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ABUSE OF GUARDIANSHIP LAWS IN THE "DEPROGRAMMING CONTEXT"

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I. INTRODUCTION

During the 1960's, many people in our society rejected established economic, political, and religious institutions. As a result, they experimented with cultural alternatives.[1] Religious attitudes changed, creating many esoteric religious groups. Many parents, dissatisfied with their children's[2] religious choice, have resorted to the use of guardianship laws. By gaining custody of the child, parents can use various methods in an attempt to re-orient the child's religious beliefs. The use of guardianship laws in this context often denies procedural and substantive constitutional rights of the child.

Many of the religious groups that became popular in the 1960's and early 1970's are not new. Some have roots in the Eastern world,[3] while others are offshoots of traditional western religions.[4] Many of these religious sects require their members to radically change their life-styles after joining. Followers may be urged to begin a new life of residential insulation, devoting all of their time and effort to working for the group.[5] The devotee's new life may be

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1. C. GLOCK & R. BELLAH, THE NEW RELIGIOUS CONSCIOUSNESS xi (1976). This book presents an extensive sociological study of many of the religious sects and organizations that contributed to the youth counterculture of the 1960's.

2. The word "children" as it is used in this discussion refers to persons aged 18 and older.

3. The International Society of Krishna Consciousness was founded in New York in 1966 by A.C. Bhaktivedanta, who came to this country from India "to establish an American version of an Indian religious discipline that has existed since the fifth century." C. GLOCK & R. BELLAH, *supra* note 1, at 32. The Healthy-Happy-Holy Organization, begun in 1969 by Yogi Bhajan who came to the United States to teach yoga, combines American and Indian (Sikh religion) elements. *Id.* at 5-8. The Divine Light Mission, which began in the early 1970's, was founded by an Indian, Guru Maharaj Ji. *Id.* at 52. The Unification Church, established by Reverend Sun Myung Moon, a Korean, espouses a religion which contains "elements of Oriental ancestor worship . . . mixed with spiritualism, Victorian sexual ethics and bits of evangelical Protestantism." *Life With Father Moon*, NEWSWEEK, June 14, 1976, at 60.

4. Examples include the Christian World Liberation Front, the Campus Crusade for Christ, Jews for Jesus, the Children of God, and the Catholic Charismatic Renewal. These groups are discussed in C. GLOCK & R. BELLAH, *supra* note 1.

5. *See* Belford, *Sun Myung Moon and the Unification Church*, INTELLECT,

extremely structured, including the regulation of former family attachments.

Although the tenets of these religions vary significantly, a common quality among them is the enthusiasm with which devotees practice their religion and attempt to recruit new members. Explanations for such strong commitments to these religious sects have been offered by various writers and by sect members themselves.[6]

Some analysts have suggested that zealousness in devotees results from psychological kidnapping. Mental resistance is weakened; communication with the outside world is cut off; and, as a result, members find it psychologically difficult to leave the group.[7] Religious groups have been charged with "brainwashing."[8] Other writers claim that devotees are very dependent people who might turn to drugs if they had no group upon which to rely.[9] Group

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April 1977, at 336-37; Donohoe, *A Weekend with the Moonies*, INTELLECT, April 1977, at 338-39; Walsh, *'Moonies'—Religious Converts or Psychic Victims?*, AMERICA, May 14, 1977, at 438-40; *Life With Father Moon*, *supra* note 3, at 60-62, 65-66; *The Children of God: Disciples of Deception*, CHRISTIANITY TODAY, February 18, 1977, at 18-23.

6. *The Children of God: Disciples of Deception*, *supra* note 5, at 18-23 (interview with two former members of the Children of God, who discuss beliefs and activities of the group and present their thoughts as to why people join). For a discussion of different types of people joining sects and various reasons for joining, see C. GLOCK & R. BELLAH, *supra* note 1.

7. Edwards, *Rescue from a Fanatic Cult*, READER'S DIGEST, April 1977, at 129-33; Robbins, *Even a Moonie Has Civil Rights*, NATION, February 26, 1977, at 238, 241; *Life With Father Moon*, *supra* note 3, at 60-62, 65-66.

8. Note, *People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies*, 11 SUFFOLK L. REV. 1025, 1026-28 (1977) [hereinafter cited as Note, *Legal Guidelines*]. Thomas Robbins defines "brainwashing" as a term which expresses "disapproval of the way in which someone has been influenced by someone else." Robbins, *Even a Moonie Has Civil Rights*, *supra* note 7, at 241. Robbins feels that "brainwashing" is an ideal term for those wishing to suppress religious cults because (1) it cannot be disproved, (2) it implies concern with the manner in which a belief is induced rather than the content of a belief, and (3) it implies that converts are victims rather than people asserting constitutional rights. Robbins, *'Brainwashing' & Religious Freedom*, NATION, April 30, 1977, at 518. For a discussion of "brainwashing" as it relates to religious groups, see Note, *Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults*, 18 ARIZ. L. REV. 1095, 1124-32 (1976) [hereinafter cited as Note, *Legal Issues*]. For a discussion of the criminal liability and civil liability for intentional torts that religious sects may incur, see Note, *Legal Guidelines*, *supra* at 1030-45. For a discussion of legal attacks that have been made on cults, see Note, *Legal Issues*, *supra* at 1100-01.

