protection of shunning practices. And the court in *Guinn* made consent and membership central to its analysis, thus elevating individual free-exercise liberties. In an area of such great constitutional consequence, such dissonance is cause for alarm.

II. *PENLEY* AND *HADNOT*: THE INADEQUACY OF THE EXISTING PARADIGM

In the wake of the foregoing shunning jurisprudence, the neighboring supreme courts of Texas and Oklahoma were faced with similar shunning cases. These cases—more modern and developed iterations of shunning doctrine—are the progeny of an unclear body of First Amendment law. Hence, the courts' analyses accentuate the inadequacy of existing paradigms and demonstrate the need for a new one.

A. Westbrook v. Penley*: Wrong for the Right Reasons*

1. *Background. Westbrook v. Penley*[101] tracks closely with the facts of other shunning cases.[102] Peggy Lee Penley, the plaintiff, was having marital issues with her husband.[103] She sought counseling from a licensed marriage counselor, defendant Buddy Westbrook, who also happened to be Penley's fellow parishioner at McKinney Memorial Bible Church.[104]

101. 231 S.W.3d 389 (Tex. 2007).

102. *See, e.g.*, *Guinn*, 775 P.2d at 767–69 (describing a similar shunning fact pattern); Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 876–78 (9th Cir. 1987) (same).

103. *Penley*, 231 S.W.3d at 392.

104. *Id.* In 1998, for example, Westbrook conducted three counseling sessions with Penley at his office; he also conducted two counseling sessions with her husband. *Id.*

In 1999, Westbrook and others—including Penley and her husband—broke from McKinney Bible Church to form their own church, CrossLand Community Bible Church.[105] Westbrook was nominated to serve as the church's inaugural pastor, and the church vowed to operate "according to biblical principles."[106] The church's statement of faith, to which each membership applicant was required to assent before joining the church, included a disciplinary policy which sought to bring sinners to repentance and keep the community pure.[107] To this end, the church's constitution contained the following provisions:

> [T]he elders will biblically and lovingly utilize every appropriate means to restore members who find themselves in patterns of serious misconduct. When efforts at restoration fail, the elders will apply the Biblical teaching on church discipline, which could include revocation of membership, *along with an appropriate announcement made to the membership*.
>
> . . . [I]f a member engages in conduct which "violates Biblical standards, or which is detrimental to the ministry, unity, peace or purity of the church . . . the elders will follow our Lord's instructions from *Matthew* 18:15–20."[108]

Thus, the church's procedure for correcting alleged misconduct included shunning the offender and disseminating information about his or her actions to the congregation.[109] During CrossLand's maiden months, Penley explicitly assented to the church constitution: "I can abide by the church constitution," she affirmed.[110]

Penley's relationship with her husband further deteriorated, and after separating, the two participated in a series of weekly counseling sessions with other couples at Westbrook's home.[111] According to

105. *Id.*

106. *Id.*

107. *See id.* ("[The church believes] that one of the primary responsibilities of the church is to maintain the purity of the Body. . . . The church's stated goal is to encourage repentance . . . .").

108. *Id.* (emphasis added) (citations omitted). For the import of Matthew 18:15–20, see *supra* note 69 and accompanying text. Ecclesial shunning policies guided by fundamentalist interpretations of Matthew 18 often culminate in church leaders announcing to the congregation the cause of the shunned parishioner's expulsion of the community.

109. *See id.* at 392 & n.1 (including such forms of discipline as revocation of membership, appropriate announcements to the church membership, and treating the sinner as a "Gentile and a tax collector").

110. *Id.* at 392–93.

111. *Id.* at 393.

Penley, these sessions were an extension of her previous marital counseling, and the Bible was never discussed.[112]

Around October 2000, Penley and her husband went to Westbrook's home for a counseling session. During a break, Penley spoke separately with Westbrook and confided that she had engaged in an extramarital sexual relationship and intended to divorce her husband.[113] Westbrook provided further counseling and recommended a family-law attorney to Penley.[114] Yet when Westbrook broached the topic of the disciplinary measures that the church would have to take as a result of her extramarital relationship, Penley explained that she was resigning from CrossLand Church.[115] Westbrook and the church elders nevertheless drafted a letter to the CrossLand congregation that encouraged them to "treat [Penley] as an outsider" and explained that Penley had been involved in a "biblically inappropriate relationship with another man."[116] After this letter was published on November 7, 2001,[117] Penley sued CrossLand, Westbrook, and the church elders for the church's shunning practices.[118] She also sued Westbrook in his professional capacity as a marital counselor.[119]

2. *Penley's lawsuit.* Penley alleged defamation, breach of fiduciary duty, intentional infliction of emotional distress, and professional negligence.[120] In response, Westbrook filed a motion to dismiss, asserting that the court lacked jurisdiction because the suit involved an "ecclesiastical dispute," which the First and Fourteenth Amendments preclude from civil adjudication.[121] The church and elders filed similar motions to dismiss, and the trial court granted all of the defendants' motions.[122] Penley appealed the dismissal only as to Westbrook.[123] The

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* Unlike the letter in *Guinn*, this letter admonished the congregation to treat the matter as a members-only issue, not to be shared with those outside the congregation. Further, CrossLand did not itself send the letter to any church affiliates. *See supra* note 69 and accompanying text.
118. *Id.* at 394.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

court of appeals affirmed the dismissal of all claims against Westbrook except for professional negligence, which it held concerned Westbrook in his capacity as Penley's secular professional counselor and, hence, did not implicate First Amendment protection.[124] The Supreme Court of Texas granted Westbrook's petition for review of whether the trial court had jurisdiction over Penley's professional negligence claim in light of the First Amendment.[125]

The court began its analysis by highlighting the difficulty of drawing lines between the "secular" and the "religious" in marital counseling, especially for liminal relationships such as the one between Westbrook and Penley.[126] The court then suggested that these blurred lines call for a balancing of the respective secular and religious interests at stake.[127] While the state's interest in protecting communications between licensed professional counselors and their clients was important,[128] the countervailing interest was a church's constitutional right to self-governance—a right that "has long been afforded broad constitutional protection."[129] Therefore, however heightened the state's interest in preserving client confidentiality may be,[130] it cannot eclipse a church's free-exercise interest in disciplining its members according to the tenets of its faith.[131]

---

124. *Id.*

125. *Id.*

126. *Id.* at 396. Numerous commentators have also highlighted this difficulty. *See* Robert J. Basil, Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L.J. 419, 437 (1988) ("Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious . . . ."); *cf.* C. Eric Funston, Comment, *Made Out of Whole Cloths? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507, 514–16 (1983) (quoting Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 166 (1981)) (noting that pastoral counseling is a religious rather than secular activity wherein "[it] is impossible to separate the cure of the minds from the cure of the souls").

127. *Penley*, 231 S.W.3d at 396.

128. *Id.* at 402.

129. *Id.* at 397 (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872)).

130. *See* R.K. v. Ramirez, 887 S.W.2d 836, 840 (Tex. 1994) ("The basis for [counselor-client] privileges is twofold: (1) to encourage the full communication necessary for effective treatment, and (2) to prevent unnecessary disclosure of highly personal information." (citation omitted)).

