# Vermont Bar Association

# 49th Mid-Year Meeting

Sheraton Hotel & Conference Center
Burlington

#5

## The Legal Lessons of the Island Pond Raid of 1984

*Friday, March 3, 2006*

*10:00 am—12:00*

*2 hours MCLE Credit*

MATERIALS FOR "LEGAL LESSONS FROM THE ISLAND POND RAID"

The materials for the seminar Legal Lessons from the Island Pond Raid in 1984 include the following:

The 2004 video "*The Children of The Island Pond Raid: An Emerging Culture"* will be shown. This hour-long documentary shows how and why the illegal seizure of 112 children whose parents shared a common faith happened in Vermont in 1984. Interviews with participants and the now grown seized children.

"The Twelve Tribes Communities, the Anti-Cult Movement and Government's Response," Jean Swantko, *Social Justice Research Journal*, 12(4), 1999, Plenum Publishing, included in textbook, "Regulating Religion: Case Studies from Around the Globe," ed. James Richardson, 2004- article documents the information that is conveyed in the video and is a more complete research tool on the topic.

"Retrospective on the 1984 Island Pond Raid: What We Know Now That We Didn't Know Then," Jean Swantko, 2006 *VBA Journal* article

Judge Frank Mahady's 1984 opinions ruling on the Island Pond Raid, five separate issues- used for background materials on the legal issues, 64 pages

"Brainwashing" Evidence in Light of *Daubert*: Science and Unpopular Religions, Gerald Ginsberg and James Richardson, Law and Science, Current Legal Issues, Vol. 1 (1998), Oxford University Press

References:

"The Cult Concept: A Politics of Representation Analysis," Jane Dillon and James Richardson, *SYZYGY Journal of Alternative Religion and Culture,* Vol. 3:1-4 (1994)

"Definitions of Cult: From Scientific-Technical to Popular-Negative," James Richardson, *Review of Religious Research*, 34, 1993, 348-356

*by Jean A. Swantko, Esq.*

# RETROSPECTIVE ON 1984: THE ISLAND POND RAID
## WHAT WE KNOW NOW THAT WE DIDN'T KNOW THEN

### Introduction

Twenty-one years ago I was a public defender in our Northeast Kingdom. Assigned to represent a member of the so-called "Northeast Kingdom Community Church" in August, 1983, meant that I was involved in a "church case." There were numerous such cases back then: custody cases, truancy cases, divorce cases, simple assault cases, but none so monumental as the day the State of Vermont came to take the children from the Church in Island Pond—all of them. It was June 22, 1984.

While in the eye of a hurricane as a young lawyer, I saw enough to realize that something was seriously amiss with the state's response to the small, close-knit, and unfamiliar religious group residing in communal households in Island Pond. Assigned to represent one of them nearly a year before the raid, I had a unique vantage point to see what these people were really like. I was welcomed into their homes and into their lives. What I discovered for myself was very different than what I had read in the newspapers. I wanted to know why.

What a long, strange trip it has been since then. In the twenty years since the infamous raid, significant pieces of the puzzle have come to light. Most especially, in 1999 I found the six-page written plan to "destroy the Church in Island Pond," a plan meticulously executed by Vermont state officials. Last year I was moved to make a documentary, called *The Children of the Island Pond Raid: An Emerging Culture*, to tell the story of what really happened in 1984 so that the citizens of Vermont—and of the world—could know how such a "grossly illegal and unconstitutional scheme" came to be part of Vermont's history. I guess you could say "if it could happen in Vermont, it could happen anywhere."

You might wonder about the current relevance of understanding the truth about the Island Pond Raid. But the facts surrounding the raid raise a number of vital current issues. How important is the reliability of the information that our government uses? How much of that information should the public be entitled to know? Just how honest does government need to be about its mistakes? These issues are timely and the lessons that can be learned from knowing the truth about how the raid happened can be an invaluable teaching tool for legal practitioners, public servants, and vigilant citizens around the world, especially in the present climate of tensions between government and religion. It may have been "1984" when the raid happened, but we have since been catapulted into a "Brave New World"—the new millennium and the post-9/11 shrinking globe. Who would dare say that issues such as freedom of religion, freedom from religion, and the government's role in regulating religion are not of current interest? Whom shall we trust? Is it not said that we must learn from history so as not to repeat its mistakes?

### The Pivotal Event, June 22, 1984: *In Re:* C.C.

On Friday morning, June 22, 1984, in the sleepy rural village of Island Pond, Vermont, nestled in the Green Mountains just south of the Canadian border, the power of state government descended on 350 believers. In an effort to satisfy itself that the children who resided within that church community were not being severely abused, the state invaded. Ninety Vermont state troopers in bulletproof vests and fifty social workers armed with virtually unlimited police power raided nineteen homes in the predawn hours, demanding not only the names of the children, but the children themselves. A local judge had signed a search warrant to legitimize the round-up of the unsuspecting children. The zeal of the social workers allowed them to intrude confidently into the lives of these little ones as if they were doing them a great favor, rescuing them from the abusive clutches of their fanatical parents. One hundred twelve children were unlawfully seized that morning because of the common religious beliefs of their parents.[1] The warrant read "*In Re: C.C.*" to stand for "certain children," because the warrant was so general that it had no names. It gave the addresses and descriptions of nineteen residences and buildings that a citizen activist had identified for the state as belonging to the Community. It authorized seizure of "any and all children under the age of 18 found herein." Later that day, an Assistant Attorney General responded to the judge's question "What is the danger of harm to these children?" He answered that "it's as if the child is living amongst bacteria and the bacteria in this case that jeopardizes this child's health is the teachings and doctrines of the church."[2]

After being transported in police custody to the courthouse in Newport, Vermont, some twenty miles away, each family waited their turn to appear before a judge who would decide if they would be separated. Happily for the parents, Judge Frank Mahady did not judge by the barometer of public opinion as he conducted some forty individual detention hearings that day. When he called the lawyers from the Attorney General's Office to provide evidence of abuse to justify the seizure of each child, the State had little to say, except to speak against the beliefs and lifestyle of those brought to court. Court continued late into the night,

Church leaders talk with Jean Swantko (back to camera) in Hyde Park, Vermont a week or so after the raid at a hearing in which the State sought to disqualify Judge Mahady.

calling each child by name. Each one was sent home with his parents because there was no basis to keep even one for examination by the state's battery of doctors, social workers, and psychiatrists who sat to no avail nearly an hour away at a ski resort, waiting to perform their scrutinizing evaluations. At around 9 p.m., Judge Mahady, after handling forty individual children's cases, had to decide what to do with the large group of children (approximately sixty) who remained. After hearing the arguments, he released them all to return home with their parents. He offered an opportunity to speak to any parent who had something to say. Many passionately told the story of their day and spoke of their deep gratitude for a judge who ruled justly. By 11 p.m., a bus of tired but rejoicing families headed home to Island Pond, singing the praises of their God and giving thanks for the judge whose humble response was, "I'm only doing my job."[3]

## Judge Mahady's Opinion: The Raid Was a Gross Violation of Rights

Scott Skinner, Director of the Vermont ACLU at the time, noted that Judge Frank Mahady used "the history of the world as a backdrop to educate the public about search and seizure"[4] in his five-part, sixty-four page opinion denouncing the raid.[5] Andrew Crane, the Defender General of Vermont who represented the parents before Judge Mahady in 1984, called the raid "the best case of my life" because of the degree of injustice that was defeated that day. In a May 2000 interview, Crane called the language used by Mahady "important" because people in Vermont *"needed to see how outrageous it [what the State did] was. He [Mahady] wrote [his opinion] that way to educate the citizenry that the State was completely out-of-line."*[6]

Skinner recalled "the unprecedented way in which the raid happened and how it was treated by the press, the absolute magnitude of it." Judge Mahady's ruling "turned the tide against the State's plan. There was an explosion of public interest and national camera crews helicoptered to the scene" in the Northeastern corner of Vermont. Administrative Judge Thomas Hayes

> appointed the most brilliant judge he could and this combined to make a powerful lesson that won't be repeated at least for fifty years. The way it happened was a disaster for the State of Vermont. The outcome was fortuitous, with the system of checks and balances not necessarily succeeding. The executive was intent on abusing its power. The judge who signed the warrant, a decent man, found himself on a railroad train being swept along by forces larger than he was.[7]

That judge later acknowledged he had been "pressured by bad information" and that the "Raid was a tragedy for the State of Vermont."[8] Because his actions were reviewed and overruled by Judge Mahady, in the end the judiciary was able to prevail over an overreaching executive.

*Two year-old boy being helped off bus in Newport, June 22, 1984. He remains in a Twelve Tribes Community in Savannah, GA*

Rejecting the State's theory that *all* of the unnamed children who resided in the Church Community's households should be seized simply because of the common faith of their parents, Judge Mahady said:

> Adlai Stevenson once noted that 'guilt is personal,' and I might add 'not communal.' Our Court has held many times that mere presence at a particular place is not sufficient to establish participation in a particular act. Therefore, 'when the court seeks to take the child out of the parental home, it may do so only upon convincing proof.' *Here, the State lacks any proof whatsoever as to these children and these parents, much less 'convincing proof.'*[9]

While Vermont's Commissioner of Social Services claimed evidence of abuse of children, he relied on newspaper reports unlawfully published as a source. Despite the fact that he knew, or should have known, the confidentiality laws for juvenile cases, he violated them. He then used the fact that newspaper reporters printed unlawful disclosures to justify his own use of them, clearly prohibited by the juvenile statutes.

Judge Mahady held the State to its "burden and heavy responsibility to demonstrate by sufficient evidence, not generalized assumption, that it is necessary to separate each of these 112 children from his or her parents."[10]

The Commissioner of Social Services accused community members of "thwarting steps of due process," stating that the community is "purposefully organized to shield the identity of the parents and children."[11] Simply because the State found it difficult to serve papers on Church members who live communally, he unfairly attributed a bad motive to them, reflecting his bias, prejudice and thin regard for due process rights which belong to the people, not the government. This thin line between public duty to protect and overzealous action to intrude is one that must be vigilantly guarded by the branches of government by holding state agents accountable to follow the law and obey constitutional limits. Also noteworthy is the degree to which the legal counsel of the State deferred to the supposed "expertise" of the social services department.

After precisely enumerating the State's utter failure to obey the juvenile proceedings established under Vermont law, as well as the provisions of the U.S. Constitution upholding family integrity, Judge Mahady concluded

> Indeed, it is all too clear that the State's request for the protective detention permitted by the statute upon an appropriate showing was entirely pre-textual. *What the State really sought was investigative detention. In effect, each of the children was viewed as a piece of evidence. It was the State's admitted purpose to transport each of the 112 children to a special clinic where they were to be examined … Not only were the children to be treated as mere pieces of evidence; they were also to be held hostage to the ransom demand of information from the parents.*[12]

In refusing "the State's rather incredible request that the Court issue a blanket detention order for 112 children

*ex parte* and without even holding hearings," the Court concluded: "Even such a goal as avoiding the abuse of children, however, cannot justify the means here employed. … Had the Court issued the detention orders requested by the state it would have made itself a party to this grossly unlawful scheme."[13]

It was the state agents who did not follow state law in the events surrounding the raid. The state took three unlawful photos of each child. Social services officials claimed that children in Island Pond "had been taught to fear all strangers." Actually, the children were taught to be hospitable to strangers, and a psychologist assessing community children who had been in the raid and raised under the teachings of their parents in the Island Pond Community found them to be "well-adjusted, social and showing no signs of abuse."[14] Dr. Craig Knapp read church child training teachings and found their child rearing philosophy to be "developmentally sound and a viable alternative to those seeking a life outside the mainstream."[15]

Without the benefit of such evidence, however, Judge Mahady, using the eyes of the Constitution, upholding standards of evidence, and not pressured by public or media hysteria, found:

> [U]nder the circumstances presented to this Court on June 22, *the State's own theory of the case ran obviously afoul of both the First Amendment and the Fifth Amendment to the United States Constitution.*
>
> The State argued its case well and clearly. Its theory was that there was considerable evidence of the abuse of some children in the past by some members of the Northeast Kingdom Community Church in Island Pond.
>
> *The Deputy Attorney General and the Special Assistant Attorney General both stated to the Court that there was no evidence whatsoever of any specific acts of abuse directed toward any one of the 112 children brought before the Court.*
>
> To close this obvious probable cause gap, the State argued that the 112 children were found in residences or other buildings owned by the church and that it was a basic tenet of the church to harshly discipline children. The argument concluded that each of the 112 children '*may* be in need of care and supervision.'
>
> Therefore, *the essential causal nexus in the State's position was the association of each child's parent, custodian or guardian with the church in the face of the church's tenet teachings regarding child discipline.*[16]

Judge Mahady took great care to weigh the State's "compelling and legitimate interest in child protection … as one of our most serious societal problems," stating "the State's motives are not at issue here." Mahady's respect for John Burchard's job and his concern for children is unquestionable, but in this case Burchard was wrong on the law and wrong on the facts about the Church in Island Pond; yet the State relied on his conclusions. He was apparently influenced strongly by anti-cultists and their stories without objectively judging their reliability.

