

## The Power and Purpose of Jewish Law

Michael J. Broyde

Law is one of the means by which groups of people cohere to form a society. The law embodies the values of a community and backs up these values with the force of the state. Religious law also serves a cohesive purpose, dictating who is part of a community and establishing rules of conduct for that subgroup. And while not backed up by the force of the state—at least in most modern societies—religious law is not without teeth.

Consider Jewish law. Jewish law has functioned for the past two millennia with essentially two jurisdictional bases to punish violations: the “pursuer” jurisdictional grant, and excommunication or shunning. The pursuer rationale (*rodef*, in Hebrew) is the jurisdictional source of power for a Jewish court or community to intervene to prevent life-threatening violence. This area of Jewish law is widely known and much written about, and normally irrelevant to the formation of sub-communities in modern times, as the class of cases it governs are also crimes within secular society, and thus are typically referred to the police.

Excommunication and shunning, however, have not lost their relevance. The ability to exclude people from a community is a power that can frequently encourage conduct in ways that formal law itself either cannot or will not accomplish. A case from the rabbinical courts of Israel demonstrates this well, and presents itself as a modern—but classical—example of the power of social shunning generally, and the Jewish courts in particular. Here the Supreme Rabbinical Court in Israel is discussing what to do in a situation where a divorce seems proper and is desired by the wife, but the husband will not cooperate:

In the appeal that was presented before us on January 7, 1985, the court did not find sufficient cause to compel the husband to divorce his wife. The court did, however, try to persuade the man, who is religiously observant, to follow the proper

path and to obey the decision of the court [that it is proper for him to issue the divorce], for it is a good deed to heed the words of the rabbis who religiously obliged him to divorce his wife whom he has chained needlessly. The court gave the husband an extension of three months within which to grant a divorce to his wife. However, when the court saw that three months passed without response, we instituted the separations of Rabbenu Tam as found in the *Sefer HaYashar* (*Chelek HaTeshuvot* 24) which states:

Decree by force of oath on every Jewish man and woman under your jurisdiction that they not be allowed to speak to him, to host him in their homes, to feed him or give him to drink, to accompany him or to visit him when he is ill . . . .

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

Without the force of the state—without *any* coercive power—the court was able to achieve its goal, and the community’s interest was thus duly served.

### **Am I My Father’s Keeper?**

While the above example demonstrates the potential power of religious law, it does not address a number of important issues. First is the question of the immediate goal of the law, which is, of course, a topic of debate in the secular realm as well. Whom is Jewish law seeking to deter through the process of excommunication? Is it the person who is flaunting community standards? Or is it the community at large that will witness the person’s exile from the community and thus be deterred? A second and, in the case of Jewish law, more controversial question is the propriety of taking action against the violator’s family.

The first issue—that of individual versus broader deterrence—is far from just a theoretical concern. What if the person to be excluded will simply abandon religious observance in response to such treatment? If it is that person whom the law is concerned with, then logic

would dictate that shunning is to be avoided. Indeed, the penalty of exclusion only works on the one being shunned if he or she desires the approbation of the community of faith that is excluding him or her. In modern secular societies, when people's connection to their faith is often already weak, shunning may simply expedite a total severing.

While such concerns are not irrelevant, they have not carried the day. Rabbi Moses Isserless, one of the codifiers of Jewish law, writing in his glosses on *Shulchan Aruch*, articulates the generally accepted wisdom on this issue:

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

Later authorities have explained the rationale for this clearly: The purpose of the shunning or excommunication is to serve notice to the members of the community that this conduct is unacceptable, and also, *secondarily*, to encourage the violator to return to the community. In a situation where these two goals cannot both be accomplished, the first takes priority over the second. Thus even in situations where there is a reasonable possibility that the person will simply abandon any connection with the community to avoid the pressures imposed on him or her, the shunning and excommunication can still be said to have accomplished its goals.

The second—and as noted more controversial—issue is whether a community may shun the relatives of a person in order to encourage the person to cease his disruptive activities. The instinctual answer of most people is, of course, no. And as a general matter, classical Jewish law follows these instincts and prohibits punishing an innocent person as a way of punishing another. This principle, however, does not settle the issue. The question becomes whether shunning is really a form of punishment, or is it some other type of activity not bound by the jurisprudential rules of punishment?

Providing one answer, Rabbi David Halevi, writing in his commentary *Turai Zahav*, states:

Heaven forbid [expelling children from school to punish parents]. The world is only in existence because of the studies of children in school. It makes sense to prohibit circumcising children, as that obligation is solely the father's; the same is true for burying his dead. . . . However, studying by children

has no restitution. . . . So too, to exclude his wife from the synagogue is improper: *If he sinned, what was her sin?*

A fair question. Rabbi Halevi views excommunication and shunning as forms of judicial punishment, subject to the general rules regulating the fairness and propriety of any given punishment. He thus reasonably concludes that we cannot justify punishing a child or wife for the sins of the father or husband.