9. Poett, *Do They Have the Right To Be Weird?*, New York Village Voice, October 24, 1977, at 24, col. 1. This article also discusses the results of studies of religious group members by J. Thomas Ungerleider and David Wellisch of the

membership "may be an integrative, adaptive thing rather than a maladaptive thing."[10]

Because many parents insist that the devotees' minds have been programmed, a technique has been developed which is designed to "deprogram" the mind and restore religious freedom.[11] "Deprogamming" typically involves forcibly seizing the devotee, taking him to a place from which he cannot escape, and keeping him captive until he renounces his religion and decides to return to his parents. The "deprogrammer" questions the sect member about the religion and explores inconsistencies in the sect's teachings. The religion is ridiculed, and the devotee is told that the sect has "deceived" its disciples. With the devotee's family participating in the process, severe psychological and emotional pressures can be applied.[12]

The "deprogramming" process requires physical custody of the devotee. Parents and attorneys have attempted to obtain this custody through the use of state guardianship laws.[13] When a court grants custody in these situations, attempts at "deprogramming" are implicitly legalized.[14]

Neuropsychic Institute at UCLA. The two researchers concluded that devotees are considerably brighter than average and able to evaluate the consequences of their actions.

10. *Id.*

11. The concept of "deprogramming" was developed in 1971 by Ted Patrick. His book describes the beginnings of "deprogramming" and some of the specific "deprogrammings" in which he has participated. Most of his efforts have been concentrated on members of the Divine Light Mission, the International Society of Krishna Consciousness, the Children of God, the Unification Church, Love Israel, and the New Testament Missionary Fellowship. T. PATRICK, LET OUR CHILDREN GO! (1976). "Deprogrammings," however, have also been reported by a priest of the Old Catholic Ministry, a Roman Catholic, and a member of a labor group. Robbins, *Even a Moonie Has Civil Rights, supra* note 7, at 242; *Fighting Cults: The Tucson Tactic*, CHRISTIANITY TODAY, February 4, 1977, at 59-60. For a compilation of documents relating to "deprogramming" and copies of affidavits of persons who have been subjected to "deprogramming," see *"Deprogramming:" A Book of Documents*. This is a collection of documents compiled by the ACLU and can be obtained by writing to the following address: American Civil Liberties Union, 22 East 40th Street, New York, New York 10016.

12. For a more detailed discussion of the "deprogramming" process, see T. PATRICK, *supra* note 11.

13. Note, *Legal Guidelines, supra* note 8, at 1050 n.141 (grantings of conservatorships and temporary guardianships).

14. When a court grants custody for "deprogramming" purposes and a devotee later sues the court alleging that the granting of custody violated procedural and substantive constitutional rights, the requisite state action needed to trigger the fourteenth amendment can be found. Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977). For a discussion of this case, see text accom-

II. STATUTORY AND PROCEDURAL ANALYSIS

A legal guardian has the right to care for the person, property, or both, of another who is unable to act competently for himself.[15] State statutory procedures limit the power to appoint guardians.[16]

Although the guardianship process varies from state to state, certain patterns prevail. Once a guardianship petition is filed by a person interested in the proposed ward's welfare, a hearing is scheduled. At the hearing, witnesses may be presented.[17] On the basis of the facts and circumstances of each case, the court determines whether or not it is in the best interest of the proposed ward or the ward's property that a guardian be appointed.[18]

A safeguard in this procedure allows an individual to contest the petition before being declared a ward. Absent exceptional circumstances, the proposed ward is present at a guardianship hearing and is entitled to due process consisting of notice and an opportunity to be heard.[19] Some statutes specifically entitle the proposed ward to be present at the hearing, see and hear evidence presented, be represented by counsel, present evidence, and cross-examine witnesses.[20] This protective process can be time-consuming.

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panying notes 39-46 *infra*. When the devotee later sues the parents or persons responsible for the actual "deprogramming," however, there may be a problem finding the requisite state action. Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (parental use of state conservatorship procedures for "deprogramming" purposes did not supply the necessary state action for a suit under 42 U.S.C. § 1983). The issue of state action is beyond the scope of this comment.

15. *E.g.*, Shaw v. Small, 124 Me. 36, 38, 125 A. 496, 498 (1924); Daniels v. Metropolitan Life Ins. Co., 135 Pa. Super. Ct. 450, 453, 5 A.2d 608, 611 (1939). Some state statutes refer to guardians as conservators, committees, or curators; others use different terms for persons granted custody of another person than for persons granted custody of another's property. The term "guardian" will be used throughout this comment unless referring to a specific state's statutes.

16. For an in-depth discussion of the guardianship and conservatorship laws of particular states, see State, *Guardianships and Conservatorships—Protection of Persons Under Disability and Their Property*, 9 CREIGHTON L. REV. 507 (1976) (Nebraska) and Comment, *North Carolina Guardianship Laws—The Need for Change*, 54 N.C.L. REV. 389 (1976).

17. These witnesses may present medical testimony which may be the result of a voluntary examination of the proposed ward. In some states, the court may request an examination by a physician. *E.g.*, ARIZ. REV. STAT. § 14-5303 (1975) (court must request examination).

18. For example, in a hearing for the appointment of a guardian of an insane person, the question of insanity is one of fact to be determined by the court on the basis of all the evidence before it. Cogan v. Cogan, 202 Mass. 58, 88 N.E. 662 (1909).

19. Even where not specified by statute, notice may be necessary in order to comply with constitutional due process requirements. McKinstry v. Dewey, 192 Iowa 753, 185 N.W. 565 (1921) (notice required by common law and due process).