The Court found that even "the phrase 'child abuse' cannot be invoked as talismanic incantation to support the exercise of State power which egregiously violates both First and Fifth Amendment rights. Even where the State acts in a noble cause, it must act lawfully."[17]

The law requires reasonable evidence that abuse has occurred before action is justified. Turning the mandate of the law on its head, Vermont's social services Commissioner felt justified in concluding that "there is reasonable evidence that child abuse may have occurred" because officials "must believe … the published accounts of disciplinary practices" *as reported by the press in newspapers and magazines.*[18] The attenuated, flimsy, and unsubstantiated nature of the claims is one reason that Judge Mahady ruled the seizure of the children illegal and the search warrant without probable cause. Judge Mahady went on to conclude firmly that "[t]here was no probable cause for the Petition as applied to the facts of the cases dismissed. They were therefore properly dismissed."[19]

The court made it abundantly clear that "[u]pon a proper evidentiary showing of abuse, this court is not the least reticent to take immediate and effective action under the law to protect the children who are the objects of such abuse."[20] *"It is certainly inappropriate for the Judiciary to allow the Executive to circumvent the clear requirements set forth by the legislature. The petition is defective. The defect is jurisdictional."*[21]

It was the State that was the guilty party, not the members of the Island Pond Church Community who came to court peacefully, surrendered to court process, and were judged accordingly.[22]

## State Claimed They Had "Exhausted Their Remedies," Making the Raid Necessary

One might conclude that once Judge Mahady's opinion was available, the state actors would have been humbled by the recognition of their "grossly unconstitutional" actions, but this was not necessarily so. As late as 1992, John Burchard published an article calling for broader powers when dealing with "closed religious societies."[23] He relied on many of the mistaken legal premises that led to the raid, as well as much inaccurate and unreliable information that was denounced as untrustworthy by the court. For example, the Commissioner (and consequently the governor himself) claimed that the raid was necessary "to protect the children"[24] because "all other legal avenues had been exhausted." A little known fact, or at least a fact not given much attention when considering the raid, is that "[t]hree days before the ill-fated Raid, a District Court Judge rejected the state's request to force seven Community men to divulge the names 'of all the children whom they lived with.'"[25] Despite jailing these men for several hours for contempt, Honorable F. Ray Keyser, in his eighties, later released them. Judge Keyser, a retired Vermont Supreme Court Justice, made the constitutional and statutory prerequisite of individual treatment for Church members abundantly clear to

*Jean Swantko on July 12, 1984, at hearing in North Hero, Vermont, where State continued to argue that "all children in the church were at risk." There were 53 lawyers present, with Judge Mahady presiding, Bill Gray as Special Prosecutor for the State, Andy Crane for Church parents. Several lawyers represented children.*

state officials, and he found the state fell short.[26]

The court rejected the state's effort to proceed, warning state lawyers that they needed "the specifics" and "the names" to go further. Despite this explicit ruling on June 19 in favor of the Community parents, the state authorities did not abide by it. A mere three days before the illegal seizure, the state simply ignored Justice Keyser's ruling. Notably, the Commissioner claims that the case was dismissed on June 19, three days before the Raid, "for unknown reasons."[27]

## A Weighty Disclosure

Writing in defense of the raid after its demise, the Commissioner claimed that his office "had some compelling *information which guided their action, information which was not available to the public."*[28] This information was the allegation of abuse provided by anti-religion activists Galen Kelly, a private investigator from Kingston, New York, and Priscilla Coates, the former director of the Citizens' Freedom Foundation (the forerunner of the Cult Awareness Network), both of whom consulted with the Attorney General's office. The Commissioner acknowledges that at "strategy meetings" in the fall of 1983 he and other officials discussed options inclusive of the state action to raid the church and take its children. Coates and Kelly met with the Attorney General's staff in Montpelier on August 9, 1983, ten months before the ill-fated raid. Thereafter, state investigators were sent around the country to talk to hand-picked ex-members to dig for stories of abuse. About half of these defectors had themselves been "deprogrammed" by Kelly or others associated with him. Scholars confirm that such accounts are notably unreliable.[29] Further, these so-called "reports" were not volunteered as the statute contemplates in order to protect a child in danger, but rather "unearthed" as part of plan to accumulate charges against the church community and focused on criticisms of supposed church "beliefs." Such a hunt is not the procedure contemplated by the statutory scheme. It was not, as the Commissioner defended the raid to be, "a routine procedure, different only in numbers."

## The Unknown Factor: The Anti-Cult Movement

The anti-cult movement (ACM) is an international coalition made up of organizations and individuals whose goals are to use sometimes exceptional means to exert control over new and minority faiths.[30] Since its beginning, the ACM has grown and spread its efforts around the globe, becoming what sociology of religion scholars call a "social movement industry."[31]

By 1982, the deliberate strategy of anti-cultists against the Island Pond Community Church was focused on claims of child abuse.[32] Leaders of the Citizens' Freedom Foundation held several meetings in Barton, Vermont, to "educate" local people about the "dangerous cult" in Island Pond where the group was called the Northeast Kingdom Community Church (NEKCC). Part of the anti-cult strategy was to spread inflammatory statements and have them reported by the media. The calculated purpose was to create suspicion and sway public opinion against the community. For the most part, the media's sensational reporting fit perfectly into this plan to control or even destroy this particular religious group. As scholar James Richardson states: "There was a confluence of interest among disenchanted parents, government officials, journalists, and others, many of whom desired to exercise control over [a] new religion."[33]

## The Connection: What We Didn't Know Then and Need to Know Now

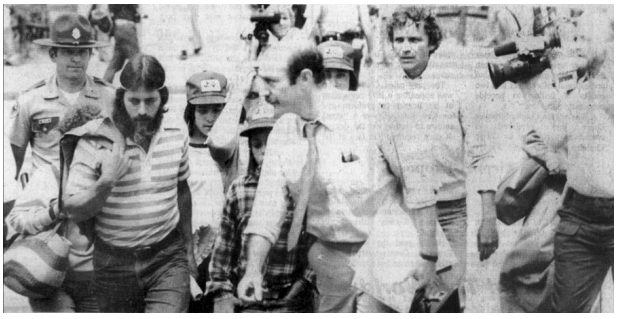
Since 1982 there was a scheme in progress in Vermont of which neither members of the church, nor the public, were aware. In 1983, Galen Kelly produced a plan for Citizens' Freedom Foundation founder, Priscilla Coates, entitled "Investigative Proposal Regarding Island Pond, Vermont." Many of the public details of the 1984 raid indicated that there was a coalition of anti-cult activists, media, government officials and defectors seeking to "destroy the Church in Island Pond."[34] But in 1999, the actual written plan was uncovered.[35]

In the six-page typed report, Kelly targets the Northeast Kingdom Community Church for destruction as a cult. He used exaggerated media reports, testimonies of those who had been deprogrammed, and the interviews of defectors as his sources of research. The intention of the investigation was to "coordinate law enforcement, the media and grassroots opposition" to the group for the purpose of destroying it. His goal was to poison Vermonters—the public and the government—against the group. He succeeded.

Kelly proposed a plan to influence government agencies in order to get the power of law enforcement behind the scheme to blackball the little church community and create public pressure so strong that the state would be forced to act against the group. The aim was to create public pressure by enlisting defectors to stir up the media against the group. This plan culminated on June 22, 1984, and it was executed completely with the cooperation and authority of the State of Vermont. It would have been impossible otherwise.

The details of the plan[36] that Kelly outlined to Coates were as follows:

1. Law enforcement (and other government agencies) would need to get Kelly's information and trust it. Law enforcement would also have to be drawn into a close relationship with the Citizens' Freedom



*Eugene Sage and sons are the first family to appear before Judge Mahady, led by their court-appointed attorney, Defender General Andy Crane, as the press crowds in. They were the first family sent home when the State had no evidence against them. All three sons pictured remain in Twelve Tribes Communities in New York and Massachusetts.*

Foundation in order for Kelly to "gain access to information that they have developed themselves." This relationship would also "establish credibility with [law enforcement]" in order to *"subtly or not so subtly force any reluctant … agencies to take … action against the group."*

2. Media would need to get Kelly's information and rely on it to persuade the public that it was true. Members of the media would have to be coordinated with the C.F.F. in order for *"scrutiny to be brought to bear on the Island Pond situation,"* and to *"focus attention on the cult issue,"* keeping to *"such clear issues as child abuse"* while avoiding such "controversial issues as mind control, deprogramming, and religious controversies."

3. Grass roots (or local) "individuals and institutions" would need to be educated using Kelly's information. Then local activists could be incorporated into the plan, to "assist in providing support services," such as arranging deprogramming and leading defectors to the media. These services were for those who "leave of their own accord" (defectors), or to "assist families" who might travel great distances "because of an individual affiliating with the group" not leaving on his or her own accord (such as through kidnapping for hire in order to be deprogrammed.)

Kelly's plan was a business proposal, drafted for a donation of $1000. It is clear that execution of this agenda would generate money for Kelly and Coates by creating fear that would then generate a need for their services. It outlined a method of operations common to many of those who work in what has been called the "anti-cult industry." Kelly suggested to Coates that she participate with him in the plan. It was to be a prototype to be used to destroy entire groups and not just to "rescue" individual members. He suggests the C.F.F. take "aggressive action" to combat "cults" when local communities were "invaded" by them. The goal of the plan was not to research the group objectively, but to seek to "document criminalities."

Twenty years later, after charges have failed in court time after time,[37] the same propaganda surrounding the Island Pond Raid continues to be disseminated about the group in Europe and Australia. Reliance on

*Another family entering the courthouse. About 40 children had hearings because their parents gave names. Over 60 children did not have hearings because their parents declined to give names. All 112 were sent home because the State "had not a single piece of evidence on any of the seized children."*

untrustworthy data circulated by the well-coordinated and international anti-cult movement continues to instigate fear, even in government, that goes beyond a healthy concern that can be satisfied by the truth.[38]

The agenda of the former ACM-oriented Cult Awareness Network included activities that have been well-documented. The following listing, derived from the work of James Lewis,[39] suggests a pattern of action that parallels the events surrounding and including the 1984 Island Pond Raid. The steps include: (1) ACM representatives, including deprogrammers, contacting disaffected ex-members (who may be engaged in a custody dispute); (2) coordinating ex-members' meeting with media representatives to stir up public opinion; (3) after sufficient concern is aroused in the general public, arranging for ex-members to give affidavits about abuse of some sort to social workers to begin regulatory and court proceedings; (4) using courts, sometimes in *ex parte* hearings, to get judgments against the group that might eventually cause great harm to the organization; (5) using exaggerated and even untrue information to promote the ACM agenda, which in turn causes more people to seek their services (which may be quite expensive); and (6) using this information to raise funds from the public to help fight the "cult menace." All of these methods have been demonstrated by the ACM industry's effort to destroy the Twelve Tribes communities.[40]

## ___Anti-Cult Rhetoric Lives On____

The same anti-cult propaganda that was discredited in court in 1984 has been relied on repeatedly in courtrooms by government agencies in criminal cases, child protection cases, and custody cases, both in the United States and abroad. Hopefully, scholars and practitioners can better educate political and religious leaders about how to respond to concerns raised about minority religious groups. It is imperative that judges, lawyers, social workers, law enforcement, government officials, and the media be educated on how best to judge the information they receive about a new religious group if justice is to be done. This need arises when officials receive complaints or inquiries about a group that they do not understand. Vermont officials proceeded on the basis of ignorance and bad information, rather than relying on balanced, thorough, and careful research from objective sources. Key officials involved in the raid remain unaware that they were gravely misled by ACM tactics.

Misinformation is spread maliciously when anti-religionists distribute old newspaper clippings of incidents about the initial stages of charges, rather than providing the actual disposition of cases reflected in court records (i.e., the dismissals). Although well-aware that the courts have rejected this testimony as unreliable, anti-religionists throughout the world continue to circulate false and incomplete information with impunity. Often, social service agencies, law enforcement officials, and journalists do the same, trusting what is not trustworthy.

## _____Conclusion_____

Oppressive religious discrimination by the government of Vermont was the basis for the seizure of 112 children from the Northeast Kingdom Community Church in Island Pond on June 22, 1984. In this case, the state, having been persuaded by anti-religionists, implemented a policy that could have led to the destruction of the Community. Once influenced to adopt the personal opinions of certain anti-cultists, government agents went forward with the power of the state fully on their side. Officials proceeded on the

Haninah, Raphael and Shemuel—three children in the Island Pond Community that were seized. All remain in Twelve Tribes Communities —the girl in Winnipeg, Manitoba, Canada; the two boys in Colorado.

basis of bias and slanted interpretations of religious doctrine and practice rather than evidence, and the anti-cultists had accomplished their mission: government and the public had been convinced that the small religious group had something to hide and was a public threat. The climate known as "moral panic" had been successfully orchestrated.[41] Had it not been for Frank Mahady holding the state agents to the rule of law and the Constitution that day, the agenda of the anti-cult movement would have prevailed in Vermont.

The anti-cult agenda to chill religious expression that is outside the mainstream creates a global problem, one much bigger than the Island Pond Raid. The ACM destroys the delicate balance that maintains social and political order by breaking down the boundaries of rightful authority separating government and religion. By effectively influencing governments to believe that certain religious groups are a social menace because of what they believe, the stage is set to pursue individual members on a selective basis because of their "dangerous" faith, without reliable evidence that criminal or anti-social activity has actually occurred. The ACM thrives in the gap, created by a failure in both governments and religions to recognize the legitimate authority of the other and to define properly their own social and political boundaries. Governments have been deceived into police action by emotional misrepresentations, persuaded to believe that force is necessary to maintain the public welfare. Anti-cultists, sometimes motivated by religious orthodoxy or anti-religious sentiment instead of religious liberty, have sought to limit religious diversity, and cry "Heresy!" or "Abuse!" to provoke government interference where the government should not tread.

The ACM takes advantage of both mainstream religions and insecure government officials by provoking fear in the public arena. The result is to convince governments that true religious diversity is unnecessary, and at the same time to convince established religions that anything outside the mainstream is dangerous and deserves to be destroyed. This trend is happening now. To maintain a democratic social order, it is essential that false information, induced hysteria, and fear not replace vigilant, conscientious, and effective law enforcement and government policies. Justice stands a greater chance of being served if agents of government become educated to the deliberate discriminatory tactics of the ACM calculated to promote fear and hysteria toward new religious movements.

My hope is that the State of Vermont will learn from this history, set the record straight, and let the truth be known, so that other states and nations will not make the same mistake.

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[1] *See* Jean Swantko, *An Issue of Control: Conflict Between the Church in Island Pond and State Government*, Appendices A, B, *at* www.twelvetribes.com (1998) for language of the search warrant and the judge's opinion.

[2] Transcript at 67, *In Re:* C.C., Orleans District Court, Unit III (June 22, 1984) (*quoting* Philip H. White, former Orleans County prosecutor, acting as an Assistant Attorney General).

[3] *Id.*

[4] Interview with Andrew Crane, former Defender General of Vermont (May 2000).

[5] The five opinions have major legal and social significance, acknowledging the limits of government and the rights of individuals in a free society. In preserving the religious freedom of the members of the Church in Island Pond in the face of extreme governmental pressure to interfere in their lives, these are landmark opinions in their analysis of the constitutional issues raised. The five opinions are as follows:

1) Denial of the state's request to detain all of the children for examination by social workers (June 25, 1984) (Detention Order);

2) Photographs taken by State of each child for identification purposes declared illegal and beyond authority of the law (June 25, 1984);

3) All cases brought were dismissed because religious association is an unlawful basis to allege danger of harm (July 2, 1984);

4) Court dismissed all the petitions because it found the state without jurisdiction because it had no allegations of specific facts for specific people (Aug. 7, 1984) (Petition Order);

5) All items seized were disallowed as evidence because the general warrant was unlawful and without probable cause (Aug. 6, 1984).

[6] Interview with Andrew Crane, *supra* note 4 (emphasis added).

[7] Interview with Scott Skinner, former Director of the Vermont ACLU (May 2000).

[8] Hon. Joseph Wolchik, CALEDONIAN RECORD, Feb. 11, 1987.

[9] Detention Order at 4 (citations omitted) (emphasis added).

