Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults

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In contrast to the sixties when the "God is dead" movement was prominent[1] and there was widespread belief that religion was losing its influence on American life,[2] the seventies have witnessed a revival of interest in religion.[3] The most vigorous religious activity in the seventies has not, however, been in long-established, "mainline" American religions such as the Methodist, Catholic, and Presbyterian churches,[4] but has instead occurred in "marginal" religions,[5] which have, either

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1. *See* N.Y. Times, Sept. 12, 1976, at 26, col. 1.

2. Smith, *Secularization and the Sacred: The Contemporary Scene*, in THE RELIGIOUS SITUATION 1968, at 583 (D. Cutler ed. 1968) (citing Gallup polls showing the number of Americans feeling that "religion is losing its influence," increasing from 14% in 1957 to 57% in 1967). *But cf.* Swanson, *Modern Secularity: Its Meanings, Sources, and Interpretation*, in THE RELIGIOUS SITUATION 1968, *supra* at 801 (arguing that, despite belief by scholars and the public that religion was losing its influence, 68% of Americans still attended religious services and 95% said they still believed in God).

3. *See, e.g.*, RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA xviii (I. Zaretsky & M. Leone eds. 1974) [hereinafter cited as RELIGIOUS MOVEMENTS]; U.S. NEWS & WORLD REPORT, June 14, 1976, at 52; *id.*, Dec. 17, 1973, at 43.

It is not clear whether this "revival of interest" is caused by an increase in the number of people belonging to religions, or only by certain groups of people changing affiliation with such new affiliations being well-publicized. A 1975 poll revealed that while most Americans still believe religion is losing its impact on society, the majority holding that view has dwindled sharply since 1970, with the most dramatic shift in opinion occurring among young adults. N.Y. Times, Jan. 16, 1975, at 39, col. 1. *See also* RELIGIOUS MOVEMENTS, *supra* at xviii (media has given great publicity to impact and spread of religious enthusiasm); Wilson, *Historical Study of Marginal Religious Movements*, in RELIGIOUS MOVEMENTS, *supra* at 596 (although specific sects have developed or declined, the relative number of religious sects and people involved in them has remained constant for 3 centuries).

4. *See* RELIGIOUS MOVEMENTS, *supra* note 3, at xvii; U.S. NEWS & WORLD REPORT, Dec. 17, 1973, at 43. In 1968, 90% of all Americans belonged to 1 of 10 Christian denominations, and all but one of these denominations have existed in America since colonial times. Gaustad, *America's Institutions of Faith*, in THE RELIGIOUS SITUATION 1968, *supra* note 2, at 835.

5. *See* RELIGIOUS MOVEMENTS, *supra* note 3, at xvii; U.S. NEWS & WORLD REPORT, *supra* note 3. Not only are newly established marginal groups growing, but so are such long-established churches with unorthodox beliefs as the Mormons and Jehovah's Witnesses. Cooper, *Publish or Perish: Negro Jehovah's Witness Adaptation in the Ghetto*, in RELIGIOUS MOVEMENTS, *supra* at 700; Dolgin, *Latter-Day Sense and Substance*, in RELIGIOUS MOVEMENTS, *supra* at 519. "Marginal religions" is the term used in RELIGIOUS MOVEMENTS, *supra* at 28, to describe groups with practices and beliefs

presently or in the past, been in sharp conflict with society.[6] There have been marginal religions in America throughout its history,[7] but the last decade has seen particularly great diversity in groups founded in or transported to the United States.[8] Some of these groups are as large and highly organized as the Unification Church, which has great wealth, published scripture, and 10,000 to 30,000 members,[9] and others are as small as Charles Manson's group, having little money and less than fifty members.[10]

Marginal religions are typically controversial, but some of today's groups have become particularly so because of allegations that they brainwash and defraud their members.[11] The Hare Krishnas, Children of God, Divine Light Mission, and the Unification Church have been the main focus of these attacks, although the press and public, in criticizing "religious cults,"[12] are usually not specific and may be refer-

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different from traditional American churches, *cf.* text & note 4 *supra* (discussing American "mainline" religion). Analysis of the current revival is complicated because the language and trappings of religion are being assumed by many groups that are not explicitly religious but are open to social experimentation. RELIGIOUS MOVEMENTS, *supra* at xx.

6. RELIGIOUS MOVEMENTS, *supra* note 3, at xxii. The conflict between marginal groups and American society is evidenced by a disproportionate number of Supreme Court church and state decisions involving unorthodox beliefs. Burkholder, *The Law Knows No Heresy: Marginal Religious Movements and the Courts*, in RELIGIOUS MOVEMENTS, *supra* at 27; *see, e.g.*, Wooley v. Maynard, — U.S. —, 97 S. Ct. 1428 (1977) (Jehovah's Witness' right to refuse to display "Live Free or Die" motto on license plate upheld); Wisconsin v. Yoder, 406 U.S. 205 (1972) (reversing conviction of Amish parents for not sending their children to public school); Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down ordinance which prohibited Jehovah's Witnesses from distributing literature); Reynolds v. United States, 98 U.S. 145 (1879) (sustaining conviction of Mormons for practicing polygamy).

7. *See* Wilson, *supra* note 3. During different periods of American history, Quakers, Shakers, Mennonites, Swedenborgians, Unitarians, and Jews, among others, have been considered unorthodox. *Id.* at 600-01.

Marginal movements can be broken down into three broad categories—occult groups (for example, Spiritualism, Satanism, Scientology), mystical or transcendental movements (such as Hare Krishna, drug-centered movements), and ecstatic or enthusiastic movements (for example, Pentecostals, Adventists). *Id.* at 608. Occult groups usually attract alienated middle class individuals through the promise of knowledge which will make them powerful. Mystical groups also appeal to alienated, although younger, members of the middle class who seek a vision of a transformed society. Ecstatic or enthusiastic movements attract members mostly from the lower and lower middle classes, and usually are conservative or reactionary politically. *Id.*

8. *See* RELIGIOUS MOVEMENTS, *supra* note 3, at xvii. Examples of religions founded in America are the Children of God and the Divine Light Mission, and those imported from the Orient include Hare Krishna, the Unification Church, Meher Baba, and Santeria. *Id.*

9. Rice, *Honor Thy Father Moon*, PSYCH. TODAY, Jan., 1976, at 36. The Unification Church is the cult which has been most publicized and from which the greatest proportion of individuals who have been removed for deprogramming have come. Interview with Dr. Kevin Gilmartin, Pima County Court Psychologist, in Tucson, Arizona (Feb. 17, 1977). The Unification Church is also the cult most vigorously using legal procedures to resist removal of its members. *See* Ariz. Daily Star, Mar. 19, 1977, § B, at 1, col. 1; *id.*, Mar. 17, 1977, § E, at 5, col. 5.

10. V. BUGLIOSI, HELTER SKELTER xiv-xvii (1974).

11. *See, e.g.*, T. PATRICK, LET OUR CHILDREN GO! (1976); Rice, *supra* note 9, at 48; U.S. NEWS & WORLD REPORT, June 14, 1976, at 52.

12. U.S. NEWS & WORLD REPORT, *supra* note 11. A cult, as defined by reli-

ring to any or all of the estimated 200 to 2,000[13] groups which are newly established in the United States, have unorthodox religious beliefs or practices, and live in close communities. Some of these groups have become particularly controversial because they appeal so strongly to young people.[14]

Parents of some cultists, emotionally upset by cult practices, have obtained custody of their children, even children past majority, under state guardianship and conservatorship statutes.[15] These parents have then subjected their children to "deprogramming"[16] to expunge the children's cult induced beliefs. This Note will first look at the characteristics of today's cults that have made them controversial. Next, it will examine the various legal means by which these cults have been attacked. It will then consider the constitutionality of ex parte temporary guardianship and conservatorship proceedings and will discuss substantive arguments, particularly arguments based on the first amendment, which could be made against removing a cult member from his group on allegations of cult induced mind control or brainwashing. Finally, a suggestion will be made for a method of deciding when to allow removal of a cult member, protecting the interests of both the state and the cultist.

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gious scholars, is characterized by the following traits: small size, short life, often of local character, search for mystical experience, lack of organizational structure, presence of a dominant charismatic leader, great problem with succession, wide deviation in rite and belief, and concern almost wholly with problems of individuals rather than the social order. R. ELLWOOD, RELIGIOUS AND SPIRITUAL GROUPS IN MODERN AMERICA 23 (1973). A sect, on the other hand, is a group formed in protest against and usually separating from another religious group. Eister, *Culture Crises and New Religious Movements*, in RELIGIOUS MOVEMENTS, *supra* note 3, at 612. In contrast, a "church" generally supports the existing social order, has a priestly organization, and has more members who are born into it than who choose it independently. R. ELLWOOD, *supra* at 20. Some marginal religions do not have all the characteristics of cults; they may, like the Unification Church, be highly organized, quite large, and have a national or even international organization.

13. U.S. NEWS & WORLD REPORT, *supra* note 11.

14. *Id.* Although marginal religions have not traditionally appealed only to young people, RELIGIOUS MOVEMENTS, *supra* note 3, at xvii, most of the one to three million Americans involved in today's cults are in their twenties or late teens. U.S. NEWS & WORLD REPORT, *supra*.

15. *See* text & notes 71-73 *infra*.

16. In deprogramming, a cultist typically is restrained in a motel room or home and subjected to intense questioning about his religious faith, often for many hours at a time. Deprogramming may include denunciations of the cultist's beliefs or physical brutality, although the extent to which the latter takes place is disputed. This procedure continues for several days, until the cultist "sees the light" and disavows his faith. L.A. Times, Jan. 3, 1977, § 1, at 1, col. 1; S.F. Chronicle, Dec. 12, 1975, at 4, col. 1. See text & notes 54-55 *infra*. Many commentators have heavily criticized deprogramming practices. The American Civil Liberties Union has warned that attempts to deprogram members of religious cults constitute a "very dangerous trend that could be used against political as well as religious dissidents," N.Y. Times, Feb. 6, 1977, at 27, col. 1, and the executive director of the National Council of Churches has called deprogramming "protracted spiritual gang rape." *Id. See also* Ariz. Daily Star, May 7, 1977, § D, at 11, col. 1.

THE RELIGIOUS CULTS

There are significant differences in beliefs and practices among today's religious cults,[17] but they also have a number of common traits.[18] Most have charismatic leaders, often the founder of the group. Sun Myung Moon, for instance, the present leader of the Unification Church, founded his group in 1954, following a vision in which Jesus purportedly appeared and told him to "carry out my unfinished task."[19] A.C. Bhaktivedanta Swami Prabhupada, present leader of the Hare Krishnas, first gathered followers by chanting the names of Krishna, accompanied by Indian cymbals, in a park in New York City's Lower East Side.[20] The leader usually has great control over his followers,[21] extending in Moon's case, for example, to deciding whom they can marry.[22]

Members of these cults live communally, sharing funds earned by the members. They perceive their groups as families, to whom the individual owes more allegiance than to his natural parents. Some groups, such as the Children of God, teach members to hate their parents,[23] based on Christ's admonition in the Bible: "If any man comes to me without hating his father and mother . . . he cannot be my disciple."[24] The daytime activities of cult members are usually very structured, with cults restricting their members' indulgence in food, sleep, and sexual activity.[25] Members' days are filled with fundraising,

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17. Some of the cults, such as the Unification Church and the Divine Light Mission, claim to be Christian, while others, such as Hare Krishna, derive from Hinduism. Judah, *The Hare Krishna Movement*, in RELIGIOUS MOVEMENTS, *supra* note 3, at 463. Some cults derive from no established religion and are questionably religious. *See* N.Y. Times, Feb. 29, 1976, § 6 (Magazine), at 12 (cult formed by man and woman who say they have come from "higher level" to help people on earth ascend to superhuman level, possibly in spaceship). The Unification Church had a national budget of $11 million in 1975, TIME, Nov. 10, 1975, at 44, accumulated through Church-run businesses as divergent as real estate speculation, a ranch, a gas station, and a tea house, Rice, *supra* note 9, at 45, while the Children of God depend largely on donations for their support; they teach that it is sinful to work at a job in society. N.Y. Times, Nov. 29, 1971, at 41, col. 1. Members of the Unification Church and Children of God dress conservatively and wear their hair short, Rice, *supra* at 40, 42, while Hare Krishnas shave their heads, chant, and wear robes. TIME, Mar. 28, 1977, at 81.

18. *See* Note, *Abduction, Religious Sects, and the Free Exercise Guarantee*, 25 SYRACUSE L. REV. 623, 624-27 (1974).

19. Rice, *supra* note 9, at 39.

20. Judah, *supra* note 17, at 464.

21. *See* T. PATRICK, *supra* note 11, at 125 (every wish of leader of New Testament Missionary Fellowship is members' command); Ariz. Daily Star, Oct. 24, 1975, § A, at 1, col. 5 (members of The Body cult seek leader's permission for many activities).

22. Rice, *supra* note 9, at 42. In fact, Moon often pairs individuals completely unknown to each other. *Id.*

23. *See* N.Y. Times, Nov. 29, 1971, at 41, col. 1. Members who consider leaving the Unification Church because of pressure from parents are told that their parents are acting on behalf of Satan. Rice, *supra* note 9, at 47.

24. *See Matthew* 10:37; *Luke* 14:26.

25. Ariz. Daily Star, Feb. 6, 1977, § A, 1, col. 1, at 6, col. 5. A typical day for Unification Church members at the Berkeley commune begins at 5 a.m. and ends at 11

proselyting, and scripture study. The groups are in a sense fundamentalistic, tending to accept the literal meaning of various scriptures and eschewing extra-scriptural sources.[26]

Many cultists feel the world is evil and in jeopardy,[27] and this belief gives them an evangelistic fervor in their proselyting. Moon's followers, for instance, preach that the United States is God's chosen land but is being destroyed by foreign communism and its citizens' crime, suicide, alcoholism, divorce, sex, and drug abuse; it can be saved only by God's servant, Reverend Moon.[28] The cults proselyte mainly in cities and near colleges and universities, distributing literature on the streets, kneeling on sidewalks to pray, and encouraging college students to attend cult sponsored discussion groups.[29]

A number of factors have created distrust of the cults among noncultists. Relatives of cult members have become alarmed at the swiftness with which conversions can take place[30] and with the total rejection by many cult members of their parents, spouses, and former lives.[31] Relatives assert that their children "do not seem to be themselves," that they talk in strange jargon and their eyes look vacant and glassy.[32] Relatives are concerned that their children have lost weight, do not get enough sleep, and may not be eating nutritiously.[33] Since such great

p.m., with only 1½ hours not scheduled for group activity or proselyting. *Id.* Breakfast is coffee, tea, or milk, and lunch consists of a sandwich. There are many rules for behavior, including prohibitions on private conversations during meals and during travel to and from proselyting. *Id.* Members of the Unification Church are forbidden to have sex before marriage and even after marriage must live separately for from 40 days to 3 years. Rice, *supra* note 9, at 44. Although celibacy is an ideal for Hare Krishnas, marriage is permitted, as is sex within marriage, but only for the purpose of having children. Judah, *supra* note 17, at 471.