20. *E.g.*, ARIZ. REV. STAT. § 14-5303 (1975).

The length of time involved in complying with the due process requirements makes these permanent guardianship procedures inconvenient for "deprogramming" purposes. If a state offers the alternative of a temporary guardianship appointment,[21] a quick way to gain custody for a short period of time is provided. Temporary guardianship procedures are generally reserved for emergency situations. Time limits for temporary appointments are usually provided by statute, with appointments generally granted only until permanent guardianship hearings are complete.[22]

The potential danger of temporary guardianship appointments is that, unlike permanent guardianship proceedings, they can be granted ex parte. Many state statutes provide for a waiver of notice as to the petition for a temporary guardianship appointment and a postponement of the ward's opportunity to be heard until the later hearing for the permanent guardianship.[23] Temporary appointments without notice, where the court has found them to be necessary for the welfare of the ward or the ward's property, have been held constitutional.[24]

Since guardianship laws were originally developed to protect the interests of minors, the aged, and others incapable of caring for themselves, the procedures are, in theory, designed to protect the rights and well-being of the ward and his property. Recently, however, these statutes have been used to gain the custody necessary

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21. For example, in Arizona, a temporary guardian may be appointed for an incapacitated person. ARIZ. REV. STAT. § 14-5310 (1975). In Connecticut, a temporary conservator may be appointed for a person's property if the person is shown to be "incapable of managing his affairs." CONN. GEN. STAT. ANN. § 45-72 (West 1960). In Massachusetts, a temporary guardian may be appointed for a person who is mentally ill. MASS. GEN. LAWS ANN. ch. 201, § 14 (West 1958).

22. *E.g.*, CONN. GEN. STAT. ANN. § 45-72 (West 1960) (not more than 30 days); D.C. Code § 21-1505 (1973) (only until a permanent conservator can be appointed).

23. In Arizona, the court may exercise the power of a guardian pending notice and hearing if an incapacitated person has no guardian and an emergency exists. ARIZ. REV. STAT. § 14-5310 (1975). In Massachusetts, notice of a petition for a temporary guardianship must be given at least 72 hours before the hearing unless the situation requires an immediate appointment. MASS. PROB. CT. R. 29B.

24. Bumpus v. French, 179 Mass. 131, 60 N.E. 414 (1901) (ex parte appointment of temporary guardian for insane person does not violate due process clause of United States Constitution). The Supreme Court, however, has begun to "[fasten] strict procedural requirements on governmental action aimed at controlling the exercise of first amendment rights," particularly in the area of obscenity. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970). *See* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) (where first amendment freedom of speech was involved, no ex parte temporary restraining order could issue without a showing that notice and an opportunity to be heard were impossible).

for "deprogramming."[25] The ramifications of the use of guardianship laws become important in the "deprogramming" context because the guardianship decree legalizes custody of the ward.

Originally parents and "deprogrammers" would trick devotees into a meeting or wait in places where devotees frequented in order to abduct them.[26] The guardianship decree, issued before the seizure of the ward, authorizes the seizure and charges the guardian with a fiduciary duty[27] to do that which is in the best interest of the ward. To the guardian, often a parent, "deprogramming" is clearly in the best interest of their allegedly "brainwashed" child. However, failure by courts to recognize the limits of guardianship procedures has resulted in abuse of the guardianship statutes. Thus, the guardianship process has become a tool used against capable, healthy adults wholly outside the context for which it was designed.

Two types of abuse result from the use of guardianship laws in the "deprogramming" context. First, existing guardianship laws and procedural safeguards are not being followed by some courts.[28] Second, even when the statutes are applied in a correct procedural context, they are often applied in a manner which denies individuals of substantive constitutional rights.[29] This denial occurs when evidence of an individual's religious beliefs and affiliations forms the sole basis upon which the guardianship decree is granted.

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25. Plowman, *Deprogramming: A Right to Rescue?*, CHRISTIANITY TODAY, May 7, 1976, at 39 (conservatorship granted to mother of member of the Alamo Foundation); Poett, *supra* note 9, at 23, col. 4 (parents of four members of the Alamo Foundation granted ex parte guardianships of their children); Robbins, *'Brainwashing' & Religious Freedom*, *supra* note 8, at 518 (parents of members of the Unification Church granted custody of their adult children for 30 days); *Fighting Cults: The Tucson Tactic*, *supra* note 11, at 57 (temporary conservatorship granted in Maryland); *id.* at 59 (guardianship granted in Oklahoma); Note, *Legal Guidelines*, *supra* note 8, at 1050 n.141 (grantings of guardianships); Note, *Legal Issues*, *supra* note 8, at 1110 n.106 (granting of temporary conservatorships).

26. This procedure is described in T. PATRICK, *supra* note 11. This form of custody can, however, lead to criminal or civil actions for assault and battery, conspiracy, kidnapping, intentional infliction of emotional distress, invasion of privacy, and false imprisonment. *See* Weiss v. Patrick, 453 F. Supp. 717 (D. R.I. 1978) (devotee failed to prove assault and battery, false imprisonment, or violation of civil rights); Willoughby, *Man Sues Parents In Religious Deprogramming*, Washington Star, April 21, 1977, § A, at 12, col. 1; Note, *Legal Issues*, *supra* note 8, at 1102-03. For a discussion of kidnapping and false imprisonment charges and the defense of "necessity" as it applies to "deprogramming" cases, see Note, *Legal Guidelines*, *supra* note 8, at 1046-50.