[10] *Id.*

[11] Approximately one month after the 1984 raid, the Commissioner of Social and Rehabilitation Services (SRS) of Vermont, John Burchard, wrote a defense of the state's action called *Children at Risk: Why Protective Action in Island Pond Was Necessary* (manuscript dated July 17, 1984, on file with the author). Again in 1992, Burchard co-authored an article relied upon by lawyers and social scientists who did not have the benefit of having access to Judge Mahady's judicial review wherein Burchard's treatise is constitutionally undermined. Vanessa Malcarne & John Burchard, *Investigations of Child Abuse/Neglect Allegations in Religious Cults: A Case Study in Vermont*, 10 BEHAV. SCI. & L. 75 (1992). For a rebuttal of Burchard's articles, *see* Jean Swantko, *Anti-Cultists, Social Policy and the Island Pond Raid, at* www.twelvetribes.com (2000).

[12] Detention Order at 4 (emphasis added).

[13] *Id.* at 6.

[14] *See* excerpt of Knapp Report from psychological evaluation of family in 1994 divorce case, at Appendix M, *at* www.twelvetribes.com.

[15] *Id.*

[16] Petition Order at 7 (emphasis added).

[17] *Id.*

[18] Burchard, *Children at Risk, supra* note 11, at 5.

[19] Petition Order at 7.

[20] *Id.* at 8.

[21] Petition Order at 3 (emphasis added).

[22] *See* Jean Swantko, *The Twelve Tribes, The Anti-Cult Movement and Government's Response*, 12 SOC. JUST. RES. J. 179 (2000), *available at* www.twelvetribes.com.

[23] Malcame & Burchard, *supra* note 11, at 11 n. 6.

[24] This was notably the same rationale used

by U.S. Attorney General Janet Reno when defending her decision to attack the Branch Davidian compound in Waco, Texas, in April 1993, resulting in the deaths (by fire) of the twenty-five children she acted "to protect." The importance of relying on informed scholars for understanding of a group's beliefs cannot be overstated. Relying on the subjective propaganda of anti-cultists can prove devastating and deadly as Professor Nancy Ammerman concluded in her portion of the 1993 Department of Justice Investigative Report on the tragedy in Waco, Texas at the Branch Davidian compound.

[25] Summons, *In Re:* C.C. (Vt. Dist. Ct. Unit III, June 19, 1984).

[26] *See* Swantko, *supra* note 22, at 185.

[27] Burchard, *Children at Risk*, *supra* note 11, at p. 11 n. 6.

[28] *Id.* at p. 2

[29] David G. Bromley, *Sociological Perspectives on Apostasy: An Overview, in* THE POLITICS OF RELIGIOUS APOSTASY 3 (David G. Bromley ed., 1998); Susan J. Palmer, *Apostates and Their Role in the Construction of Grievance Claims against the Northeast Kingdom/Messianic Communities, in id.* at 191; James T. Richardson, *Apostates, Whistleblowers, Law and Social Control, in id.* at 171; Anson Shupe, *The Role of Apostates in the North American Anti-Cult Movement, in id.* at 209.

[30] ANSON SHUPE & DAVID G. BROMLEY, THE NEW VIGILANTES (1980); Anson Shupe, *The Modern North American Anti-Cult Movement 1971-91: A Twenty Year Perspective, in* ANTI-CULT MOVEMENTS IN CROSS-CULTURAL PERSPECTIVE 3 (Anson Shupe & David G. Bromley eds., 1994); Bromley, *supra* note 29.

[31] Shupe, *supra* note 30, at 3.

[32] Palmer, *supra* note 29, at 198 n. 15; James T. Richardson, *Social Control of New Religions* in CHILDREN IN NEW RELIGIONS 174 (Susan J. Palmer & Charlotte Hardman eds., 1999).

[33] Richardson, *supra* note 32, at 173.

[34] Jean A. Swantko, *An Issue of Control: Conflict between the Church in Island Pond and State Government*, paper presented at 14th World Congress of Sociology, Montreal, 1998, *available at* www.twelvetribes.com.

[35] It was found while searching through the (old) Cult Awareness Network (C.A.N.) files on the Church in Island Pond at the (new) Cult Awareness Network offices after they acquired the files through litigation. The old C.A.N. was bankrupted in 1995 after the Jason Scott case in Washington state. *See* Anson Shupe, Susan E. Darnell, & Kendrick Moxon, *The Cult Awareness Network and the Anti-Cult Movement: Implications for New Religious Movements in America, in* NEW RELIGIOUS MOVEMENTS AND RELIGIOUS LIBERTY IN AMERICA 21 (Derek H. Davis & Barry Hankins eds., 2002).

[36] "An Investigative Proposal Regarding Island Pond, Vermont" was prepared by Galen Kelley of Kingston, New York, for Priscilla Coates, Director of the Cult Awareness Network (emphasis added).

[37] Swantko, *supra* note 1, at n. 20; Jean A. Swantko, *The Messianic Communities in the European Union: An Issue of Parental Authority*, paper presented at the CESNUR International Conference on the Future of Religious and Spiritual Minorities, Turin, Italy, 1988, *available at* www.twelvetribes.com.

[38] Interview with David G. Bromley, June 2000. "[I]f you have a situation in which there's a political alliance between an individual who's defecting because they're angry and a group that has its political agenda to discredit a broad range of organizations and to lump specific organizations into a category like 'cults' then those stories tend to be political theatre. Whether or not they're true is a coin flip. You have to then really investigate those stories. You can't assume them going in. I think some of the problems in the contemporary debate over new religious movements is that many of those stories have received immediate credibility when they needed to have their credibility challenged." *Id.*

[39] James Lewis, FROM THE ASHES: MAKING SENSE OF WACO (1994). Lewis is a professor of philosophy at the University of Wisconsin.

[40] Twelve Tribes Communities include approximately fifty communities ranging in size from 30-120 members in ten countries on four continents. These believers live a common life of sharing in communities according to the pattern of the first church established in Acts 2 and 4 in the Bible.

[41] The literature on moral panic is extensive. Of particular relevance here is Massimo Introvigne, *Who Is Afraid of Religious Minorities? The Social Construction of a Moral Panic*, paper presented at the Center for Study of New Religions Conference, Turin, Italy (Sept. 1998).

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# The Twelve Tribes' Communities, the Anti-Cult Movement, and Government's Response

**Jean A. Swantko**

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# The Twelve Tribes' Communities, the Anti-Cult Movement, and Government's Response

**Jean A. Swantko**

*The Twelve Tribes Messianic Communities are approximately 25 communities ranging in size from 30 to 120, on four continents. Since their inception 25 years ago, they have been plagued by continual attacks of the Anti-Cult Movement (ACM), originally in North America, but in recent years also in Europe. These believers live a common life of sharing in Communities according to the pattern they perceive in Acts 2 and 4 in the Bible. Despite repeated vindication in the courts, Twelve Tribes' members continue to battle to maintain the right to parent their children according to their beliefs, outside the mainstream popular culture. Antireligionists have effectively influenced governments to act against these parents, based on information that has not proved to be trustworthy evidence in court.*

**KEY WORDS:** Twelve Tribes; Island Pond; Canada; France; Germany; Anti-Cult Movement; children.

## INTRODUCTION

Since 1972, in the 25 locations where the Twelve Tribes/Messianic Communities live throughout the world, members have encountered state and local governments who challenge their right to live in obedience to their view of the Bible. This paper focuses on several of the more prominent conflicts members have faced with state governments and demonstrates the influence of the Anti-Cult Movement (ACM) on government officials. The ACM is an international movement made up of organizations and individuals whose goals are to use sometimes exceptional means to exert control over new and minority faiths (Shupe and Bromley, 1980, 1994; Bromley, 1998). The ACM has infringed on the freedom of

[1]Trial and appellate lawyer, Vermont, focusing on constitutional issues, who has handled some legal matters for the Twelve Tribes communities, and who is also a member. This paper summarizes and integrates two larger papers presented at professional meetings, Swantko (1998a,b), both of which are available, with appendices, at www.twelvetribes.com.



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Twelve Tribes' members to practice their faith without government interference. Having faced numerous legal battles in the courts, members have been plagued by attacks generated from the ACM, whose exaggerations and misrepresentations seem to never die, despite the fact that their claims remain unsubstantiated by credible evidence when tested in court. The examples that follow indicate a lack of adequate education to the tactics and agenda of anti-cultists who try to use the legal system to advance their own interests at the expense of violating fundamental freedoms of members of new religious movements. Consequently, there is often a discriminatory or at least delayed response by state government, its agents, and the courts.

## BEGINNINGS OF ANTI-CULT ACTIVITY AGAINST THE TWELVE TRIBES MESSIANIC COMMUNITIES

The ACM was initially fueled from fear evoked in parents in the 1960s, when a whole generation of young people began to rebel against their mainstream values, including institutionalized religion. At its inception, the ACM convinced parents that the reason their children had left the mainstream was because they were under "mind control" and desperately needed to be "rescued" and brought back to their senses (Shupe and Bromley, 1980; Palmer, 1998). Since this beginning, the ACM has grown and spread its efforts around the globe, becoming what Shupe and Bromley (1994, p. 3) call a *social movement industry*.

In the mid-to-late 1970s, a method used by anti-cultists to "bust cults" was *deprogramming*. Several Twelve Tribes Messianic Community members were forcibly seized from the community in which they were living peacefully only to be harangued, harassed, threatened, and humiliated for adherence to their chosen religious beliefs. Their documented accounts illustrate how the ACM effectively persuaded courts, media, law enforcement, and social workers to tread on individual rights, failing to respect the protections of religious freedom. The most publicized incident was that of Kirsten Nielsen in 1981, who was kidnaped at the age of 21 by her parents and associates of Ted Patrick, a notorious deprogrammer who claims to have deprogrammed thousands of members of newer religious groups (Patrick, with Dulak, 1976). Kirsten is now 40 and happily married, residing in a German Community with her husband and six beautiful children.

However, it was the attempted deprogramming of Rebecca Westbrook in 1980 that exposed both law enforcement and the court's involvement with anti-cult activist Ted Patrick. In this case, Rebecca's father, who was a county detective in Tennessee, used a falsified arrest warrant to get his 27-year-old daughter into "protective custody." The consequences of this deprogramming, recounted in Rebecca's own words in 1995 (available as Appendix E.2 of the "Island Pond" paper at www.twelvetribes.com, as are more details of the Kristen Neilsen

deprogramming), show how her family was misled by ACM rhetoric in ways that destroyed family ties for years. The account also shows collusion between her father and the judges who handled the case.

The result of the local government's collaboration with the goals of the Citizen's Freedom Foundation (CFF) brought devastation to the Westbrook family. Deprogrammer Ted Patrick was given so much credibility that these officials deprived Rebecca Westbrook of her rights under the Constitution and were willing to let bogus charges against her stand to cover up their own misdeeds.

## FROM DEPROGRAMMING TO CHILD ABUSE CHARGES

By 1982, the strategy of anti-cultists against the Twelve Tribes shifted from allegations of mind control to claims of child abuse (Palmer, 1998, p. 198; Richardson, 1999, pp. 174–177). Leaders of the CFF held several meetings in Barton, Vermont, to "educate" local people about the "dangerous cult" in Island Pond, where a Twelve Tribes Community called the Northeast Kingdom Community Church had begun in 1978, named because of its remote location in Vermont's "Northeast Kingdom." Part of the strategy was to spread inflammatory statements and have them reported by the media. The calculated purpose was to create suspicion and sway public opinion against the community. In the wake of Jonestown, the locals of the Northeast Kingdom in Vermont were easy prey. For the most part, the media's sensational reporting fit perfectly into this plan to control or even destroy this particular religious group (consequences of this concerted effort are discussed herein). As stated in Richardson (1999, p. 173), "There was a confluence of interest among disenchanted parents, government officials, journalists, and others, many of whom desired to exercise control over [a] new religion."

The next step was to use a willing apostate with a personal vendetta to launch a legal battle for custody. The CFF found their man in apostate Juan Mattatall, who fits many characteristics presented in Wright's analysis of the apostate role (Wright, 1998). In November 1982, the CFF had a public meeting in Barton, Vermont, 20 minutes from Island Pond. A press release warned citizens of the "sect charged with child abuse" (see Appendix I of "Island Pond" paper on www.twelvetribes.com). Priscilla Coates and Galen Kelly, two key ACM leaders, were invited guests who organized the meeting with a local citizen who was a licensed practical nurse. Mattatall's case was one of three custody battles launched against community parents in the early 1980s through the influence of CFF. Community members involved in these custody disputes found their religious beliefs being viewed as criminal instead of being protected by the courts. Judges proved wary of an unfamiliar group and were persuaded by the deceptive tactics used by anti-cultists charging "abuse." Eleven children were taken from their mothers in the Twelve Tribes' Communities in the three separate custody battles. Between 1982 and 1990, these children rarely, if ever, saw their parent who lived in the Community. Nine

of these 11 now reside in the Twelve Tribes Communities; 5 are married, and all lament the fact that they were ever taken away.

## INTERNATIONAL EFFECTS: THE FOCUS IS CHILDREN

Violations of community members' freedom of association, as well as their freedom of religion, since the early 1980s is apparent from court records and some judicial decisions. Although in incident after incident, Twelve Tribes' members eventually have been exonerated by the courts, the preruling allegations based on untrustworthy data and unsubstantiated claims continue to be circulated against other community members around the world. This use of unreliable information has led to premature governmental action based on prejudice, not facts based on evidence (see discussion of apostates involvement in legal efforts at social control in Richardson, 1998). Most seriously harmed by these actions have been the children who were taken from their secure lives in the Community and subjected to confusing, conflicting, and deceptive tactics that undermined their faith and the faith of their custodial parents. Some still suffer the effects today.

Social service agencies, law enforcement, and the courts have the power of the state's resources at their disposal to promote the general welfare of citizens. When misinformed by anti-cult propaganda, state agents sometimes use their authority to unleash the awesome police power of the government. "This awe-inspiring power can be unleashed by any person making the claim that child abuse is occurring" (Richardson, 1999, p. 175). Those who advocate for expansion of state powers to intervene to protect children "in cultic settings" (Malcarne and Burchard, 1992) have not recognized the basic unreliability of information generated by anti-cultists and the magnitude of the effect such information can have on government officials such as those involved in the Island Pond raid. Being in such a vulnerable and prejudiced position leaves a Community member to face a tremendous uphill battle just to have a voice in a forum free from religious prejudice. The damage to lives has been high, especially to the children, who, ironically, government agents claim to protect the most.

Although the stale and inflated claims from North America now circulating in Germany and France have found little credibility in the American or Canadian courts, they continue to be used as a basis to substantiate complaints against European Community members (to be detailed herein). In most instances, anti-cultists do not inform about the judicial acquittals, court findings of religious discrimination, and children eventually being returned home to the Community.