26. Judah, *supra* note 17, at 368; *see* Tucson Daily Citizen, Oct. 24, 1975, at 2, col. 2 (cult leader refused to discuss cult practices, saying, "What we believe is right in the Bible. I beseech ye to read the scriptures").

27. *See, e.g.*, T. PATRICK, *supra* note 11 (most of Children of God left the United States in 1973, saying that the Comet Kohoutek was a herald of the destruction of the United States); Roiphe, *Struggle Over Two Sisters,* N.Y. Times, June 3, 1973, § 6 (Magazine), at 17 (the world's evil is hastening it to Judgment Day); N.Y. Times, Nov. 7, 1975, at 41, col. 6 (N.J. edition) (150-member Restored Israel of Yahveh has begun 10-year countdown towards Armageddon).

28. Rice, *supra* note 9, at 40.

29. In June, 1976, the Unification Church held a missionary rally in Yankee Stadium in New York City, attended by more than 25,000 persons. N.Y. Times, June 2, 1976 at 30, col. 1.

30. *See, e.g.*, T. PATRICK, *supra* note 11, at 37-60 (girl converted to Children of God in a weekend); Ariz. Daily Star, *supra* note 21 (man disappeared within a few hours of meeting religious group); N.Y. Times, Oct. 10, 1975, at 16, col. 4 (20 persons disappeared to join cult after single meeting).

31. *See* T. PATRICK, *supra* note 11, at 213-14 (man abandoned wife and children); Sage, *The War on the Cults,* HUMAN BEHAVIOR, Oct., 1976, at 40, 46 (man refused to see parents); Ariz. Daily Star, *supra* note 21 (man abandoned wife).

32. *See* T. PATRICK, *supra* note 11, at 125 (cultist was unresponsive, always with the same smile); Rice, *supra* note 9, at 42 (although cultists talk and smile, one does not feel it is the whole person). Cultists' vacant expressions have been compared to those of people using drugs. *Id.*; Ariz. Daily Star, Jan. 26, 1977, § B, at 1, col. 5 (face was vacant, cultist appeared dazed, distant).

33. *See* Ariz. Daily Star, Mar. 16, 1977, § F, at 2, col. 1 (Hare Krishnas got

changes in lifestyle and belief occur so rapidly, parents argue that their children must have been hypnotized or brainwashed.[34]

Much concern also arises from the fact that the founders of some cults have amassed great wealth from the labors of their converts.[35] New members of cults often are pressured to give their possessions, including vehicles and bank accounts, to the group.[36] Although Unification Church members are paid salaries for their work in church businesses, they are not recompensed for the number of hours they actually work, and most members sign over to the church the money amount they do receive.[37] Ironically, Reverend Moon lives in luxury in a $620,000, twenty-five room New York mansion, while his converts work 80 to 100 hours per week and live in sparsely furnished dormitories.[38]

Legal Attacks on the Cults

There have been a few direct legal attacks against cult practices by individuals and the government. The parents of a Unification Church member have filed suit,[39] charging the church with violating the Fair Labor Standards Act,[40] Internal Revenue Code,[41] Federal Insurance Contributions Act,[42] and the thirteenth amendment to the Constitution:[43] "We view the church as a business masquerading behind the first amendment and brainwashing its members."[44] The Immigration and Naturalization Service has refused to admit 583 aliens for missionary training by the Unification Church because such training was "principally fund raising by street solicitation of borderline legality,"[45] and federal immigration officials are examining Moon's own status as a permanent resident alien.[46] The Internal Revenue Service

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little rest and inadequate diet); *id.*, Oct. 14, 1976, § B, at 3, col. 2 (Hare Krishna convert required to drink cow urine as part of ritual); *id., supra* note 21 (The Body cult members eat food from garbage cans).

34. *See, e.g.*, NEWSWEEK, June 14, 1976, at 60; TIME, June 14, 1976, at 48-50; Tucson Daily Citizen, Oct. 24, 1975, at 1, col. 5.

35. *See* authorities cited note 34 *supra.*

36. *See* T. PATRICK, *supra* note 11, at 49; Ariz. Daily Star, Oct. 28, 1975, § A, at 1, col. 2.

37. Rice, *supra* note 9, at 47. Some deprogrammed Unification Church members stated that they also wrote bad checks or tricked their parents in order to get money for the church. S.F. Chronicle, *supra* note 16, at 5, col. 1.

38. Rice, *supra* note 9, at 47.

39. U.S. NEWS & WORLD REPORT, *supra* note 11.

40. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1970), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55.

41. *See* I.R.C. § 501.

42. *See* Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3126 (1964).

43. U.S. CONST., amend. XIII.

44. U.S. NEWS & WORLD REPORT, *supra* note 11.

45. NEWSWEEK, *supra* note 34.

46. U.S. NEWS & WORLD REPORT, *supra* note 11.

is investigating the Unification Church to see if it is violating rules restricting political lobbying and personal enrichment of church leaders,[47] and to determine whether it should be permitted to retain its tax-exempt status.[48] However, these methods of attack have clear limitations. The difficulty with private actions by parents is that the parents may lack standing to challenge the application of federal acts to a church, or to raise the thirteenth amendment rights of their child.[49] A difficulty facing both private and governmental actions is that the courts have traditionally given broad application to the first amendment freedom of religion clause,[50] which would no doubt be relied upon by the cults to thwart such action. Nevertheless, several important challenges have been made on cultist techniques the constitutionality of which will be the central focus of this Note.

In October of 1976, two top leaders of a Hare Krishna temple were indicted by a New York grand jury on charges of unlawfully imprisoning two members of the religious sect through brainwashing techniques.[51] However, these indictments were dismissed by a New York State Supreme Court judge, who ruled: "The entire and basic issue before this court is whether or not the two alleged victims in this case, and the defendants, will be allowed to practice the religion of their choice—and this must be answered with a resounding affirmative."[52] The judge determined that the "victims" entered the Hare Krishna movement voluntarily, and that they were not physically restrained from leaving. He noted that there had been no allegations of misrepresentation or deception.[53]

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47. NEWSWEEK, *supra* note 34.

48. N.Y. Times, *supra* note 29.

49. A person generally does not have standing to assert the rights of third parties. *See* Roe v. Wade, 410 U.S. 113, 126-27 (1973) (physician cannot assert rights of abortion patients); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (to same effect). This rule of judicial restraint may, in a particular case, be outweighed by competing considerations. *See* Barrows v. Jackson, 346 U.S. 249 (1953) (white property owner granted standing to contest constitutionality of judicial enforcement of a restrictive covenant because of practical inability of black buyers to bring suit on their own behalf). *See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1974).

50. *See* text & notes 246-92 *infra.*

51. Ariz. Daily Star, Oct. 14, 1976, § B, at 3, col. 2. This was probably the first such charge in United States history. *Id.*

52. Ariz. Daily Star, Mar. 18, 1977, § C, at 14, col. 1.

53. *Id.* The United States Department of Justice apparently has taken a similar position. Although it is reported that the Department receives four or five complaints daily, the official position seems to be that the coercion cults utilize is not illegal. U.S. NEWS & WORLD REPORT, *supra* note 11. Although the Justice Department is investigating organizations and persons associated with Reverend Moon to see if American citizens are illegally working for the South Korean government, its inquiry is not focused solely on Moon or the Unification Church, lest questions of freedom of religion be raised. N.Y. Times, Oct. 30, 1976, at 3, col. 3.

Parents of cultists began to take the law into their own hands in 1971, when, with the help of California state employee Ted Patrick, they seized cult members and subjected them to deprogramming.[54] The member was first "snatched," removed quickly and forcibly from his religious group, and then restrained in a motel room or home while Patrick challenged his religious beliefs until the member "saw the light," recognizing that he had been deceived by the cult.[55] Such forcible removal from cults and consequent restraint during deprogramming made both parents[56] and deprogrammers[57] vulnerable to legal attack on grounds of false imprisonment and kidnapping. Although most of Patrick's deprogramming attempts were successful,[58] in which case the removed cultist did not press charges, a number of cultists who either were unsuccessfully deprogrammed or escaped before they could be deprogrammed filed criminal charges against Patrick or sued him in tort.[59] Additionally, at least one class action suit has

54. *See generally* T. PATRICK, *supra* note 11; S.F. Chronicle, *supra* note 16. Patrick first became suspicious of cults when members of the Children of God group encountered his 14-year-old son on a San Diego beach one afternoon and kept him there until late in the evening, attempting to convert him. T. PATRICK, *supra* at 37-39.

55. S.F. Chronicle, *supra* note 16.

56. The traditional common law rule was that an unemancipated or minor child could not maintain a tort action against a parent. *See, e.g.*, Capps v. Smith, 263 N.C. 120, 139 S.E.2d 19 (1964); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). Today, however, this doctrine is being increasingly abrogated by American courts. *E.g.*, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Even in jurisdictions retaining the immunity doctrine, a suit by an emancipated child or one who has reached the age of majority may be maintained against a parent. *See* Streenz v. Streenz, 106 Ariz. at 88, 471 P.2d at 284; Fowlkes v. Ray-O-Vac, 52 Ga. App. 338, 183 S.E. 210 (1935).

In addition, criminal sanctions may be available against cultists' parents. The federal kidnapping statute, 18 U.S.C. § 1201 (1970), and several state statutes, *see, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-491 to -492 (Supp. 1976-77); FLA. STAT. ANN. § 787.01 (West 1976); KY. REV. STAT. § 509.060 (1975), exclude from coverage acts against minors by their parents, but there is no such exclusion applying if the child is an adult. For a discussion of emancipation and its effect on the rights and duties of parents in the present context, see Note, *supra* note 18, at 635-43.

Since most cult members would be adult age or emancipated from their parents, there is little chance they will be prevented from suing their parents in tort. In addition, the parents may be vulnerable to a criminal prosecution for kidnapping, although this is generally viewed by police authorities as a "family matter." T. PATRICK, *supra* note 11, at 192.

57. Patrick always made sure a parent made the first contact with his child, thinking that a parent would not be committing a crime in kidnapping his own child and that therefore anyone assisting would not be an accessory to a crime. He also counted on successfully deprogramming every child so that no child would bring suit against him. T. PATRICK, *supra* note 11, at 65. Both of Patrick's assumptions proved incorrect. *See* N.Y. Times, July 25, 1976, at 20, col. 8 (parents of cultist convicted of false imprisonment, along with Patrick); Helander v. Patrick (Conn. Super. Ct., Bridgeport County, filed Sept. 8, 1976) (unsuccessfully deprogrammed cultist recovered $5,000 damages from Patrick).

58. Sage, *supra* note 31, at 44.

59. *Id.* In September 1976, an unsuccessfully deprogrammed Unification Church member, Wendy Helander, recovered $5,000 from Patrick on grounds that, during deprogramming, he had "treated her disgracefully" and labeled her a vegetable, dog, and

been filed by members of a cult against Patrick and the cultists' parents.[60]

Patrick has been successfully defended in at least two kidnapping cases.[61] However, in June, 1974, he was convicted in Colorado of false imprisonment for aiding parents in abducting their daughters for deprogramming.[62] Patrick was charged with second-degree kidnapping and conspiracy but was found guilty only of false imprisonment, a lesser-included offense.[63] The appeals court affirmed, rejecting Patrick's "choice of evils" defense. Patrick had argued that his actions, although forbidden by law, were justified because of the greater possibility of harm to the victims if he did not intercede.[64] The court noted that for the choice of evils defense to be available under Colorado statutes, "there must be an imminent public or private injury about to occur which requires emergency action."[65] The court noted that there was no evidence of such a situation in Patrick's case.[66] The trial court suspended Patrick's 1 year prison sentence, but reimposed it in June, 1975,[67] following Patrick's conviction for false imprisonment in California.[68] Patrick protested that the California judge had not allowed him to explain that the young woman he was convicted of imprisoning was already at the home of her parents when he allegedly spoke with her, and that he spoke with her for less than 15 minutes before she became angry and left the house.[69] Patrick began serving a 1 year sentence in California in July, 1976.[70]

In October, 1975, Michael Trauscht, then a Deputy County Attorney in Pima County, Arizona, pioneered a legal technique of removing

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bitch. Helander v. Patrick (Conn. Super. Ct., Bridgeport County, filed Sept. 8, 1976).

60. Note, *supra* note 18, at 623 n.4.

61. S.F. Chronicle, *supra* note 16.

62. People v. Patrick, 541 P.2d 320 (Colo. Ct. App. 1975). *See also* People v. Patrick, 555 P.2d 182 (Colo Ct. App. 1976) (affirming trial court's revocation of prior sentence suspension).

The facts giving rise to the conviction were the following: As two young women cultists were attempting to drive out of a parking lot in Denver, Colorado, Patrick blocked the exit with a car he was driving, making it possible for the victims' fathers to push their way into their daughters' cars and drive the young women away without their consent. 541 P.2d at 321. The young women were driven to Eldorado Springs, Colorado, where they were detained for 2 days during deprogramming. *Id.*

63. People v. Patrick, 541 P.2d 320, 321 (Colo. Ct. App. 1975).

64. *Id.* at 322. *See* T. PATRICK, *supra* note 11, at 167-73 (describing Patrick's successful use of the same defense against a New York false imprisonment charge).

65. 541 P.2d at 322; *see* COLO. REV. STAT. § 18-1-702(1) (1973).

66. 541 P.2d at 322.

67. People v. Patrick, 555 P.2d 182 (Colo. Ct. App. 1976); *see* N.Y. Times, *supra* note 57.

68. N.Y. Times, *supra* note 57.

69. *See* T. PATRICK, *supra* note 11, at 265-75.

70. N.Y. Times, *supra* note 57.

cult members from the groups which avoided the hazards of Patrick's approach.[71] This method is now widely used, yet still controversial.[72] Under Trauscht's method, a court order is obtained to put the cultist under a temporary guardianship or conservatorship with his parent as guardian, and the parent then turns the cultist over to a deprogrammer.[73] By the time the temporary guardianship terminates and a hear-

71. *See* Sage, *supra* note 31; L.A. Times, *supra* note 16.

72. *See* L.A. Times, *supra* note 16; N.Y. Times, *supra* note 16.

73. *See* authorities cited note 72 *supra*. Trauscht now heads a nonprofit group, the Freedom of Thought Foundation, which provides an attorney for parents wishing to get custody of their cultist children, deprograms the children, and then houses them for 30 days at its Tucson retreat. The Foundation claims a 95% success rate on the 70 cultists it has attempted to deprogram since late 1975. Ariz. Daily Star, Nov. 5, 1976, § A, at 1, col. 1.

Trauscht has successfully removed cultists by guardianship procedures, for the past 1½ years. Alternative methods of removing cultists, specifically civil commitment or through the writ of habeas corpus, would present problems. Civil commitment statutes could not have been used as successfully because a committed individual is under the custody of a mental hospital, and the mental hospital might shun deprogramming for more traditional, less confrontive treatment. If the cultist is under a guardianship, the parent has custody and so can dictate the type of treatment to which the cultist is subjected.