131. The *Penley* court noted the general tendency for courts to protect free-exercise rights over other important interests:

> The values that underlie the constitutional interest in prohibiting judicial encroachment upon a church's ability to manage its affairs and discipline its members, who have voluntarily united themselves to the church body and impliedly consented to be bound by its standards, have been zealously protected. When presented with conflicting interests like these, courts have generally held that 'a spirit of freedom for

The court next addressed Penley's contention that her claims did not implicate matters of church governance. Since she only sought to sue Westbrook in his capacity as a licensed counselor, she argued, her claim did not require a court to explore religious doctrine.[132] The court summarily rejected this argument. It determined that Westbrook's disclosure could not be isolated from the church's disciplinary proceedings due to the parties' intimate ties to the church.[133] And because "'[t]he relationship between an organized church and its ministers is its lifeblood,'"[134] inquest into Westbrook's counseling duties would represent a First Amendment violation even if Westbrook's secular and pastoral roles could be differentiated.[135] Thus, although Penley's professional-negligence claim *could* be defined by neutral principles of law, the application of those principles would impinge upon CrossLand's autonomy.[136]

The court subsequently distinguished cases in which courts reviewed a clergy member's counseling behavior and found it to be tortious.[137] Unlike those cases, the court reasoned, Westbrook's disclosure to the congregation was "mandated by doctrine" and did not endanger "Penley's or the public's health or safety."[138] Consequently, the court affirmed the dismissal of Penley's professional negligence claim.[139]

The court concluded by addressing a question germane to almost all shunning cases: Does a plaintiff's resignation from a religious

---

religious organizations' prevails, even if that freedom comes at the expense of other interests of high social importance.

Penley, 213 S.W.3d at 403 (citations omitted) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

132. *See id.* at 400 ("Rather, Penley explains, her suit centers on Westbrook's initial disclosure to the church elders of confidential information obtained during the marital counseling sessions, which she claims constituted a breach of professional counseling standards.").

133. *Id.*

134. *Id.* at 402 (citations omitted).

135. *Id.* ("Any civil liability that might attach for Westbrook's violation of a secular duty of confidentiality in this context would in effect impose a fine for his decision to follow the religious disciplinary procedures that his role as pastor required and have a concomitant chilling effect on churches' autonomy.").

136. *Id.*

137. *Id.* at 403–04. The court, for example, distinguished Penley's case from (among others) *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), which held that the plaintiff who had engaged in a sexual relationship with her priest stated a cause of action for breach of fiduciary duty.

138. *Id.* at 404.

139. *Id.*

organization preclude a clergy member's First Amendment privilege to discipline her? The court answered in the negative:

> Penley's voluntary forfeiture of her membership did not, in CrossLand's or Westbrook's view, forestall the church's duty under its constitution to "tell it to the church" . . . . Their decision to so proceed was based on . . . an inherently ecclesiastical matter. We hold that court interference with that decision through imposition of tort liability in this case would impinge upon matters of church governance in violation of the First Amendment.[140]

In short, the *Penley* court determined that, because Penley "voluntarily became a member of the church body and agreed to abide by the church constitution," she agreed to its disciplinary measures at the outset.[141] She was therefore barred from bringing a claim—even one of professional negligence—because Westbrook's conduct was connected to ecclesial doctrine, and the First Amendment precludes the adjudication of disputes concerning church membership.[142]

3. Analysis. "Consent" played a peripheral role in *Penley*, with the court declining to utilize it as an analytical framework.[143] The court merely observed that members who voluntarily join a church impliedly consent to be bound by the body's disciplinary measures.[144] Instead, the court premised its holding on the weight of the constitutional interests at stake, the negative implications of imposing tort liability, and what Westbrook's obligations entailed according to the church's disciplinary doctrine.[145]

This scant treatment comports with the Ninth Circuit's restrained approach to consent in *Paul*.[146] In *Penley*, consent was important ex ante; however, to make continued consent dispositive would be to encroach upon the church's autonomy to manage its internal affairs—

140. *Id.* at 404–05.

141. *Id.* at 402.

142. *Id.* at 404–05.

143. In fact, the court only mentions "consent" twice, and merely does so to address implied consent. *Id.* at 397, 403.

144. *Id.* at 403.

145. *Id.* at 396–405. This dearth of consent analysis demonstrates the court's refusal to follow its sister court in *Guinn*. Indeed, the court references numerous religious-tort cases from other jurisdictions that preceded and followed *Guinn*, but never mentions *Guinn* itself, even though it is a foundational shunning case that pertains to the same issues.

146. Consent analysis is noticeably absent in *Paul* as well, as the Ninth Circuit does not address the issue at all.

a violation of the First Amendment.[147] Moreover, the *Penley* court referenced a qualitatively different type of consent—implied consent—and was only concerned with it insofar as it was probative of entry into membership.[148]

In these ways, *Penley* is almost entirely correct in its analysis. Its respect for stare decisis fosters theoretical coherence, and its expansive scope for free-exercise protection promotes the integrity of religious institutions. And the *Penley* court refrained from deploying consent as a vague analytical tool. That said, it is difficult to argue that Penley had the requisite ex ante consent to warrant providing Westbrook with such broad First Amendment protection.

Indeed, because Penley's relationship with Westbrook underwent a metamorphic transition, there is little indication that she knew or had reason to know that she would be disciplined for what she disclosed to him. Her counseling sessions did not take place at church, did not mention the Bible, and commenced before her licensed counselor became her pastor.[149] If Penley thought that she would only be disciplined for what she disclosed in an ecclesiastical context—which, on the facts, seems to have been the case—then her consent was inapplicable to Westbrook's actions. Thus, the case for ex ante consent was weak in *Penley*, even under a contractual rubric.[150]

Membership stood in as the court's analytical lynchpin. Yet membership, like consent, was only significant for the court to the

147. *Penley*, 231 S.W.3d at 405.

148. *See id.* at 397, 403 (implying that consent is voluntarily assumed from membership in a religious body). The court cites *Watson* for both instances in which it analyzes consent and church membership, and *Watson* applies an entirely different notion of consent than *Guinn* or *Hadnot*. *See* Lee W. Brooks, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1318 (1986) ("The Court in *Watson v. Jones*, however, used the concept of 'implied consent' not in the strict sense, employed in tort law, but more metaphorically to describe something like a jurisdictional conflict between the civil courts and religious authority."). Brooks goes on to argue that when an individual participates long enough in a religious organization, he or she can be assumed to be familiar enough with its beliefs and practices and, as such, gives an appearance of consent by his or her mere presence in the religious group. *Id.* at 1318–19. The Supreme Court of Oklahoma, on the other hand, underscores the explicit nature of consent—it must be manifested through words. *See supra* note 85 and accompanying text.

149. *See Penley*, 231 S.W.3d at 391–93 (describing Penley's counseling sessions).