For the most part, in the end, appellate courts have eventually protected Community members and upheld their rights. This protection has usually been won after individual members struggled for years to find a way to be heard within the legal system. It has not come without unwarranted time in jail on the part of some, including two fathers involved in custody battles described herein. Victories in these

several legal matters have come at a great cost to the principals, their families, and the reputation of the Twelve Tribes as a people. Several of these cases are discussed in more detail to show the costs of governmental authorities accepting ACM claims at face value.

## THE VERMONT CASES

### *In Re: Certain Children*—The 1984 Raid on the Church in Island Pond

On a Friday morning, June 22, 1984, in the sleepy rural village of Island Pond, Vermont, nestled in the Green Mountains just south of the Canadian border, the power of state government descended on 350 believers. In an effort to satisfy themselves that the children who resided within that church community were not being severely abused, the state invaded. Ninety Vermont state troopers in bulletproof vests and 50 social workers armed with virtually unlimited police power raided 19 homes in the predawn hour, demanding the names of the children and the children themselves. A local judge had signed a search warrant to legitimize the round-up of the unsuspecting children. The zeal of the social workers allowed them to intrude confidently into the lives of these little ones as if they were doing them a great favor, rescuing them from the abusive clutches of their fanatical parents. One hundred twelve children were unlawfully seized that morning because of the religious beliefs of their parents (see appendices A and B of "Island Pond" paper at www.twelvetribes.com for language of the search warrant and the judge's opinion). The warrant read "*In Re: C.C.*" to stand for "certain children" because the warrant was so general that it had no names. It gave the addresses and descriptions of the 19 residences and buildings that a citizen anti-cultist identified for the state as belonging to the Community. It authorized seizure of "any and all children under the age of 18 found herein." Later that day, the Assistant Attorney General responded to the judge's question asking what the danger of harm was to these children. He answered that "it's as if the child is living amongst bacteria and the bacteria in this case that jeopardizes this child's health is the teachings and doctrines of the church" (*In Re: CC.*, Orleans District Court, Unit III, Transcript, p. 67, June 22, 1984).

After being transported in police custody to the courthouse in Newport, Vermont, some 20 miles away, each family waited their turn to appear before a judge who would decide if they would be separated. Happily for the parents, Judge Frank Mahady respected the Constitutions of Vermont and the United States and did not judge by the barometer of public opinion as he conducted some 40 individual detention hearings that day. When he called the lawyers from the State Attorney General's Office to provide evidence of abuse to justify the seizure of each child, the State of Vermont was left with little to say, except to speak against the beliefs and lifestyle of those brought to court.

Court continued late into the night, calling each child by name. Each one was sent home with his parents because there was no basis to keep even one for examination by the state's battery of doctors, social workers, and psychiatrists who sat to no avail nearly an hour away at a ski resort, waiting to perform their scrutinizing evaluations. At around 9 PM, Judge Mahady, after handling 40 individual children's cases, had to decide what to do with the large group of children (approximately 60) who remained. After hearing the arguments, he released them *all* to return home with their parents. He gave the opportunity for any parent who had something to say, to speak. Many passionately told the story of their day and spoke of their deep gratitude for a judge who ruled justly. By 11 PM, a bus of tired but rejoicing families headed home to Island Pond, singing the praises of their God and giving thanks for the judge whose humble response was, "I'm only doing my job" (Court transcript, June 22, 1984, *In Re: C.C.*).

## 1982–1984 BACKDROP

Juan Mattatall was a church member who, in 1982, after leaving the Community, sought the aid of an ACM group CFF to launch a campaign to get his wife and children "out of the cult" in the midst of their custody battle. In the Mattatall case, the alleged and misrepresented religious beliefs of the Community mother were weighed against her more than the substantiated pedophilia of the father. Affidavits of three alleged victims of Mattatall were available to the Court, but were not considered during the custody hearings, which resulted in custody being granted to the father. (In 1985, Mattatall also pled guilty to a charge of lewd and lascivious conduct in Osceola County outside Orlando, Florida.)

Mattatall was a child molester who vowed to "destroy the Community" when his wife would not leave the Community with him. He told the world that the Community "splits up families" and won custody of his five children, making great photo press on the front page of a statewide newspaper. Once in the custody of their father in Florida, he deprived the mother of her court-ordered visits and the children spent a good deal of their childhood in foster care and orphanages, their father being charged with sexual crimes on children. Juan Mattatall's own mother shot him dead in April 1990 in Oveido, Florida, whereupon the children returned to the Community in Island Pond, Vermont, with the mother, where there was much rejoicing over their return. His mother killed him and then herself to escape from "the grief that seemed destined to continue 'due to his troubled life which' had been a non-stop series of problems with children and the law" (see Appendix F of "Island Pond" paper at www.twelvetribes.com for affidavit of Mattatall's daughter). The five Mattatall children are now aged 18–25, and four of them reside in the Twelve Tribes Communities in the United States.

## VERMONT ATTORNEY GENERAL'S OFFICE: INFLUENCED BY ACM

In the wake of Mattatall and the other custody cases in 1982, Galen Kelly, a well-known deprogrammer who has himself been charged with kidnapping in a deprogramming case, and Priscilla Coates, an activist in the CFF, provided a list of people who had left the group to the Attorney General's Office in Vermont, many of whom had been deprogrammed. One such person named Michael Taylor recalled that, after his deprogramming by Galen Kelly, he attended a meeting in Burlington, Vermont, where Kelly vowed he had a "fool-proof plan to bust up the Northeast Kingdom Community Church." Kelly then took Taylor immediately to a Vermont State Police officer and the director of the Newport Social Services Office, who were sent on a mission to travel around the country to gather negative information on the church, mainly through interviewing a few former members. Malcarne and Burchard (1992, p. 81) acknowledge these interviews a year before the 1984 raid without any admission that anti-cult activists Kelly and Coates had provided the Attorney General of Vermont a list of apostates for state investigations to probe. Child abuse laws require the reporting of abuse, but do not contemplate governmental officials being sent out to seek information based solely on suspicions deriving from the religious beliefs and practices of parents.

In 1983, Kelly, working with Mattatall and local participants in the CFF, proceeded to execute his plan by visits to the Vermont Attorney General, who responded to the fear he generated (see Palmer, 1998, p. 197, for a discussion of the influence of Mattatall). By the time this state team of investigators left Vermont, they had already been strongly influenced by the claims of the anti-cultists and were convinced that child abuse and mind control were commonplace in the Island Pond Community. So they went, at taxpayers' expense, touring the country to talk to a dozen or so former members, returning with what they thought was the necessary ammunition "to get the Church in Island Pond." In a coordinated effort, these two antireligious zealots, Kelly and Coates, prevailed on the Attorney General's Office and the Governor himself to adopt as true the unreliable information collected by the two state employees sent to investigate. Taylor and other defectors' distorted, "deprogrammed" accounts were presented as truth to the judge, who issued a search warrant to raid the church community. They provided the fodder for local law enforcement to compile a 32-page affidavit used to secure the warrant, which was replete with unfounded stories of abuse and strewn with erroneous and sensational interpretations of doctrine.

Of the 14 people quoted in the affidavit, at least 6 had faced deprogramming efforts by anti-cultists. Their testimony was less than reliable, having been tainted by undue influence and distorted in the retelling (Palmer, 1998, p. 199). Once hearing of the raid, several ex-members called Community members and told them of the pressure tactics used by the state investigators and how their statements

had been misquoted, exaggerated, and edited so as to be misleading. In 1998, Michael Taylor wrote a detailed affidavit in which he chronicled how he was "deprogrammed" by Galen Kelly, and confirms the pressure tactics used by state officials to extract false and exaggerated statements prior to the raid (see Taylor affidavit at www.twelvetribes.com). There were no affidavits from current members attesting to the accuracy of claims about beliefs and practices of the community, or from parents and friends who regularly visited the Community who had firsthand knowledge of Community practices. Contrary to sound social science research methodology, anti-cultists often make a deliberate practice of avoiding the use of members or supporters as sources of information about a group.

Many well-intentioned civil servants (e.g., social workers, supervisors, judges, law enforcement officers) were led to believe that they were doing a good deed to protect innocent children, and to this day remain none the wiser. There were several state police officers, however, who regretted participating in the raid at all, for they knew it was unlawful, but followed orders anyway. To their credit, some of them spoke of their shame publicly. Captain Michael LeClair, who retired from the Vermont State Police in August 1996, was quoted in the *Rutland Herald* saying that the only case in his career that he regretted participating in was the Island Pond Raid because "he knew it was wrong" (*Rutland Herald*, 1996, p. 1).

The raid was a major embarrassment for the State of Vermont. The warrant-signing judge later acknowledged publicly in 1987 that he had been "pressured" to believe bad information from prejudiced sources that he should not have relied on. The two judges most intimately involved with the facts and the law in the raid case found that it was grossly unlawful, unconstitutional, and regrettably authorized "under pressure." The source of this pressure was the effect of the propaganda generated by leaders of the ACM on public officials. It produced a dangerous outcome in a land that promises religious freedom, and the pattern continues today.

Three days before the ill-fated raid, a Family Court judge rejected the state's request to force seven Community men to divulge the names "of all the children whom they lived with" (Summons, June 19, 1984, in *Re: C.C.*, Vermont District Court, Unit III). Despite jailing these men for several hours for contempt, 85-year-old F. Ray Keyser later released them. Judge Keyser made the constitutional and statutory prerequisite of individual treatment for Church members abundantly clear to state officials. Judge Keyser, a retired Vermont Supreme Court Justice, was the judge of their legality that day and he found the state fell short.

This was the state's final effort to proceed lawfully and the court rejected it, warning the state lawyers that they needed "the specifics" and "the names" to go further. (See Richardson, 1999, for more discussion of this legal requirement and the problems it can raise for authorities.) Despite this explicit ruling on June 19 in favor of the Community parents, the state authorities did not abide by it. When this judge followed the Constitution at an inquiry to force church leaders to give the names of innocent church members, the state simply ignored his ruling. Without

the legally required specifics, state lawyers a few days later misled a judge into signing a search warrant by persuading him with anti-cult generated information. This warrant was soon determined to be grossly unconstitutional.

The checks and balances offered by the judicial branch, which had judged the illegality of the state's actions against its citizens, was ignored by the executive branch when they took armed police action against Twelve Tribes' members 3 days later. What one court told a team of attorneys from the attorney general's office that they could not do on Tuesday, Judge Mahady told them again they could not do, and should not have done, on Friday, June 22, 1984. The intrusive raid ensnaring 112 children from a supposed "cult" made the nightly news from the east coast to the west coast of the United States. The focus of news accounts, however, was the alleged child abuse by Community members, *not* the state's abuse of power against a minority religion. Vermont officials simply relied on their own judgment rather than the ruling of the court. They took the law into their own hands. Such abuse of authority against a minority religion without reliable evidence is the essence of prejudice, and it is the greatest threat to a democratic society.

## *STATE V. WISEMAN* (1983)

A simple assault charge was brought against Charles Wiseman in 1983 for spanking a child, Darlynn Church. This was the most notorious charge against a church leader, and it received inflammatory publicity of unprecedented proportions during the year before the raid. The charge grew out of public perceptions, fueled by the ACM, that children in Twelve Tribes communities were at risk because of a policy of using corporal punishment with children. Members do use corporal punishment, but abusive punishment is not taught or condoned.

The *Wiseman* case was eventually dismissed for lack of a speedy trial on June 13, 1985. When the state tried to use the unsigned depositions of a father and his daughter after they had recanted these exaggerated accounts, the trial court said no. The State of Vermont's appeal of that ruling was denied. Once the witnesses were available and explained how they had been pressured by anti-cultists and state agents to produce evidence against Wiseman, the state no longer sought their live testimony. Defector Roland Church and his 13-year-old daughter Darlynn became the unwitting pawns of Galen Kelly and his plan to destroy the Community Church in Island Pond. Consequently, the trial judge found an attorney for the State of Vermont guilty of misconduct, an ethical violation, for their strategy of appealing to delay the case when the witnesses were ready to testify to the truth in support of Mr. Wiseman, the Community Church member.

The *Wiseman* case is a vivid example of how important it is for the checks and balances system of government to work. For citizens to be protected from abusive authority by the state and the purpose of government to be served, each branch

must function as a check on the other. In *Wiseman*, the judiciary stopped unlawful executive action.

Today, the alleged victim is a 29-year-old mother of three who has nothing but friendship toward her once-alleged "abuser" and regret for what her father's cooperation with the state put Wiseman through. She clearly remembers the intense pressure tactics used on her by the state Department of Social Services and law enforcement who "put words in her mouth" to exaggerate her account, thereby providing the basis for a criminal charge. Like Michael Taylor in 1998, her father, Roland Church, executed an affidavit attesting to how he was used and manipulated by anti-cultists in 1983 and he tells his story to set the record straight (see Roland Church affidavit at www.twelvetribes.com).

## ANTI-CULT RHETORIC LIVES ON

Since the pre-raid gathering of information in 1983–1984, the same anti-cult propaganda that was discredited in court 15 years ago has been relied on repeatedly in courtrooms by government agencies in criminal cases, child protection cases, and custody cases, both in the United States and abroad. The religious freedom of Twelve Tribes members has been seriously jeopardized when government officials have relied on mere subjective opinions of antireligious zealots as true and have acted on them without evidence to back up their claims. Anti-cult activists have claimed to be experts in matters of faith and have effectively convinced government officials that they are trustworthy when they are not. Their credibility was not and is not questioned, although the law requires their trustworthiness to be proved. The failure of the government to investigate the allegations of the anti-cultists before relying on them as true has had serious social consequences, especially for members and their children.

## CANADA: *THE QUEEN V. DAWSON* (NOVA SCOTIA)

Perhaps the best example that shows the cost to individuals when governments are not careful to protect religious liberty and guard against discrimination is the story of a father and son, Edward and Michael Dawson (for details, see "An Issue of Control" at www.twelvetribes.com). Dawson became a believer in a Twelve Tribes Community in Nova Scotia in 1986, 3 years after Michael was born in Montreal. He is victorious after 10 years (1987–1997) of legal battling in the province of Nova Scotia. Two court decisions, one in 1988 and again in 1997, found that provincial government officials in that province discriminated against Dawson because of his religion when deciding who had authority over the life of his son Michael.

In 1986, Michael's mother executed a written agreement giving Dawson sole custody. In 1987, when Michael was 4 years old, he was seized by a team of social

workers and police officers who came to the Community at the Myrtle Tree Farm in Annapolis Valley, Nova Scotia. After 44 days in foster care without seeing his father, the boy was returned to his father because of an appeal court decision. The Nova Scotia Court of Appeal rebuked the social service agency and acknowledged Dawson's practice of "kind, but firm" physical discipline that was sanctioned by his faith. The decision rocked the social service community.