Even if a parent merely wanted his child removed from a cult, and was not concerned with the treatment the cultist received thereafter, it may be difficult to show that the cultist is subject to commitment under the applicable statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-501 to -548 (Supp. 1976-77); CAL. WELF. & INST. CODE §§ 5000-5401 (West 1972); MASS. ANN. LAWS ch. 123, §§ 1-37 (Michie/Law Co-op Supp. 1972). There is also much recent case law specifying due process protections required prior to commitment, and it may not be possible to detain an individual under an emergency commitment statute for longer than a few days. *See, e.g.*, FLA. STAT. ANN. § 394.463 (West Supp. 1977); IDAHO CODE § 66-329(A) (Supp. 1976); ILL. ANN. STAT. ch. 91½, § 7-1 (Smith-Hurd Supp. 1977).

A writ of habeas corpus would be an effective method in some cases for bringing a cultist into court for a hearing. It would not, however, be an adequate substitute for appointment of a guardian. Habeas corpus is available under both federal law, 28 U.S.C. §§ 2241-2255 (1970) and most state statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2001 (1956); CAL. PENAL CODE § 1473 (West Supp. 1977); MICH. STAT. ANN. § 27A.4307 (1974). It provides a speedy hearing on the question of whether an individual has been unlawfully imprisoned or detained. The applicability of the habeas corpus remedy is the first difficulty. Although habeas corpus is most typically used to test whether a particular court has jurisdiction to issue a certain order and whether the court's trial procedures accord with constitutional guarantees, state laws generally are applicable to private imprisonment. *See In re* Hollopeter, 52 Wash. 41, 100 P. 159 (1909). The federal habeas corpus law is applicable to private imprisonment when a constitutional violation is alleged. Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1202-03 (9th Cir. 1975) (although most child custody conflicts do not rise to level of constitutional violations, "babylifting" of Vietnamese orphans did). Second, habeas corpus has traditionally been a remedy only for physical imprisonment—an individual must be in actual, physical custody at the time of filing the writ. *See In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); Dixon v. Warden, Nev. State Prison, 85 Nev. 703, 462 P.2d 753 (1969). In *In re* Surber, No. G-946 (Ariz. Super. Ct., Pima County, filed Oct. 24, 1975), in which a cultist was removed from his cult by a writ of habeas corpus, there was evidence that he had been physically restrained, and that this restraint was against his will. It is questionable, however, whether courts would issue writs of habeas corpus for cultists where there was either no evidence that the cultist's association with the cult was involuntary, *see In re* Phillips, 140 Cal. App. 2d 583, 295 P.2d 471 (1956), or in situations in which the cultist was restrained by emotional rather than physical coercion. Of course, a number of cases have emphasized that a judge should be accorded broad discretion in issuing the writ, *see* Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87 (1952); Thompson v. Harris, 106 Utah 32, 144 P.2d 761 (1943), and an Arizona statute even allows an individual

ing, if any, is held, the cultist has usually been deprogrammed. Although cultists strenuously object to guardianship in the unusual event that a hearing is held before deprogramming is completed, after deprogramming they usually do not object to being in the custody of a spouse or parents.[74] Trauscht's technique of removing cultists is less flagrantly illegal than was Patrick's "snatching" without court supervision, but it is still of questionable legality. This is particularly true if, as has happened in California, the temporary guardianship was issued at an ex parte proceeding without hearing or notice to the cult member or anyone representing him.

The legality of using temporary guardianships and conservatorships to allow deprogramming of cult members is being tested by Erik O'Dowd, a Tucson, Arizona attorney representing various cult groups,[75] who has filed writs of habeas corpus to remove cult members from deprogrammers. Of the five cultists O'Dowd produced by habeas corpus, however, four have told the court they preferred to continue with their treatment.[76] In the case of the fifth, deprogrammers were able to convince the court that they had no control over the woman, who reportedly had left the state with her mother.[77] Although the lawfulness of the confinement may have been a moot question in all five cases, one judge did rule that the cultists were not unlawfully imprisoned.[78]

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who is wrongfully denied the writ to recover damages, not exceeding $5,000, from the judge who denied it. ARIZ. REV. STAT. ANN. § 13-2026 (1956).

Even if a cultist were produced before the court on a writ of habeas corpus and determined to be unlawfully imprisoned, the type of relief available under habeas corpus is limited. *See, e.g., In re* Weintraub, 61 Cal. App. 2d 666, 143 P.2d 936 (1943); People *ex rel.* Klee v. Klee, 202 App. Div. 592, 195 N.Y.S. 778 (1922); *In re* St. Onge, 93 Vt. 373, 108 A. 203 (1919). If the judge merely discharged the cultist, the typical habeas corpus remedy, he would probably return to his cult. In order to subject the cultist to deprogramming or to put him under the custody of a parent, the court would have to consult the specifications of state guardianship statutes. This procedure was utilized in *In re* Surber, No. G-946 (Ariz. Super. Ct., Pima County, filed Oct. 24, 1975); Interview with Judge Jack Marks, Pima County Superior Court, Tucson, Ariz. (Mar. 16, 1977).

74. *See* Ariz. Daily Star, *supra* note 36.

75. Ariz. Daily Star, Feb. 6, 1977, § A, at 1, col. 1. O'Dowd has represented members of the Hare Krishnas and the Unification Church. Interview with Erik O'Dowd, Attorney at Law, in Tucson, Ariz. (Feb. 15, 1977).

76. Interview with Erik O'Dowd, *supra* note 75.

77. *Id.*

78. Ariz. Daily Star, Dec. 15, 1976, § B, at 1, col. 2. In that case, Judge Carruth may have been ruling on the merits of the case, that the Freedom of Thought Foundation was not imposing on the deprogrammed cultists' rights. He may also have been ruling that the California court which ordered the temporary guardianship had jurisdiction to issue the custody order and that an inquiry under habeas corpus should proceed no further. Arizona courts have held that the only issue that may be considered in a collateral attack by habeas corpus is whether the court that issued the order or decree had jurisdiction to do so. *See* State v. Court of Appeals, Div. 2, 101 Ariz. 166, 168, 416 P.2d 599, 601 (1966); *In re* Oppenheimer, 95 Ariz. 292, 297, 389 P.2d 696, 700 (1964), *cert. denied*, 377 U.S. 948 (1964). Trauscht argued, in Rufty v. Freedom of Thought Foundation, No. 165144 (Ariz. Super. Ct., Pima County, filed Jan. 13, 1977) a case subsequent to that just discussed, that an Arizona court should not, on

Lawyers working in conjunction with O'Dowd have filed petitions in California for termination of temporary conservatorships of cult members, on the grounds that the conservatees are of sound mind and body.[79] These lawyers have succeeded in getting hearings granted on the validity of the conservatorships, but this legal maneuver has not been of practical value. Usually deprogrammers remove cultists on a Friday afternoon.[80] Even if the cultist has signed a retainer agreement with an attorney, to take effect if he mysteriously disappears, his attorney cannot file a petition for termination of conservatorship until Monday morning.[81] Since the court frequently seals the files in cult conservatorship cases,[82] the cultist's attorney may be delayed in determining which court issued the conservatorship order.[83] After a petition is filed in the correct court, there may be 2 or 3 days further delay before a hearing is held and service of process on the deprogrammers made. Deprogramming usually takes 3 days or less, and so is finished by the time a hearing on the petition to terminate the conservatorship is granted. By the timing of their snatching and deprogramming, deprogrammers thus prevent any judicial decision on custody from being made on the merits of the case.

However, in March 1977, in *In re Katz*,[84] Judge Vavuris of the

a writ of habeas corpus, modify a California order appointing Francis Rufty's parent as her conservator. *See* Ariz. Daily Star, Jan. 14, 1977, § A, at 1, col. 5. Trauscht cited Arizona cases holding that the state of a child's domicile has jurisdiction in determining custody. *See* Brown v. Brown, 105 Ariz. 273, 274, 463 P.2d 71, 72 (1969); Johnson v. Johnson, 105 Ariz. 233, 238, 462 P.2d 782, 787 (1969); Deatrick v. Galligan, 18 Ariz. App. 171, 172, 500 P.2d 1159, 1160 (1972). Since Rufty was domiciled and residing in California at the time she was put in custody, although residing in Arizona at the time the writ of habeas corpus was filed, Trauscht argued that the California court had jurisdiction to put her in custody and that the Arizona court had no jurisdiction to modify that order.

Even if Arizona case law will not allow a court, on writ of habeas corpus, to set aside the order of a foreign court which has jurisdiction, the full faith and credit clause of the U.S. CONST. art. IV, § 1, would not seem to prohibit setting aside a foreign order. Although the full faith and credit clause requires that valid final judgments be upheld by sister states, Depper v. Depper, 9 Ariz. App. 245, 248, 451 P.2d 325, 331 (1969); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971), a temporary conservatorship is not a final judgment; it is modifiable by the court. *See* CAL. PROB. CODE § 1755 (West Supp. 1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79(c) (1971). For modifiable judgments, the rule is thus:

> If a custody or guardianship decree remains subject to modification because of changed conditions in the state of rendition, as will almost invariably be the case, the decree will similarly be modifiable in sister states. . . . For this reason, custody decrees do not enjoy the same extra-territorial effect as do unmodifiable judgments.

Id.

79. *In re* Preskill, No. 205888-8 (Cal. Super. Ct., Alameda County, filed Oct. 28, 1976); Interview with Erik O'Dowd, *supra* note 75.

80. Interview with Erik O'Dowd, *supra* note 75.

81. *Id.* Some members of the Hare Krishnas and Unification Church have signed such agreements. *Id.*

82. *Id.*

83. *Id.*

84. No. 216-828 (Cal. Super. Ct., S.F. County, filed Mar. 17, 1977). Editor's Note: Since this Note went to press, the California Court of Appeals has returned a lengthy decision specifying that conservatorship proceedings cannot be used in a manner

California Superior Court in San Francisco began a full adversary hearing to determine whether to appoint temporary conservators for five Unification Church members. Judge Vavuris himself had previously granted ex parte conservatorships.[85] The outcome of the *In re Katz* case hinges on whether the five Unification Church members involved are "likely to be deceived or imposed upon by artful or designing persons" under the California conservatorship statute,[86] so they could be placed in the custody of their parents. Expert testimony was offered as to whether the cultists had been brainwashed[87] and an argument was made that awarding the parents custody of their cultist children would deprive the children of freedom of religion.[88] The court held that the five Unification Church members fell within the statute and so could be placed under custody. Judge Vavuris noted, however, that this was a case of first impression and that he would welcome an appeal. The cultists filed an appeal immediately[89] and petitioned the California Court of Appeal for an order staying the parents from having them deprogrammed before an appellate decision could be made. The stay was granted.[90]

In re Katz is significant for a number of reasons. It marks the first time a cultist has been allowed a hearing of any sort before being put under a California conservatorship. Since the California statute allows appointment of a temporary conservator either with or without notice,[91] Judge Vavuris' requiring an open hearing before appointment does not preclude the possibility of cultists being subjected to ex parte conservatorships in the future, although California judges may choose to follow Judge Vavuris' precedent. *In re Katz* marks the first time the practices of the Unification Church regarding its members had been fully examined in court, and, particularly, the first time that the ques-

that amounts to legal kidnapping. Before a cultist can be placed under a conservatorship, there must be a court hearing of some sort to determine whether the individual has in fact been brainwashed. *See* Katz v. Superior Court, S.F. County, No. 1-41045 (Cal. Ct. App., Oct. 6, 1977). The court noted, however, that the *Katz* decision might not have precedential value since the California conservatorship laws have been changed since the case was filed. *See* text & notes 93, 117-34 *infra*. The *Katz* case was actually one of five cases filed together. The others are: *In re* Underwood, No. 217-039 (Cal. Super. Ct., S.F. County, filed Mar. 17, 1977); *In re* Howard, No. 217-040 (Cal. Super. Ct., S.F. County, filed Mar. 17, 1977); *In re* Brown, No. 217-041 (Cal. Super. Ct., S.F. County, filed Mar. 17, 1977); *In re* Kaplan, No. 217-063 (Cal. Super. Ct., S.F. County, filed Mar. 17, 1977); *see* TIME, Apr. 4, 1977, at 63; Ariz. Daily Star, Mar. 19, 1977, § B, at 1, col. 1.

85. Ariz. Daily Star, Mar. 17, 1977, § E, at 5, col. 5.

86. CAL. PROB. CODE § 1751 (West Supp. 1977). See text & notes 117-34 *infra* for discussion of the statute construed in *In re* Katz and the amendments which have been made to that statute.

87. Ariz. Daily Star, *supra* note 85.

88. TIME, *supra* note 84, at 73.

89. Application for Order to Show Cause and for Modification of Temporary Restraining Order, *In re* Katz, No. I Civ. 41045 (Cal. Ct. App., filed Mar. 28, 1977).

90. Ariz. Daily Star, Mar. 29, 1977, § C, at 5, col. 4.

91. CAL. PROB. CODE § 2201 (West Supp. 1977).

tion of brainwashing by the Unification Church had been explored. A judicial holding on the legality of putting cultists under temporary conservatorships has been eagerly awaited by cult lawyers,[92] and the trial court's holding in *In re Katz* that cultists fell within the wording of the California conservatorship statute was a setback for them. Even if the appellate decision is favorable to cultists, that decision may, ironically, have little precedential value in that state, since the statute construed by Judge Vavuris in *In re Katz* has now been amended by the California legislature.[93]

The present dispute over the use of temporary guardianships for cultists poses several different questions: In what instances should a temporary guardian or conservator be appointed for a cultist? In situations which justify appointing a temporary guardian or conservator, what procedural safeguards must be provided in order to comply with due process? These important questions will be addressed in the remainder of this Note.

GUARDIANSHIPS AND CONSERVATORSHIP STATUTES APPLIED TO CULTISTS

Most states have statutory provisions under which a court may appoint guardians for individuals who are unable to care for their persons or property.[94] Although statutes vary in the conditions under which a guardian may be appointed and the powers the guardian possesses, the two main categories of wards are minors and mentally incompetent persons.[95] The powers of a guardian can be roughly equated with those of a parent[96] or trustee.[97] A number of states have conservatorship statutes in addition to their guardianship provisions.[98] Members

92. Interview with Erik O'Dowd, *supra* note 75.

93. *See* text & notes 117-34 *infra.*

94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5303 (1975); GA. CODE ANN. § 49-604 (Supp. 1976); IND. CODE ANN. § 29-1-18-21 (Burns, 1972); ME. REV. STAT. tit. 18, § 3601 (West Supp. 1977). *See generally* Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966); *Symposium—Guardianship*, 45 IOWA L. REV. 209 (1960).