27. *See, e.g.*, 21 J. LOMBARD, MASSACHUSETTS PRACTICE § 903 (1962).

28. This results in a clear denial of due process. *See* notes 47-54 *infra* and accompanying text.

29. *See* notes 55-83 *infra* and accompanying text.

Two cases illustrate the first type of abuse, judicial misapplication of a guardianship statute. In the first case, Walter Robert Taylor,[30] a twenty-two-year-old priest of the Old Catholic Church,[31] was placed in the temporary custody of his father who objected to Taylor's religious orientation.[32] Taylor was never given the statutorily required notice[33] nor was he represented by counsel. The court granted the guardianship on the basis of the testimony of Taylor's father and the written opinion of a clinical psychologist who had never examined Taylor.[34] The order was revoked by the same court one week later, after the judge discovered that Oklahoma law does not provide for orders of temporary guardianships. By that time, however, pursuant to the order, Taylor had been forcibly seized from the monastery where he lived and was taken to Ohio where he was subjected to "deprogramming" techniques.[35]

The court in the case of Carl Kent Trimble, unlike the Taylor court, realized from the beginning that the laws of the District of Columbia did not cover Trimble's situation.[36] Trimble's parents

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30. The plight of Walter Robert Taylor is discussed in Willoughby, *supra* note 26, and in *Fighting Cults: The Tucson Tactic, supra* note 11, at 58-59.

31. The Old Catholic Church is a religious organization which separated from the Roman Catholic Church in the 18th century. There are nearly 500,000 members in the United States. Willoughby, *supra* note 26.

32. Under Oklahoma law, a guardianship of any mentally incompetent or insane person may be granted. OKLA. STAT. ANN. tit 58, § 852 (West 1965) provides as follows:

> § 852. Guardian appointed, when
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> If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate with the powers and duties in this article specified. R.L.1910, § 6539, as amended Laws 1953, p. 247, § 80, reenacted Laws 1955, p. 302, § 2.

(Footnote omitted).

33. Notice of the time and place of the hearing must be given to the alleged incompetent not less than five days before. OKLA. STAT. ANN. tit. 58, § 851 (West 1965). This notice requirement is mandatory; and without the prescribed notice, the court has no jurisdiction to handle the guardianship case. Colby v. Jacobs, 179 Okl. 170, 64 P.2d 881 (1937).

34. The clinical psychologist who wrote the opinion is Kevin M. Gilmartin. Willoughby, *supra* note 26. Gilmartin is associated with the Freedom of Thought Foundation, an organization established to help parents gain custody of their children for "deprogramming" purposes.

35. Taylor later filed suit in Oklahoma City, Oklahoma, against his parents and the Freedom of Thought Foundation, alleging deprivation of civil rights, legal and medical malpractice, false imprisonment, intentional infliction of emotional distress, and assault and battery. *Id.*

36. The laws of the District of Columbia provide for guardianship of a substantially retarded person. D.C. Code § 21-1106 (1973). They provide for an order that a

were granted the temporary guardianship over their son in superior court in Washington, D.C.[37] The deciding judge based his order not on any statute or case law, but rather on his belief that the court has certain inherent powers. An ex parte hearing was held; Trimble was neither given notice nor represented by counsel. Most of the testimony involved the unusual characteristics of the religion to which Trimble was devoted. Four days after the granting of the temporary guardianship, Trimble was given court-appointed lawyers. The two attorneys had to negotiate with Trimble's parents' attorneys for an opportunity to see their client. By that time, eleven days later, Trimble had already been "deprogrammed."[38]

While neither Taylor nor Trimble was provided an opportunity to challenge the guardianship proceedings before "deprogramming" occurred and they were deprived of their freedom, five adult children made such a challenge in the California Court of Appeal. *Katz v. Superior Court of San Francisco*[39] illustrates the second type of abuse which can occur when guardianship laws are applied accurately, but outside of their intended context. Conservatorship orders had been granted to the parents of five adult children after an adversary hearing in the Superior Court of San Francisco.[40] At the hearing, the parents presented expert testimony of a psychiatrist and a clinical psychologist to show that the proposed wards had been "brainwashed" and suffered psychological damage

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conservator, already appointed to care for the estate of a person who "is unable, by reason of advanced age, mental weakness not amounting to unsoundness of mind, mental illness, . . . , or physical incapacity, properly to care for his property," be responsible for that person's personal welfare as well. D.C. Code §§ 21-1501, 21-1506 (1973). They also provide for guardianship of infants. D.C. Code § 21-101 (1973). This guardianship terminates, however, when the child becomes 18 years of age. D.C. Code § 21-104 (Supp. 1978). At the time the temporary guardianship was granted, Trimble was 22 years of age.

37. This case is discussed in Cohan, *Basic 'Moonie' Case Issue Was One of Citizenship*, Washington Post, October 10, 1976, § B, at 1, col. 1.