150. Additionally, the court failed to state why consent at the outset of membership should be the only constitutionally relevant inquiry. That the court spent such little time on consent illustrates its attention to protecting organizational religious freedoms—a worthy judicial aim. But the court should have discussed the role of consent in more detail given its doctrinal primacy in other jurisdictions.

extent that it was established ex ante.[151] Once Penley became a member, her unilateral withdrawal did not affect the church's duty or right to enact its disciplinary procedures in accordance with doctrine.[152] So for the *Penley* court, Penley's voluntary resignation was largely irrelevant insofar as the First Amendment requires courts to abstain from inquest into church doctrine when it involves disciplining members or former members.[153] This approach is more sensible than an approach premised on continued consent,[154] but membership status should still not serve as a *sine qua non* for resolving shunning cases.[155] Indeed "[m]embership in a church creates a different relationship from that which exists in other voluntary societies formed for business, social, literary, or charitable purposes."[156] This difference is also present between the pastor-parishioner relationship and the counselor-client relationship.[157]

Next, the court acknowledged that there were valid competing interests and rights for both parties.[158] But as was the case with consent—a prerequisite for membership—it is doubtful that Penley had reason to know that her membership granted Westbrook immunity from tort liability when acting in his capacity as a licensed counselor. This should have diminished the church's free-exercise interest in protecting Westbrook as a counselor and, in turn, increased Penley's interest in tort recovery. The state's interest was the duty of confidentiality, which is intended to protect counselor-client communications.[159] And although the court conceded that this interest

151. *See Penley*, 231 S.W.3d at 402 (Tex. 2007) ("Penley voluntarily became a member of the church body and agreed to abide by the church constitution; indeed, she expressed that she did so 'willingly.' That constitution outlined the disciplinary process that would be followed if a member engaged in conduct that the church considered inappropriate.").

152. *Id.* at 404 (articulating the freedom to excommunicate as a "duty," not just a right).

153. *Id.*

154. *See infra* notes 186–91.

155. Indeed, Penley claimed that "she did not receive . . . counseling from Westbrook in his capacity as a member." *Penley*, 231 S.W.3d at 402. The court readily dismissed this argument, though, precisely because Penley and Westbrook were both contemporaneously members at one point in time.

156. Minton v. Leavell, 297 S.W.2d 615, 621–22 (Tex. Civ. App. 1927).

157. Lawrence M. Burek, Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPP. L. REV. 137, 139 (1986) ("While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective.").

158. *Penley*, 231 S.W.3d at 402–03.

159. *Id*. at 396.

was substantial,[160] it failed to give it due weight merely because of the parties' membership status.

In other words, by focusing too single-mindedly on membership status, the court erroneously subsumed the counselor-client relationship into the pastor-parishioner relationship and wrongly affirmed the dismissal of Penley's professional-negligence claim.

Thus, even though sparse in its treatment of consent, *Penley* shows how problematic it is to resolve shunning cases solely through the lens of membership. Applying a contract paradigm to *Penley* would remedy this issue by looking not to the status of the parties but to whether—and to what extent—the plaintiff manifested initial consent to church discipline.

B. Hadnot v. Shaw*: Right Result for the Wrong Reasons*

1. *Background. Hadnot v. Shaw*,[161] decided by the Supreme Court of Oklahoma before *Penley,* was based on a very different rationale. In *Hadnot*, two sister plaintiffs, Jeanne A. Hadnot and Suzette Renee Ellis, were parishioners at the Church of Jesus Christ of Latter-day Saints in Chickasha, Oklahoma.[162] Both parishioners were requested to be present at a "Church disciplinary hearing called to determine their membership status."[163] Neither attended.[164] As a result, church leaders sent a letter to each detailing the grounds for her excommunication.[165] The letter addressed to Hadnot in particular, which was first opened and read by her husband, stated that her membership had been terminated because of "fornication."[166] The sisters accordingly claimed

160. *Id.* at 402–03. The court noted:

> We do not doubt that preserving client confidences revealed in the context of a professional counseling relationship serves an important public interest, as the duty the Legislature has imposed on such professionals reflects. . . . When presented with conflicting interests like these, courts have generally held that 'a spirit of freedom for religious organizations' prevails, even if that freedom comes at the expense of other interests of high social importance.

Id. (citations omitted) (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952)).

161. Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992).

162. *Id.* at 980.

163. *Id.*

164. *Id.*

165. *Id.*

166. The relevant portion of the letter from the church reads: "[Y]our membership should be removed from church records, for the reason of fornication." *Id.* at 980 n.4.

damages for "harm from wilful [sic] or grossly negligent delivery of the expulsion letters."[167]

Furthermore, during the excommunication process, a church elder was asked by a congregant why the elders were "going after" the sisters, and the elder allegedly replied that the sisters' excommunication proceedings were initiated because of "fornication."[168] This communication of the letters' contents to the public was the second of the sisters' claimed injuries.[169] The theories undergirding these two claims included libel, slander, intentional infliction of emotional distress, and invasion of privacy.[170]

Hadnot is procedurally convoluted. To distill, the plaintiffs sought discovery pertaining to the church's procedures and communications after their excommunication.[171] But the district court denied the discovery request, holding that "by force of the First Amendment the information sought was privileged from secular judicial inquest."[172] With the plaintiffs unable to engage in discovery, the district court therefore granted summary judgment for the defendants.[173]

2. *The decision on appeal.* On appeal, the Oklahoma Supreme Court held that actions taken within a church's valid judicature—that is, within its authority to discipline—are nondiscoverable.[174] However, "any activity *outside* of valid church judicature . . . *may* be discoverable."[175] To determine the scope of the church's judicature,[176]

---

167. *Id.* at 981.

168. *Id.* at 984.

169. *Id.* at 981.

170. In light of the "rather imprecise wording of the [plaintiffs'] pleadings and the briefs," the Oklahoma Supreme Court concluded "that [the plaintiffs] ha[d] alleged two delictual causes of action, advancing three theories of liability in support of each." *Id.* at 980–81. The first cause of action—alleging negligent delivery of the letters—was grounded on theories of: 1) libel; 2) intentional or negligent infliction of emotional distress; and 3) invasion of privacy. *Id.* at 981. The second cause of action—for the harm caused by disseminating the slanderous information to the public—rested on theories of: 1) slander; 2) intentional or negligent infliction of emotional distress; and 3) invasion of privacy. *Id.*

171. *Id.* at 981. Several procedural issues were raised, but this was the only one that gave rise to constitutional analysis.

172. *Id.*

173. *Id.* at 979.

174. *See id.* at 990 ("Church judicature exercised within proper bounds of cognizance is not discoverable."). Valid judicature is directly contingent upon a church member's consent. *See infra* note 189 and accompanying text.

175. *Id.*

176. *See supra* note 13 and accompanying text.

the court examined whether the trial court properly applied *Guinn*.[177] The court stated that, under *Guinn*, a church's disciplinary judicature is contingent upon the "mutual agreement" between the church and its member.[178] "That relationship," the court continued, "may be severed freely by a member's *positive act* at any time."[179] In this sense, the court aligned with Justice Wilson's dissent in *Guinn*: conduct can be sufficient to break membership.[180] Then, the court relied on *Paul*[181] to assert the following:

> The church privilege extends in this case to activities or communications which occurred *after excommunication* if these may be termed as mere implementation of previously pronounced ecclesiastical sanction which was valid when exercised—i.e., that it was declared when Church jurisdiction subsisted. Within the concept of protected implementation are not only the religious disciplinary proceeding's merits and procedure but also its end product—the expulsion sanction. While excommunication would put an end to jurisdiction over any further offense, it does not abrogate the consequences flowing from the previously announced Church judicature.[182]

Hence, according to the *Hadnot* court, so long as a church's activities are merely a continuation of enumerated disciplinary measures and are legitimately commenced before the member's severance, then the consequences resulting from the church's discipline are not actionable.[183] Therefore, because the plaintiffs did not "positively act to withdraw membership" before their excommunication, the church retained its jurisdiction over them and was free to discipline them as it

177. *Id.* at 987–98.