The seizure stemmed from an exaggerated report by a visitor to the Community who had been influenced by anti-cult reports of alleged child-rearing practices by Community parents. The Nova Scotia social services also had a file compiled from social services in Vermont that was full of inflammatory news accounts and magazine articles defaming Dawson's faith, generated by anticult activity with the deliberate intention to destroy the small religious community. The fact that the Vermont raid had been illegal did nothing to prevent the social workers from relying on the same bad information 3 years later. Instead, they waited for the opportunity to seize a Community child to investigate. Under cross-examination, the doctor who examined Dawson's son revealed that, in fact, he had not written the affidavit substantiating Michael's need for protection, but rather that he had "just trusted the social worker and signed it," after reading an inflammatory magazine article she had given him, acquired from Vermont (court transcript in *Family and Children Services of Kings County v. Dawson*, Sept. 1987).

In the intervening years between 1988 and 1992, Michael's mother took advice from anti-cultist Michael Kropveld, head of *Infosecte Montreal*, a major Canadian ACM organization, who reinforced her fears about the Community and influenced her to seek custody of him. Despite their earlier agreement, she developed and executed a devious plan to acquire custody. In 1992, she went to court without giving Dawson notice of the hearing and called a local antireligionist witness who had never even visited the Myrtle Tree Farm Community, to convince the court that it was a cult and a dangerous place for her son. He spoke untruths about Dawson's faith that were effective in persuading the judge to make an order changing the boy's custody status without his father having a chance to appear or present evidence. Within days, Dawson, who left with his son to avoid giving him up to authorities under these circumstances, was charged with parental abduction after the Royal Canadian Mounted Police believed the mother's version of the events and relayed those supposed "facts" to the local prosecutor. Without much effort, he obtained the required consent of the provincial attorney general, who had been lobbied by a national senator after being contacted by the mother who maligned Dawson's religious beliefs and associations. Eventually, in 1994 and again in 1997, after a trip to the Supreme Court of Canada, Dawson was twice acquitted of kidnapping his son.

The pattern of the two acquittals reveals the persistence of officials in the case. Dawson was acquitted of abduction in a court trial in September 1994. The Crown appealed to the Supreme Court of Nova Scotia, winning a new trial in 1995 through the appeal. This decision, however, gave Dawson an automatic right of

appeal to the Supreme Court of Canada, which granted a new trial, with two strong dissents written by the current chief justice (who said the majority decision was "not worthy of the history or the Constitution of Canada").

In his November 1997 2-week jury trial, Dawson represented himself. His 15-year-old son testified in his defense. The jury unanimously found Dawson not guilty. A judge of the Nova Scotia Supreme Court found as fact that the mother, her lawyer, and an anti-cult "expert" had seen to it that Dawson was excluded from the March 1992 hearing in Family Court *because of his religious association*. Judge John Davison ruled that indeed, Dawson had been denied fundamental justice because, "some people had used a certain degree of force to undermine Dawson's faith." The judge found Dawson's deliberate exclusion from the court hearing to be improper activity in a country that claims to protect religious freedom.

## LEARNING FROM NORTH AMERICA'S MISTAKES

It is instructive to consider a 20-year history of conflict between the Twelve Tribes communities and state government in North America (1978–1998) and the judicial decisions rendered. Hopefully, scholars and practitioners can better educate political and religious leaders about how to respond to concerns raised about minority religious groups. It is imperative that judges, lawyers, social workers, law enforcement, government officials, and the media be educated on how to best judge the information they receive about a new religious group if justice is to be done. This need arises when officials receive complaints or inquiries about a group that they do not understand. Malcarne and Burchard (1992) propose broader authority based on the claim that "collective noncompliance" by Community members hindered the state's efforts. Much like the much-criticized approach before the 1993 assault at Waco, where in the name of child protection 25 children were killed in the horrendous fire, Vermont officials proceeded based on ignorance and bad information rather than balanced, thorough, and careful research from objective sources. Key officials involved in the raid remain unaware that they were gravely misled by ACM tactics. Invaluable lessons are available by learning from the mistakes of North American social service agencies and law enforcement officials who have seriously misled both the public and the government. Inappropriate responses to religious minorities by governments based on misinformation can have catastrophic and fatal consequences, as the Waco tragedy shows (Wright, 1995).

Twelve Tribes' former members Michael Taylor and Roland Church have now told why they made the claims they did. They now claim they were pressured by anti-cultists and that their subsequent statements were used irresponsibly by state officials in Vermont. Yet the documents misrepresenting them are still circulated by government agencies in Europe, including Protestant "sect" ministers in Germany and L'Association pour la Defense des Familles et de i'Individu (ADFI) in France

(see related articles by Introvigne and by Seiwert, this issue). Misinformation is spread maliciously when antireligionists mail old newspaper clippings of incidents about the initial stages of charges rather than sending the accurate disposition of cases reflected in court records (i.e., the dismissals). Although well aware that the courts have rejected this testimony as unreliable, antireligionists in the United States and Canada continue to circulate wrong and incomplete information with impunity. Often, social service agencies, law enforcement, and journalists do the same, trusting what is not trustworthy.

Two examples from the history of attacks on Twelve Tribes communities demonstrate the damage that can be caused by individuals in positions of influence. They are John Burchard, the Commissioner of Social and Rehabilitative Services in Vermont at the time of the raid in 1984, and Michael Kropveld, director of *InfoSecte Montreal*, a self-appointed expert on "cultic thinking," who gave counsel to Michael Dawson's mother for years in the early 1990s. Despite the fact that the Twelve Tribes' members had prevailed in the court cases in which these two were personally involved, each of them has either written or distributed untrustworthy accounts that are still circulating in Europe today, causing many problems for Twelve Tribes communities there.

## VERMONT SOCIAL SERVICES COMMISSIONER: WRONG IN THE LAW AND ON THE FACTS

Approximately 1 month after the 1984 raid, the Commissioner of Social and Rehabilitation Services (SRS) of Vermont at that time, John Burchard, wrote a defense of the state's action called *Children at Risk: Why Protective Action in Island Pond Was Necessary* (Burchard, 1984). His 13-page self-serving justification was widely distributed and has, for instance, circulated throughout Germany, distributed by pastors, "sect" information officers appointed by the Lutheran Church, and others. Despite his justification that there was a solid basis to seize 112 children, the court found that there was not enough reliable evidence to detain even one! The case was also deemed so weak that an appeal of Judge Mahady's judgment filed immediately after the raid by the state was eventually withdrawn. Although asserting in his 1984 paper and another publication that Community members were noncooperative with state authorities (Malcarne and Burchard, 1992, pp. 80–83), Burchard does not mention that all members surrendered willingly to the authority of the state at the time of the seizure, did not use any force or resist the force that was used against them, and did not resist the court procedures that culminated in their being released to return home. A second major point made by John Burchard is that the state had exhausted all less-intrusive ways to ensure the protection of the children before launching the raid. The truth according to the law is that once the state failed to seize all of the group's children in their efforts by the legal avenues they tried, there is no provision in a democracy to proceed by

illegal means. However, in Vermont, the government did it anyway. Such actions were negligent, irresponsible, and not worthy of the public trust. Those who read Burchard's defenses of his actions do not receive the judicial opinion explaining why the reasons that Mr. Burchard offered to justify the state's action were inadequate, unconstitutional, and illegal.

The unlawful 1984 raid on the Church in Island Pond for the ostensible reason of "protecting the children" is an outstanding example to show why social workers need judges to oversee their work. The need for courts is to judge the legality of what state officers might otherwise think is a "good idea" or necessary course of action in the public interest. If the social workers or law enforcement officers were the judges with unchecked power, there would be no freedom for individual choices that did not conform to the opinions of the social workers or law enforcement officers. If and when such a day comes, democracy and freedom will not prevail.

Respect for John Burchard's job and his concern for children is unquestionable, but in this case he was wrong about the Church in Island Pond, yet the State of Vermont relied on his conclusions. He was apparently influenced strongly by anti-cultists and their stories without objectively judging their reliability. He asks in his paper of those who criticize the raid:

> Are all these people uncaring, incompetent human beings who are only interested in the abuse of power? Those of us who were responsible for the decision struggled with the complex legal and human issues involved. But no one who had the opportunity to participate in the decision or the action that followed refused to do so. Why? I do not believe it was because they were coerced, cajoled or brainwashed into taking action contrary to their beliefs. *Rather those individuals had some very compelling information which guided their actions; information which was not available to the public.* I will provide as much of that information as is legally possible. (emphasis added; Burchard, 1984, p. 2)

The public servants were not uncaring, but they failed to do their job adequately. They believed people who had personal agendas and took action in the name of the public based on incompetent investigation. They were misled by bad information, which was later found unsubstantiated by Judge Mahady, who declared the raid unconstitutional. The state produced no evidence to prove its serious claims of mistreatment by group members. Also, Judge Wolchik, who initially signed the search warrant authorizing the illegal raid, later regretted the action as a "tragedy for the State of Vermont," acknowledging that he had been pressured to rely on bad information that was in fact unreliable (*Caledonian Record*, 1987). Judge Mahady wrote directly to John Burchard when he said in his judicial opinion denouncing the raid, "Even such a goal as avoiding the abuse of children, however, cannot justify the means employed here" [in *Re: C.C.* (August 8, 1984)]

The raid was determined "the worst state-sanctioned violation of children since Herod," violating the basic constitutional rights of hundreds of people (see Judge Mahady's opinion in *In Re: CC* (August, 1984), at www.twelvetribes.com, Appendix B of "Island Pond" paper). However, Burchard's pleas are still read and

relied on as true despite the fact that they were openly repudiated and rebuked by the court. Hence, the need to caution social workers and law enforcement officers: Be careful whom you listen to. Judges also need to be careful what evidence is relied on in cases involving controversial religious groups.

As indicated, Burchard defended his actions and made recommendations about changes he thinks are needed in laws governing such cases in another article (Malcarne and Burchard, 1992). This article also presents an incomplete and biased view of the facts of the case, and seems ignorant of the ACM influences over the process, as well as of the legal problems raised by the actions involved with the raid.

The changes of law recommended in Malcarne and Burchard (1992) are disturbing, because they would expand the power of the state considerably in dealings with religious communities and also thereby limit individual religious freedoms and the freedom of religious communities to practice their faith. Malcarne and Burchard claim that existing child protection laws expect parental cooperation and ready access to children at all times (1992, pp. 85–87). However, Malcarne and Burchard fail to appreciate that both parents and children are entitled to be judged by a government free from religious prejudice and by government agents who understand and respect the Constitution. Thus his recommendations seem one-sided and self-justificatory.

## GERMANY 1994–1998: INFLUENCED BY MICHAEL KROPVELD OF *INFOSECTE MONTREAL*

The second example of social injustice caused by the influence of an individual is the use of material generated by Michael Kropveld, which has been circulated to officials in Germany. Twelve Tribes' members in Germany are faced with the report of Michael Kropveld of *InfoSect Montreal* being used to build a case against them once it surfaced in the hands of a member of the German Parliament. Previous to this report being released, Twelve Tribes Community members in Germany had a generally positive reputation and good communication with education officials. The Kropveld report is based largely on anti-cult misrepresentations from pre-raid days. In the United States, Twelve Tribes' communities have the freedom to home school their children according to their religious belief and practice, but parents in Germany are being pursued by the government on this issue because the government has never allowed home schooling. The educational authorities in Germany can find nothing wrong with Community members' lives or their children, except that the narrowly drafted education law makes no provision for parents to accept legal responsibility for schooling their children.

Kropveld provided an erroneous report alleging social, educational, developmental, psychological, and emotional harm to children in Twelve Tribes Communities to a father of a child whose mother lived in a Twelve Tribes Community in Pennigbuttel, Germany. In that case, a father in search of information about his

ex-wife's new religion made inquiry to *InfoSecte Montreal* as to the anticipated effect of the Community on his young daughter.

Mr. Kropveld sent a 3-page letter to him allegedly "documenting" why his daughter would be at serious risk were she to live in the Community. His sources were newspaper clippings, television shows, a few critical ex-members, and other second- or third-hand sources attempting to discredit the Community. The letter relied on old information provided by Roland Church and Michael Taylor before the Island Pond Raid in 1984 and passed it on, even though 10 years after the 1984 raid, Kropveld was aware that Taylor and Church had recanted and that all the cases were eventually dismissed for lack of evidence. He passed much information on to the father (and therefore much of Germany) that was either deliberately, negligently, or, at best, recklessly false, libelous, and misleading. His letter, written in March 1994, is full of unsubstantiated claims about the practices and beliefs of the Community, some of which attach criminal liability to group members. He relied on information that he had to have known was untrue and contrary to available court records.[2]

In this 1994 letter, Kropveld persists in equating corporal punishment per se with child abuse. He fails to acknowledge, however, the fact that Community children receive outstanding reports from visitors, doctors, and friends, and that *all* cases charging abuse have been dismissed for lack of evidence or other reasons. A supposed truancy conviction in Vermont was cited when there has been none. In fact, the communities have an exemplary working relationship with the state Department of Education, as confirmed by a letter from their attorney in 1994 acknowledging that members comply with state law. Educators who visit communities often are impressed with the caliber of the children's interest, self-confidence, and friendliness, all contraindications of abuse (see Knapp report in Appendix M of Island Pond paper at www.twelvetribes.com).

Kropveld claimed six kidnappings by Community parents when there has not been even one. He ignored the fact that the Community parent had custody of the child in every instance he cited, and that all charges have been dropped. He also misrepresents the beliefs of the group, such as stating that members divide society into "two monolithic blocks," black and white (i.e., evil and good). Contrary to his personal interpretation presented as empirical fact, members believe that there are righteous people outside the Community, and that every man will inherit his eternal destiny according to his deeds.

So where is the accountability for such irresponsible actions? This German custody case is a prime example of how anti-cult activists fail to give members

[2] In January 1998, the author met with Kropveld and presented him with the 1994 letter to Germany and the documentation that proved his conclusions were biased, not objective, erroneous, untrustworthy, and not based on first-hand knowledge. He denied accountability, and has yet to respond to an invitation to a second meeting. He was also the consultant to Michael Dawson's mother, who claims that Kropveld "convinced her to take legal action" against Michael's father rather than to approach him personally about Michael's custody arrangements (see Island Pond paper, Appendix I, www.twelvetribes.com).

of an unsuspecting public the whole story. Both the father and his lawyer in this case trusted the "expert" opinions of Mr. Kropveld, using his letter and a letter from a German anti-sect information agency in Stuttgart as "evidence" in the custody proceeding, even though unsubstantiated. These personal letters to the father, along with other antireligious information, were eventually made available to the anti-sect network throughout Germany and had the effect of promoting religious intolerance through widespread publicity.