38. All of this occurred just eight months after Trimble's parents had tried to get custody of their son in California. There the court had ordered Trimble to submit to a psychiatric examination. The psychiatrist said that Trimble was mentally normal, that he had not been "brainwashed," and that there was no evidence to substantiate the allegation. *Id.*

39. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

40. The superior court judge believed that the mother-father-child relationship is the very essence of civilization and is never-ending. It appears that this is what influenced his decision, for he never discussed "what facts he considered were established by the evidence." *Id.* at 958 n.8, 141 Cal. Rptr. at 240 n.8 and accompanying text.

because of their involvement with the Unification Church.[41] A psychiatrist and a psychologist appearing on behalf of the proposed wards testified that the children suffered from no mental pathological disorder, that the allegations of "brainwashing" were merely speculative, and that the behavior exhibited by the proposed wards was no more unusual than that which one sees in any person devoted to a religious belief.[42] The reviewing court held that the statute under which the conservatorship orders were granted[43] was unconstitutionally vague,[44] that the evidence presented in the case did not warrant the appointments,[45] and that the appointments for purposes of "deprogramming" violated the conservatees' freedom of religion.[46]

As *Katz* recognized, the use of guardianship laws in the "deprogramming" context violates individual substantive constitutional rights. Defenses to this application of guardianship laws center around procedural due process and substantive constitutional guarantees.

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41. *Id.* at 966-68, 141 Cal. Rptr. at 248-50.

42. *Id.* at 968, 141 Cal. Rptr. at 250.

43. CAL. PROB. CODE § 1751 (West Supp. 1977) (allowed for the appointment of "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 . . . ."). This statute has subsequently been amended by 1976 Cal. Stats. ch. 1357, § 25, operative July 1, 1977. CAL. PROB. CODE § 1751 (West Supp. 1978) provides as follows:

§ 1751. Reasons for appointment

Upon petition as provided in this chapter, the 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 * * *, 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, or for whom a guardian could be appointed under Division 4 of this code, or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor, or who is an absentee as defined in Section 1751.5. "Substantial inability" shall not be evidence solely by isolated incidents of negligence or improvidence. The court, in its discretion, may appoint one or more conservators.

Underlinings indicate changes or additions by amendment. Asterisks indicate deletions by amendment.

The California guardianship and conservatorship statutes and their recent amendments are discussed in Note, *Legal Issues*, *supra* note 8, at 1111-14.

44. 73 Cal. App. 3d at 963, 141 Cal. Rptr. at 245.

45. *Id.* at 971, 141 Cal. Rptr. at 253.

46. *Id.* at 974, 141 Cal. Rptr. at 256.

III. DEFENDING AGAINST A PETITION FOR A GUARDIANSHIP

A. *Procedural Due Process*

An individual subjected to "deprogramming" loses rights of freedom of association and free exercise of religion that are protected by the first and fourteenth amendments.[47] Proceedings to appoint a permanent guardian, which allow the proposed ward notice and an opportunity to be heard, afford the ward the requisite due process by allowing the presentation of defenses and the assertion of constitutional rights. However, ex parte proceedings in which a temporary guardian is appointed deny such an opportunity.[48] Recognizing the need to protect the rights of the proposed ward, several temporary guardianship statutes include provisions which purport to safeguard those rights. For the most part, these safeguards are inadequate.

One procedural safeguard in some states' guardianship laws requires that a petition for a permanent guardianship be filed with the temporary guardianship petition.[49] This provides an opportunity at a later hearing for the ward to refute evidence of incompetence and assert constitutional rights and defenses. Constitutional protection, however, is needed at the first hearing because the unique short-term nature of "deprogramming" defeats this safeguard.[50] If "deprogramming" has been successful, the individual will be convinced that the religious group deceived her, and that she did not join the group of her own free will. Therefore, she will have no desire to prove that she was competent while she was a devotee. The devotee's parents will have no need to follow through

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47. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. "The fundamental concept of liberty embodied in that [fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). For a discussion of the "deprogramming" process and an illustration of how it causes these deprivations, see T. PATRICK, *supra* note 11.

48. For a discussion and comparison of due process as it applies to "deprogramming" cases and civil commitment cases, see Note, *Legal Issues*, *supra* note 8, at 1114-21.

49. *E.g.*, CAL. PROB. CODE § 2201 (West Supp. 1977); 21 J. LOMBARD, MASSACHUSETTS PRACTICE § 901.16 (Supp. 1977).

50. For illustrations of how quickly "deprogramming" can occur, see T. PATRICK, *supra* note 11.

with the permanent guardianship petition, for the temporary guardianship will have served their purpose. Clearly then, the mere requirement that permanent custody also be filed for is inadequate to protect the individual's rights.

Some statutes require that a ward seized pursuant to a temporary guardianship order be given notice of the right to a subsequent hearing to challenge the appointment.[51] Here, again, the guardian may safely ignore the notice requirement, relying on the anticipated success of the "deprogramming." In such cases, even if the ward is eventually informed of the right to a hearing, successful "deprogramming" renders that right meaningless.

While these safeguards function very well in the contexts for which guardianship laws were designed, the statutory attempts to protect the proposed ward's rights are inadequate in the "deprogramming" context. It is far too likely that abuse will deprive the proposed ward of constitutional rights. The "deprogramming" process is unique in that it is a quick method to change, sometimes permanently, a person's religious beliefs and life-style. Guardianship laws, which were developed to protect a person who needs long-term protection, should not be used in a "deprogramming" situation. This new and different context calls for new and different procedures.

First, a person seeking legal custody of an adult should be required to use permanent guardianship procedures that include the right to be heard, unless the proposed ward poses a serious and immediate threat to himself or to society. In making such a determination, the proposed ward should be evaluated in terms of functional disabilities. Allegations of a sudden change in habits or friends or of an extreme devotion to an esoteric religious group should never be sufficient to constitute an emergency situation because no immediate threat to life, safety, or public order is shown. Concrete, objective evidence that the proposed ward is unable to provide for his own physical well-being or that a devotee is deprived of adequate food or sleep endangering his health should be required.[52]

Second, if evidence is shown that it is absolutely necessary to provide for temporary custody of the proposed ward until a hearing for a permanent guardianship can be held, the court should order

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51. *E.g.*, MASS. PROB. CT. R. 29B.