95. Atkinson, *Guardianship: A Symposium*, 45 IOWA L. REV. 209, 210 (1960).

96. *See, e.g., In re* Howard's Guardianship, 218 Cal. 607, 24 P.2d 486 (1933); *In re* Pratt, 219 Minn. 414, 18 N.W.2d 147 (1945); ARIZ. REV. STAT. ANN. § 14-5312 (1975).

97. Bell v. Bell, 44 Ariz. 520, 39 P.2d 629 (1934). *Cf.* CAL. PROB. CODE § 1400 (West Supp. 1977) (describing confidential, fiduciary nature of relationship).

98. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5401 (1975); CAL. PROB. CODE §§ 1400, 1751 (West Supp. 1977); ILL. ANN. STAT. ch. 3, §§ 113, 131 (Smith-Hurd Supp. 1977).

The function of a conservator varies substantially from state to state. In Arizona, Kansas, Iowa, and Illinois, for example, a conservator preserves the incompetent's estate while a guardian cares for his person. ARIZ. REV. STAT. ANN. § 14-1201(6), (18) (1975); Cobean, *The New Kansas Philosophy About "Care or Treatment" of the "Mentally Ill Person" and Obtaining a Guardian or Conservator, or Both*, 6 WASHBURN L.J. 448 (1967); *see* Peters, *Conservators and Guardianships Under the Iowa Probate Code*, 49 IOWA L. REV. 678 (1964); Comment, *Illinois Conservator's Right to Invade Joint Savings Account*, 48 CHI.-KENT L. REV. 230 (1971). In California a conservator may be appointed to have control over both property and person and has most of the powers

of cults have been removed through appointment of temporary guardians in Arizona[99] and at least seven other states,[100] and have been removed through appointment of temporary conservators in California.[101]

This Note will focus on the guardianship and conservatorship statutes of Arizona and California and the way in which they have been applied to cultists, since it is in these two states that much of the action surrounding removing and deprogramming cultists has taken place. Guardianship statutes were first used to remove cultists in Arizona, where the Freedom of Thought Foundation, the largest deprogramming organization in the United States, is located. Conservatorship statutes have frequently been used to remove cultists in California, and it was in California that the *In re Katz* decision was made. It was also in California that Ted Patrick first began deprogramming, and in California that he was finally convicted.

On October 23, 1975, Bruce Surber was ordered removed from a cult by a writ of habeas corpus issued by Judge Marks of the Superior Court of Pima County, Arizona.[102] Surber's wife, who had searched for her husband for 13 months after he abruptly left their Ohio home to join a cult, alleged in her habeas corpus petition[103] that when she found him in Tucson, he expressed a desire to stay with her. However, it was alleged that he was physically led away by other members of the cult. After Surber's removal from The Body, a wandering evangelist cult,[104] he was examined by psychologists, who diagnosed him to be psychotic. He was given an open court hearing on October 24, 1975, at which he waived right to counsel and was placed under the 30 day temporary guardianship of his wife. Neither the hearing nor offer of counsel were required by Arizona law.[105] During this period, Surber was deprogrammed, apparently the first cultist to be deprogrammed during guardianship.

In California, a number of cult members have been put under temporary conservatorships without notice, hearing, or examination by

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of a guardian. *See* CAL. PROB. CODE § 1751 (West Supp. 1977).

99. Ariz. Daily Star, Oct. 25, 1975, § A, at 1, col. 4; *see In re* Surber, No. G-946 (Ariz. Super. Ct., Pima County, filed Oct. 24, 1975).

100. Interview with Dr. Kevin Gilmartin, Pima County Court Psychologist, in Tucson, Ariz. (Feb. 17, 1977); Interview with Erik O'Dowd, *supra* note 75. Those states are Oklahoma, Texas, New Mexico, Maryland, Illinois, Colorado, and Kansas. *Id.*

101. Interview with Erik O'Dowd, *supra* note 75; *see In re* Rufty, No. 216449 (Cal. Super. Ct., S.F. County, filed Jan. 6, 1977); *In re* Stewart, No. 164651 (Cal. Super. Ct., Alameda County, filed Dec. 2, 1976); *In re* Preskill, No. 205888-8 (Cal. Super. Ct., Alameda County, filed Oct. 28, 1976).

102. Ariz. Daily Star, *supra* note 21.

103. *In re* Surber, No. G-946 (Ariz. Super. Ct., Pima County, filed Oct. 24, 1975).

104. Ariz. Daily Star, *supra* note 21, § A, at 1, col. 4.

105. *See* ARIZ. REV. STAT. ANN. § 14-5310 (1975).

psychologists or psychiatrists.[106] Temporary conservatorships have been issued upon petitions which have done nothing but recite the technical requirements of the statute—that the cultist was unable to properly care for his person or property and is likely to be deceived by artful and designing persons[107]—and making the conclusory allegations that the cultist showed abrupt personality changes, had transmitted assets to the leaders of the religious group, and appeared to be the victim of mind control through hypnosis, mesmerism, or brainwashing.[108] Moreover, the court records were then sealed because of allegations that if the ward became aware of the petition, he would probably be sent into hiding and removed from the jurisdiction.[109]

Statutory Requirements

Guardians may be appointed in Arizona for minors[110] and for incapacitated persons.[111] An individual is incapacitated when, for any one of a number of reasons, he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.[112] Prior to appointment of a guardian, an incapacitated person must be given notice and an adversary hearing at which he is entitled to be represented by counsel.[113] However, "when an emergency exists," the court may exercise the power of a guardian prior to notice and hearing.[114] Technically, only if an appointed guardian is not effec-

106. *See In re* Rufty, No. 216449 (Cal. Super. Ct., S.F. County, filed Jan. 6, 1977); *In re* Stewart, No. 164651 (Cal. Super. Ct., Alameda County, filed Dec. 6, 1976); *In re* Preskill, No. 205888-8 (Cal. Super. Ct., Alameda County, Oct. 28, 1976).

107. CAL. PROB. CODE § 1751 (West Supp. 1977) reads:

> [T]he superior court, if satisfied by sufficient evidence of the need therefor, shall appoint a conservator of the person and property or person or property of any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons. . . .

108. *See In re* Rufty, No. 216449 (Cal. Super. Ct., S.F. County, filed Jan. 6, 1977); *In re* Stewart, No. 164651 (Cal. Super. Ct., Alameda County, filed Dec. 2, 1976); *In re* Preskill, No. 205888-8 (Cal. Super. Ct., Alameda County, filed Oct. 28, 1976).

109. *See* authorities cited note 101 *supra.*

110. ARIZ. REV. STAT. ANN. § 14-5201 (1975).

111. *Id.* §§ 14-5301, -5303.

112. "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

Id. § 14-5101(1).

113. *Id.* § 14-5303.

114. If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the in-

tively performing his duties and the welfare of the incapacitated person requires immediate action may the court appoint a temporary guardian, who may serve in that capacity for up to 6 months.[115] However, Arizona trial courts have construed the provision allowing courts to exercise the power of a guardian in emergency situations as also allowing them to appoint a temporary guardian in an emergency situation, even for an individual who has not previously been under guardianship.[116] The wording of the Arizona statute is broad enough to cover cultists, depending on the judicial gloss put on the concept of "emergency."

The California statutes present a slightly different picture. To supplement its guardianship statute,[117] the California legislature adopted a conservatorship statute in 1957.[118] The purpose of the latter statute is to remove the stigma of incompetency that guardianship holds for individuals who may either be legally incompetent but resist guardianship, or those who may not be incompetent but still need some help in managing their affairs.[119] The California legislature intended a procedure applicable to individuals who were only partially or temporarily incompetent and one which individuals would voluntarily elect.[120] Until July, 1977, the California conservatorship statute allowed appointment of a conservator of the person and property of any person who

> by reason of advanced age, illness, injury, mental weaknesses, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or his property or who for said causes or any other cause is likely to be deceived or imposed upon by artful or designing persons.[121]

The California conservatorship statute has recently been amended however, and under the 1977 version, a conservator may be ap-

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capacitated person for a specified period not to exceed six months. A temporary guardian is entitled to the care and custody of the ward.

Id. § 14-5310.

115. *Id.*

116. Interview with Judge Jack Marks, *supra* note 73; Interview with Alan Bogutz, Pima County Public Fiduciary, in Tucson, Ariz. (Mar. 10, 1977). Judge Marks believes that the courts have inherent power, in emergency situations, to appoint guardians for individuals who are not able to take care of themselves. The court exercises the power of a guardian itself when only a single decision need be made, as when a particular medical procedure is mandated and the individual is unconscious or otherwise incapable of giving consent. Interview with Judge Jack Marks, *supra.*

117. CAL. PROB. CODE § 1435 (West Supp. 1977).

118. 1957 Cal. Stats., ch. 1902, § 1, at 3307.

119. REPORT OF SENATE INTERIM COMMITTEE, 1967, 1 Appendix to JOURNAL OF THE CALIF. SENATE 487 (Reg. Sess., 1957) (quoted at Zillgitt, *Planning for Incompetency and Possibilities and Practices under the Conservatorship Law*, 37 S. CAL. L. REV. 181, 186 n.20 (1964)). *See* Board of Regents v. Davis, 14 Cal. 3d 33, 38, 533 P.2d 1047, 1050, 120 Cal. Rptr. 407, 410 (1975).

120. *See* Board of Regents v. Davis, 14 Cal. 3d 33, 39, 533 P.2d 1047, 1051, 120 Cal. Rptr. 407, 411 (1975).

121. CAL. PROB. CODE § 1751 (West Supp. 1977).

pointed for an individual who is "unable properly to provide for his personal needs for physical health, food, clothing, or shelter."[122] A conservator for property may be appointed for an individual who is "substantially unable to manage his own financial resources, or resist fraud or undue influence."[123] The California guardianship statute has, like the conservatorship statute, been modified.[124] The circumstances in which a guardian may be appointed are the same as those in which a conservator may be appointed, with the exception that substantial inability to resist fraud or undue influence is not grounds for appointment of a guardian.[125] Upon the filing of a petition for appointment of a permanent conservator, a temporary conservator may be appointed "for good cause" shown.[126] The court must be satisfied that reasonable grounds exist for appointment of a temporary conservator.[127] The temporary conservatorship exists pending final disposition of the petition for court appointment of a permanent conservator, but for no longer than 30 days. No notice need be given to the proposed conservatee.[128]

The new California statute significantly restricts the instances in which a conservator may be appointed, and particularly the instances in which a conservator may be given power over an individual's person, rather than his property. A conservator no longer may be appointed on allegations that an individual is likely to be deceived or imposed upon by artful or designing persons. This deceit or imposition must amount to fraud or undue influence, terms which imply greater interference and which have more definite legal definitions. Further, only a conservator of property will be appointed for an individual who is unable to resist fraud or undue influence. Under the old law, a conservator would have power over an individual's person and property even though all the petitioner alleged was that the individual could not

122. 1976 Cal. Stats., ch. 1357, § 25, at 5997 (amending CAL. PROB. CODE § 1751 (West Supp. 1977)).

> [T]he superior court . . . shall appoint a conservator of the person and property or person or property of any adult person who, in the case of a conservatorship of the person, is unable properly to provide for his personal needs for physical health, food, clothing or shelter, and, in the case of a conservatorship of the property, is substantially unable to manage his own financial resources, or resist fraud or undue influence . . . . "Substantial inability" shall not be evidenced solely by isolated incidents of negligence or improvidence.

CAL. PROB. CODE § 1751 (West Supp. 1977).

123. CAL. PROB. CODE § 1751 (West Supp. 1977).

124. 1976 Cal. Stats., ch. 1357, § 4, at 5987-88 (codified at CAL. PROB. CODE § 1435.2 (West Supp. 1977)).

125. CAL. PROB. CODE § 1435.2 (West Supp. 1977).

126. *Id.* § 2201.

127. *In re* Gray, 12 Cal. App. 3d 513, 521-22, 90 Cal. Rptr. 776, 781 (1970).

128. CAL. PROB. CODE § 2201 (West Supp. 1977).

manage his property. In addition, the new provision states that an individual must be unable to provide properly for his own health, food, clothing, or shelter in order to be placed under the care of a conservator of the person, a much more restrictive standard then the "unable to properly care for himself" language of the old statute, which might have been construed to apply to individuals whose physical but not emotional needs were being met. Finally, under the pre-1977 California conservatorship statute, an individual had a right to notice and a hearing before a permanent conservator could be appointed for him. The amendment provides that he also has a right to appointed counsel and a jury trial.[129]

Parents will probably have more difficulty gaining custody of their cultist children under California's new conservatorship statute than they have had under the pre-1977 law. This would be particularly true if Judge Vavuris' precedent in holding an open hearing before ordering a temporary guardianship for a cultist is followed,[130] since full exploration of whether a cultist's behavior brought him within the wording of the statute would then be more likely to take place. While parents have been given custody of cultists on mere allegations that the cultists were victims of mind control under the "likely to be deceived or imposed upon" language of the old statute, under the new statute, even if the alleged mind control amounted to fraud or undue influence, parents would at most be granted custody of their children's financial resources. Parental allegations that a cultist had transmitted assets to the leaders of the religious group, which under the pre-1977 statute might be sufficient for appointment of a conservator of the person, would similarly allow appointment only of a conservator of property under the new statute. Allegations that an individual showed abrupt personality changes would not be grounds for appointment of a conservator under the new law, unless there were further allegations that these abrupt personality changes resulted in an individual being unable to provide for his particular physical needs. Cultists who are not being fed adequately,[131] or who are weak or ill because of lack of sleep or medical care,[132] might still be removed under the statute.

Although it appears that most cultists would not fall within the

129. *Id.* § 1754.
130. *See* text & notes 84-92 *supra.*
131. *See* text & note 33 *supra.*
132. T. PATRICK, *supra* note 11, at 128 (Church of Armageddon members not allowed to consult doctor during pregnancy); text & note 33 *supra.* Whether a cultist could be removed from his cult even if his physical needs were not being met might depend upon whether the acts creating the inability were protected by the first amendment. *See* text & notes 242-92 *infra.*

literal wording of California's new statute, parents will no doubt allege that their cultist children cannot care for their physical needs. The new law still leaves some room for judicial discretion in this area, which is likely to be exercised in favor of appointment of conservators, in that judicial sympathy appears to run strongly with parents against cults.[133] One attorney working with the Freedom of Thought Foundation has explained the bias in this way: "The law is only about 5% of it. The other 95% is having the conviction to be able to persuade the judge that what you're doing is right. He's got to want to help these people. If he does he'll find a way to do it."[134] In view of the availability of this statutory interpretation, the California temporary conservatorship statute will probably continue to be used to remove cultists for deprogramming. The constitutionality of this practice under both the Arizona and California statutory provisions thus becomes an important question.

DUE PROCESS AND TEMPORARY GUARDIANSHIP AND CONSERVATORSHIP STATUTES

The fourteenth amendment protects individuals from deprivations of life, liberty, or property without due process of law. Under the Constitution, it is necessary to ask first whether due process applies to the particular facts at hand, and second, whether the procedural safeguards provided are sufficient to satisfy the minimum constitutional requirements. In the context of guardianship and conservatorship statutes, there can be no doubt that they must meet constitutional standards. When an individual is placed under a guardianship or conservatorship, he is clearly deprived of important property and liberty interests protected by the fourteenth amendment.[135] The more difficult question is whether the requisite procedural protections are being provided.