The result was that the girl was taken from her mother in the Community even though the judge could find nothing wrong with her except that she did not send her daughter to public school. In fact, the court's finding refuted the charges against the community:

> Specific evidence is lacking as to the girl having been exposed to such treatments, especially the beating with rods for discipline. Up to now, she did not incur any damage in her soul or deficits in her personality. Also, no evidence was found of "psychological brainwashing" of her mother. The court has no right to judge the beliefs of the mother. This can obviously be contributed to the positive child rearing practices of her mother. In this aspect, she cannot be accused of any omissions. (*Schwiebert v. Schwiebert*, 1994, Family Court, Osterholz-Scharmbeck, lower Saxony, Germany)

This episode began shortly after the Community arrived in Pennigbüttel, Germany, in 1994, when Protestant Pastor Gert Glaser, an official Commissioner of Worldviews appointed by the Lutheran Church, began to attack the Community in the media and distributed antireligious and inflammatory information about the Community to government officials. Initially, education officials and the family court judge involved with the community turned a deaf ear, stating that they were uninterested in what supposedly happened in other Twelve Tribes communities in the United States and Canada. However, in August 1995, a few families moved to the small village of Oberbronnen in southern Germany, whereupon the same pastor wrote a letter of warning to the local mayors, churches, and the police.

Just days after writing a favorable newspaper report entitled, "All You Can See Is Happy Children," the same reporter produced a series of negative articles after receiving antireligious information. His sources were ADFI of France, Michael Kropveld, and a Vermont prosecutor who wrote a 2-page letter offering her misleading and inaccurate personal interpretation of members' religious beliefs and practices. This dramatic turnaround from "exemplary community" to "cult" by the media came about not by direct observation of life in the Community, but by reliance on the antireligious, unsubstantiated information gathered by the reporter from unreliable sources, yet used to inform the public. These articles served the purpose of putting public pressure on local officials to act.

As a result of this concerted effort, and the attendant negative publicity, Social Services took action and sent a letter to the local Family Court, asking if the children in the Community in Oberbronnen were in danger and if custody should be taken away from the parents. The fact that the parents of all children regardless of age

were under investigation by the Family Court reveals that it was not just a school issue anymore, but that the Community had been defined as a "problem" to the government based on the antireligious distribution of untruthful data. Eventually, a Family Court judge took responsibility for the issue and paid a surprise visit to the Community himself in August 1997, instead of trusting Social Services to conduct a psychological examination of all the children. He rendered a very positive report. He saw no need for a psychological examination, but ordered an academic evaluation of the school-age children, thus returning solely to the issue of compulsory education. Since May 1998, the parents and educational authorities have been communicating and working toward a solution that accommodates the needs of both the state and the families involved.

## FRANCE: ADFI OPENLY ADVISES GOVERNMENT

Since the early 1980s, the Twelve Tribes/Messianic communities have had a group of approximately 100 or more that have resided at Tabitha's Place in Sus, near Navarrenx, France, within sight of the Atlantic Pyrenees. The leaders and administrators there have maintained open and working relations with local officials in the area. Over the years, the home education of children was questioned, as was the legal structure of the group and the practice of spanking children. However, on numerous occasions, the children have been tested by the educational authorities and also by Social Service officials. Community members cooperated with such investigations, and there was no cause for alarm on the part of officials about the well-being of the children.

Nevertheless, the media and the anti-cult forces have made a substantial impact as far as the public perception of the people at Tabitha's Place. L' Association pour la Défense des Familles et de l'Individu (ADFI), as a private anti-cult advisory group to the government of France (which in turn receives government funding from the French government), duplicates and distributes massive quantities of propaganda against the group. This material is untrue and untrustworthy, yet government officials have failed to properly evaluate its reliability.

The story of ADFI working against the believers at Tabitha's Place began in 1985. Newspapers reported that ADFI had been contacted by two sets of parents of members of the Community in Sus. The parents were a Mr. and Mrs. Nielsen from Los Angeles and a Mr. and Mrs. Töpfer from Berlin. After receiving information about the Community from ADFI, the Nielsens hired a deprogrammer to kidnap their daughter. The Töpfers, however, chose to visit their son at Tabitha's Place in Sus before making any decisions about the well-being of their son. Since that time, the Töpfers have been friends of the Community and have visited several communities on two continents. The son, now a married man in his 30s with young children of his own, enjoys a good and friendly relationship with

his parents. Meanwhile, Kirsten Nielsen (mentioned earlier in this paper), who was deprogrammed twice at great expense to her parents, is now 40 and has hardly any relationship with them because of their unwillingness to respect her life in the Community.

In November 1988, there was another news article in a local paper, *Sud Quest*, which said: "Another group denounced by ADFI, the Northeast Kingdom Community in Vermont, U.S.A., which was spoken of in the papers in 1984 when it had been stated that the children were *regularly beaten*. This sect has a subsidiary in Béarn, at Sus: Tabitha's Place" (emphasis added; Chaintrier, 1988).

This very first article reflects the seriousness of the problem with groups like ADFI that do not take the time to conduct adequate research to determine if the claims were true. Had ADFI desired accurate information, they could have easily discovered that in every case in which allegations of abuse were leveled in Vermont, all charges were dismissed for lack of evidence.

This example raises the question of whether ADFI and the French government itself want to know the truth. The Association for the Defense of Families and Individuals distributes destructive information that is relied on and recognized by the French national government, despite the antireligious bias of the information. There are repeated examples of officials visiting the Twelve Tribes Community at Tabitha's Place, examining children, and coming away with positive reports, but ADFI simply ignores such information. Despite the fact that courts have ruled favorably on behalf of Community members based on the evidence presented in individual cases, ADFI continues in its reckless dissemination of information about the Messianic Communities that is not substantiated. Meanwhile, the evidence suggests a more positive picture. An article in *Sud Ouest* in January 1996, reports: "During an unexpected visit, the substitute of the procurer in charge of the children, Frédérique Loubet, together with gendarmes, *met spontaneous people and especially children that did not look abused, but to the contrary. 'Nothing, for now, made me think that the judge for the children should intervene,' she explained*" (emphasis added; Aristequi, 1996, p. 20). The mayor of Sus also says that the people at Tabitha's Place "don't make problems, that they are polite, and that the children are beautiful." Members practice the teaching, "Train a child up in the way he should go and even when he is old he will not depart from it" (Proverbs 22: p. 6).

In another January 1996 article, ADFI alleges child abuse and child labor abuses in the Twelve Tribes Messianic Communities, but produces no evidence. The same article reports that the Renseignements Généraux (General Information Agency) qualifies Tabitha's Place as a potentially suicidal sect, but again without substantiating their claim. As a result, police investigations were conducted. After the police investigations were over, to his credit, the Minister announced that, "We are in a country of rights. These investigations cannot let us conclude to the claimed danger." A basic understanding of Twelve Tribes doctrine reveals clearly that the

suspected actions are not even in keeping with the faith of the believers there. Scholarly research confirms this (see Palmer and Bozeman, 1997, for discussion of Twelve Tribes' beliefs).

After a series of inflammatory articles about Tabitha's Place following the Solar Temple suicides in February 1996, the state sent out the gendarmes to investigate the people at the Community again. To quote from their report: "We could not see any trace of bad treatment, as the ADFI is claiming. There is no trouble to the public order. They stay home, work and go to the market" (Rouquier, 1996).

It is noteworthy that in case after case involving education, custody, and social services, judges and other public servants, in both Germany and France, have eventually been able to rise above the destructive tactics of the ACM by rendering fair decisions. They simply looked at the facts presented and rose above the prejudicial influences being promoted by anti-cultists and some government officials, even if this sometimes took a while to accomplish.

## CONCLUSIONS

The anti-cult movement (ACM), which Shupe and Bromley (1994, p. 3) refer to as an *industry*, is not a reliable source when seeking the truth about the Twelve Tribes communities. After 20 years of harassment by the ACM, a review of the Twelve Tribes' legal history reveals that antireligionists have repeatedly influenced governments to unfairly prosecute or adjudicate controversies surrounding members of this religious minority. Religious discrimination by the government becomes apparent when one studies the facts and sees that, in case after case, anti-cult data was not a trustworthy source to rely on before making official judgments and taking public action (Shupe, 1998, pp. 209, 212–213; Palmer, 1998, p. 198).

The agenda of the former ACM-oriented Cult Awareness Network included activities that have been well documented. The following listing, derived from careful reading of Lewis (1994), suggests a pattern of action that seems demonstrated by the experience of the Twelve Tribes communities around the world. The steps include: (1) ACM representatives, including deprogrammers, contact disaffected ex-members (who may be engaged in a custody dispute); (2) they coordinate ex-members' meeting with media representatives to stir up public opinion; (3) after sufficient concern is aroused in the general public, they arrange for ex-members to give affidavits about abuse of some sort to social workers to begin regulatory and court proceedings; (4) they use courts, sometimes in *ex parte* hearings, to get judgments against the group that might eventually cause great harm to the organization; (5) they use the exaggerated and even untrue information to further promote the ACM agenda, which in turn causes more people to seek their services (which may be quite expensive); and (6) then they use this information to raise funds from the public to help fight the "cult menace." All of these methods have

been demonstrated by the ACM industry's effort to destroy the Twelve Tribes communities.

In the face of such tactics, Twelve Tribes' members eventually have been vindicated time and time again in the courts, although not without considerable disruption and difficulties for members. Prosecutors and local law enforcement and social service workers entrusted to promote the public good repeatedly relied on untrustworthy anti-cult information, which resulted in an abuse of state authority directed toward Twelve Tribes communities.

The ACM destroys the delicate balance that maintains social and political order by breaking down the boundaries of rightful authority separating government and religion. This is especially a problem in societies such as France and Germany, where there is sometimes a close relationship between private anti-cult groups and the government (see articles, by Introvigne and by Seiwert, this issue). By effectively influencing governments to believe that certain religious groups are a social menace because of what they believe, the stage is set to pursue individual members on a selective basis because of their "dangerous" faith, without reliable evidence that criminal or antisocial activity has happened. The law (at least in some countries) prohibits accusing someone based on guilt by association because guilt is personal [see *Scales v. U.S.*, 367 U.S. 203, 224–25 (1961)].

The ACM thrives in the gap, created by a failure in both governments and religions to recognize the legitimate authority of the other and to properly define their own social and political boundaries. Governments have been deceived into police action by emotional misrepresentations, persuaded to believe them and trust that force is necessary to maintain the public welfare. Anti-cultists, sometimes motivated by religious orthodoxy or antireligious sentiment instead of religious liberty, have sought to limit religious diversity, and cry "Heresy!" or "Abuse!" to provoke government interference in areas in which the government should not tread.

The ACM takes advantage of both mainstream religions and insecure government officials by invoking fear and inducing "moral panic" (Goode and Ben-Yehuda, 1994; Introvigne, 1998) in the public arena. The result is to convince governments that true religious diversity is unnecessary, and at the same time to convince established religions that anything outside the mainstream is dangerous and deserves to be destroyed. This trend is happening now. To maintain a democratic social order, it is essential that false information, induced hysteria, and fear do not replace vigilant, conscientious, and effective law enforcement and government policies.

Oppressive religious discrimination by the government of Vermont was the basis for the seizure of 112 children from the Church Community in Island Pond on June 22, 1984 (see judge's opinion at www.twelvetribes.com, Appendix B of Island Pond paper). In the case of the raid, the reality is that the state government of Vermont, having been persuaded by antireligionists, implemented a policy that

could have led to the destruction of the Northeast Kingdom Community Church in Island Pond. Once influenced to adopt the personal opinions of certain anti-cultists, government agents went forward with the power of the state fully on their side. Officials proceeded on the basis of their prejudiced opinion and slanted interpretations of religious doctrine and practice rather than evidence, and the anti-cultists had accomplished their mission: government and the public had been convinced that the small religious group had something to hide and was a public threat. The climate known as "moral panic" had been orchestrated. Nevertheless, rising above the public pressure to act without evidence, Judge Frank Mahady followed the U.S. Constitution, making it abundantly clear that "Upon a proper evidentiary showing of abuse, this court is not the least reticent to take immediate and effective action under the law to protect the children who are the objects of such abuse" (*In Re: C.C.*, p. 8).

Judicial autonomy such as was demonstrated by Judge Mahady has proved essential to safeguard religious freedom for Twelve Tribes' members. Research documents the fact that antireligionists made deliberate efforts to bias the functions of government against targeted Twelve Tribes' members. When judges assured that due process was followed, guaranteeing notice and a real opportunity for hearing before judgment, anti-cultists have not had evidence to back up their assertions. In marked contrast, discrimination and unfair treatment resulted where anti-cultists had achieved *ex parte* hearings with only one side present. Justice stands a greater chance of being served if agents of government become educated to the deliberate discriminatory tactics of the ACM that are calculated to promote a response of fear and hysteria toward new religious movements in general and Twelve Tribes' members in specific.

A few illustrations make the point. The search warrant authorizing the 1984 raid on the Community Church in Island Pond was issued by a judge who later admitted being influenced by anti-cultists with "bad information." Another judge reviewed the warrant, declaring it illegal and the resulting seizure of 112 children grossly unlawful and unconstitutional. In Germany, a Family Court judge elected to visit Community households himself rather than entrusting the job to social workers influenced by discriminatory material. He found the children healthy and happy. However, the cost of two *ex parte* hearings to Isaac and Michael Dawson was 5 years of separation at the hands of legal battling, substantial unwarranted jail time for the father, and unfortunate juvenile detention for the son. Eventually a new judge ruled that there had been religious discrimination and a denial of fundamental justice at the initial stages in Family Court, but harm had already been done.

The essential ingredient to fairness and justice for minority religions is that courts demand valid evidence before ruling and take care to weigh the reliability and sources of the information on which they rely. Courts and other governmental entities must make certain that they are acting with full and accurate information,

and that they are not simply furthering the agendas of those who would limit the rights of others. When such care is not exercised, egregious actions such as what happened at Island Pond can result. Judge Mahady assessed the government's actions in the raid, which included taking three photographs of each of the children without permission by the parents or the court, as well as the children being taken by authorities on the basis of a faulty warrant:

> The delegation of judicial authority claimed by the State to have been made here is so broad as to violate due process rights. It provided law enforcement authorities the power to do "whatever was necessary" to identify the children. Taken literally, such presumptive delegation of authority would allow the tattooing of numbers of the arms of children for the purposes of later identification. In fact, many of the fears well expressed by Mrs. Justice O'Connor in *Kolender v. Lawson*, 461 U.S. ___1983, came home to roost in Island Pond on June 22, 1984. The photographs of the children were taken without legitimate authority. (*In Re: C.C.*, p. 6)

Judge Mahady's decision stopped such actions, at least in that traumatic episode. More judges should follow his example, and act on the autonomy vested in them in a democratic society.

