CASE COMMENT

THE NINTH CIRCUIT'S ELEVENTH COMMANDMENT TO RELIGIOUS GROUPS: THOU SHALT NOT BE LIABLE FOR THINE INTENTIONAL INTANGIBLE TORTS

Paul v. Watchtower Bible and Tract Society of New York, Inc., 819 F.2d 875 (9th Cir. 1987)

In *Paul v. Watchtower Bible and Tract Society of New York, Inc.*[1] the Ninth Circuit concluded that the first amendment provides a privilege against tort liability to religious groups if tort liability would curtail the free exercise of their religious beliefs.[2]

The plaintiff, Janice Paul, had been a member of the Jehovah's Witnesses since 1967.[3] In 1975, she decided to disassociate herself from the Church.[4] In 1981, the Governing Body of Jehovah's Witnesses, acting through defendants,[5] issued a new interpretation of canon law, directing present members to shun disassociated persons.[6] In 1984, Paul went to a

1. 819 F.2d 875 (9th Cir. 1987), *cert. denied* 108 S. Ct. 289 (1987).

2. The scope of this Case Comment is limited to the question of whether the Ninth Circuit's extension of past Supreme Court free exercise precedents to intentional torts committed by the church is consistent with the first amendment and these precedents. The issue of whether religious institutions are immune from tort liability based on the "charitable immunity" doctrine is beyond the scope of this Comment. For a general discussion on the effect of "charitable immunity" on religious groups' tort liability, see RESTATEMENT (SECOND) OF TORTS § 895E comments b, c (1977); PROSSER & KEETON, THE LAW OR TORTS § 133 (5th ed. 1984)[hereinafter PROSSER]; Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 MICH. L. REV. 1295, 1302-07 n.19 (May 1986).

3. 819 F.2d at 876.

4. *Id.* Paul left the Church because of her parents' disfellowship (expulsion from the Church) in 1975, which resulted from internal discord in the congregation. *Id.* Elders of the Lower Valley congregation urged Paul not to discuss, with other members of the Church, her belief that her parents had received unjust treatment. Failure to heed this advice, they warned, would result in her own disfellowship. *Id.*

5. Defendants, two Tract Societies, are the corporate arm of the Jehovah's Witnesses' Governing Body. *Id.* at 876-77.

6. *Id.* at 877. Prior to 1981, the Church distinguished between ex-members who disassociated themselves and those who were disfellowshipped. Those who fell into the former category, including Paul, were subject to no express sanction. In fact, because of the close nature of many Jehovah's Witness communities, disassociated persons were still consulted in secular matters. *Id.*

Disfellowshipped members, on the other hand, were "shunned" by all the members of the Church. For a definition of "shunning", see *infra* note 8.

In 1981, the Governing Body eliminated the distinction between disfellowshipped and disassociated members. Thereafter, disassociated members were to be treated as if they were disfellowship-

Jehovah's community to visit friends and family.[7] When she tried to speak to her friends, however, they "shunned"[8] her because of the Governing Body's new interpretation of Church law.[9]

Paul brought suit in Washington State Supreme Court against the Governing Body of Jehovah's Witnesses, alleging the intangible torts of defamation, invasion of privacy, fraud, and outrageous conduct.[10] Defendants removed the case to federal court on diversity grounds.[11] The district court granted defendants' motion for summary judgment.[12] On appeal, the Ninth Circuit unanimously affirmed, but on different grounds than the district court.[13] The Ninth Circuit held that because shunning is part of the Jehovah's Witnesses religious beliefs, the first amendment free exercise clause[14] protects the Church from tort liability for intangible torts.[15]

In interpreting the free exercise clause, the Supreme Court has recog-

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ped. *See Disfellowshipping—How to View It*, THE WATCHTOWER (Sept. 15, 1981) (citing various passages from the Bible to justify the decision).

7. 819 F.2d at 877.

8. "Shunning" is a form of ostracism. Members of the Jehovah's community were prohibited, under threat of their own disfellowship, from having any contact with disfellowshipped persons. Family members were only allowed to conduct necessary family business with disfellowshipped members. They were forbidden from talking to them on any other subject. *Id.* at 876-77.

9. *Id.* at 877. When Paul approached a childhood friend, the friend told her: "I can't speak to you. You are disfellowshipped." Other friends told her that the Elders of the congregation instructed them not to speak with her. *Id.*

10. *Id.* at 876-77. Paul dropped her fraud claim on appeal. *Id.* at 878 n.1.