While the Arizona[136] and California[137] permanent guardianship and conservatorship statutes seem to clearly comply with procedural due process, the temporary appointment statutes in those two states may be found unconstitutional because they have no provisions for a mandatory hearing shortly after a temporary appointment is made. The extent to which specific protections are required by due process,

133. Interview with Erik O'Dowd, *supra* note 75.
134. Sage, *supra* note 31, at 47 (quoting Wayne Howard, attorney, Phoenix, Arizona).
135. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 571 (1975); Specht v. Patterson, 386 U.S. 605, 608 (1967); Lynch v. Baxley, 386 F. Supp. 378, 385 (M.D. Ala. 1974).
136. ARIZ. REV. STAT. ANN. §§ 14-5303, -5309, -5405, -5407 (1975).
137. CAL. PROB. CODE §§ 1461, 1754 (West Supp. 1977).

typically notice, a hearing, and legal counsel, depends on the deprivation the individual suffers. The Supreme Court has stated: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[138]

The types of property considered protected by the due process clause have been greatly expanded in recent years,[139] as have the situations in which due process safeguards must precede deprivation of liberty.[140] There has been a particularly large body of case law defining the rights of individuals prior to involuntary commitment in mental hospitals. Since both guardianship and commitment are civil proceedings, both are based on the state's parens patriae power,[141] and both deprive an individual of liberty; case law considering due process safeguards preceding commitment is relevant to a consideration of due process safeguards preceding appointment of a guardian or conservator.

In *Lessard v. Schmidt*,[142] a federal district court recently considered the extent of due process requirements applicable to an involuntary commitment proceeding. The court held that persons facing involuntary commitment to a state mental hospital are entitled to a number of due process protections, including written and oral notice of their rights, a probable cause hearing within 48 hours of detention, a full hearing within 2 weeks of detention, legal counsel, and proof beyond a reasonable doubt that they are dangerous to themselves or others, based on a recent attempt to do substantial harm.[143] *Lessard* questioned the distinction between the stringent safeguards required in criminal proceedings and lax standards traditionally allowed in civil commitment.[144] The court determined that the devastating effect a

138. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

139. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (public school education); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare payments); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wages).

140. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480-84 (1972) (parole revocation); *In re* Gault, 387 U.S. 1, 12-13 (1967) (juvenile court proceedings); Specht v. Patterson, 386 U.S. 605 (1967) (civil commitment). *But cf.* Paul v. Davis, 424 U.S. 693 (1976) (reputation alone neither liberty nor property interest sufficient to invoke due process procedures).

141. For a discussion of the state's parens patriae power, see O'Connor v. Donaldson, 422 U.S. 563, 583-84 (1975) (Burger, J., concurring); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-21 (1974).

142. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded per curiam on other grounds*, 414 U.S. 473 (1973).

143. *Id.* at 1103.

144. *Id.* at 1086-88.

commitment adjudication has on an individual's civil rights makes narrow, precise precommitment standards a necessity.[145]

In the years since *Lessard*, a number of other courts have invalidated state commitment statutes.[146] In one case, the statute found wanting had been considered highly protective of individual civil rights when it was enacted just a few years before.[147] The Supreme Court has not ruled directly on whether the full panoply of due process protections outlined in *Lessard* are constitutionally required, but there is already surprising agreement among lower courts on the extent to which strict due process protections are required in involuntary commitment proceedings.[148] The due process protections required during guardianship proceedings have not been so minutely explored by the courts as have the protections required during commitment proceedings. However, Chief Justice Burger, concurring in *O'Connor v. Donaldson*,[149] indicated that due process protections do apply to guardianship proceedings:

> Of course, an inevitable consequence of exercising the state's *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that is not be invoked indiscriminately.[150]

An individual who is put under a guardianship or conservatorship is not necessarily deprived of as much freedom as he would be if he were committed to a mental institution, but he is nevertheless deprived of substantial liberty. Although the guardian may not be able to obtain "voluntary commitment" of a ward,[151] he does exercise a great deal of control over the ward's life. In most states, a guardian or conservator may set the ward's residence anywhere within the state,[152] subject him to medical care[153] or other types of supervision,

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145. *Id.* at 1088.

146. *See, e.g.*, Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Kendall v. True, 391 F. Supp. 413 (W.D. Kan. 1975); Lynch v. Baxley, 386 F. Supp. 378 (N.D. Ala. 1974).

147. *See* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1117 (D. Hawaii 1976).

148. *See* authorities cited note 146 *supra*. *But cf.* Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976) (statute upheld although not requiring probable cause determination soon after emergency commitment). See discussion note 169 *infra*.

149. 422 U.S. 563 (1975).

150. *Id.* at 583.

151. Pima County Pub. Fiduciary v. Superior Court, 26 Ariz. App. 85, 546 P.2d 354 (1976); *see* CAL. PROB. CODE § 1500 (West Supp. 1977).

152. *See, e.g., In re* Pratt, 219 Minn. 414, 18 N.W.2d 147 (1945); ARIZ. REV. STAT. ANN. § 14-5312(A)(1) (1975); CAL. PROB. CODE § 1500 (West Supp. 1977).

153. *See, e.g.*, ALASKA STAT. § 13.26.150 (1962); ARIZ. REV. STAT. ANN. § 14-5312 (A)(3) (1975); ARK. STAT. ANN. § 57-625 (1947).

and has considerable power over the ward's property.[154] States have almost uniformly afforded notice and hearing to potential wards[155] to guarantee that guardianship is compatible with their best interests and does not restrict the liberty of individuals who are able to act for themselves. A number of courts have held that without notice and opportunity for a ward to be heard, guardianship proceedings are a nullity.[156] One court has gone further, holding that guardianship proceedings are a nullity where the proposed ward is not informed of his right to counsel.[157]

Courts in this country have been divided since the early part of the century on whether due process requires notice to a ward before appointment of a temporary guardian. In 1901 a Massachusetts court held that notice was not required,[158] but that caution must be used to ensure that the temporary ward had access to the court to contest quickly the appointment. The court further held that temporary guardianships should be founded on and limited by considerations of necessity.[159] In 1921 *McKinstry v. Dewey*,[160] a much cited Iowa case,[161] required still greater protection: even though notice to a temporary ward was not mandated by statute, it was demanded by common law and the due process clause. The court stated: "If such proceedings can be had without any notice, the door is opened wide for the machinations of the designing or the malicious."[162]

In 1970, in *In re Gray*,[163] the California Court of Appeal upheld the constitutionality of its statute allowing appointment of temporary conservators without notice to wards, and requiring only an evidentiary showing of "good cause."[164] The court noted that temporary conservatorships were a provisional remedy granted only for the period be-

154. *See, e.g., In re* Forthmann's Estate, 118 Cal. App. 334, 5 P.2d 472 (1931); ARIZ. REV. STAT. ANN. § 14-5312(4) (1975); MASS. ANN. LAWS ch. 201, §§ 37-48(A) (Michie/Law. Co-op Supp. 1975).

155. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5303 (1975); ARK. STAT. ANN. § 57-611 (1967); CAL. PROB. CODE § 1754 (West Supp. 1977).

156. *See, e.g., In re* Mims Estate, 202 Cal. App. 2d 332, 20 Cal. Rptr. 667 (1962); Tucker v. Tucker, 221 Ga. 128, 143 S.E.2d 639 (1965); *In re* Guardianship of Bouchat, 11 Wash. App. 369, 522 P.2d 1168 (1974).

157. Trapnell v. Smith, 131 Ga. App. 254, 205 S.E.2d 875 (1974).

158. Bumpus v. French, 179 Mass. 131, 60 N.E. 414 (1901).

159. *Id.* at 133, 60 N.E. at 415; *accord, In re* Hanrahan's Will, 109 Vt. 108, 194 A. 471 (1937).

160. 192 Iowa 753, 185 N.W. 565 (1921). Interestingly, the old cases seemed to consider it more important to give notice to an individual preceding guardianship than to an individual being committed. *See id.* at 566.

161. *See* Davis v. Corrin, 417 F.2d 1160 (D.C. Cir. 1969); *In re* Adoption of Anderson, 235 Minn. 192, 50 N.W.2d 278 (1951).

162. 192 Iowa at 762, 185 N.W. at 569.

163. 12 Cal. App. 3d 513, 90 Cal. Rptr. 776 (1970).

164. *Id.* at 521, 90 Cal. Rptr. at 781. "The term 'good cause' is relative and what constitutes good cause depends largely upon the circumstances of each case. . . . [I]t calls for a factual exposition of a reasonable ground for the sought order." *Id.*

tween filing of a petition and the hearing on the merits of the petition. The *Gray* court could foresee many instances in which a proposed conservatee might lose his property through deceit by designing persons if the court had to wait for a hearing before appointment of a guardian. The court held, however, that in the *Gray* case there was no evidence of such threatened loss.[165] The court seemed to indicate that "good cause" could be broadly construed and did not require a showing of an emergency to forego notice to the future temporary ward. In contrast to the California statute construed in *Gray*, the Arizona statute[166] specifically requires as a prerequisite to appointment of a temporary guardian that an emergency exist.

In light of recent developments in due process as applied to emergency commitment to mental hospitals, the Arizona temporary guardian statute and the California temporary conservator statute appear to violate due process. *Lessard*[167] and the cases following it[168] held that the power of a state to deprive a person of liberty to go unimpeded about his affairs must rest on a societal interest in the emergency detention of persons who threaten violence to themselves or others—the state has a compelling interest in protecting society and the individual in such circumstances. Emergency measures can be justified, however, only for the length of time necessary to arrange for a hearing before a neutral judge, at which hearing probable cause for further detention must be established.[169] The *Lessard* court set the maximum period for

165. *Id.* The reason for appointment of a temporary guardian was continuity in management pending appointment of a permanent guardian. The proposed guardian had handled the proposed ward's financial affairs for 5 years before requesting appointment.

166. ARIZ. REV. STAT. ANN. § 14-5310 (1975). The text of this statute is set out in note 114 *supra.*

167. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded per curiam on other grounds,* 414 U.S. 473 (1973). See text & notes 142-45 *supra.*

168. *See* authorities cited note 146 *supra.*

169. 349 F. Supp. at 1091. The constitutional necessity of a probable cause hearing soon after commitment might be questioned following the Supreme Court's holding in Gerstein v. Pugh, 420 U.S. 103 (1975), and the affirmance of Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd sub nom.* Briggs v. Arafeh, 411 U.S. 911 (1973). However, these cases can be distinguished and *Lessard* still seems to have validity as precedent.

Gerstein held that although an individual has a right to a judicial determination of probable cause soon after arrest, 420 U.S. at 114, that probable cause determination may be made by a judicial officer without an adversary hearing, or even the presence of the charged. *Id.* at 120. The Court reasoned that a probable cause determination deals with only one issue, has limited consequences, and considers only probabilities, in contrast to proof required at trial. The Court further held that because of its limited function and nonadversary character, the probable cause determination is not a "critical stage" in the proceeding and appointed counsel is not required. *Id.* at 122. Four members of the Court concurred in requiring a judicial determination of probable cause, but would have stopped there, without ruling on the type of hearing required and the safeguards necessary. *Id.* at 126-27 (Stewart, J., concurring) (joined by Douglas, Brennan, Marshall, JJ.). Arguably, the latter portion of the majority opinion therefore is dicta. *Id.*

which a person might be detained without a probable cause hearing at 48 hours; courts following *Lessard* have been even more restrictive.[170]

The power of Arizona temporary guardians and California temporary conservators to detain their wards may be analogized to the power of mental hospitals to detain their committed patients. Subjecting a ward to medical treatment, especially if it involves hospitalization, is detention. Similarly, the guardian's authority to change his ward's place of abode may be a form of detention, such as where the ward

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Although *Lessard* and the cases following it did not specify that formal, adversary hearings must be held to determine probable cause for commitment, they did require that the committed individual be permitted to be present and represented by counsel at the probable cause hearing. *Lessard* might be distinguished from *Gerstein*, however, on grounds that greater due process protections should be afforded when an individual is significantly deprived of liberty because of his status than when he is deprived of liberty because of a criminal offense. *Lessard* emphasized that an individual's interest in avoiding loss of his liberty is particularly great when that liberty may be taken away without allegations that he has committed a crime against society. 349 F. Supp. at 1092. The necessity for counsel at probable cause determinations in commitment cases can be distinguished from the lack of necessity in criminal cases because an individual being committed may, because of his mental state, be unable to present his case without counsel. *Id.* at 1100. Whereas in a criminal prosecution, probable cause must be shown that the individual has previously committed an act, the court pointed out that in a civil commitment proceeding, probable cause that the person will commit a dangerous act in the future must be shown. *Id.* at 1095. The *Lessard* court noted that the latter determination involves a greater degree of speculation and thus should be accompanied by greater procedural safeguards. *Id.* at 1100-02.

Another basis for distinguishing *Lessard* from *Gerstein* is that probable cause determinations may be a critical stage in commitment or guardianship proceedings, although it is not one in criminal proceedings. Whereas a prisoner will simply be restrained between the probable cause hearing and the preliminary hearing, a committed person may be given medication and otherwise treated between a probable cause determination and the formal hearing. *See* authorities cited note 146 *supra*.

Logan v. Arafeh upheld a Connecticut commitment statute allowing confinement for up to 45 days without a hearing, 346 F. Supp. at 1269, and the Supreme Court summarily affirmed. 411 U.S. 911. The provision for emergency detention upheld in *Logan* required, before commitment, certification by one physician that he had examined the patient within the past 3 days and found him in need of immediate hospitalization. CONN. GEN. STAT. ANN. § 17-183 (West 1975). The statute further gave the patient the right to submit a certification by a physician of his choice that he was not dangerous to himself or others and should not be committed. *Id.* If the patient submitted such a certification, he could not be committed under the emergency provision. The *Logan* court further noted that Connecticut law gives habeas corpus petitions from mental patients, filed at any time after the temporary commitment, priority in assignment for trial. 346 F. Supp. at 1269.

Another troublesome case is Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976), in which the court upheld a New Jersey statute which did not require a probable cause hearing immediately following emergency commitment. The statute did require certification by two physicians prior to temporary confinement and a full-scale adversary hearing within 20 days of commitment. *Id.* at 909. *Coll* relied for its holding on the summary affirmance of *Logan*. *But cf.* Kendall v. True, 391 F. Supp. 413 (W.D. Kan. 1975) (distinguishing *Logan* and disagreeing with its reasoning).

Lessard is distinguishable from *Coll* and *Logan* in that the statute attacked in *Lessard* did not require certification by doctors preceding detention, nor did it allow individuals to avoid commitment by presenting contrary certification. *Logan* can be viewed quite narrowly, holding only that a probable cause hearing is not required when satisfactory alternative protections are given.