178. *Id.* at 987.

179. *Id.* (citing Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989)) (emphasis added).

180. *See supra* notes 93–94 and accompanying text (discussing the *Guinn* majority's insistence that a written revocation of membership be required to take a parishioner outside of a church's judicature).

181. *Hadnot*, 826 P.2d at 987 n.44–45. There is nothing in *Paul* that corroborates the proposition that follows. In fact, *Paul* espouses the exact opposite proposition. The ecclesiastical sanctions in *Paul* were anything but previously pronounced; they underwent a drastic change while Paul was regarded as a "disassociated" person. *See supra* notes 52–54. The church in *Paul* nonetheless retained its privilege.

182. *Hadnot*, 826 P.2d at 987; *see also infra* notes 232–39 and accompanying text (critiquing this and asserting that, à la Justice Wilson's dissent in *Guinn*, membership should be a more porous and fluid concept).

183. *Hadnot*, 826 P.2d at 987.

saw fit.[184] After excommunication, however, it could only implement existing sanctions.[185]

3. *Analysis*. Consent served a different function in *Hadnot* than in *Penley*.[186] In *Hadnot*, the court attempted to closely follow its own opinion in *Guinn*,[187] which applied a "consent theory" of tort law.[188] Under a consent theory, "the church's judicature *rests solely on consent* which in turn is anchored on the ecclesiastical respondent's church affiliation."[189] And, as in *Guinn*, the court considered membership to be a proxy for consent.[190] So as long as an individual is a church member, punishment is fair game, and the disciplinary measures taken by the church remain nondiscoverable. But once the relationship with a religious group has been "severed freely by a member's positive act *at any time*," the member presumptively removes her consent to the church's authority, and the church's disciplinary judicature recedes.[191]

Whatever merit a consent theory might have, the court in *Hadnot* misinterpreted and misapplied *Guinn*, the precedent it was principally

---

184. *Id.* at 988. The court describes the process of terminating an ecclesiastical court's jurisdiction as follows:

> To terminate an ecclesiastical court's jurisdiction a positive and affirmative action is required. The action must impart due notice to the ecclesiastical body that its spiritual cognizance has come to an end as a result of the parishioners' act of withdrawal. Silence and inactivity alone are not indicia of cessation.

Id. at 988 n.46. It is unclear whether the court understood that, for many religious communities, expulsion and excommunication are quite different things. For example, in the Roman Catholic Church, when a member is excommunicated, she might still be invited to participate in church practices, although she may not participate in the sacraments. *See* CATECHISM OF THE CATHOLIC CHURCH, ¶ 1463 (2d ed. 2016).

185. *Hadnot*, 826 P.2d at 988.

186. The *Restatement (Second) of Torts* § 892(2) (AM. LAW INST. 1979) explains, "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." This definition of "consent" is slightly tautologous, but it informs the discussion in the next section.

187. *See Hadnot*, 826 P.2d at 987–88 (discussing the trial court's correct application of *Guinn*).

188. *See* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 775–79, 784 n.70. (Okla. 1989) (emphasis added) (outlining the court's consent theory); Wiesen, *supra* note 12, at 302 ("The court reasoned that the prewithdrawal actions were protected under a consent theory: While Guinn was a member, the Church had a right to rely on her consent to its disciplinary precepts."). Wiesen refers to *Guinn*'s notion of conditioned discipline as "consent theory" throughout his article, and other commentators employ the same language. *See, e.g.*, Cupp, *supra* note 38, at 97376 (promoting a consent theory to shunning jurisprudence). As such, this term is used in the analysis below.

189. *Hadnot*, 826 P.2d at 989 (emphasis omitted).

190. *Id.* at 989–90.

191. *Id.* at 987 (emphasis added).

concerned to follow.[192] For example, in *Hadnot*, the court noted that, "[w]hile excommunication would put an end to jurisdiction over any further offense, it does not abrogate the consequences flowing from the previously announced Church judicature."[193] Yet the consequences flowing from a previously announced ecclesiastical judicature are precisely what the court refused to protect under the First Amendment in *Guinn*.[194] Indeed, in *Guinn*, the Collinsville Church was held liable even though it merely continued the disciplinary practices it had already commenced before Guinn had withdrawn her membership.[195] Yet *Hadnot*'s version of consent only bars disciplinary measures commenced *after* a person withdraws her membership; a continuation of legitimate, prewithdrawal church discipline remains within a church's judicature. *Hadnot* therefore represents a departure from doctrine.

Regarding membership, the *Hadnot* court found it decisive that the parishioners had not officially withdrawn their membership before the disciplinary measures transpired.[196] For the court, the failure to withdraw membership created a presumption of consent.[197] However, the facts indicate anything but the parishioners' consent to the excommunication methods used—a fact best portrayed by their decision to file suit. Moreover, the parishioners' purposeful refusal to show up to their own excommunication proceedings should have constructively severed their membership (and thus consent). Thus,

192. *See, e.g.*, Doe v. First Presbyterian Church U.S.A., No. 115,182, 2017 WL 1332134, at *12–13 (Okla. Feb. 22, 2017) ("In *Hadnot v. Shaw*, this Court reaffirmed the protection provided to churches to discipline their members free from outside interference from the courts, and backed away from the tort exception stressed in *Guinn*." (citation omitted)). Although *Doe* has ultimately been withdrawn and superseded, Doe v. First Presbyterian Church U.S.A., 421 P.3d 284 (Okla. 2017), its interpretation here demonstrates that the *Hadnot* court did not follow *Guinn* as closely as it purported.

193. *Hadnot*, 826 P.2d at 987.

194. *See supra* note 87–89 and accompanying text.

195. *See supra* notes 69–71 and accompanying text.

196. *Hadnot*, 826 P.2d at 985 ("The parishioners had not withdrawn their membership at the time they received notice of their expulsion. Under the First Amendment, the procedural norms which govern the exercise of ecclesiastical cognizance are not subject to a secular court's scrutiny."); *accord* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 783–84 (Okla. 1989) ("The law presumes that during the time she was a member of the church *she voluntarily submitted to all known tenets of congregational discipline* . . . . [W]hen Parishioner withdrew from the Church . . . she effectively revoked any consent upon which the Elders could have based a defense of 'absolute privilege' . . . .").

197. *Hadnot*, 826 P.2d at 988 ("It is undisputed that in this case the parishioners never withdrew their membership from the Church. Thus in contemplation of law their consent to the Church's disciplinary action stood unaffected.").

membership obfuscated the court's analysis in *Hadnot*, just as it did in *Penley*, and membership failed to resolve the consent quandary.

III. A CONTRACT PARADIGM FOR SHUNNING

A. In Favor of Organizational Religious Rights

In all of the foregoing cases—especially *Penley* and *Hadnot*—it quickly becomes clear that courts are unsure how to proceed when varied and competing interests are at stake. How should courts weigh the constitutional claims of religious organizations and individuals? Can courts equitably weigh the government's interest in granting citizens tort recovery against a religious entity's free-exercise rights? This Part argues for a more robust protection of organizational free-exercise rights in shunning cases.