11. *Id.* at 877. The court's jurisdiction was premised on 28 U.S.C. § 1441 (1982). The Jehovah's Witness community to which Paul belonged is located in Ephrata, Washington (the Lower Valley congregation). *Id.* At the time of the lawsuit, however, Paul resided in Alaska. *Id.* at 877.

12. 819 F.2d at 877.

13. *Id.* The district court held that Paul's affidavits did not set forth facts that would establish a prima facie case for relief. Moreover, the district court ruled that even if the practice of shunning was actionable, the court was prohibited from ruling on the issues on the grounds of "ecclesiastical abstention". *Id.* Ecclesiastical abstention provides that civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of a religious polity. *Id.* at 878 n.1. The court must accept such decisions as final and binding in their application to the case at bar. *Id. See generally* Serbian Eastern Orthodox Diocese v. Milivojevich 426 U.S. 696, 710 (1976).

The Ninth Circuit found the abstention doctrine irrelevant because Paul was not alleging that the new rules governing disassociation were improper under Church doctrine. Nor did she seek relief for having been wrongfully disfellowshipped. Rather, she sought relief from harm suffered as a result of conduct ordered by the Church pursuant to Church law. 819 F.2d at 878 n.1.

14. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

15. 819 F.2d at 883-84.

nized that while Congress is forbidden from regulating religious belief,[16] Congress can prohibit certain religious conduct that poses a danger to public health, safety, morals, or welfare.[17] To determine whether a religious practice is subject to regulation or insulated under the first amendment, the Supreme Court applies a balancing test.[18] For the past twenty-five years the Supreme Court has struggled to define the elements of that test.[19]

Cantwell v. Connecticut[20] is a precursor to the modern balancing test cases. In *Cantwell*, the Supreme Court invalidated a Connecticut law prohibiting solicitation of money for religious causes without the Secretary of the Public Welfare Council's approval.[21] The Court found the statute an unconstitutional burden on the free exercise of religion to the extent that it authorized censorship of religious materials.[22] Moreover, the Court disapproved of the lack of any judicial review over the Secretary's actions.[23] The Court held that while the state may regulate the time, place and manner of solicitation, the state may not prohibit solicitation based solely on religious beliefs.[24]

16. Reynolds v. United States, 98 U.S. (8 Otto.) 145, 162 (1878). *See also* Sherbert v. Verner, 374 U.S. 398, 402 (1962) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . . .") (emphasis in original).

17. *See, e.g., Reynolds*, 98 U.S. (8 Otto.) 145 (criminal law prohibiting polygamy, by the Mormon Church, upheld because polygamy was historically viewed as reprehensible by society); Prince v. Massachusetts, 321 U.S. 158 (1944) (state law prohibiting minors from selling magazines on the street is not a violation of the free exercise clause even though the sale of magazines by children is part of the Jehovah's Witnesses' religious beliefs); *see also* Olsen v. Iowa, 808 F.2d 652 (8th Cir. 1986) (government may charge members of religious group with violations of drug laws even though the use of drugs is part of the groups' religious practice); United States v. Rush, 738 F.2d 497 (1st Cir. 1984). *But cf.* United States v. Ballard, 322 U.S. 78 (1944) (the truth or falsity of the religious belief that use of the mail in a fraudulent manner is required may not be challenged).

18. *See Sherbert*, 374 U.S. at 403-94. The balancing test requires weighing the burden on plaintiff's religious belief against the state's interest in the regulation. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 1067-88 (3rd ed. 1985).

19. *See, e.g., Sherbert*, 374 U.S. 398; Wisconsin v. Yoder, 406 U.S. 205 (1972); Braunfeld v. Brown, 366 U.S. 599 (1961) [these cases are discussed at *infra* notes 25-54].

20. 310 U.S. 296 (1940).

21. *Id.* The Secretary had discretion to determine whether the cause was, in fact, a religious one.

22. *Id.* This part of the Court's analysis is similar to the first prong of the balancing test—substantial burden on free exercise—that the Court later developed. *See infra* notes 37-38 and accompanying text.

23. 310 U.S. at 305. The Court was particularly concerned about controlling arbitrary or corrupt practices. *Id.*

24. *Id.* This portion of the Court's opinion is the precursor to the second prong of the balancing test—a compelling state interest. *See infra* notes 42-45 and accompanying text.