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*Family and Children's Services of King County v. E.F. Dawson*, 12 R.F.L. (3d) 104 (N.S.C.A. 1988). Nova Scotia Court of Appeal ruling that seizure of Dawson's son was unfounded.

*The Queen v. Dawson*, Nova Scotia Supreme Court, Kentville, Sept. 14, 1994, and Nov. 14, 1997. Two not guilty verdicts rendered.

*Kolender v. Lawson*, 103 S.Ct. 1855 (1983).

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STATE OF VERMONT
ORLEANS COUNTY, ss.

Appendix B 1)

| | | |
|---|---|---|
| IN RE: CERTAIN CHILDREN | ) | DISTRICT COURT OF VERMONT |
| | ) | |
| | ) | UNIT NO. 3, ORLEANS CIRCUIT |
| | ) | |
| | ) | DOCKET NO. |



OPINION: DETENTION ORDER

At dawn on June 22, 1984, 112 children were taken into custody by the State in Island Pond, Vermont. They were delivered to this Court pursuant to 33 V.S.A. §640(2) at which time the State requested a blanket order of detention under 33 V.S.A. §641.

The Court refused to proceed ex parte and appointed counsel for the parents as well as counsel for the children on its own motion pursuant to 33 V.S.A. §653. Individual, contested hearings were then held with regard to the State's request for Section 641 orders of detention.

Each such request was denied by the Court from the bench, and the Court indicated that this Opinion regarding those Orders would subsequently be filed.

(A.)

One purpose of Vermont's Juvenile Procedures Act is "to provide for the care, protection and wholesome moral, mental and physical development of children." 33 V.S.A. §631(a)(1).

However, it is the unequivocal goal of the Vermont legislature "to achieve [this] purpose, whenever possible, in a family

environment, separating the child from his parents only when necessary for his welfare." 33 V.S.A. §631(a)(3). (emphasis supplied).

This clause recognizes the fact that "the freedom of children and parents to relate to one another in the context of the family, free of governmental interference, is a basic liberty long established in our constitutional law." In re N.H., 135 Vt. 230, 236 (1977) [Hill, J.]; see, Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923). The legislature, in Section 631(a)(3), has expressly provided that a child be separated from his parents only when necessary precisely in order to ensure that this fundamental liberty will not be unduly tampered with. In re N.H., op. cit.; In re J.M., 131 Vt. 604, 609 (1972).

(B.)

When the Court applies these clear and unambiguous constitutional and legislative mandates, regard must be had for compelling parental rights. In re N.H., op. cit. at 237. Therefore, Vermont's Courts "have proceeded with great caution, and continue to do so in light of the awesome power involved" with the removal of children from their parents. In re G.V. and R.P., 136 Vt. 499, 503 (1978); In re D.T., 136 Vt. 478 (1978); In re J. & J.W., 134 Vt. 490 (1976).

Of course, the best interests of the child involved is the principal concern in juvenile proceedings. However, as Mr. Justice Larrow has pointed out, "the 'best interest of the child' is a useful maximum, but it comes into play only when there is a legal justification." In re J. & J.W., op. cit. at 485, 486 (Larrow, J., concurring).

(C.)

It is in this context that Mr. Justice Hill, writing for a unanimous Court, explicitly set out the controlling rule of law: "Accordingly, any time the State seeks to interfere with the rights of parents on the generalized assumption that the children are in need of care and supervision, it must first produce sufficient evidence to demonstrate that the statutory directives allowing such intervention are fully satisfied." In re N.H., op. cit. at 235; In re J.M., op. cit. at 607.

Therefore, it is the burden and heavy responsibility of the State to demonstrate by sufficient evidence, not generalized assumption, that it is necessary to separate each of these 112 children from his or her parents. 33 V.S.A. §631(a)(3).

(D.)

The State virtually admits that it cannot meet this burden. It's Petition, on its face, does not even allege that the

children are, indeed, in need of care and supervision. The allegation is merely a blatantly generalized assumption that "all children under the age of 18 residing in the Community of the Northeast Kingdom Community Church (NEKCC) in Island Pond. . .may be in need of care and supervision. . .." (emphasis supplied).

Moreover, the State admits that there is not a single piece of evidence in the material submitted that documents a single act of abuse or neglect with regard to any of the 112 children.

The theory is that there is some evidence of some abuse at some time in the past of some other children in the community. The same, of course, may be shown of Middlebury, Burlington, Rutland, Newport or any other community. Such generalized assumptions do not warrant mass raids by the police removing the children of Middlebury, Burlington, Rutland, Newport or any other community (even a small, unpopular one).

Adlai Stevenson once noted that "guilt is personal", and I might add "not communal". Our Court has held many times that mere presence at a particular place is not sufficient to establish participation in a particular act. See, e.g., State v. Wood, 143 Vt. 408, 411 (1983); State v. Carter, 138 Vt. 264, 269 (1980); State v. Orlandi, 106 Vt. 165, 171 (1934).

Therefore, "when the Court seeks to take the child out of [the] parental home, it may do so only upon convincing proof." In re Y.B., 143 Vt. 344, 347 (1983) [Billings, C.J.]. Here, the State lacks any proof whatsoever as to these children and these parents, much less "convincing proof". "The right of children and parents to relate to each other free of government interference is a basic liberty. . .and will only be interfered with

upon requisite proof of parental unfitness." In re Y.B., op. cit. at 348. One's right to the care, custody and control of one's children is a fundamental liberty interest protected as well by the due process clause of the Fourteenth Amendment to the United States Constitution. In re C.L., 143 Vt. 554, 557-58 (1983); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

These concerns apply at the detention stage of juvenile proceedings. "In cases of juvenile detention it is important . . .to minimize the possible intrusion upon the parents' constitutional right to family integrity." In re R.S., 143 Vt. 565, 569 (1983)[Gibson, J.].

For these reasons this Court refused the State's rather incredible request that the Court issue a blanket detention order for 112 children ex parte and without even holding hearings. The same reasons compelled denial of that request after holding the adversary hearings.

(E.)

Indeed, it is all too clear that the State's request for the protective detention permitted by the statute upon an appropriate showing was entirely pretextual. What the State really sought was investigative detention.

In effect, each of the children was viewed as a piece of potential evidence. It was the State's admitted purpose to

transport each of the 112 children to a special clinic where they were to be examined by a team of doctors and psychologists for evidence of abuse. If no signs of abuse were found, a child would be returned to its parents provided the parents "cooperated", that is, gave certain information to the police.

Thus, not only were the children to be treated as mere pieces of evidence; they were also to be held hostage to the ransom demand of information from the parents.

This stated plan of the State lends credence to the complaint of a number of the parents during the course of the hearings to the effect that they had been told by law enforcement personnel at the time of the raid that they would not be reunified with their children unless they gave certain information. During the course of the hearings the State did indicate that, if custody were awarded, children would be returned to "cooperative parents".

Had the Court issued the detention orders requested by the State it would have made itself a party to this grossly unlawful scheme.

In our society, poeple are not pieces of evidence. Such a "contention. . .clashes with a fundamental written into our Constitution. . .; no human being in the United States may be [so] dealt with. . .by government officials, or by anyone else." Blackie's House of Beef, Inc. v. Castillo, 467 F.Supp. 170 (D.C. D.C. 1978). Our rules relating to the issuance of search warrants reflects this basic concept. Such a warrant may be issued for a person only if there is probable cause to arrest that person, V.R.Cr.P. 41(c)(5), or for a person who has been kidnapped or

unlawfully imprisoned or restrained. V.R.Cr.P. 41(b)(4).

Were it otherwise, the State could use the device of a search warrant or other detention to compel a traumatized rape victim to submit to physical and psychological examination in order to provide the State with evidence. Our society and laws would not for a moment countenance such an outrage. Yet, that is precisely how the State here proposes to treat these 112 children.

As for that part of the scheme that would return the children to "cooperative parents", such practices are disapproved "because of society's abhorrence of techniques of coercion". Whitebread, Constitutional Criminal Procedure, 163. Statements may not be obtained by means of physical brutality, Brown v. Mississippi, 297 U.S. 278 (1936); Williams v. United States, 341 U.S. 97 (1951) nor by psychological pressures. Spano v. New York, 360 U.S. 315 (1959).

No person may be held "in order that he may be at the disposal of the authorities while a case is discovered against him." In re Davis, 126 Vt. 142, 143 (1966). Neither may his child.

(F.)

Upon a proper evidentiary showing of abuse, this Court is not the least reticent to take immediate and effective action under the law to protect the children who are the objects of such abuse.

Even such a goal as avoiding the abuse of children, however, cannot justify the means here employed.

The request for the detention orders were properly DENIED.

Dated this 25th day of June, 1984.

Frank G. Mahady, District Judge

STATE OF VERMONT
ORLEANS COUNTY, ss.

Appendix B 2)

IN RE: CERTAIN CHILDREN

) DISTRICT COURT OF VERMONT
) UNIT NO. 3, ORLEANS CIRCUIT
) DOCKET NO.
)

OPINION: PHOTOGRAPHS

At dawn on June 22, 1984, 112 children were taken into custody by the State in Island Pond, Vermont. The authorities thereupon took three photographs of each child. One photograph of each child was attached to the return of custody form presented to the Court; one photograph of each child was retained by the police; one photograph of each child was given to Social and Rehabilitation Services.

During the course of hearings held on June 22, 1984, this Court ordered from the bench that all three photographs of each of the 112 children be delivered to the Court and sealed no later than the close of business on Monday, June 25, 1984. The Court at that time indicated that this Opinion regarding that Order would subsequently be filed.

(A.)

The controlling statute is clear: "no photograph shall be taken of any child when taken into custody without the consent of the judge." 33 V.S.A. §864(c).

The State represents that they requested such consent from Hon. Joseph Wolchik during an ex parte hearing prior to June 22. The Judge, according to the State, refused to specifically give such consent but indicated that the law enforcement authorities could "do whatever was necessary" to identify the children.

That hearing was tape recorded and no transcription of that tape has yet been made available. A transcript is not necessary to a proper disposition of the issue.

This Court finds it difficult, if not impossible, to believ that any judicial officer would issue such a sweeping delegation of his Constitutional duties to law enforcement authorities.[1/] This Opinion, however, for the sake of argument, will proceed on the assumption that such an unprecedented delegation did, in fact, occur. That assumption avails the State not at all.

(B.)

First, such a sweeping indication to "do whatever was necessary" to identify the children is simply that---an "indication". It clearly is not the specific consent to photograph a specific child under specific circumstances for specific good cause shown which is contemplated by the statute, 33 V.S.A. §664(e).

When construing a statute, it is necessary to consider the statute's subject matter, effects and consequences as well as the spirit and reason of the law. State v. Teachout, 142 Vt 69 (1982); Langrock v. Department of Taxes, 139 Vt. 108 (1980).

The real meaning and purpose of the legislature should be determined and put into effect. State v. Mastaler, 130 Vt. 44 (1971) see, Philbrook v. Glodgett, 421 U.S. 707 (1975). This statute unmistakably intends to prohibit the taking of photographs of children taken into custody without specific judicial consent There was none here.

(C.)

Second, it is all too apparent that the law enforcement authorities exceeded even the very broad consent they claim was obtained from Judge Wolchik.

That consent was conditioned upon the action taken being necessary to identify the children. A majority of the children taken into custody and their parents identified themselves by name to the police. Yet, all 112 children were photographed. Obviously, there was absolutely no need to photograph the majority of the children to identify them.

This fact alone illustrates the evil of such broad delegation of judicial authority to law enforcement. At best, the police went about taking pictures with unrestrained zeal; at worst, there is an ulterior motive behind the taking of the photographs.

(D.)

Third, such a delegation of judicial authority to law enforcement is constitutionally invalid under Vermont's separation of powers doctrine. The legislature has specifically provided that it is for the judiciary to determine whether a photograph of a specific detained child should be taken. 33 V.S.A. §664(e).

Our Constitution leaves no room for doubt as to such a fundamental issue: "The Legislative, Executive, and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others." VT. CONST Ch. II, sec. 5.

The Executive, therefore, may not exercise the powers properly belonging to the Judiciary under 33 V.S.A. §664(e).

Nor may the Judiciary effectively delegate such power to the Executive. It is a fundamental principle of the American Constitutional system, clearly expressed in Vermont's own State Constitution (Ch. II, sec. 5), that the legislative, executive and judicial departments of government are separate from each other, and therefore such functions of one department as purely and strictly belong to that department cannot be delegated, but must be exercised by it alone. State v. Auclair, 110 Vt. 147, 162 (1939) [Moulton, C.J.]; Village of Waterbury v. Melendy, 109 Vt. 441, 448 (1938).

Even were this one of those situations where necessity

dictates some delegation, which it is not, any such delegation must not be unrestrained and arbitrary; it is essential that even permissible delegation establish certain basic standards, definite and certain policy, and rules of action. State v. Auclair, op. cit. at 163. A delegation to "do whatever is necessary", on its face, fails woefully to establish any such standards, policies or rules.

(E.)

Fourth, the Fourteenth Amendment to the Federal Constitution precludes such unrestrained delegation of authority to the police. It is not for them to determine "whatever is necessary" for them to do. As Mrs. Justice O'Connor has recently noted, there must be "minimal guidelines to govern law enforcement" and it is not permissible to allow "a standardless sweep that allows policemen [and] prosecutors. . .to pursue their personal predelictions." The present cases illustrate all too well Mrs. Justice O'Connor's concern that such a situation "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure" as well as her concerns centering upon "the potential for arbitrarily suppressing First Amendment liberties." Kolender v. Lawson, 461 U.S. ___, 103 S.Ct. 1855 (1983).

The delegation of judicial authority claimed by the State to have been made here is so broad as to violate due process

rights. It provided law enforcement authorities the power to do "whatever was necessary" to identify the children. Taken literally, it would allow the tattooing of numbers on the arms of the children for the purpose of later identification. In fact, many of the fears so well expressed by Mrs. Justice O'Connor in Kolender came home to roost in Island Pond on June 22, 1984.

The photographs of the children were taken without legitimate authority.

Dated this 25th day of June, 1984.

Frank G. Mahady, District Judge

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1/ Indeed, it is of interest to note that Judge Wolchik's Order of June 21, 1984 contains absolutely no reference whatsoever to any such matter.

STATE OF VERMONT
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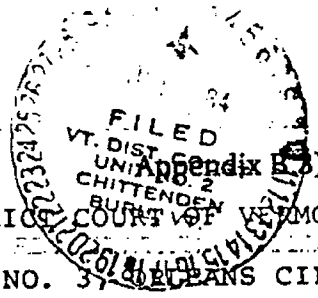


(Appendix B.3)

IN RE: CERTAIN CHILDREN ) DISTRICT COURT OF VERMONT
) UNIT NO. 37 ORLEANS CIRCUIT
) DOCKET NO.