Appealing to the First Amendment rights of a shunned individual alone is improper and only convolutes the constitutional analysis in the shunning context. Two problems emerge from the primacy of individual free-exercise rights. The first is conceptual: Modern free-exercise jurisprudence has trended toward protecting individual religious rights at the expense of organizational religious rights.[198] Various commentators have posited reasons for this "disfavoritism . . . towards conceptualizing religious liberty in institutional terms,"[199] ranging from American liberalism's influence on free-exercise jurisprudence[200] to a general judicial inability to reason religiously.[201] Whatever the cause, there are scarcely "grounds to argue that free exercise protects only individual claims."[202] In fact, the Free Exercise Clause was originally intended to extend robust protection to the

198. *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 489–96 (1991) (discussing the trend of prioritizing individual free-exercise rights while "largely ignoring [the Free Exercise Clause's] associational and institutional dimensions").

199. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 256 (2000).

200. *See, e.g.*, Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 100–01 (discussing the influence of liberalism and secularism on group religious rights).

201. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126–27 (1992) (discussing the academic elitism that has caused the judiciary to become averse to sympathetic understandings of and protections for religious forms of life).

202. Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 593 (1998).

organizational dimensions of religious life.[203] Organizational free-exercise rights should therefore be central in a court's shunning analysis.

The second problem with an overemphasis on individual religious rights is practical: A religious group should not be forced to relinquish its First Amendment coverage merely because a shunned member will be harmed by its practices. Indeed, without the religious community, there might not be individual religious rights worth preserving in the first place—at least not in any meaningful sense.[204] Moreover, the individual members of a religious congregation act in concert to practice deeply held religious beliefs.[205] Allowing recovery in tort based on a consent theory would restrict the free exercise of religion for those individuals seeking to carry out their beliefs through communal disciplinary practices—something that the shunned member was best situated to recognize as a possibility to begin with. This is chiefly because consent removes the judicature from the aegis of the religious entity and relocates it in the individual. In doing so, consent disproportionately assigns weight to the individual's interests over and against the community's. Accordingly, a framework that brings consent

---

203. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) ("A close look at the Bill [of Rights] reveals structural ideas . . . and [the] protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to deploy it . . . ."); Glendon & Yanes, *supra* note 198, at 544 (discussing the importance of intermediate associations to the Bill of Rights and labeling religious groups as "foremost among them").

204. This depends, of course, on how one defines the enigmatic term "religion," but most religious rights are exercised within the context of a religious community. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 ("An individual's freedom to speak, to worship, and to petition the government . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."); *cf.* STANLEY HAUERWAS, THE PEACEABLE KINGDOM: A PRIMER IN CHRISTIAN ETHICS 33 (1983) (emphasizing the communal texture of [Christian] faith). As Hauerwas observes, "This is not to suggest that our actions, decisions and choices are unimportant, but rather that the church has a stake in holding together our being and behaving in such a manner that our doing only can be a reflection of our character." Hauerwas, *supra*, at 33–34. Elsewhere, he notes that "the [Christian] church does not have a social ethic; the church is a social ethic." Hauerwas, *supra*, at 99; ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 23–24 (3d ed. 2007) (criticizing emotivism and utilitarianism's individualistic ethical thrust, and emphasizing the importance of a common good for a community that wishes to maintain meaningful social relationships and discourses). *But see* Stephen Macedo, *Hauerwas, Liberalism, and Public Reason: Terms of Engagement?*, 75 LAW & CONTEMP. PROBS. 161, 169–80 (2012) (critiquing Hauerwas's political philosophy and theology, especially Hauerwas's criticism of liberalism).

205. *See* Gedicks, *supra* note 200, at 106–07 (discussing the symbiotic relationship that emerges between individuals and groups in religious contexts).

to the foreground of a free-exercise analysis necessarily brings individual liberties to the foreground—to the detriment of religious institutions.

B. Critique of Consent and Membership

A shunning jurisprudence that employs consent and membership as its primary analytical tools will fail to adequately protect the organizational free-exercise rights of religious entities. As the foregoing review illustrates, membership and consent have been wielded enigmatically by courts. But certain trends can be deciphered from their deployment.

First, some courts treat membership as a proxy for consent.[206] If a member belongs to a religious group, then she is presumptively considered to have consented to its judicature. As soon as membership is withdrawn—by the congregation or the parishioner—consent is likewise withdrawn. Other courts find membership to be a proxy for a *congregation's* disciplinary authority.[207] If the shunned is a member of the congregation at any point in time, then that grants the church broad constitutional latitude to enact its discipline. Under this approach, a former member's ongoing consent, or lack thereof, is largely immaterial. The relevant question is whether a parishioner originally consented to the church's practices when joining.[208] And even still, some courts do not assign membership dispositive weight at all.[209] Instead, they look to whether a parishioner manifested consent to the congregational discipline at the time of its enactment.[210]

These nuances shed light on precisely what is so problematic about membership and consent as analytical touchstones. Courts do not ascribe the same meaning or significance to them, nor has the Supreme Court provided any guidance regarding how these categories should be deployed in religious-tort suits.[211] Perhaps there is enough overlap to

206. *See supra* note 88 and accompanying text (discussing *Guinn*'s treatment of membership and consent); *see also* Hadnot v. Shaw, 826 P.2d 978, 989–90, 989 n.53 (following *Guinn* in treating membership as a proxy for consent).

207. *See, e.g.*, *supra* note 65–75 and accompanying text (noting that the court in *Paul* granted the congregation disciplinary latitude because Paul was a "former member").

208. *See supra* note 147 and accompanying text.

209. *See infra* notes 238–39 and accompanying text.

210. *See infra* notes 238–39 and accompanying text.

211. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting) (remarking that "this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance").

discern a "family resemblance" between the terms as they are applied from jurisdiction to jurisdiction.[212] Membership might connote a sense of formal belongingness to an identifiable group, whereas consent might entail a parishioner's willingness—whether as a member or not—to be subject to a church's judicature. But because there has been careless deployment of consent and membership, their use in shunning jurisprudence is problematic. Both deserve discrete attention to tease out their deficiencies.

1. *Consent*. Although a consent theory is proper in several areas of tort law, it is inapposite when dealing with a shunning case for several reasons. To begin, a consent theory of constitutional protection fails to give adequate coverage to religious activities and thereby chills the free exercise of religion.[213] Some commentators argue that this is a desirable outcome inasmuch as, with shunning, "the disgruntled former member with dubious-sounding claims of intangible emotional harm [often] confronts a unified church bureaucracy" with coercive power.[214]

A consent theory for religious torts, however, ignores an important practical reality. Church members, with the luxury of a voluntary decision and the ability to appraise religious doctrine, are typically the parties best situated to avoid dignitary harm. They have notice at the outset about the potential consequences of church discipline and voluntarily assume the risk should they fail to abide by the religious group's teachings.[215] To be sure, as a social-psychological reality, this is not always the case (for example, in the case of children). The religious member often finds herself within a community *in medias res*, whether due to familial influence or whatever else might attract a member to a religious community.[216] However, even in circumstances where the member does not possess notice ex ante, she generally

212. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 35–36 (G.E.M. Anscombe P.M.S. Hacker & Joachim Schulte trans., 4th ed., 2009) (employing the concept of family resemblance to discuss how language works across different social and institutional contexts).

213. *Cf.* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345–46 (noting that prioritizing individual free-exercise rights over organizational rights carries "substantial potential for chilling religious activity"); Cupp, *supra* note 38, at 962 (discussing the chilling effect of tort liability for churches, even for nontortious activity).