The Court also held the charges of breach of the peace brought against the defendants were in

Braunfeld v. Brown was the Supreme Court's first attempt to define the elements of the balancing test.[25] In *Braunfeld*, the Court upheld a Pennsylvania criminal statute that prohibited the sale of certain enumerated commodities on Sunday.[26] Plaintiffs, Orthodox Jews, challenged the law on the grounds that it interfered with their free exercise of religion.[27]

The Court recognized the substantial burden placed on Orthodox Jews,[28] but characterized the burden as indirect.[29] If the state enacts a law to advance legitimate secular goals, the Court held, then the statute is valid despite its indirect burden on religious conduct, unless the state may accomplish its purpose by less restrictive means.[30] Implicitly, *Braunfeld* envisions two steps in the analysis. First, the plaintiff must show that the law places a substantial burden on the exercise of his religious beliefs.[31] Second, the state must demonstrate an overriding secular purpose achieved by the least restrictive means.[32] Applying the test, the Court found that Pennsylvania had a compelling interest—to set aside a

violation of the free exercise clause. The Court recognized the legitimate state interest in preventing a riot and punishing those who cause it, but, in this case, the defendants posed no such threat. Although defendant's literature and records offended listeners or aroused their animosity, the defendants were innocent of any physical assault or personal abuse which would subject them to a charge of breach of the peace. The Court found these charges a guise to punish and suppress the defendants' exercise of their religious beliefs. 310 U.S. at 307-11.

25. 366 U.S. 599 (1961).

26. *Id.* at 600, 609.

27. Plaintiffs sought a permanent injunction against enforcement of the statute which interfered with their retail sales business. 366 U.S. at 601. Due to their religious beliefs, plaintiffs closed their business on Saturday, the Jewish Sabbath. However, they did substantial business on Sunday. They argued that the Sunday closing law would impair their ability to earn a living and render them unable to continue in business, forfeiting their capital investment. *Id.* Plaintiffs also argued that the law gave Saturday workers an unfair advantage. *Id.* at 602.

28. *Id.* at 603.

29. *Id.* at 606. A direct burden is one in which an activity essential to the religious practice is prohibited (e.g., prohibition on Mormon polygamy). An indirect burden is one, as in *Braunfeld*, that makes the practice of religion more difficult, but does not prohibit the practice. *See* NOWAK, ROTUNDA & YOUNG, *supra* note 18, at 1068.

In *Braunfeld*, the Court refused to strike down what it perceived to be an indirect burden on religion, in part, because doing so would radically restrict the operating latitude of the legislature. 366 U.S. at 606. The Court noted that other laws have an indirect economic burden on religious groups and have been upheld (e.g., a statue limiting the amount a taxpayer may deduct on his tax return for religious contributions, thereby preventing some donations, or a law closing the courts on Saturday and Sunday though a lawyer's religion may require him to rest during the week). *Id.* at 606.

30. 366 U.S. at 607. Conversely, if the law has as its purpose the obstruction of a religious practice or discrimination between religions, it is constitutionally invalid. *Id.*

31. *Id.* at 605-07.

32. *See supra* note 30 and accompanying text.

single day for "rest, recreation and tranquility"—that outweighed the indirect burden on the Orthodox Jewish businessmen.[33] Though other jurisdictions provided for exemptions from their Sunday closing laws,[34] the Court refused to fashion an exemption that would frustrate the goals of the Pennsylvania legislature.[35]

The Supreme Court, in *Sherbert v. Verner*, expounded further on the elements of the balancing test.[36] In *Sherbert*, the Court struck down a South Carolina statute that denied unemployment benefits to plaintiff, a member of the Seventh Day Adventists, who refused to work on Saturday because of her religious beliefs.[37] The Court first considered whether the denial of unemployment benefits imposed any burden on plaintiff's free exercise of religion.[38] The Court rejected *Braunfeld's* direct-indirect distinction,[39] holding that if the burden is substantial, it is irrelevant whether the burden was an indirect effect of the law.[40] In application, the Court found plaintiff pressured to choose between giving up her religious beliefs or following the Church precepts and foregoing necessary benefits.[41]

Second, the Court considered whether any compelling state interest existed to justify the substantial infringement of plaintiff's first amendment rights.[42] South Carolina proffered prevention of fraudulent claims

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33. 366 U.S. at 607.