52. *See, e.g.*, CAL. PROB. CODE § 1751 (West Supp. 1978), *reprinted in* note 43 *supra*. For a similar suggestion, see Note, *Legal Issues*, *supra* note 8, at 1113, 1122.

that "deprogramming" not occur. A guardian who is least likely to allow "deprogramming" to take place should be appointed.[53] This will allow the ward to challenge the guardianship at the later hearing. This basic procedural framework allows the state to achieve its concededly legitimate interest in the safety of its citizens, while providing the individual with the opportunity to meaningfully assert constitutional rights and defenses.[54]

B. *Substantive Constitutional Defenses*

1. *Free Exercise of Religion and Freedom of Association*

Parents and "deprogrammers" have been relying successfully on the guardianship laws that deal with mental illness and incompetence.[55] Their reliance and success is based, in part, on the similarities perceived between some of the practices of many religious sects and the signs of mental illness.[56] Consequently, in a

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53. In California, an adverse interest is grounds for removing a conservator. Note, *Legal Issues*, *supra* note 8, at 1122 n.184. It has been suggested that "deprogramming" occurred in *Katz* even though the court ordered that it should not. Robbins, *'Brainwashing' & Religious Freedom*, *supra* note 8, at 518.

54. Even though the government has a legitimate and substantial purpose in enacting a law, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted). The government must consider other "less drastic means for achieving the same basic purpose." *Id.* (footnote omitted).

55. For example, ARIZ. REV. STAT. § 14-5303 (1975) (guardian of an incapacitated person); CONN. GEN. STAT. ANN. § 45-70 (West 1960) (conservator for incapable person); MASS. GEN. LAWS ANN. ch. 201, § 6 (West Supp. 1978) (guardian of mentally ill person); OHIO REV. CODE ANN. § 2111.02 (Page 1976) (guardian of incompetent).

56. It is questionable whether mental illness, incapacity, or insanity should be used at all as standards for judging a proposed ward. *See generally* T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); Blinder, *Why It's Crazy for a Psychiatrist to Talk About Insanity*, 23 CATH. L. REV. 769 (1974); Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101 (1971); Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735 (1973); Note, *Civil Commitment of the Mentally Ill* Lessard v. Schmidt, 23 DEPAUL L. REV. 1276 (1974). Proof of mental illness consists, in part, of testimony and affidavits from psychiatrists, clinical psychologists, or others knowledgeable in the area of personality disorders. This simply adds another opinion as to what constitutes socially acceptable behavior. *See* text accompanying note 34 *supra*. The definitional problems with "mental illness" result from the various contexts and frames of reference of the persons doing the defining. T. SCHEFF, ed., MENTAL ILLNESS AND SOCIAL PROCESSES 25 (1962). What may be deviant to one group may be tolerated by another and rewarded by yet another. *Id.* Even psychiatrists cannot agree on terms used in their own field. "[N]o rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean." Blocker v. United

"deprogramming" case, the proposed ward's religious beliefs and practices comprise the evidence on which the guardianship order is based. The devotee is placed in the position of having to assert the sanity of both her religion and her belief in it. Removing devotees from their chosen sect and unduly scrutinizing their religion violates the first amendment rights of freedom of religion and association.[57]

The free exercise clause of the first amendment protects the right of the individual to hold any religious belief,[58] provided that belief is sincerely held.[59] Beliefs may not be questioned nor put to any test of proof of validity.[60] Even beliefs which seem irrational to most people are entitled to constitutional protection.[61] More important, all religions should be treated equally.[62] Enforcement of guardianship laws in the "deprogramming" context tends to single out and discriminate against minority religious groups. This violates the individual's right to religious freedom. Therefore, the evidence of incompetence required for a guardianship order to issue must exist aside from evidence of sincere religious beliefs.[63]

Religious practices which are manifestations of religious beliefs are not afforded such complete protection. Practices are subject to some degree of control in order to protect society or the practitioner himself.[64] A person's religious practices, however, may be

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States, 288 F.2d 853, 860 (D.C. Cir. 1961) (Burger, J., concurring) (discussing burden of proof of establishing defense of insanity in a murder prosecution). Aside from the problem of defining mental illness, there is an additional question as to whether this condition should be the basis for depriving someone of fundamental rights. *See* Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. FAM. L. 463 (1976-1977).

57. *See* note 47 *supra*.

58. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (defendant's conviction for breach of peace when using a phonograph record to interest passersby in his religion held violative of constitutional guarantee of religious liberty).

59. United States v. Seeger, 380 U.S. 163, 176 (1965) (discussion of "sincere" religious belief).

60. United States v. Ballard, 322 U.S. 78, 86 (1944) (district court properly withheld questions of truth or falsity of religious beliefs from jury).

61. *Id.* at 86-87. In *Ballard*, respondents believed that they had been selected as divine messengers and given the power to heal persons of ailments and diseases ordinarily classified by the medical profession as incurable. The Supreme Court reversed their conviction for using, and conspiring to use, the mails to defraud.

62. Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (state cannot pass laws that prefer one religion over another).