214. Miller, *supra* note 4, at 293.

215. *Cf. supra* notes 110–52 (discussing *Penley*).

216. *See* Cupp, *supra* note 38, at 979–80 (outlining circumstances in which voluntary consent to church membership might be equivocal).

becomes apprised of ecclesiastical practices with time,[217] and the importance of preserving organizational free-exercise rights *still* favors the legal fiction of a contractual approach.[218]

By giving precedence to the ongoing consent of individuals, religious organizations become subject to the individual's First Amendment rights and hence less able to perform their corporate religious practices.[219] Religious groups' shunning practices are usually bound by inveterate doctrines, traditions, and texts; the practice of shunning in particular has been used by religious communities for millennia. So to find liability anytime one of those practices emotionally harms a plaintiff would necessarily vitiate the longstanding and entrenched rights of remaining congregants—and the entity itself—to freely exercise their religious beliefs. Simply put, if a religious group does not regain its disciplinary authority after the shunned member withdraws her consent, then it is restricted from exercising its embedded religious practices by the threat of tort liability.

A consent theory also causes judicial analysis to hinge on incommensurable rights claims, wielding rights-based language to that end.[220] This ultimately leads to impasse.[221] Not only is this emphasis on

---

217. *See id.* at 980 ("Even if an individual's religious membership was not originally voluntary, she is usually capable of affirming the church's beliefs as an adult.").

218. *See, e.g.*, Murphy v. I.S.K.CON. of New England, 571 N.E.2d 340, 349–50 (Mass. 1991) ("The decision whether the free exercise clause bars a particular tort action is not necessarily determined by the presence of tortious activity but by other factors such as . . . *the effect that liability for a successful claim would have on free exercise rights*." (emphasis added)).

219. *Supra* notes 198–206 and accompanying text. To be sure, this could be argued to be a desirable result on a philosophical, psychological, or sociological level. But such an institutional subversion does not comport with the utilitarian logic usually employed by judicial decisionmakers—for better or for worse. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 986–89 (1977) (discussing the influence of utilitarianism on prominent jurists).

220. Although American jurisprudence is steeped in this practice, Alasdair MacIntyre artfully presents an alternative view of rights:

> From this it does not of course follow that there are no natural or human rights; it only follows that no one could have known that there were. And this at least raises certain questions. But we do not need to be distracted into answering them, for the truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns.

MACINTYRE, *supra* note 204, at 69. It is beyond the scope of this Note to address the issue of rights or rights-based language at length. It is mentioned here merely to show that arguments that depend upon such rights-based language—and indeed rights themselves—are contested philosophical categories.

221. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 171–83 (1991) (arguing that rights-based language has caused political discourse to become anemic).

rights problematic in the way it arbitrarily weighs incompatible rights,[222] but it also fails to account for how religious people think, speak, and act. Within Western jurisprudence, when one consents to something, one passively allows another to perform conduct that could potentially invade personal rights or interests, and agrees not to seek recourse if such an invasion occurs.[223] The speech-acts performed within religious forms of life,[224] on the other hand, more often connote a sense of positive duty than passive permission.[225] Consent is allowance. It is negative and passive in tenor. Contract is covenant. It entails mutual, affirmative promises to act—or not act—in a specific way. This is often lost on jurists.

Finally, within the consent paradigm, it is difficult to say what constitutes and effects ongoing consent—that is, what would be required for a person to manifest or withdraw his or her consent. These issues find expression in both *Penley* and *Paul*. In *Penley*, in light of Penley's transitional relationship with Westbrook, it is difficult to determine what exactly she consented to at the outset.[226] Of course she consented to church doctrine;[227] but her already-established counseling relationship obscured her ex ante consent to the church's disciplinary measures, made clear by her inability to foresee that her divulgence would lead to injury. Similarly, in *Paul*, the Church of Jesus Christ of Latter-day Saints changed its shunning doctrine *after* Paul had already

---

222. *See supra* notes 204–05 and accompanying text.

223. RESTATEMENT (SECOND) OF TORTS § 892(1) (AM. LAW INST. 1979) ("Consent is willingness in fact for conduct to occur. . . . 'Consent' is used throughout with reference to conduct on the part of the actor that is intended to invade the interests of the one who consents."); *id.* § 892A(5) cmt. i ("On termination of the consent it ordinarily ceases to be effective and the actor is no longer privileged to continue his conduct. There are, however, situations in which the consent has become irrevocable either by its terms or by separate contract.").

224. *See* WITTGENSTEIN, *supra* note 212, at § 15 (providing examples of language games which differ according to the tacit backgrounds that he dubs "forms of life").

225. Dietrich Bonhoeffer's notion of freedom—that is, freedom for the other rather than freedom from the other—more accurately captures the communal nature of faith communities and highlights the affirmative duties that animate religious life:

> [F]reedom is not something persons have for themselves but something they have for others. . . . It is not a possession, a presence, or an object. . . . Rather, it is a relationship; otherwise, it is nothing. . . . Being free means "being free for the other" . . . . Only in relationship with the other am I free.

DIETRICH BONHOEFFER, A TESTAMENT TO FREEDOM 106–07 (1995). A covenantal model more accurately reflects the ethos of religious persons than a consent model, the latter of which is based heavily upon liberalism's commitment to freedom from the infringement of rights. For examples of these duties, see *supra* note 248 and accompanying text.

226. *See supra* notes 104–21 and accompanying text.

227. *See supra* note 110 and accompanying text.

failed to consent to it. It is therefore doubtful that her ex ante consent adequately encompassed the discipline enacted after the doctrinal change.[228]

Consent is also problematic in jurisdictions that employ membership as a proxy for consent. In *Hadnot*, for example, the court held that "a member's positive act at any time" is sufficient to sever consent, including words and conduct.[229] Yet the court did not find constructive withdrawal, even though the parishioners in *Hadnot* refused to show up to their own excommunication proceedings.[230] And *Guinn* further complicates consent by holding that membership withdrawal—and thus, withdrawal of consent—must be explicit and in writing.[231] There is little basis for such wooden rules.

Thus, consent perpetuates muddled inquiries with vexing definitional and line-drawing issues. It therefore should not be the operative framework for shunning cases.

2. *Membership*. Similar definitional and line-drawing issues arise in evaluating religious membership, even in cases where membership is decisive. In particular, definitional issues arise in determining what constitutes both the creation[232] and rescission[233] of membership. For this reason, analytical templates that treat membership as static, monolithic, or dispositive fail to provide adequate free-exercise

228. This is not to suggest that Paul should still have been able to recover; it is rather to note that consent is an imprecise analytical device.

229. Hadnot v. Shaw, 826 P.2d 978, 987 (Okla. 1992).

230. *See supra* notes 163–64 and accompanying text. The sisters' failure to show up was arguably sufficient to constitute their constructive withdrawal of membership. Furthermore, the libelous act of accusing the sisters of fornication allegedly occurred after excommunication proceedings had taken place. *Hadnot*, 826 P.2d at 980.

231. *See supra* note 85 and accompanying text.

232. *See* Smith v. Calvary Christian Church, 614 N.W.2d 590, 594 n.8 (Mich. 2000) (discussing the difficulty in defining membership). For example, is a congregant a member when she participates in a church community for fifteen years but never formally becomes a member? Is a person who has multiple memberships bound by all of them? Does a nonparticipating adult who was baptized in a particular religious tradition as a baby possess membership? Queries in this vein tend to multiply when membership is central to a free-exercise analysis.