34. *See, e.g.*, IND. CODE § 10-4301 (Burns 1956).

35. 366 U.S. at 608. Moreover, the Court refused to reevaluate the wisdom of the statute. Rather, the Court viewed its job as determining if the law falls within constitutional limits. The Court believed granting an exemption would make enforcement of the law impossible. *Id.*

In dissent, Justice Brennan noted that the law required Orthodox Jews to choose between their religion and business. *Id.* at 613. Such a burden, though indirect, is substantial. Brennan opined that Pennsylvania's goal of providing a day of rest deserved less weight than either the goal of prohibiting polygamy or preventing children from selling magazines on the street. *Id.* at 614. *See also supra* note 17 (discussion of *Reynolds* and *Prince*). Furthermore, the state's concern is satisfied because Orthodox Jews observe their own Sabbath—Sunday. The only purpose Justice Brennan could find was the mere convenience of having everyone observe the same day of rest. *Id.* Such a goal, he believed, failed to outweigh the burden on religion. 366 U.S. at 616.

36. 374 U.S. 398 (1963).

37. *Id.* at 402. Under South Carolina law her failure to accept available work was sufficient grounds for denial of unemployment benefits. *Id.* at 399-401.

38. *Id.* at 403.

39. *See supra* note 29 and accompanying text.

40. 374 U.S. at 404.

41. *Id.* at 404. The Court saw little difference between this benefit regulation and a fine on Saturday worship. *Id.*

42. *Id.* at 406.

as a compelling state interest.[43] The Court found this justification unsubstantiated and insufficient to outweigh the burden on plaintiff's free exercise rights.[44] Moreover, South Carolina failed to disprove the existence of alternative means of regulation that would combat fraud without infringing plaintiff's first amendment rights.[45]

The Supreme Court's epilogue to the balancing test came in *Wisconsin v. Yoder*.[46] In *Yoder*, the Court held that Wisconsin could not compel Amish children to enroll in public schools after the eighth grade, a practice contrary to Amish religious beliefs.[47] The Court began by considering whether the Amish educational practices were religiously based. The Court stated that conduct based purely on secular, personal, or philosophical grounds would not be protected under the free exercise clause.[48] In this case, however, the Court found the Amish educational practices

43. *Id.* at 407. The state claimed it had an interest in preventing the filing of fraudulent claims by unscrupulous workers feigning religious objections to Saturday work. The state feared this practice would dilute the unemployment compensation fund and hinder the scheduling by employers of necessary Saturday work. *Id.* The Court found that the state failed to raise this claim before the South Carolina Supreme Court. The Court declined to assess the importance of an asserted state interest without the view of the state court. Even if the state had made this contention at the state level, however, the Court found no proof to warrant such fears of deceit. *Id.*

44. 374 U.S. at 409. The Court has reaffirmed *Sherbert* in two recent decisions. *See* Thomas v. Review Board, 450 U.S. 707 (1981) (a state may not deny unemployment benefits to a Jehovah's Witness who refused to work in the production of armaments because doing so would be contrary to his religious beliefs); Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1987) (same facts and result as in *Sherbert*). In *Hobbie*, Justice Brennan, writing for the majority, rejected the test put forth by Chief Justice Burger in *Bowen v. Roy*, 476 U.S. 693 (1985). In *Roy*, the Court rejected a free exercise challenge to the statutory requirement that a Social Security number be supplied by any applicant seeking certain welfare benefits. Chief Justice Burger wanted the Court to adopt a less rigorous test for when a law is neutral and uniform in its application ("... the government meets its burden when it demonstrates that a challenged requirement for governmental benefits is a reasonable means of promoting a legitimate public interest."). In *Hobbie*, Brennan noted that in *Roy*, five Justices had expressly rejected Burger's approach: White, Marshall, Blackmun, O'Connor and Brennan himself. Moreover, O'Connor's concurrence in *Roy*, suggested "[s]uch a test has no basis in precedent . . ." 476 U.S. at 727.

45. 374 U.S. at 407.

46. 406 U.S. 205 (1972).

47. *Id.* at 207. The Amish believed that sending their children to high school would "interpose[] a serious barrier to the integration of the Amish child into the Amish religious community." *Id.* at 211-12. While high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students, Amish society emphasizes informal learning through doing and a life of "goodness rather than a life of intellect; wisdom rather than technical knowledge; community welfare rather than competition; and separation from, rather that integration with, contemporary society." *Id.* at 210-12.