170. Lynch v. Baxley, 386 F. Supp. 378, 387-88 (M.D. Ala. 1974) (7 days); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974) (5 days).

is placed in a nursing home which he is not free to leave as he pleases. Clearly, subjecting an individual to deprogramming, which has been at least implicitly considered by Arizona and California courts to be within the powers of a guardian or conservator,[171] is detention. Arizona temporary guardians and California temporary conservators have, through ex parte proceedings, been given custody of their wards, with the authority to detain them for certain purposes, for considerably longer than the maximum suggested by *Lessard* and cases following it. In the Arizona case of *In re Surber*[172] and in the California case of *In re Rufty*,[173] 30 day temporary appointments were made.

Since guardianship and conservatorship statutes may deprive individuals of substantial liberty, they should have specific requirements for a probable cause hearing within a specified period of time, just as commitment statutes are required to have. Even if, as the California Court of Appeal suggested,[174] requirements of notice and hearing before appointment of a temporary conservator would thwart the purpose of the conservatorship law, since an individual might lose his property or be physically harmed before a conservator could be appointed, these losses would not be sustained if a probable cause hearing were held necessary within a short time of the temporary appointment.[175] In addition to requiring a probable cause hearing following emergency detention, *Lessard* requires that emergency detention only last for as long as it takes to prepare a full hearing on the merits, but in no event longer than 14 days.[176] The new California conservatorship statute will limit temporary conservatorships to 30 days, but the Arizona statute allows appointment of temporary guardians for up to 6 months. Although in practice the orders are often limited to 30 days,[177] the statute itself would be unconstitutional if not so limited.

Temporary guardianship and conservatorship statutes should, in

171. Certainly, with all the publicity that has been given cults and deprogrammers, courts realize that a parent's purpose in gaining custody is to have his child deprogrammed. Nevertheless, courts have not prevented parents from having their children deprogrammed while under custody.

172. No. G-946 (Ariz. Super. Ct., Pima County, filed Oct. 24, 1975).

173. No. 216449 (Cal. Super. Ct., S.F. County, filed Jan. 6, 1977).

174. *In re* Gray, 12 Cal. App. 3d 513, 524, 90 Cal. Rptr. 776, 783 (1970). *See* text & notes 163-65 *supra.*

175. Very frequently, at least in Arizona, *see* authorities cited note 116 *supra,* temporary guardianships are appointed in medical emergencies. In these instances, the individual ward might not be able to appear at a probable cause hearing shortly after appointment of a guardian. If counsel were appointed for him when a guardian was appointed, his rights could be safeguarded in his absence.

176. Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), *vacated and remanded per curiam on other grounds,* 414 U.S. 473 (1973). *See also* Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (holding 30 days to be reasonable for emergency detention).

177. Interview with Judge Jack Marks, *supra* note 73.

order to comply with due process, specify that the guardianship will be limited to not more than 30 days. They should specify that guardians and conservators will be appointed only in emergencies, that counsel will be appointed for the ward or conservatee upon issuance, and that a probable cause hearing will be held within 2 or 3 days of issuance. They should specify that a full adversary hearing on the question of custody will be held as soon as possible and in no circumstances longer than 30 days from issuance of a temporary guardianship. Although the statute itself need not so specify, there should be some factual showing preceding appointment of a temporary guardian or conservator sufficient to persuade the judge that the individual's behavior falls within the meaning of the statute and that a bona fide emergency exists. Just as arrest warrants must be based upon particular facts leading a judge to believe a crime has been committed by a certain individual,[178] issuance of conservatorships should be based upon a finding of particular facts justifying detention.

Constitutionality of Temporary Guardianship and Conservatorship Statutes as Applied to Cultists

The California conservatorship statute, in addition to being unconstitutional on its face, would certainly be unconstitutional as used to appoint ex parte temporary conservators for cultists. Using the Supreme Court formulation that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss,"[179] cultists who are put under temporary conservatorships for the purpose of being subjected to deprogramming are condemned to suffer grievous loss out of proportion to any governmental interest in making sure they do not harm themselves or others. To date, many of the petitions which have sought temporary conservatorships for cultists have included no allegations that an emergency existed—that the cultists faced specific, substantial harm in the immediate future.[180] The government's interest in summary adjudication was thus not of sufficient magnitude to allow custody without a probable cause hearing within 3 days, and arguably insufficient to allow detention at all without prior notice and a hearing. Cultists, in the likely event deprogramming takes place, are deprived of their liberty no less than individuals who are involuntarily committed. Deprogramming involves involuntary treatment and total confinement

178. *See* Aguilar v. Texas, 378 U.S. 108 (1964).
179. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).
180. *See* cases cited note 101 *supra.*

for an unspecified period of time,[181] aspects of commitment which most impose upon an individual's liberty. Even if an individual's freedom of religion[182] were not infringed as well, the similarities between deprogramming and commitment would demand that the due process protections preceding commitment be applied to the process of appointment of a temporary guardian or conservator for a cultist.

As suggested above, in many instances appointment of a temporary conservator for a cultist would violate due process even if a probable cause hearing were held several days later. In few situations involving cultists is there a true emergency at the time of issuance of the guardianship order. There is usually no threat that the cultist will severely injure himself or others within the following few days or even within the 2 or 3 weeks it would take to appoint a permanent conservator or guardian following an adversary hearing. If no emergency existed, it would violate due process to deprive a cultist of liberty for even 2 or 3 days preceding a hearing. Temporary conservators and guardians should be appointed in true emergencies, such as when cultists are not being given proper medical care or are acting so strangely as to physically endanger themselves or others. An emergency might also be considered to exist if a cultist were shown to belong to a cult which had a history of hiding wanted members, or to a wandering cult, rather than one with a fixed place of residence. Wandering cults tend to vacate the jurisdiction rather quickly following apprehension of a member,[183] and perhaps the only way a court could examine the cultist at all would be to take him into custody.[184]

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181. Most individuals are deprogrammed within a week, but deprogrammers sometimes lead their subjects to believe that they may be detained for as long as 4 months. T. PATRICK, *supra* note 11, at 24.

182. *See* text & notes 242-92 *infra.*

183. *See* Ariz. Daily Star, Oct. 30, 1975, § A, at 1, col. 2. (The Body cult left Tucson the day after Surber was removed from it; state and local police throughout Arizona were alerted to watch for another member of the cult alleged to be "brainwashed").

184. When, in an emergency, a temporary guardian or conservator is appointed for a cultist, a parent should not be allowed to fill that role. The statutes of both Arizona and California state that the first priority for guardians should be relatives. *See* ARIZ. REV. STAT. ANN. § 14-5311 (1975); CAL. PROB. CODE § 1753 (West Supp. 1977). However, according to California law, an adverse interest is grounds for removing a guardian ad litem, a general guardian, or a conservator. *In re* Lacy's Estate, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 (1975). A conservator or guardian in California is appointed to act, under guidance of the probate court, as an agent of his ward, *see* Place v. Trent, 27 Cal. App. 3d 526, 530-31, 103 Cal. Rptr. 841, 844 (1972); *In re* Stewart, 276 Cal. App. 2d 211, 214, 80 Cal. Rptr. 738, 740 (1969), and it is unlikely that he could fulfill this duty if his interests were adverse to those of his ward. When a parent tries to remove his child from a cult, the possibility of his interests being adverse to those of his child is great. If the child were indeed "brainwashed," the parent would be acting in the best interests of the child to remove him and have him deprogrammed, but if the child were merely exercising his freedom of religion, the parent would be acting adversely to the child's rights and best interests.

The much preferable method for deciding whether to appoint a guardian for a cultist is to hold an adversary hearing prior to appointment, following the example set recently by Judge Vavuris in California.[185] Questions of "mind control" are so new and questions of capacity and freedom of religion so intertwined in the case of a cultist that they should be explored fully before custody is granted. When a temporary guardian or conservator is appointed for a cultist, however, the court should specify that deprogramming cannot be attempted until after an adversary hearing. Deprogramming is designed to eradicate a certain set of beliefs and seems to be very effective at doing so.[186] An individual should not be subjected to treatment specifically designed to eradicate his beliefs until there has been a hearing to determine whether those beliefs are protected by the first amendment.[187] A hearing will enable the court to give due consideration to the substantive requirements, statutory and constitutional, prerequisite to appointment of a guardian or conservator.

At an adversary hearing on whether a cultist could be put under custody, a court would have to make a number of difficult decisions. The primary inquiry would be whether a particular cultist's behavior brought him within the wording of the statute at all. In determining whether a cultist was able to "make or communicate responsible decisions concerning his person," as required by the Arizona statute,[188] or whether he was likely to be deceived or imposed upon by artful or designing persons," as stated in the former California statute,[189] questions of brainwashing and mind control would be immediately relevant. Under the new California statute, however, the inquiry would be only whether the cultist could properly care for certain specific physical needs.[190] If the cultist were healthy, eating well, and had sufficient clothing and shelter, the question of whether he was brainwashed

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In a situation where the court cannot determine until the actual adversary hearing whether the parent's interests are adverse to those of the child, it would be unwise to put the child under the parent's custody.

185. *See* text & notes 84-93 *supra.*

186. *See* Ariz. Daily Star, *supra* note 73 (Freedom of Thought Foundation claims it has been 95% successful in deprogramming cultists).

187. Deprogramming before an adversary hearing might be held unconstitutional under the reasoning of Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974), which forbade involuntary, "physically intrusive" treatment on patients between detention and a full commitment hearing. Subjecting a conservatee to deprogramming is also arguably beyond the powers of a California conservator, absent a finding that the individual is incompetent to give or refuse consent to such treatment. *See* 58 OP. CAL. ATT'Y GEN. C.V. 74-327 (1975) (conservator cannot subject his conservatee to medical treatment, absent a finding of the conservatee's incompetence to give such consent).

188. ARIZ. REV. STAT. ANN. § 14-5101(1) (1975).

189. 1957 Cal. Stats., ch. 1902, § 1, at 3307 (amended 1976).

190. *See* CAL. PROB. CODE § 1751 (West Supp. 1977).

would seem to be irrelevant, unless one could somehow argue that an individual is not "properly" able to care for his personal, physical needs unless he is making decisions as to where he will stay and whether he will follow religious dietary laws without coercion from a group.

If a judge decided that whether a cultist had been brainwashed was a relevant issue, he would then have to decide whether brainwashing exists within this cult, whether this particular cultist had been brainwashed, and whether this brainwashing made him fall within the wording of the statute. Once the court decided that the cultist did have incapacities that brought him within the statute, it would have to decide whether those incapacities were created or encouraged by the cultist's religion. If they were, the court would be required to consider whether putting the cultist in the custody of a guardian or conservator would be a violation of the first amendment. The remainder of this Note will be devoted to discussion of brainwashing and the first amendment issues raised by deprogramming.

BRAINWASHING AND THE CULTS

The term "brainwashing" was introduced into English in 1951, with the publishing of Edward Hunter's book[191] describing techniques used by Chinese Communists to secure allegiance to communism by politically neutral or hostile Chinese. "Brainwashing" comes from the Chinese *Hai Nao*, literally translating to "wash brain,"[192] the term by which Chinese Communists referred to the wide ranging thought reform program they instituted in China following their takeover in 1948. Although scholars have criticized the looseness with which the term "brainwashing" has been used,[193] use of the term has persisted.[194]

Americans are most familiar with brainwashing in the context of the Korean War. United Nations prisoners of war in Korea, including a number of Americans, were subjected to a program of physical punishment and intense small group discussion which resulted in a number of Americans deciding to remain in Korea and others making false public confessions.[195] This prison experience was not engineered

191. E. HUNTER, BRAINWASHING IN CHINA (1951).
192. R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM 2 (1961).
193. *Id.*; interview with Dr. Kevin Gilmartin, *supra* note 100. Dr. Gilmartin stated his objection in the following manner: "Brainwashing has been bandied about by [Tucson, Arizona attorney Erik] O'Dowd and other cult lawyers without any understanding of what it means psychologically." *Id.*
194. Szasz, *Patty Hearst's Conversion—Some Call it Brainwashing*, NEW REPUBLIC, Mar. 6, 1976, at 10 ("Brainwashing is a term reserved for influences of which we disapprove.").
195. *See* Segal, *Correlates of Collaboration and Resistance Behavior Among U.S. Army P.O.W.s in Korea*, 13 J. SOC. ISSUES 31 (No. 3, 1957); TIME, Mar. 8, 1976, at 26.

especially to indoctrinate westerners, but was just one segment of a thought reform program being used throughout Communist China. The first great wave of thought reform took place from 1948 to 1952.[196] Foreigners, as well as Chinese deemed to have committed crimes against the state, were sent to prison, in which confessions were extracted from them through direct punishment and small group persuasion.[197] Prisoners were told that they would be freed when they had satisfactorily reformed their thought. Groups of prisoners met for 10 to 16 hours per day[198] to discuss revolutionary philosophy and the personal problems they had in accepting it. Everyone was required to participate actively and anyone who did not was severely criticized. This technique apparently was successful: "With each of the prisoners feeling that his freedom or even his life might be at stake, the zeal of the participants was overwhelming."[199] Punishments and restraints were used to facilitate thought reform; for example, an individual would be put in handcuffs and chains when he refused to confess to bourgeois crimes in his past, and awarded freedom from the chains, exercise time outside, and periods of relaxation when he expressed ideas more in harmony with the party line.[200] After months or even years of such a regimen, the prisoner would finally sign a confession and be released.

Outside the prisons, "universities" were set up to indoctrinate both well-educated and illiterate Chinese. These universities lacked the overt coercion through punishment that existed in prison and, indeed, participants in this aspect of the program were said to share a feeling of great togetherness and exhilaration.[201] Both in prisons and in revolutionary universities, thought reform techniques included the following:

> 1) encouragement of grievances against non-Communist groups or ideas combined with the presentation of highly acceptable positive goals (to reconstruct China, fight Japan, and later fight American aggression in Korea, or, in the case of dealing with American POWs to fight for world peace);
>
> 2) heavy reliance on group discussion, creating an atmosphere in which each student had to commit himself and subject himself to detailed scrutiny and analysis;

196. R. LIFTON, *supra* note 192, at 399.
197. E. SCHIEN, COERCIVE PERSUASION 17 (1961). "[T]he crux of the Chinese approach has been to immerse the prisoner in a small group of others who are more advanced in their reform than he and who operate as the key agents of influence." *Id.*
198. R. LIFTON, *supra* note 192, at 26.
199. *Id.* at 256.
200. *Id.* at 25.
201. *Id.* at 256.