233. In Justice Wilson's *Guinn* dissent, for instance, she observed that "the plaintiff had the right to terminate her membership within the church upon *communication* of that fact to an authorized representative of the church, *at any time*. The form of the communication is not limited to written or explicit resignation." Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 791 (Okla. 1989). This is clearly at odds with the majority's insistence upon explicit written communication. So the majority and dissent disagreed about what effects membership withdrawal.

protection for religious institutions or individuals—especially when their membership is equivocal.[234]

In reality, membership is often fluid, amorphous, and porous. A person might pass in and out of a congregation without either party clearly defining the scope of membership, but that person's conduct might still expose her to church discipline. An instructive case on this point is *Smith v. Calvary Christian*.[235] There, a parishioner withdrew his church membership but still returned to his former church to dispute religious doctrine with his former pastor during a congregational gathering.[236] Although he had rescinded his membership, the church still enacted disciplinary measures against him, so he sued.[237] The court found for the defendant church, however, holding that, contra *Guinn*, "church membership alone is not dispositive of whether the plaintiff consented to the church's practices. . . . Indeed, many faiths do not include a concept of 'membership' at all."[238] Consequently, because the parishioner consented to church discipline before joining the church and by returning to the church after he withdrew membership, the court held that he could not recover in tort.[239] Hence, on a practical level, membership fails to account for the realities of congregational participation. It is often messy and indeterminate. Therefore, it should not serve as the direct analytical touchstone of shunning cases, nor should it do so indirectly as a proxy for consent.

The elusive nature of membership is further complicated when a religious body's doctrine prohibits the withdrawal of membership, like the Collinsville Church in *Guinn*.[240] Under those circumstances, a court's definition of "membership," however reasonable, is not a neutral articulation, but rather an affirmative definition with First Amendment implications. Indeed, by defining what constitutes "membership" against the express theological understanding of a church and then resolving to settle disputes on that basis, a court

234. *See* Cupp, *supra* note 38, at 978 ("Not recognizing the difference between equivocal and wholehearted membership may lead to harsh results, particularly in a society in which religious membership is often halfhearted or traditional.").

235. Smith v. Calvary Christian, 614 N.W.2d 590 (Mich. 2000).

236. *Id.* at 591.

237. *Id.*

238. *Id.* at 594.

239. *Id.* at 595.

240. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 776 (Okla. 1989) ("In defense of their actions the Elders claim that the Church of Christ has *no doctrinal provision for withdrawal of membership*. According to their beliefs, a member remains a part of the congregation for life.").

effectively restricts a religious entity's free-exercise rights of self-definition.[241] Thus, a protean category like membership status should not be dispositive for courts.

C. Proposed Contractual Paradigm

Most courts address the issues that are generated by religious-discipline cases through a consent or membership paradigm.[242] Yet this has led to a morass of analytical problems and inconsistencies, as outlined above. Numerous commentators have also suggested that courts should apply a definitional approach to religious-tort cases, which would be redolent of the Supreme Court's treatment of defamation law.[243] This approach advocates recovery for tort plaintiffs but tempers recovery based on the definition of what constitutes tortious conduct (for example, by requiring proof of malice, burden shifting, and damages limitations). Although this approach has some merit, a definitional balancing framework may also create further confusion and unpredictability, just as it has in the defamation context.[244]

This Part therefore advocates a contract paradigm for shunning cases and a movement away from a consent theory or rigid membership analysis. This is not to suggest that consent or membership should be jettisoned or play only a peripheral role in shunning cases; rather, viewing them through a contractual lens is analytically crisper and better attuned to the diverse facts presented by shunning. A contract

---

241. *See* Gedicks, *supra* note 200, at 150 (discussing the negative free-exercise implications of government intervention in membership decisions).

242. *See, e.g.*, Smith v. Calvary Christian Church, 614 N.W.2d 590, 595 (Mich. 2000) (holding that consent, instead of status, is the relevant consideration for deciding whether a plaintiff can bring an intentional-tort claim against a religious tortfeasor); *cf.* Hadnot v. Shaw, 826 P.2d 978, 988–89 (Okla. 1992) (observing that "the church's judicature *rests solely on consent*," but highlighting the importance of membership status in determining consent). For a detailed analysis of the cases applying a consent theory, see Cupp, *supra* note 38, at 976–83.

243. *See, e.g.*, Cupp, *supra* note 38 at 971–73 (suggesting a definitional approach); Wiesen, *supra* note 12, at 311–24 (same).

244. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 23 (1990) (Brennan, J., dissenting) ("Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion, notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence."); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 961–63 (1987) (observing that, despite definitional balancing's allure, it has a propensity to reintroduce the "bane of constitutional law—the judge's personal preference"); Gedicks, *supra* note 200, at 148 (discussing the drawbacks of definitional balancing for religious groups and its tendency to reify an ad hoc balancing approach).

paradigm would narrow the factual inquiry and broaden the constitutional protection that would enable free-exercise values to thrive.[245] It would therefore foster more cogent analysis and strike the appropriate balance between free-exercise interests.

A contract framework was proposed in Justice Hodge's dissent in *Guinn*: "Church membership is one of contract and when a person joins a church he/she covenants expressly or impliedly that in consideration of the benefits of the relationship he/she will submit to its control and be governed by its laws, usages and custom."[246] Under a contract paradigm, the individual submits her First Amendment rights to the authority of the religious entity when she joins the congregation, and those rights are subsumed under the church's need to maintain its doctrine. A court need not inquire into the content of a parishioner's contract with her church unless the contract raises issues of public concern.[247] Instead, a court only needs to consider whether the contract was fraudulently or coercively induced at the outset, whether it was agreed to under incapacity, or whether the disciplinary practices instantiated go beyond the scope of the implied agreement.[248] If so, then a plaintiff would be allowed to recover in tort. If not, then a church could exercise its legitimate disciplinary doctrine under the protection of the First Amendment, since the breaching party contracted away her right to recover in tort for the church's exercise of its disciplinary doctrine.

In this vein, a parallel can be drawn to free-speech challenges in which an individual contracted away their rights. In *Snepp v. United States*,[249] for instance, the Supreme Court upheld a contract that "impose[d] a serious prior restraint on Snepp's [free speech], and [was] of indefinite duration and scope."[250] Applying a contract theory, the court reasoned that, because Snepp voluntarily waived his First

245. As one shunning-law commentator aptly observed, "[t]he grand challenge is to develop legal standards that protect all but penalize none unduly on account of religious belief." Hayden, *supra* note 12, at 607.

246. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 795 (Hodges, J., dissenting).

247. *See supra* note 34 and accompanying text (explaining the health, safety, morals triad from *Sherbert v. Verner*, 374 U.S. 398 (1963)). This factor would be akin to substantive unconscionability, where the church's disciplinary doctrine so offends the health, safety, and morals of society that it cannot be deemed to be constitutionally protected. *See supra* note 34.

248. For a rich treatment of the application of these doctrines to the shunning context, *see* Cupp, *supra* note 38, at 979–83. Although Cupp does not advocate a contract framework, the presence of these factors would mean there was no initial consent.

249. Snepp v. United States, 444 U.S. 507 (1980).

250. *Id.* at 520 n.9 (citation omitted).