48. *Id.* at 215-26.

central to the beliefs of the Church.[49]

The Court then applied a modified, two-prong balancing test.[50] First, the Court considered whether the evidence supported plaintiffs' claim that compulsory attendance would be a significant burden on the free exercise of religion.[51] Next, the Court balanced the burden on religion against the state's asserted interests[52] and the degree to which these interests would be impaired by an Amish exemption.[53] The Court found that the law clearly burdened Amish religious principles and that an Amish exemption would not significantly impair the state's goals.[54]

The Supreme Court applied the *Yoder* balancing test in a federal context in *United States v. Lee*.[55] In *Lee*, an Amish farmer and carpenter, who employed several church members, challenged the application of the

49. *Id.* at 216. The Court stated that if the Amish merely refused to send their children to school to preserve a "traditional way of life," their free exercise claim would be denied. However, the Court found that the Amish lifestyle, education practices, and refusal to submit their children to further secular education were based in religion. Central to this determination were four facts: (1) non-public education was a shared belief by an organized group rather than a personal preference; (2) the belief related to certain theocratic principles and interpretation of religious literatures; (3) the system of beliefs pervaded and regulated their daily lives; and (4) the system of belief and lifestyle resulting therefrom had been in existence for a substantial period of time. *Id.* at 216-17.

50. More specifically, the Court stated "[Wisconsin's] interest in universal education . . . is not totally free from a balancing process" and "only those interests of the highest order . . . not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 214-15.

51. *Id.* at 215, 219.

52. Wisconsin advanced two arguments in support of compulsory secondary education: preparation of young citizens for effective political participation and creation of a self-sufficient, self-reliant group of young people. *Id.* at 221.

53. *Id.*

54. *Id.* at 235-36. The Court found that effective political participation would not be impaired by a religious exemption. Rather, eight years of formal education, combined with Amish home training, adequately prepared Amish children for life in a self-limiting environment. *Id.* at 225-29. *But see* Blackwelder v. Safnauer, No. 86-CV-1208, slip op. (N.D.N.Y. June 17, 1988) (refusing to extend the *Yoder* analysis across the board to parents who consider it their religious duty to educate their children in the home, and upholding the New York "substantial equivalence" law against a free exercise clause attack).

The state also argued that its interest in the children's health and well-being justified an absolute rule requiring secondary education. The Court recognized that the interest in the child's health would overcome a claim for religious freedom if the practice was detrimental to the health, training, or well-being of the child. But because the record showed that the Amish children were well taken care of and well trained in their community, the state goals would not be impaired by an exemption. *Id.* at 233-34. In dissent, Justice Douglas contended that the majority failed to take into account the issue of the children's right to go beyond the eight grade. Justice Douglas believed that if the children were mature enough to say they wished to remain in school, the state may well be able to override parents' objections. *Id.* at 243-46.

55. 455 U.S. 252 (1982).

Social Security Act to his business on free exercise grounds.[56] The Amish believe it is their religious duty to provide for elder church members and therefore oppose the social security system. The district court held the Social Security Act unconstitutional as applied.[57] The Supreme Court disagreed, noting that "[n]ot all burdens on religion are unconstitutional."[58] Though recognizing the burden on the Amish faith,[59] the Court held that the government's overriding interest in maintaining the vitality of the social security system required all employers to contribute.[60] Unlike the limited educational exemption in *Yoder*, here the Court believed an exemption would prove unmanageable and interfere with fulfillment of the government interest.[61]

Other courts have applied the *Yoder* balancing test in cases involving government interference with the free exercise of religion.[62] In *Bear v. Reformed Mennonite Church*,[63] the Pennsylvania Supreme Court, faced with facts analogous to *Paul*, held that the first amendment does not grant an absolute privilege against tort liability.[64] In *Bear*, the Mennonite Church excommunicated the plaintiff and instructed members of the

56. *Id.* at 254-55. Plaintiff filed his suit in response to an Internal Revenue assessment for unpaid employment taxes in the amount of $27,000. *Id.*

57. *Id.* at 255.

58. *Id.* at 257.