63. Evidence of objective, functional disabilities, such as an inability to provide for one's own food or medical needs, should be shown.

64. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot

restrained only on the basis of a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate."[65] This would include certain overt acts which present a substantial threat to public safety, peace, or order.[66] Such acts may be prohibited in the proper exercise of the state's inherent police power.

Accordingly, evidence that a proposed ward's religious practices pose an immediate threat to public safety, peace, or order would support the prohibition of such practices. Even if practices do pose such a threat, however, a warning that they are prohibited will initially serve the state's interest in protecting society. Therefore, unless there is evidence that a proposed ward should have known that such practices were prohibited and has refused to discontinue them, they should not be used as a basis for appointing a guardian. The individual should be allowed the greatest latitude possible in exercising the right to religious freedom.

Scrutinizing an individual's religion not only interferes with the right to religious freedom, but also interferes with an individual's freedom of association.[67] To insure that this right is protected, any state action forcing an individual to reveal, explain, or defend associations, regardless of whether the association is for political, economic, cultural, or religious reasons, should be closely scrutinized.[68] Denying freedom of association not only frustrates the individual, but also inhibits the growth of religious groups. All religious groups need a climate of full freedom of association to grow and develop. The Supreme Court has recognized that this constitutional protection is especially important when the beliefs and ideas which the group advocates are not those of the majority.[69]

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be." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (conduct may be regulated for the protection of society).

65. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (refusal of unemployment compensation benefits to applicant because of her refusal to accept employment which would require her to work on Saturday against her religious beliefs held violative of first amendment).

66. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (state may prohibit adults from furnishing minors with articles to sell in public places); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination to protect public health and safety does not violate fourteenth amendment rights); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942) (state may prohibit snake handling as part of a religious rite).

67. *See* note 47 *supra*.

68. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (state did not show a compelling interest in disclosure of membership lists of NAACP).

69. Bates v. Little Rock, 361 U.S. 516, 523 (1960) (citing NAACP v. Alabama,

Minority religious groups which are relatively new to this country and require a high degree of devotion from their followers in order to perpetuate themselves cannot afford the chilling effect which guardianship hearings have on the growth and development of the sect. Because the guardianship hearing relies on evidence of religious beliefs, practices, and associations, the threat of having to defend themselves in such a proceeding and the possibility of being subjected to "deprogramming" may deter individuals from joining unpopular religious organizations.[70] Present members may not wish to chance open and continuous devotion to their religious sect. Such a chilling effect is in clear contradiction to the first amendment's purpose of protecting both freedom of religion and freedom of association.[71] The court in a guardianship case, then, must decide whether or not a devotee shows signs of a need for a guardian aside from any consideration of his religion.[72]

2. *Vagueness*

Although some aspects of an individual's religion may be regulated for the protection of society, an imprecise statute which regulates conduct may be challenged as unconstitutionally vague[73] under the fourteenth amendment.[74] An attack for vagueness involves two considerations: (1) Whether the statute gives individuals fair notice of what is forbidden;[75] and (2) whether the statute provides precise standards to be used in its application.[76] These con-

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357 U.S. 449, 462 (1958)) (compulsory disclosure of membership lists of NAACP held violative of members' freedom of association).

70. NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (compelled disclosure of membership lists deters freedom of association).

71. The court in *Katz* recognized the possibility of such a deterrent effect stating, "Finally, there may be severe inroads on the individual's freedom to practice his religion, and to associate with whom he pleases because of the threat of proceedings such as this." 73 Cal. App. 3d at 962, 141 Cal. Rptr. at 244. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 277-79 (1964) (Supreme Court recognized the deterrent effect which a state libel law had upon public debate protected by the first amendment).

72. *See* note 63 *supra*.

73. For a discussion of Supreme Court decisions regarding the vagueness doctrine, see *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972-73 Term*, 7 CONN. L. REV. 94 (1974).

74. Giacco v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (vague statutes violate due process and are unconstitutional).

75. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

76. *See* Coates v. Cincinnati, 402 U.S. 611 (1971), in which the Supreme Court held unconstitutionally vague an ordinance which made it a criminal offense for three or more persons to assemble and conduct themselves in a manner annoying to

siderations are especially important when state regulation of conduct affecting the exercise of first amendment rights is involved.[77]

The more important consideration is that of precise standards. Because courts apply the terms of a statute as they are glossed by court constructions, the concept of fair and adequate notice makes little sense standing alone.[78] Individuals "cannot be expected to foresee subsequent construction of a statute . . . ."[79] It is more accurate to premise the doctrine of vagueness "upon the fundamental notion that due process requires governments to make explicit their choices among competing social policies . . . ."[80]

Guardianship statutes which define the need for a guardian without describing concrete, objective standards for determining when a guardian should be appointed do not meet this test of precision.[81] For example, in Massachusetts, a guardian may be appointed for a person who is "mentally ill."[82] There is no prescribed

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passersby. The ordinance allowed "discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." *Id.* at 616 (footnote omitted).

77. *See* McGautha v. California, 402 U.S. 183, 257 (1971) (Brennan, J., dissenting) (citing United States v. National Dairy Corp., 372 U.S. 29, 36 (1963)).

78. *Id.* at 258 (Brennan, J., dissenting).

79. *Id.* Justice Brennan illustrates this lack of sense by stating, "In dealing with vagueness attacks on federal statutes, we have not hesitated to construe the statute to avoid vagueness problems and, having so construed it, apply it to the case at hand." *Id.*

80. *Id.*

81. Terms such as "incompetent," "mentally ill," or "infirm" should not pass a constitutional vagueness test. For an example of concrete, objective standards, see text accompanying note 52 *supra*.