> 3) the use of criticism and self-criticism to stimulate self-examination and to permit group members to compete with each other in self-exposure and mutual exposure with the aim of denigrating and thus destroying all emotional ties with the past;
> 4) systematic rewarding by group members and authorities of self-exposure, confession, and self-criticism, thus setting the tone that any man was redeemable provided he was willing to allow his "reactionary tendencies" to be exorcised;
> 5) learning Communist doctrine and its practical meaning in a group setting in which each member had publicly to think through and apply to his own case whatever the theoretical point was.[202]

No statistics appear to be available regarding the success of the Chinese thought reform programs in instilling Communist beliefs. However, Robert Lifton, who did extensive interviewing of Chinese expatriates in Hong Kong during 1954 to 1955,[203] suggests that thought reform in China between 1948 and 1952 was very successful, largely because of the immense appeal of nationalism following the Chinese takeover, the reinforcement of thought reform by the Chinese Communist environment, and the sense of belonging to a group within one's own society.[204] It seems to have been particularly successful with a particular type of person—young,[205] greatly susceptible to guilt, lacking a strong identity, and with a tendency towards all-or-nothing emotional alignments.[206]

The program in China was much less successful with imprisoned westerners. Virtually all westerners released from China signed confessions stating varying degrees of truth, but, once repatriated, their reactions differed. Some individuals seemed emotionally "broken" by the experience, remaining tense and nervous; some individuals with strong inner senses of identity experienced few adverse effects at all. A few repatriates seemed confused and distant, compulsively repeating the same points, praising their captors for their leniency, and using Communist jargon. Most of these individuals evaluated their prison experience within a few months and recognized that they had been forced to comply against their will.[207] Another very small group of repatriates actually integrated the attitudes which had been forced upon them into their personalities. Some of these individuals became outspoken politi-

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202. E. SCHIEN, *supra* note 197, at 38.
203. R. LIFTON, *supra* note 192, at iii.
204. *Id.* at 399.
205. *Id.* at 400. The incidence of conversion decreased in direct proportion to age, and zealous converts who underwent a "profound religious experience" were probably rare in the upper age groups. *Id.*
206. *Id.* at 131-32.
207. E. SCHIEN, *supra* note 197, at 163.

cally and highly critical of the United States' economic and political system, but ironically they did not tend to become actively involved in Communist groups in America.[208]

Theories of Thought Control

Scholars have set forth a number of theories explaining the operation of thought control. According to psycho-physiological stress theories,[209] the thought controller systematically creates a state of psycho-physiological exhaustion in which the victim cannot think clearly enough and does not have will enough to avoid accepting beliefs which he would ordinarily shun. As the individual becomes more tired physically and emotionally, he becomes more uncritical and more susceptible to influence. Traditional learning model theories,[210] on the other hand, state that when an individual is forced to do things which conflict with his own beliefs, he feels anxiety and guilt. He then searches for responses which will reduce guilt and anxiety, but the only response that will do so is the adoption of beliefs and values which justify his forced behavior. Changes in beliefs and values in the direction of those of the captor are reinforced because they reduce anxiety and guilt and because they may produce more tangible rewards given by the captor.[211] Related to the latter theory are theories of identity,[212] suggesting that an individual may change his beliefs and behavior because his present role and identity are denied by those with whom he associates: The prisoner may act and think like his captors in order to create a new, acceptable role for himself. The above theories evolved out of studies of Chinese thought control programs, although their authors emphasize that they are applicable to other situations as well. What is popularly called "brainwashing," however, can also be explained by theories which have been developed by social psychologists without reference to the Chinese or Korean experience.

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208. *Id.* at 166.

209. E. SACHEIN, *supra* note 197, at 199. *See* E. HUNTER, *supra* note 191; W. SARGANT, BATTLE FOR THE MIND (1957); Hinkle & Wolfe, *Communist Interrogation and Indoctrination of "Enemies of the State,"* 76 A.M.A. ARCHIVES NEUROLOGICAL PSYCH. 115 (1956); Miller, *Brainwashing: Present and Future*, 13 J. SOC. ISSUES 48 (1957).

210. E. SCHIEN, *supra* note 197, at 205. *See* Farber, Harlow, & West, *Brainwashing, Conditioning, and D.D.D.*, 20 SOCIOMETRY 271 (1957); Meerloo, *Pavlovian Strategy as a Weapon in Menticide*, 110 AM. J. PSYCH. 809 (1954); Santucci & Winokui, *Brainwashing as a Factor in Psychiatric Illness*, 74 A.M.A. ARCHIVES NEUROLOGICAL PSYCH. 11 (1955).

211. E. SCHIEN, *supra* note 197, at 205.

212. *Id.* at 221. *See* A. STRAUSS, MIRRORS AND MASKS (1959); Goffman, *Alienation from Interaction*, 10 HUMAN REL. 47 (1957); Lifton, *Thought Reform of Chinese Intellectuals: A Psychiatric Evaluation*, 13 J. SOC. ISSUES 5 (No. 3, 1957); Schien, *Interpersonal Communication, Group Solidarity, and Social Influence*, 23 SOCIOMETRY 148 (1960).

Asch, in his classic studies of group pressure,[213] found that some individuals, rather than go against a unanimous group, would deny things that had previously seemed true to them.[214] Approximately one-third of the individuals in Asch's experiments gave wrong answers to very simple questions when every other subject in the group was also, by predesign, giving the wrong answer. The unanimous majority had its full impact when it reached three against one—an individual was as likely to comply with three others as with fifteen. However, if a second subject joined the group and agreed with the lone individual, the latter no longer had any tendency to yield. This finding was consistent with Edgar Schien's finding that only in those Chinese prisons where an individual was placed in a cell with others who opposed him was he likely to adopt the actions and beliefs of the captors.[215] Asch, in interviewing individuals who yielded, found that they yielded for different reasons. Some individuals simply complied, recognizing they were giving the wrong answers. Others thought the answer seemed wrong but went along anyway, while still other denied they had given wrong answers at all.[216] Kelman's theory of attitude change[217] helps to explain why some people are permanently influenced by thought reform while others are not:

> If an individual merely complies with an influencing agent in order to obtain some reward or avoid some punishment, or adopts the behavior because he wants to maintain a satisfying relationship with the agent or agent's group, the behavior will be evident so long as the relationship exists and thrives. If an individual "internalizes" the agent's influence, or changes because he recognizes the content of the new behavior to be intrinsically rewarding, the behavior may be evident regardless of the surveillance or attractiveness of the agent.[218]

Schien suggests that the theories of scholars studying Chinese thought control and those studying group processes in general are not contradictory, but build upon each other to provide a more complete explanation of how thought control works in any sector of society.[219] He then presents a model for coercive persuasion which draws upon the theories of other psychologists. Schien's model divides the process into three parts—unfreezing, changing, and refreezing. During un-

213. E. SCHIEN, *supra* note 197, at 250.
214. *Id.*
215. *Id.* at 25.
216. *Id.*
217. *Id.* at 247-48.
218. *Id.*
219. *Id.* at 254.

freezing an individual is induced to desire to abandon a particular belief. Schien theorizes that various forces maintain a certain belief and the equilibrium of these forces must be altered in order to make the belief susceptible to change. For instance, making an individual feel guilty, isolating him, and threatening him with punishment may all help to "unfreeze" his belief, or make it susceptible to change.

Once the belief is unfrozen, Schien says, there must be information available, a new frame of reference, new standards for evaluating behavior, and individuals with whom the subject can identify as he reestablishes a sense of identity. This process Schien calls "changing."[220] If changes in beliefs are to remain stable, the new equilibrium of forces must be refrozen. The new belief must be integrated into other parts of the person and must be supported by the behavior of others. Schien points out that communistic attitudes in the Chinese prisons were refrozen through support of cellmates and ample opportunity to study the communistic point of view.[221] If the individual stayed in a Communist society when he got out of prison, his ideas would continue to be supported, but if he went back to Western society they would not. Whether they then persisted would depend on how well integrated they were with the rest of the repatriate's personality.

Methods used by religious cults conform well to Schien's model of coercive persuasion, as well as to models of thought reform set forth by other scholars.[222] During what Schien calls the unfreezing period, the individual investigating a cult may be isolated from his normal social contacts; very often newcomers to the cults are intentionally surrounded by a number of devoted cultists and isolated from other newcomers.[223] Other cults physically isolate prospective cultists from outside society, typically by holding an introductory weekend gathering in an isolated rural spot.[224] Individuals contemplating joining and investigating cults are often kept in a state of exhaustion, brought on by constant lectures and physical activities during the day, and by shortened hours of sleep at night.[225] Their old identities may be denied, as by receiving a new name or new clothing[226] or by being allowed no contact with their par-

220. *Id.* at 277.
221. *Id.* at 137.
222. *See also* Ariz. Daily Star, May 6, 1977, § D, at 3, col. 1 (Reverend Sun Myung Moon, head of the Unification Church, reportedly accused of "brainwashing").
223. *See* T. PATRICK, *supra* note 11, at 46.
224. *Id.* at 250.
225. *See* Rice, *supra* note 9, at 38. Investigators are asked to make a commitment to the Unification Church following an exhausting, rigidly structured, weeklong seminar. They are "worn out from lack of sleep, numbed by the endless lectures, cut off from advice of family or friends, and softened up by the embracing warmth of the group." *Id.* at 40. *See* T. PATRICK, *supra* note 11, at 50.
226. *See* T. PATRICK, *supra* note 11, at 132 (members of Love Israel given new

ents or former friends following conversion.[227] Many investigators of cults may already have their beliefs unfrozen—the type of person who most typically joins a cult is one who is young, idealistic, and without a firmly established identity.[228]

During the changing period identified by Schien, the new cultist is inundated with information in the form of lectures, scripture reading, and group prayer,[229] and is constantly associated with already converted cultists. The convert's immersion in cult practices is inevitably more complete because he is living in a commune.[230] The cultist's refreezing would be accomplished by proselyting,[231] by constant reinforcement of the idea that each cult is a "family,"[232] and by continued association with the cult.

Methods of coercive persuasion are also used by other American institutions. In both mental hospitals and prisons, for instance, an individual is removed from his normal social contacts and living routines. He is often put into some form of group therapy in which he is expected to take an active part in analyzing his past "self-defeating" acts and values, as well as the self-defeating acts and values of others in the group. He may be systematically rewarded for progress he makes towards "correct" behavior and attitudes, and will be released when his behavior and attitudes meet a certain norm.

Some established American religions, which, like the cults, are entered voluntarily, also use aspects of thought control. For instance, upon joining a religious order, an individual's past identity is in a sense denied. He dons a new type of clothing and is regulated in the contacts he can have outside the monastery. As these changes in routine help to unfreeze his beliefs, he may also be spending long hours devoted to study and prayer and rituals with other members of the order—all activities which help to change his beliefs and attitudes and then refreeze them.[233]

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names); Rice, *supra* note 9, at 40 (Unification Church members often wear identical clothes); TIME, Mar. 28, 1977, at 81 (Hare Krishnas chant, wear robes, shave heads).

227. *See* text & note 31 *supra.*

228. Interview with Dr. Kevin Gilmartin, *supra* note 100. Interestingly, psychologists have found that members of the Jesus People movement score significantly lower than average on personality tests measuring self-confidence and personal adjustment. Rice, *supra* note 9, at 47.

229. *See* T. PATRICK, *supra* note 11, at 51 (Children of God regularly listen to readings of letters from cult founder, Moses David); Rice, *supra* note 9, at 42 (when not out recruiting, fund raising, or working in Church businesses, "Moonies" spend most of remaining hours in group prayer); Ariz. Daily Star, *supra* note 30 (members of The Body spend much time reading scriptures).

230. *See* authorities cited note 230 *supra.*

231. *See* Rice, *supra* note 9, at 42.

232. *Id.*

233. E. SCHIEN, *supra* note 197, at 270-77.

The missionary program of the Mormon Church is another example of what Schien might call thought reform. All 19 year-old Mormon males are expected to go on 2 year missions to various parts of the world.[234] During what Schien would call an unfreezing stage, young missionaries are brought to Salt Lake City, Utah, where, in groups of 200 to 300 they go through rituals in the Mormon Temple and hear lectures for up to 7 hours per day.[235] During this period and throughout their mission they are required to wear dark suits, white shirts, and ties. Once sent into the field, missionaries are not allowed to date or even be alone with women and are discouraged from going to the movies, listening to radio, or reading any books except the scriptures.[236] Mormon missionaries sometimes proselyte as many as 70 to 80 hours per week and are commanded never to leave their missionary companion.[237] In what Schien would call changing techniques, group meetings are held weekly and every other month groups of approximately fifty missionaries meet, with each member given the opportunity to bear his testimony of the truthfulness of the church. The group pressures Asch described are effective here in that missionaries virtually never fail to bear their testimonies at these meetings.[238] Once the missionary returns home, beliefs and behaviors inculcated in the mission field are supported by monthly testimony meetings in local parishes and by the church goal: "Every member a missionary."[239]

An analysis of methods used by groups which have been accused of brainwashing and comparison of these methods with their parallels in other American institutions shows that cults do use methods which are highly effective at influencing their members' thoughts.[240] These methods do not differ qualitatively, however, from those used by many other American institutions. Cults may attract people who are particularly susceptible to being influenced by the types of messages they convey, but other institutions also attract individuals susceptible to their influence. It would be very difficult to prove that leaders of cults are

234. Interview with David C. Spendlove, Mormon Missionary to New England States, 1966-68, in Tucson, Ariz. (Feb. 28, 1977).

235. Benson, *Missionary Work: A Major Responsibility*, ENSIGN OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, May 1974, at 104.

236. Interview with David C. Spendlove, *supra* note 235.

237. One missionary reports that the farthest he ever got from his missionary companion in the 2 year period was half a mile down a deserted beach where the two young men could still see each other. *Id.*

238. Only once in two years did the missionary consulted herein, in a 250 member mission, hear another missionary admit that he was not sure the church was true. *Id.*

239. ENSIGN OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, May 1975, at 122.

240. *See* Ariz. Daily Star, *supra* note 16 (comparing parents' attempt to obtain release of Hare Krishna child to attempt by parents of Mormon missionaries, themselves nonmembers to prevent children from serving mission).

"artful and designing" simply because they very effectively use techniques of influence also used by leaders of other American institutions. There should be no presumption that an individual is unable to take care of himself or likely to be unduly influenced simply because he is a member of a cult. In addition, the influence of the first amendment may further restrict the use of guardianship and conservatorship for cultists.

CUSTODY AND FREEDOM OF RELIGION

Even if a cultist is incapacitated within the meaning of a guardianship or conservatorship statute, he still may be protected by the first amendment from being subjected to the statute. The first amendment guarantees that neither Congress nor the states will make any law prohibiting the free exercise of religion.[241] The free exercise clause has given protection both to organized groups which claim to be religious for tax exemption and other purposes[242] and to individuals who, whether or not they regularly worship with an organized group, claim to hold sincere religious beliefs.[243] The courts have been liberal in deciding which groups qualify as religions,[244] holding that, in order to be constitutionally protected, a group need not espouse a belief in a supreme being.[245] The group or individual need only espouse a belief which occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of their holders, and it must conduct itself similarly to the way groups conceded to be religious conduct themselves.[246] The court in *Fellowship of Humanity v. County of Alameda*[247] listed the following characteristics an organization should have in order to be considered a bona fide religion: "(1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral

241. School Dist. of Abington v. Schempp, 374 U.S. 203, 222-23 (1963).

242. *See, e.g.*, Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Ct. App. 1957).