59. *Id.*

60. *Id.* at 260. The Court found that widespread voluntary participation would undermine the Social Security Act. Moreover, a comprehensive social security system allowing voluntary participation would be a contradiction in terms and difficult, if not impossible, to administer. *Id.*

61. 455 U.S. at 260. The Court feared that if a taxpayer could avoid paying Social Security taxes because of religious beliefs, then a taxpayer whose religion opposed war could argue for a reduction in his income tax representing that portion of his tax money going to war-related activities. *Id.*

62. *See, e.g.*, Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984) (law requiring a Social Security number for anyone seeking public benefits held constitutional even though it conflicted with plaintiff's belief that Social Security numbers are "the mark of the beast"); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (governmental interest in a zoning ordinance outweighs the burden on a religious group that wants to open up a house of worship in an area zoned for single-family dwellings); E.E.O.C. v. Pacific Press Publishing Assoc., 676 F.2d 1272 (9th Cir. 1982) (government interest in assuring equal employment opportunity under Title VII overrides the burden this interest places on the free exercise of religion); Backlund v. Board of Commissioners of Kings County Hospital, 106 Wash.2d 632, 724 P.2d 981 (1986) (hospital regulation requiring doctors to have liability insurance upheld even though contrary to doctor's religious beliefs).

In all these cases the courts faced a law that was facially neutral (i.e., applicable to everyone regardless of faith). Despite this fact, the courts continued to apply the *Yoder/Sherbert* balancing test rather than Chief Justice Burger's suggested test in *Roy*. *See supra* note 44.

63. 462 Pa. 330, 341 A.2d 105 (1975).

64. *Id.* at 341, 341 A.2d at 107.

Church to shun him. Plaintiff sued the Church, alleging that the Church's "shunning" instruction interfered with his business relations and caused alienation of affections within his family.[65] The trial court granted the Church's demurrer, holding that the first amendment granted such religious institutions an absolute privilege against tort liability. On appeal, the Pennsylvania Supreme Court reversed.[66] The court found that when the religious practice of the Church would excessively interfere with "paramount state concerns"[67] then states may regulate the practices and still comply with the free exercise clause.[68]

In *Paul v. Watchtower Bible and Tract Society of New York, Inc.*,[69] the Ninth Circuit recognized that shunning by the Jehovah's Witnesses is a practice pursuant to canon law, which the court is not free to reinterpret.[70] Under the Washington state[71] and United States Constitutions, church members are entitled to freely exercise their religious beliefs.[72] The court next considered the issue of state action, and found that state law, whether statutory or common law (including tort law), constitutes state action.[73]

In keeping with free exercise analysis, the court asked whether the imposition of tort liability would substantially burden the Jehovah's Wit-

65. *Id.* at 332-33, 341 A.2d at 106.

66. *Id.* at 335, 341 A.2d at 108.

67. Here, those concerns included "the maintenance of marriage and family relationship, alienation of affection and the tortious interference with a business relation . . . ." *Id.* at 334, 341 A.2d at 107.

68. *Id.* The Court held, however, that the plaintiff pleaded sufficient facts to proceed in his cause of action against the church. *Id.* at 335, 341 A.2d at 108.

69. 819 F.2d 875 (9th Cir. 1987).

70. *Id.* at 878.

71. WASH. CONST. Art. I, § 11, amend. 34 states, in part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

72. 819 F.2d at 879. The court considered at length whether the Washington Constitution or United States Constitution applied. The court concluded that the issue was irrelevant because the provisions are identical in scope. The court did not have to decide the issue, however, because the Supreme Court previously decided that the first amendment applies to the states. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (discussed at *supra* notes 20-24 and accompanying text). This constitutional conflicts question is only important if the state constitution is more generous in granting free exercise rights than is the United States Constitution. 819 F.2d at 880 n.3.

73. *Id.* at 880 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

nesses' free exercise rights.[74] Following the *Braunfeld*, *Sherbert*, and *Yoder* line of analysis,[75] the court found that imposing tort rules on the Church would result in a direct burden on religion.[76] Furthermore, the court found the burden to be substantial because tort liability puts great pressure on a defendant either to forego a part of its religious faith or be sued for exercising a constitutional right.[77]

The court also considered the second part of the balancing test: the compelling state interest in tort regulation.[78] First, the court found that shunning did not pose a sufficient threat to public health, safety, or morality to warrant state intervention.[79] Second, the court reasoned that if the tort resulted in intangible or emotional harm,[80] in most circumstances a cause of action will not lie against the Church.[81] The court opined that if the first amendment is to have any meaning, society must tolerate offenses to its sensibilities.[82]

Finally, the court concluded that granting the privilege in this case was appropriate because Paul was a past member of the Church.[83] The court reasoned that churches are generally afforded great latitude in disciplining past and present members; therefore, the court's role is somewhat limited.[84]

The Ninth Circuit's extension of the free exercise clause to include a

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74. *Id.*

75. *Id.* at 881. *See also supra* notes 25-54 and accompanying text. The court noted that the *Braunfeld* rationale was substantially undermined in *Sherbert*, *Yoder*, and *Hobbie*. Even if *Braunfeld* were still good law, the court in *Paul* refused to give it controlling effect. *Id.* at 881 n.4.