By no means, however, is this the only possible ruling. As with the question of individual deterrent versus general deterrent, Rabbi Isserless again adopts the legal rule that posits that punishment is not the goal:

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

According to this interpretation, letting the close family of an excluded person participate in the religious sub-community—using its synagogue, cemetery, or schools—still allows the excluded person to be part of the community. As for not punishing the innocent, Rabbi Isserless, and those authorities who follow his view, simply assume that the normal rules regulating judicial punishment do not apply in the case of shunning and excommunication—not because on a practical level the innocent person is not hurt, but because on a philosophical level exclusion is not punishment. As Rabbi Hershel Schachter wrote in a recent article,

He [the one being shunned] would agree to obey the law, in the particular area in which he is remiss, in order to afford his wife and children a proper religious environment. Using the children as leverage is not to be confused with punishing them unjustly.

Of course, it is quite easy to see why an affected child or spouse would question such reasoning. From their perspective, they *are* being punished. However, while their claim is undeniable, it is also considered secondary. The reasoning behind the “punishment” of those who are not guilty lies not in the apparent impact of shunning or excommunication, but rather in its ultimate purpose. It is to this purpose that I now turn.

## **Jewish Law's *Raison D'être*: Justice or Community?**

In concluding that it is appropriate to shun an individual even when doing so might drive that person completely away from the religious community, Jewish leaders, as noted earlier, cite as the basis for their judgment the goal of communicating to the rest of the community that certain conduct is unacceptable. Thus is served the broader purpose of Jewish law: *communal cohesiveness*. In order to survive, many religious communities cannot be fully open to any and all conduct by their members. Like other faiths, Judaism established a mechanism and procedure—including partial shunning, complete shunning, and in rare situations excommunication—for the exclusion of members of the faith who reject basic norms of the community in either practice or theology. Such exclusionary practices allow for the formation of self-selected sub-communities sharing common religious values.

It is with this purpose in mind that one must judge the practice of “punishing” the non-guilty spouse or child. It is true that they are treated as a means to an end, but the ultimate end is the formation and maintenance of community, not simply the punishment of the offender. In a situation where shunning relatives would have no impact on the conduct of the principal and would not *de facto* admit the person to the community, punishment of a spouse or child would be prohibited.

The guiding concern of sub-group solidarity can also be seen in the list of specific offenses for which the classical code deems shunning proper. The common characteristic of these violations is not their seriousness or their religious importance; rather it is their breach of community discipline. Those to be shunned include one who denigrates a community scholar or an agent of the Jewish court while he is doing his job, or one who mocks—not who violates—one of the rules of Jewish law. Other offenses include declining to accept the jurisdiction of the Jewish court system to resolve disputes with members of the community, and conduct that desecrates God’s name. Each of these offenses (as well as all the others listed in the *Shulchan Aruch*) share the central characteristic that they are violations that appear to hinder the creation or maintenance of community.

In these significant ways Judaism parts company with the classical Christian and Mormon practices of using shunning to enforce

observance of the details of the law and to supervise the private conduct of church members. That was never its use in the Jewish tradition. In fact, adultery, Sabbath violations, ritual violations, and other central tenets of the faith were never subject to shunning *unless* the person engaged in this conduct in a public manner intended to indicate defiance of tradition.

As for when the law is actually enforced—an empirical question that reveals much about most every legal system—while the theoretical Talmudic law is clear (“one who violates any prohibition may be shunned”), in practice this is limited to situations where the person has already been formally warned that his public conduct violates the law. Similarly, one may not excommunicate or shun a person who unintentionally violated Jewish law. Indeed, one may not shun a person who is aware of what the rule of law is, tries to observe it, and occasionally slips. All of these rulings are the natural outgrowth of a doctrine focused on building communal cohesion. Traditional Jewish communities build a social structure that creates a climate where religious behavior is the social norm; shunning and excommunication are the tools these communities use to ensure community formation.

Why is Jewish law primarily concerned with community, even arguably at the expense of fairness? To answer that question one would have to look extensively at history and at the social conditions that provided the context in which the applications of Jewish law developed. Such a task is too large for the confines of a short essay. It is probably fair to note, however, that for a religious minority, cohesion is vital not simply to the strength of a community, but often also to its existence. This truth bore relevance to Jewish communities decades, centuries, and millennia ago, as it does in the pluralist societies of today.