243. *See* United States v. Seeger, 380 U.S. 163 (1965); Torasco v. Wilkins, 367 U.S. 488 (1961).

244. *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967); Comment, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1964).

245. *See* United States v. Seeger, 380 U.S. 163, 165-66 (1965); Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957).

246. United States v. Seeger, 380 U.S. 163, 165-66 (1965); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692, 315 P.2d 394, 406 (Ct. App. 1957).

247. 153 Cal. App. 2d 673, 315 P.2d 394 (Ct. App. 1957).

practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief."[248]

The free exercise clause has extended protection to individuals and groups embracing beliefs "which are rank heresy to followers of orthodox faiths."[249] It protects views "which might seem incredible, if not preposterous, to most people."[250] The Supreme Court has specifically noted the danger of intentionally or unintentionally discriminating against those whose beliefs are unfamiliar or outside of conventional religiosity.[251] It seems clear that the beliefs of most cultists would be protected by the free exercise clause. The Hare Krishna sect has recently been held to be a religion within the meaning of the first amendment,[252] and the Unification Church would probably also be held protected, since it completely meets the criteria set out in *Fellowship of Humanity*.[253] The Unification Church has detailed, formally adopted beliefs which have even been codified into scripture[254] and it has an organization openly expressing those beliefs through proselyting and regular group prayer and study.[255] Some practices of Unification Church members, such as abstention from drugs and premarital sex, directly result from adherence to church beliefs.[256] Even small cults would qualify for protection under the first amendment, since they are typically fundamentalistic in their espousal of and adherence to a creed.[257] There is no constitutional requirement that a group have a certain number of members in order to qualify as a religion.[258]

In deciding whether a religious belief should be protected, the courts cannot constitutionally consider whether that belief is logical or valid. As the Supreme Court stated in *United States v. Ballard*:[259] "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . Where triers of fact undertake that task, they enter a forbidden domain."[260] Thus, in *Harris v. Harris*,[261] the Supreme Court of Mississippi upheld the right

248. *Id.* at 693, 315 P.2d at 406.
249. United States v. Ballard, 322 U.S. 78, 86 (1944).
250. *Id.* at 87.
251. Gillette v. United States, 401 U.S. 437, 457 (1970).
252. *See* text & note 52 *supra*.
253. *See* text accompanying note 249 *supra*.
254. Rice, *supra* note 9, at 39.
255. *Id.*
256. *Id.*
257. *See* text & note 26 *supra*.
258. *See* State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975).
259. 322 U.S. 78 (1944).
260. *Id.* at 86-87.
261. 343 So. 2d 762 (Miss. 1977). *Harris* was a divorce proceeding in which the former husband sought custody of the couple's 7½ year-old child on the grounds that the mother's religious beliefs and practices would detrimentally affect the child. *Id.*

of a member of a fundamentalistic sect, the Free Will Holiness Pentecostal Church, to practice her religion, which believes in handling live snakes as part of the worship service. The Court specifically noted that the fundamentalistic nature of the group and the strange practices it required did not affect its constitutional status.[262]

The courts may, however, consider whether an individual's beliefs are sincerely held, although there are no clear guidelines as yet for determining who is sincere and who is not. A cultist may be held sincere, if sincerity merely means holding a certain belief at a particular time. On the other hand, if sincerity is defined as having gained a certain belief through particular accepted methods, then cultists might be held insincere where their beliefs were gained through coercive persuasion. The courts have never indicated that the latter is the proper interpretation, and such a holding may be detrimental to orthodox religions as well, since coercive persuasion techniques used by cults are also used to varying extents by more orthodox religions.[263]

Only rarely has an individual's belief been held unprotected because insincere, usually in circumstances in which religious acts would yield temptingly tangible rewards.[264] For instance, in 1974 the Church of the New Song, founded at a federal prison and "having as its sole purpose the disruption of prison discipline"[265] was pronounced a sham and absurdity and its members patently devoid of religious sincerity. In that case, prisoners were clearly using "religious beliefs" to maneuver the system, since by declaring a Paschal festival to celebrate Easter they could get steak and wine, and by declaring a worship service they could get time off to socialize. However, the line is a very narrow one. In *United States v. Ballard*,[266] the Supreme Court declined to hold members of the "I Am Movement" insincere and thus unprotected by the first amendment, even though their religious beliefs were being used in a way that would pay off very tangibly—they were selling scientifically ineffective healing machines through the mail.

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at 763. The trial court granted the relief requested, although it found the mother otherwise fit to care for the child. *Id.* The Mississippi Supreme Court reversed, holding that the former wife had a right to expose the child to her religious beliefs and practices, provided she did not expose the child to physical danger. *Id.* at 764.

262. *Id.*

263. *See* text & notes 234-40 *supra.*

264. Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975) (purpose of the "Church of the New Song" found to be to disrupt prison life); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (in drug prosecution, court rejected defense of religious practice of the Neo-American Church on grounds that it was created for sole purpose of avoiding such laws).

265. Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975).

266. 322 U.S. 78 (1944).

Leaders of the Unification Church have been criticized for being opportunistic businessmen rather than sincere spiritual leaders.[267] Arguably, then, the Unification Church is open to attack as representing something other than the practice of religion. It is clear, however, that in order for a practice to be found without first amendment protection, the evidence of insincerity or opportunism must be overwhelming. In contrast to the flagrant opportunism prevailing in the *Church of the New Song* case,[268] the Unification Church's mixture of business and ritual would not provide sufficient evidence of insincerity to exclude constitutional protection.

Once an individual's beliefs are held to be both religious and sincere, they are absolutely protected by the first amendment.[269] However, his right to act on those beliefs is not absolute. The belief-act distinction was first drawn in *Reynolds v. United States*,[270] which upheld a prohibition of polygamy by Mormons, although their religion imposed it upon them as a duty. In narrowly circumscribed situations,[271] the government may restrict the practices accompanying particular religious beliefs. Thus, the Supreme Court has sustained a criminal conviction for employing child labor in a case where the child was used to sell religious literature,[272] upheld state mandatory Sunday closing laws as not unduly interfering with the religious freedom of those celebrating the Sabbath on Saturday,[273] and has held that the federal government could constitutionally compel an individual to bear arms in defense of the United States where his conscientious objection went only to particular wars.[274]

In determining whether a cultist may be constitutionally removed from his cult, one therefore must first consider whether such removal will restrict his beliefs or merely his actions based on those beliefs. If a cultist were removed but not deprogrammed, such religious actions as group worship and proselyting might be restricted, but the cultist's basic beliefs arguably would not be infringed upon. However, deprogramming is a technique the specific aim of which is not merely to

267. *See* text & notes 35-38 *supra*.
268. *See* Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975).
269. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); *see* Sherbert v. Verner, 374 U.S. 398, 402 (1963); Reynolds v. United States, 98 U.S. 145, 162 (1879).
270. 98 U.S. 145 (1879).
271. *See* text & notes 280-92 *infra*.
272. Prince v. Massachusetts, 321 U.S. 158 (1944).
273. Braunfield v. Brown, 366 U.S. 599 (1961). *But cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (state may not disqualify an individual from eligibility for unemployment compensation because she was unwilling to accept Saturday employment).
274. *See* Gillette v. United States, 401 U.S. 437 (1971) (holding that secular interests overbalanced infringement of religious beliefs).

change a cultist's behavior, but to alter his religious beliefs.[275] If a cultist's beliefs are protected at all by the first amendment,[276] they are, under the reasoning of *Reynolds v. United States*,[277] absolutely protected. A court which allowed a parent custody of his child in order to have him deprogrammed would be violating the child's first amendment right. A cultist could possibly be constitutionally removed from his cult, however, for reasons other than deprogramming. For instance, if a cultist's physical needs for medical care, nourishment, clothing, or shelter were not being met,[278] removal from the cult in order to fulfill those needs might be permissible. Removal for these purposes would be a restriction on a cultist's actions, rather than his beliefs.

The Supreme Court has adopted a balancing test in deciding when actions based on religious beliefs should be protected against state interference. The Court set out this test clearly in *Sherbert v. Verner*,[279] stating: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice [to justify a substantial infringement of religious liberty]; in this sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation' . . . ."[280] In *Sherbert*, a Seventh-day Adventist was declared ineligible for state unemployment compensation because she refused to accept employment on Saturdays, the traditional Sabbath day of her faith. The woman was willing to work 6 days per week, but excluded Saturday work. The Court held the state statute unconstitutional, ruling that the state may not condition receipt of a benefit upon the nonexercise of first amendment rights. In *Sherbert*, the woman's free exercise of her religious beliefs outweighed any interest the state may have had.[281]

In carrying out the balancing process, the court should first analyze the importance of the religious practice for which special protection is claimed, and the degree to which governmental regulation interferes with that practice.[282] The court must then balance this claim for religious liberty against the competing governmental interest, examining the importance of the secular values underlying governmental regulation.[283] In the cultist context, the state's only interest in imposing a

275. *See* text & note 16 *supra.*
276. *See* text & notes 242-69 *supra.*
277. 98 U.S. 145 (1879).
278. *See* text & note 33 *supra.*
279. 374 U.S. 398 (1963).
280. *Id.* at 406.
281. *Id.* at 409.
282. *See* Giannella, *supra* note 245, at 1390.
283. *Id.*

guardianship or conservatorship on the cultist is the parens patriae interest in the safety, health, and welfare of the individual. In order for this interest to come into play, there would have to be a clear showing that the cultist presented a danger to himself or others. Even where such an interest was present, such as where the cultist could not adequately provide for basic physical needs, the court must give due consideration to the second aspect of the free exercise balancing process, the importance of the religious practice involved, and the degree of state interference with that practice.

The cultist, attempting to establish the preeminence of his first amendment freedom, could argue that proselyting, group scripture study, and communal living were central to cult beliefs, and that his removal from the cult would infringe greatly on his right to take part in these activities.[284] He also might argue that the eating or health habits which precipitated the petition for his removal were central to his religious beliefs. In *Murdock v. Pennsylvania*,[285] the Supreme Court struck down a municipal license tax on peddling when it was applied to the distribution of religious literature by Jehovah's Witnesses, emphasizing that the Jehovah's Witnesses' distribution of literature was more than preaching; it was in fact a form of worship.[286] In *Sherbert v. Verner*, the Court concluded that observance of the Sabbath was a "cardinal principle" of the faith of a Seventh-Day Adventist,[287] immune from excessive government restriction.

The government, in allowing removal of a cultist, would assert its interest in preserving the health and safety of its citizens. This interest has sometimes been held sufficient to overcome an individual's interest in religious liberty, as when the Supreme Court upheld a state compul-

284. The Supreme Court recently espoused an extremely broad view of the first amendment's protection of freedom of thought and religious beliefs. In Wooley v. Maynard, — U.S. —, 97 S. Ct. 1428 (1977), the Court upheld the right of a Jehovah's Witness to refuse to display the New Hampshire state motto "Live Free or Die" on his motor vehicle license plate. In *Wooley*, the Court was less than explicit as to the particular first amendment freedom infringed by the state law requiring license plate display of the motto, which the appellees characterized as "ethically, religiously and politically abhorrent." *Id.* at —, 97 S. Ct. at 1434. The Court expressed its holding that New Hampshire may not compel such "dissemination of an ideological message," *id.* at —, 97 S. Ct. at 1435, in the following manner:

> We begin with the proposition that the right of freedom of thought protected by First Amendment [*sic*] against state action includes both the right to to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

Id. (citations omitted).

285. 319 U.S. 105 (1943).

286. *Id.* at 108-09.

287. 374 U.S. 398, 406 (1963).

sory vaccination requirement[288] and when a state court upheld a statute forbidding handling of poisonous snakes in religious ceremonies.[289] However, a distinction can be made between religious actions which affect public health and safety and those which affect only the individual's safety. In *In re Estate of Brooks*,[290] for instance, the court reversed the order of a probate court which had appointed a conservator for the sole purpose of compelling a dying Jehovah's Witness woman to accept a blood transfusion forbidden by her religious principles and previously refused by her with full knowledge of the probable consequences. This case was relied on by the court in *Winters v. Miller*,[291] which held that, at least absent any finding of incompetency, an individual committed to a mental hospital has a right to refuse medical treatment on religious grounds. In most instances, a state would have no overriding interest in removing a cultist from his cult, even if he were getting improper health care, food, or clothing, since the cultist would be harming only himself by his actions and would not affect the public health or safety. If the cultist were harming someone else, either overtly, for example, by committing violent acts against someone in the community, or by eating poorly and going without needed medical care during pregnancy, the state might have a sufficient interest in removal.

In evaluating a petition for permanent or temporary guardianship or conservatorship over a cultist, the court must balance carefully the competing interests involved. Although the statutory requirements for appointment are met, the court must be certain that thorough consideration is given the right to free exercise of religion belonging to the proposed ward. The first step to be taken is necessarily to determine whether valid secular governmental objectives will be served by the appointment. If that question is answered in the affirmative, the court must next weigh that governmental interest against the cultist's religious practices. If and only if the cultist's religious practices to be affected by the guardianship order are outweighed by the state's interests, may the appointment be made.

CONCLUSION

The seventies have thus far been a period of turmoil for the emerging religious cults. Much of the turmoil arises from the nature

288. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
289. State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975). *Contra*, Harris v. Harris, 343 So. 2d 762 (Miss. 1977) (upholding woman's right to snake handling in religious services).
290. 32 Ill. 2d 361, 205 N.E.2d 435 (1965). *But see In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964).
291. 446 F.2d 65 (2d Cir. 1971).

of the cults, and their divergence from the mainstream of American society and its religions. Parents of newly converted cultists are often determined to end their children's involvement with the cults, and have recently begun to explore various legal means of doing so, with varying degrees of success. Self-help methods have created legal problems of their own for parents and deprogrammers; allegations of kidnapping have even been brought successfully. As a result, temporary guardianships and conservatorships have been sought and granted, allowing deprogramming of cultists to proceed before any adversary hearing was held.

The application of temporary guardianships and conservatorships in this manner raises serious problems of statutory construction and constitutional infirmity. Before subjecting a cultist to a guardianship or conservatorship, the court must determine whether the statutory requisites have been met. If the cultist is an individual subject to the statutory appointment standards, the court must consider whether procedural due process requires notice and a hearing before or soon after the guardian or conservator is appointed. In most cases, such procedural safeguards will be constitutionally mandated. A hearing will often be necessary and useful in determining whether the cultist has been subjected to "brainwashing," in the popular sense, or merely the type of systematic influencing of ideas and actions utilized by established American institutions. This hearing will also present a forum for the arising of the cultist's first amendment freedoms, which the court must balance against the state interests that may be invoked. In any event, courts must be careful to avoid the tendency to presume the need for guardianship in regard to cultists, since important liberty and religious freedoms will weigh heavily on the other side.