82. MASS. GEN. LAWS ANN. ch. 201, § 6 (West Supp. 1978) provides as follows:

§ 6. Mentally ill persons; appointment of guardian; commitment; hearing

A parent of a mentally ill person, two or more relatives or friends of a mentally ill person, a nonprofit corporation organized under the laws of the commonwealth whose corporate charter authorizes the corporation to act as a guardian of a mentally ill person, or the department of mental health, may file a petition in the probate court asking to have a guardian appointed for such mentally ill person; and if after notice as provided in section seven and a hearing the court finds that he is incapable of taking care of himself by reason of mental illness, it shall appoint a guardian of his person and estate. A copy of such appointment shall be sent by mail by the register to the said department. The court may require additional medical testimony as to the mental condition of the person alleged to be mentally ill and may require him to submit to examination. It may also appoint one or more physicians, expert in mental illness, to examine such person and report their conclusions to the court. Reasonable expense incurred in such examination shall be paid out of the estate of such person or by the county as may be determined by the court. No guardian so appointed shall have the authority to cause to

standard of mental illness.[83] In the "deprogramming" context, a parent may present affidavits of doctors, friends, and members of the family asserting behavioral changes such as a sudden withdrawal from school, job, or organizations, alienation of friends and family, changes in appearance, and radical changes in personal habits in support of a guardianship petition. Because this behavior may appear odd, the court may be led to believe that the devotee is not capable of managing his own affairs and is mentally ill. This allows the guardianship statute to be used against devotees who are exercising constitutional rights.

Ohio's statutes provide for the appointment of a guardian of an incompetent.[84] An incompetent is defined as "any person who by reason of . . . mental or physical disability or infirmity, . . . , or mental illness, is incapable of taking proper care of himself or his property . . . ."[85] This vague standard provides no guidance in

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admit or commit such person to a mental or retardation facility unless the court specifically finds the same to be in the best interests of such person and specifically so authorizes such admission or commitment by its order or decree. The court shall not authorize such admission or commitment except after a hearing for the purposes of which counsel shall be provided for any indigent, allegedly mentally ill person. The court shall require the attendance of the allegedly mentally ill person at such hearing unless the court finds that there exists extraordinary circumstances requiring his absence, in which event the attendance of his counsel shall suffice.

83. MASS. GEN. LAWS ANN. ch. 201, Introductory Comment (West 1958) provides, in part, as follows:

* * * *

The statutes do not attempt to set forth any standard for determining who is a mentally ill person or a person who is alleged to be a spendthrift or one who may be in need of a conservator; it is still a question of fact for the court and a matter of medical evidence as to those alleged to be mentally ill and a matter of other evidence, generally speaking, in cases of spendthrifts, minors, and in appropriate cases, adults.

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84. OHIO REV. CODE § 2111.02 (Page 1976) provides, in part, as follows:

§ 2111.02 Appointment of a guardian.

When found necessary, the probate court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian.

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85. OHIO REV. CODE § 2111.01 (Page 1976) provides, in part, as follows:

§ 2111.01 Definitions.

As used in Chapters 2101. to 2131., of the Revised Code:

(D) "Incompetent" means any person who by reason of advanced age,

deciding whether a guardian is necessary. This procedure can inhibit the exercise of constitutional rights.[86] On the other hand, judging a person in terms of objective, functional disabilities, gives courts the requisite guidance in granting guardianships.[87]

Unpopular minority religious groups are threatened by vague statutes that allow conduct to be proscribed merely because it is annoying to some people.[88] Religious activities which may not be proscribed under the first and fourteenth amendments may be effectively inhibited by vague guardianship laws.[89]

IV. CONCLUSION

Guardianship laws are presently being abused in the "deprogramming" context. The more protective permanent guardianship statutes are being circumvented through the use of temporary guardianship statutes. Because of the rapid changes which can occur in a devotee during "deprogramming," the procedural safeguards which may be written into temporary guardianship statutes do not afford the high degree of protection which should be available to preserve the individual's constitutional rights. The statutory definitions, by allowing for the imposition of subjective ideas of socially acceptable behavior, do not provide meaningful standards for evaluating a proposed ward. The more concrete ob-

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improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

86. Other states have similarly imprecise definitions of the incapacity required for a guardianship appointment. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-70 (West 1960) ("incapable of managing his affairs"); D.C. Code §§ 21-501, 21-1501 (1973) (conservator of an estate may be appointed for a person who by reason of "psychosis or other disease which substantially impairs the mental health" or "mental weakness not amounting to unsoundness of mind" is unable to care for his property properly).

87. For example, judging a person in terms of whether or not he is providing himself with food and medical care eliminates some of the subjectivity.

88. *See* note 76 *supra*.

89. It has been stated elsewhere that within the context of first amendment rights, "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice," but rather upon the inhibitory effect that such statutes have on the exercise of first amendment rights. NAACP v. Button, 371 U.S. 415, 432-33 (1963). First amendment "freedoms are delicate and vulnerable, . . . [and] [t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*

jective standard of functional disabilities should be applied in the procedural context proposed[90] in order to prevent the abuses that have already denied many persons their constitutionally guaranteed freedoms.

Shelley Kay Parker

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90. *See* notes 52-54 *supra* and accompanying text.