Amendment rights as a condition precedent to his employment with the Government, his free-speech claim was barred even though Snepp was no longer an employee and the restrictions were indefinite.[251] One famous commentator remarked of *Snepp* that "a right . . . can be sold and both parties to the bargain made better off."[252] In other words, Snepp waived his constitutional protections under the belief that he was better off with the contract than without it. *Snepp* therefore provides a lucid example of a person's general ability to waive treasured constitutional rights under a contract and the persistence of that waiver even after a membership relationship and ex post consent have been severed.

Similarly, a member of a religious congregation relinquishes her right—emerging both from tort law and from her own free-exercise interests—to recover for injuries occasioned by the church's disciplinary procedures. In exchange, she receives a community of worship.[253] Given this freely made, quasi-transactional relationship, it is unfruitful and unnecessary to engage in a competitive, zero-sum analysis of rights, as the *Hadnot* court did—pitting organizational and individual free-exercise interests against each other. Consent still has some merit for analyzing shunning practices in establishing assent to the contract. But ongoing consent is deficient as a dispositive apparatus because it disregards the covenantal nature of the relationship between religious entities and their congregants.

A contract paradigm also prevents membership from becoming an all-or-nothing analysis. The consent necessary to find membership should not be resolved formalistically, as the *Guinn* court attempted to do through its writing requirement.[254] Instead, as Justice Wilson's dissent argues, conduct and words should be sufficient to determine whether a congregant manifested adequate consent to church doctrine

---

251. *Id.* at 509 n.3 ("[H]e voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress.").

252. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347.

253. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 731 (1872) ("[W]hen [excised members] became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.").

254. *See supra* notes 85–86 and accompanying text.

at the beginning of her participation in the community.[255] This functionalist approach comports with the contract model—and it comports with good sense.[256] Under this more functionalist framework, courts will be better equipped to consider the constitutional interests of all the parties involved, be they the religious entity or parishioner. And a plaintiff would not be barred from tort recovery solely because of her status as a former member.[257] For example, a plaintiff might be able to recover from a fellow member if the defendant was not acting in a religious capacity[258] or if the defendant extended religious discipline beyond the scope of the parties' implied agreement.[259]

By the same token, a former member might be barred from recovery even though she withdrew her membership or was never formally made a member.[260] For example, the *Hadnot* parishioners would not have been considered members when they manifested withdrawal through their refusal to show up to their excommunication proceeding.[261] Accordingly, they would not have consented to further church judicature. However, the church would have still been entitled to exercise whatever discipline was reasonably contemplated by the parties upon their joining the community, whether formally or informally. The contract framework, then, merely identifies the parties to the original agreement and examines what sort of doctrine the parishioner agreed to. In doing so, it accounts for the practical reality of a vast and diverse array of religious-group participation and leads to simpler legal analysis.[262]

In religious-membership contexts, the parishioner and religious group agree ex ante—whether through words or conduct—that they

255. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 791 (Okla. 1989). This also represents the view of the Michigan Supreme Court. *See supra* notes 238–39 and accompanying text.

256. In contract law, a contract can be formed through mere conduct or words. A writing is not necessary to form a contract.

257. This framework is in tension with *Penley* and *Paul* in this sense.

258. This was the exact point of contention in *Penley*. *See supra* note 155 and accompanying text.

259. *See, e.g.*, Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 3 (Tex. 2008) (discussing the church members' exorcism practices which, under a contract paradigm, would have likely exceeded the church's implied agreement with parishioner).

260. This framework is in tension with *Guinn* and *Hadnot* in this sense.

261. *See supra* notes 163–64 and accompanying text.

262. *See supra* notes 235–39 and accompanying text; *see generally* CHRISTINE POHL, LIVING INTO COMMUNITY (2012) (emphasizing the importance of the religious group when considering a person's commitment to membership, instead of the person's individual preferences).

will affirmatively do certain things.[263] They less often profess what they will allow to be done to them. This is perhaps best illustrated by the confirmation process in many religious traditions. A confirmation of membership is redolent of a contractual relationship, wherein the religious member and her religious group make affirmative covenants to each other to perform certain positive acts for and with each other.[264] According to a religion's doctrine, the failure to execute some of the promises—that is, a breach of the covenant—may precipitate disciplinary consequences. Nevertheless, the consent the member gives is preliminary and finds expression through the performance of duties, as in a contract.

Thus, although consent still may be an ingredient of free-exercise protection, ex ante contractual consent is more in line with the practice of most religious organizations and is therefore more apposite when evaluating the constitutional status of religious discipline. Courts would still need to establish whether ex ante consent was manifested. However, a contract paradigm would resolve the intermediate and ex post line-drawing problems, since courts would not have to arbitrarily determine the standard for effective withdrawal of consent or membership. Rather, by shifting the locus of the analysis to the front end, courts could develop unified standards and principles that would more ably strike the balance between competing interests and honor organizational rights.

---

263. For example, a Christian church generally promises to administer sacraments and provide a community of worship. In turn, the member is expected to contribute to the church with her prayers, presence, gifts, and service. *See supra* note 223.

264. For example, the United Methodist Church has the following liturgical practice for welcoming members, expressed through call and response:

> *Pastor*: As members of this congregation, will you faithfully participate in its ministries by your prayers, your presence, your gifts, your service and your witness?
>
> *New Member*: I will.
>
> *The pastor addresses the congregation:* Members of the household of God, I commend these persons to your love and care. Do all in your power to increase their faith, confirm their hope, and perfect them in love.
>
> *The congregation responds:* . . . . As members together with you in the body of Christ and in this congregation of The United Methodist Church, we renew our covenant faithfully to participate in the ministries of the Church by our prayers, our presence, our gifts, our service, and our witness, that in everything God may be glorified.

THE UNITED METHODIST HYMNAL 34, 38, 44 (1989). This highlights the affirmative duties incumbent upon parishioners and is representative of multiple religious communities.

CONCLUSION

Penley and *Hadnot*'s legal analyses were checkered with moments of clarity, but they ultimately demonstrate that they belong to an inconsistent body of First Amendment law. As it stands, shunning jurisprudence misunderstands organizational religious exercise and is awash in analytical tools that shroud the dual concerns of the religion clauses. Indeed, shunning jurisprudence is awash in words. To fashion a more coherent jurisprudence, courts should adopt a contract paradigm. This would appropriately minimize the importance of ongoing consent and cause religious-group membership to be analyzed functionally according to the participation that manifests ex ante consent. A contractual approach would be simpler than the current analytical rubrics, but it would be just as protective of free-exercise values. It would be woolly enough to allow for this area of the law to be factually driven but wooden enough to offer uncompromised constitutional protection.

In the Bible, Adam and Eve were banished from the Garden of Eden after they ate the forbidden fruit. Because they broke their pact with God, they found themselves East of Eden, away from blissful communion. They were harmed, to be sure, but their injury was wrought by their own error, so they had no recourse to seek. Today, shunning plaintiffs similarly find themselves East of Eden—similarly injured, similarly isolated. Whether their injury was caused by their own vice or the vice of their religious communities, however, is not always clear. And when courts have tried to determine the merits of tort recovery, the devil has often been in the details—arbitrary details about consent and membership. Under the contract paradigm advanced here, some plaintiffs might deserve tort recovery, while others might have assumed the risk of their harm. But when a judge is deciding between the two, at least the devil wouldn't be in the details; it would be in the contract.