76. *Id.* at 880.

77. 819 F.2d at 881.

78. *Id.*

79. *Id.*

80. *Id.* Intentional infliction of emotional distress is characterized by a tortfeasor's extreme and outrageous conduct intentionally or recklessly inflicted. The presence of physical harm is not required for recovery. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1976). The court's language suggests that its holding might not apply to more tangible harms. *See infra* note 84.

81. 819 F.2d at 883. The court noted that the values underlying the free exercise clause have been zealously protected, even at the expense of other interests. *Id.*

82. *Id.* at 883.

83. *Id.*

84. *Id.* The court restricted its holding to intangible torts. The court intimated that the Church *would* be liable had it committed a tangible tort. In addition, the court did not say Paul's injuries were unreal or insubstantial because recognition of the privilege prevented it from reaching the question. The court's distinction between members and non-members injured by the Church, and the possible significance of granting tort immunity, is discussed in Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be Free Exercise?*, 84 MICH. L. REV. 1296 (May 1986).

privilege against tort liability is incorrect. First, by distinguishing emotional harms from physical harms, the court downplayed the significance of an emotional injury, which is often times as great as physical harm.[85] Ordinarily, plaintiffs may recover for intentional infliction of emotional distress without any concomitant physical injury.[86] When the injury is nonphysical, whether the defendant is a church should not matter.

Second, the Ninth Circuit's application of the balancing test failed to fully consider the state's compelling interest.[87] As the court in *Bear* held,[88] the state has an interest in family and business tranquility which may override the unfettered exercise of religious freedom.[89] The Ninth Circuit logically could have extended this "paramount state interest" rationale to include a citizen's interest in emotional well-being. At a minimum, the court could have recognized that, as in *Bear*, the plaintiff pleaded a case sufficient to get to a jury to try to prove the elements required for relief.[90]

Finally, in most of the free exercise cases decided by the Supreme Court the government has acted against the religious group, either by imposing criminal sanctions for religious conduct or denying members some benefit because of their religious beliefs.[91] In *Paul*, however, the religious group acted as the aggressor, violating the plaintiff's right to emotional well-being. By granting defendants an absolute privilege against tort liability, the court has allowed the Church to use the shield of the first amendment as a sword.[92]

The *Paul* decision is an unfortunate expansion of a doctrine intended to protect individual rights. To turn the doctrine on its head and use it as a means to thwart another person's rights is an ironic twist that would undoubtedly displease the drafters of the first amendment. One can hope

85. PROSSER, *supra* note 4, § 12 at 54-66.

86. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1976).

87. *See supra* notes 71, 77-82 and accompanying text.

88. *See supra* note 63 and accompanying text.

89. *See supra* notes 65-68 and accompanying text.

90. *See* Bear v. Reformed Mennonite Church, 462 Pa. 330, 334, 341 A.2d 105, 107 (1975).

91. *See supra* notes 25-54 and accompanying text.

92. In addition, it surely is relevant that "shunning is a means of helping the Church at the expense of ex-members, who may plausibly argue that they are in no way helped or reformed by the process." *See* Note, *supra* note 84, at 1321 n.103. Finally, the court found that the Church should be given leeway in punishing ex-members. The court's reasons for this belief are unclear. Unlike persons who are members of the Church, ex-members have, by leaving, shown a desire to be free from control by the religious hierarchy. To say that they will be controlled indefinitely by a hierarchy they no longer recognize seems a cruel punishment.

that other jurisdictions will follow the Pennsylvania Supreme Court's decision in *Bear*. In addition, it seems unlikely *Paul* will be extended to a church's intentional physical tort against an ex-member.[93] At best, *Paul* can be viewed as a slight detour from the correct interpretation of the free exercise clause and the proper balancing of interests performed by the Supreme Court and numerous lower courts.

S.P.

93. *See supra* note 80.