OPINION: DISMISSALS

On June 22, 1984, the State brought 112 children who had been taken into custody in Island Pond, Vermont, before this Court pursuant to 33 V.S.A. §640(2). The Court refused to grant orders of detention under 33 V.S.A. §641 as to any of the children. The Court also dismissed the State's Petition as to 45 children.

At the time of the dismissals from the bench, the Court indicated that this Opinion would subsequently be filed.

(A.)

In each case that was dismissed, the State was unable to furnish the Court with the name of the child or the name and residence of the child's parent, custodian or guardian as required by 33 V.S.A. §646(2).

Of course, under certain circumstances "John Doe" juvenile petitions may be appropriate. The example of an abandoned infant comes immediately to mind. Clearly, the Legislature in adopting 33 V.S.A. §646(2) did not intend the irrational result

of precluding State action under such circumstances.

However, under the circumstances presented to this Court on June 22, the State's own theory of the case ran obviously afoul of both the First Amendment and the Fifth Amendment to the United States Constitution.

The State argued its case well and clearly. Its theory was that there was considerable evidence of the abuse of some children in the past by some members of the Northeast Kingdom Community Church in Island Pond.

The Deputy Attorney General and the Special Assistant Attorney General both stated to the Court that there was no evidence whatsoever of any specific acts of abuse directed toward any one of the 112 children brought before the Court.

To close this obvious probable cause gap, the State argued that the 112 children were found in residences or other buildings owned by the church and that it was a basic tenet of the church to harshly discipline children. The argument concluded that each of the 112 children "may be in need of care and supervision."

Therefore, the essential causal nexus in the State's position was the association of each child's parent, custodian or guardian with the church in the face of the church's tenet and teachings regarding child discipline.1/

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1/ The same analysis applied to the State's allegations of truancy and lack of proper medical care.

(B.)

This reasoning fails logically with its first assumption. That assumption is that the children and custodians found within the buildings of the church are associated with the church.

Simple logic dictates that the conclusion does not necessarily follow from the premise. In fact, the hearings held on June 22 demonstrated the opposite. By way of example, the State's dragnet ensnared not only church members but also at leas three children from Rutland County, one child from Massachusetts, and one thoroughly annoyed lawyer from Hardwick.

With regard to the cases dismissed, this Court could not in good conscience ignore this gaping hole in the State's case as to children and custodians whom the State could not even identify much less associate with the church and its tenets. The law is absolutely clear that mere presence at a particular place is not sufficient to establish participation in a particular act. See, e.g., State v. Wood, 143 Vt. 408, 411 (1983); State v. Carter, 138 Vt. 264, 269 (1980); State v. Orlandi, 106 Vt. 165, 171 (1934).

(C.)

Even were the State able to overcome this threshold problem, it would be met by yet more fundamental obstacles. If we assume for the purpose of argument that each child was under the control of a parent, custodian or guardian associated with the church, and that it is a tenet of the church to harshly discipline children, simple logic again dictates that the conclusion that each such child has been illegally disciplined does not follow. (Many Catholics, for example, exercise birth control.)

Even were the Court to ignore this logical flaw in the State's position, the probable cause argument offends (1.) the Fifth Amendment in that it impermissibly imputes guilt to an individual merely on the basis of his associations rather than because of some concrete personal involvement; see, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964), and (2.) the First Amendment in that it infringes on the free exercise of religion and association, see, e.g., United States v. Robel, 389 U.S. 258 (1967). Such basic and fundamental concerns the Court cannot ignore.

(D.)

As Mr. Justice Harlan has said, "in our jurisprudence guilt is personal" and where the government attempts to impute conduct to an individual by reason of that individual's associations "that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." Scales v. United States, 367 U.S. 203, 224-25 (1961).

Moreover, "the First Amendment guarantees freedom of association with religious and political organizations, however unpopular. Thus, the government cannot punish an individual for mere membership in a religious or political organization that embraces both illegal and legal aims unless the individual specifically intends to further the group's illegal aims." United States v. Lemon, 723 F.2d 922, 939 (D.C. Cir. 1983).

Therefore, in such cases, "there must be clear proof that a [person] specifically intends to accomplish [the illegal aims of the organization]." Scales v. United States, op. cit. at 229 (emphasis supplied); Noto v. United States, 367 U.S. 290, 299 (1961). The test is well-established: the State must not only establish that the individual is a member of an organization embracing illegal aims; it must also show by clear proof that such a person is an active member of such an organization and that he or she specifically intends to carry out such illegal

aims. Hellman v. United States, 298 F.2d 810, 812-13 (9th Cir. 1962); United States v. Lemon, op. cit. at 939-40; United States v. Robel, op. cit.; Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, op. cit.; Scales v. United States op. cit.

Here, where the State cannot even identify the individual parent, custodian or guardian, it fails entirely to meet its Constitutionally mandated burden. Compare, e.g., United States v Robel, op. cit.

(E.)

While most of the cases involving these First and Fifth Amendment issues have dealt with the validity of criminal statutes, "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." Healy v. James, 408 U.S. 169, 185-86 (1973)[emphasis supplied]; N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 896, 919 (1982).

These Constitutional principles, for example, have been applied to the government's right to revoke a passport, Aptheker v. Secretary of State, op. cit., to regulate admission to the bar, Baird v. State of Arizona, 401 U.S. 1 (1971), and to deny public employment. Keyishian v. Board of Regents, 385 U.S 589 (1967). Clearly, they apply to the fundamental liberty

interest in one's right to the care, custody and control of one's children which is protected by the Due Process Clause of the Fourteenth Amendment. In re C.L., 143 Vt. 554,557-58 (1983); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

(F.)

This is not to ignore the fact that the State demonstrates a legitimate and compelling interest. It does. The problem of child abuse is a grave one to which this Court has given substantial attention. It is one of our most serious societal problems. It is, therefore, entirely proper and, indeed, desirable for the State to attack it aggressively. In short, the State's motives are not at issue.

Mr. Chief Justice Warren in Robel wrote, "however, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." United States v. Robel, op. cit. at 263. Likewise, the phrase "child abuse" cannot be invoked as a talismanic incantation to support the exercise of State power which egregiously violates both First and Fifth Amendment rights. Even where the State acts in a noble cause, it must act lawfully.

There was no probable cause for the Petition as applied to the facts of the cases dismissed. They were therefore properly DISMISSED.

Dated at Middlebury, Vermont this 2nd day July, 1984.

Frank G. Mahady, District Judge

STATE OF VERMONT
ORLEANS COUNTY, ss.

AUG 8 1984 Appendix B 4)

| | | |
|---|---|---|
| IN RE: CERTAIN CHILDREN | ) | DISTRICT COURT OF VERMONT |
| | ) | |
| | ) | UNIT NO. 3, ORLEANS CIRCUIT |
| | ) | |
| | ) | DOCKET NO. 22-6-84Osj |

OPINION AND ORDER: PETITION

The parents have moved to dismiss the Petition in this proceeding. The Motion was heard at North Hero, Vermont, on July 12, 1984.

The State has filed eight Amended Petitions. This Opinion and Order does not address those Amended Petitions. Hearings on the Motion to Dismiss will be held separately on each such petition at a time to be scheduled by the Clerk.

(I)

A.

In Vermont, the juvenile court has "exclusive jurisdiction over all proceedings concerning any child who is or who is alleged to be... a child in need of care or supervision... ." 33 V.S.A. §633(a). This jurisdiction is invoked by the filing of a petition: "Upon the request of the commissioner of social

and rehabilitation services... the State's Attorney [1/] having jurisdiction shall prepare and file a petition alleging that a child is in need of care and supervision." 33 V.S.A. §645(a). The petition must be verified. 33 V.S.A. §646.

Such a petition "shall set forth plainly the facts which bring the child within the jurisdiction of the court... ."

The petition here (excluding from consideration the eight amended petitions subsequently filed) nowhere alleges that any of the children are children in need of care and supervision. The only allegation is a blatantly generalized assumption that "all children under the age of 18 residing in the community of the Northeast Kingdom Community Church (NEKCC)... may be in need of care and supervision." (emphasis supplied). This simply does not meet the requirements of the statutes that the State's Attorney (or, presumably the Attorney General) set forth in a verified petition that a child brought before the Court "is or... is alleged to be...a child in need of care or supervision."

The State attempts to avoid this responsibility by pointing to that part of the Petition which reads "therefore, your petitioner asks the Court to hear the petition and find that all

1/ The juveniles here involved were found in the Town of Brighton. The Essex County State's Attorney has not appeared in this case, nor has the Court had any indication of his role (if any) or his position in this matter. There is no evidence that he withdrew or declined to take action as was the situation in State's Attorney v. Attorney General, 138 Vt. 10 (1979); however, it would appear that the holding in State's Attorney v. Attorney General would support the assumption of authority here by the Attorney General although the cases are arguably distinguishable.

children residing in the community of the NEKCC as designated above are in need of care and supervision." (emphasis supplied in State's Memorandum). Of course, the simple answer to this frankly sophistic argument is that there the State "asks", it does not "allege". The statutes require the State to make a verified allegation, not a prayer for relief.

Given the generalized assumptions upon which the State relies, and given the continuing admission of the State that it has no specific evidence of abuse, truancy or lack of adequate medical care as to any specific child or parent, it is not surprising that no attorney for the State apparently was willing to put his signature to a verified petition which actually alleged any of these children to be, in fact, in need of care and supervision.[2/]

It is certainly inappropriate for the Judiciary to allow the Executive to circumvent the clear requirements (particularly that of a verified allegation) set forth by the Legislature.

The Petition is defective on its face.[3/] The defect is jurisdictional. 33 V.S.A. §633(a).

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2/ See, State v. Woodmansee, 128 Vt. 467, 472 (1970): "It is the law of the State of Vermont that a State's Attorney shall not set his hand to an official complaint, unless he has gone far enough...to satisfy himself of the probable guilt of the party to be charged."

3/ It also must be noted that the facially defective nature of the Petition was brought to the attention of the State by Justice Keyser on June 19, 1984, in the matter of In re Certain Children, Docket No. 1-6-84Ej.

This defect underscores the fundamental difficulty with the State's attempted justification for these proceedings: it sought, through the juvenile proceedings, an investigative detention which, the State hoped, would provide proof to support the initiation of the juvenile proceedings. This puts the cart before the horse. Under our system of justice, the State must have an adequate factual basis upon which to act against individuals first; it cannot act first, then hope that the action itself will unearth proof to retroactively justify the action. In the context of this case, these are not easily corrected problems of technical pleading; they rather are difficulties of fundamental concern which go to the very heart of the matter. 4/

B.

On its face, the Petition gives no notice, or even indication, to the parents or to the juveniles as to the claims of the State which they will be required to meet. Cf, e.g., In re Anonymous, 37 Misc. 2d 827, 238 N.Y.S. 2d 792 (1962); In re

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4/ The State claims justification here under 33 V.S.A. §685. Of course, what was done here does not come close to the procedures set forth in Sec. 658. One can only be left to wonder why that statute was not utilized in the first instance. Such investigative detentions involve "a massive curtailment of liberty", and even where specifically authorized by statute serious scrutiny must be given to the procedures surrounding them. See, In re W.H. ___Vt.___ (1984).

Neal D., 100 Cal. Rptr. 706, 708-9 (1972).

The State attempts to save the Petition from this inadequate notice under due process standards through the use of the affidavit attached to the Petition and incorporated into the Petition by reference.

Of course, it is appropriate to read the petition in conjunction with the supporting affidavit. In re S.A.M., 140 Vt. 194, 197 (1981); In re T.M., 138 Vt. 427, 429 (1980); In re Certain Neglected Children, 134 Vt. 74, 77-78 (1975). However, in both In re S.A.M. and In re T.M., the Supreme Court has warned very clearly "that it would be better practice for the State to provide for specific allegations of the grounds relied on in its petition." See, also, In re A.D., 143 Vt. 432, 435 (1983). The State ignores such repeated warnings at its peril.

The basic problem, of course, is the State's admission that the affidavit contains no specific allegation or specific evidence of abuse, truancy, or lack of adequate medical care as to any specific child or parent. (Compare, by way of example, the opinion of Mr. Justice Peck in In re A.D., op. cit.)

In the present case, the Petition makes no attempt to allege facts constituting any of the children to be children in need of care or supervision. Although the accompanying affidavit does make reference to other specific children, presumably living in the same community, it is essentially a collection of generalized assumptions as to these children. There is no documented evidence before the Court that any of the children or parents are even active, participating members of that community. (Indeed, at the

detention hearing, it was demonstrated that some were not.)

It is not required of each parent and each child to "sort out from the morass of claims" those allegations and generalized assumptions which may, somehow, relate to them. See, State v. Phillips, 142 Vt. 283, 289-90 (1982); compare, State v. Christman, 135 Vt. 59 (1977). Such a morass does not reasonably indicate to the parent or the juvenile the nature of the State's specific claim as to them nor does it provide a basis which would make possible intelligent preparation for a merits hearing.[5/] See, Besharov, Juvenile Justice Advocacy, 189 et. seq. (1979).

Moreover, this morass does not come close to satisfying the statutory requirement that a juvenile petition "set forth plainly the facts which bring the child within the jurisdiction of the court." 33 V.S.A. §646(1) [emphasis supplied].

It is true that modern rules of pleading are designed to forgive the sloppy pleader. They do not, however, carry such forgiveness to the point of requiring adverse parties to guess what specific claims against them as individuals they will need to meet. "One of the stated purposes of Title 33, Ch. 12 is to assure a fair hearing and protection of the parties' constitutional and other legal rights." In re T.M., op. cit. at 429-30; 33 V.S.A. §631(a)(4); see, In re Lee, 126 Vt. 156, 158-59 (1966).

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5/In this regard, it is interesting to note that a number of highly skilled and experienced attorneys representing the children have indicated, as officers of the Court, that they are unable, on the basis of the pleadings, to even conduct meaningful initial interviews with their clients.

(II)

A.

The State has argued its case well and clearly. Its theory claims that probable cause exists because there is considerable evidence indicating the abuse of some children in the past by some members of the Northeast Kingdom Community Church in Island Pond. The State admits, however, that there is no evidence whatsoever of any specific acts of abuse or neglect as to any one of the children subject to the Petition. 6/

Attempting to close this obvious probable cause gap, the State argues: 1) it is a basic tenet of the church to use corporal punishment to discipline its children; and 2) that the children were found in residences or other buildings owned by the church and therefore must be members of the church subject to discipline. The argument concludes that each of the children is, therefore, "at risk" and "may be in need of care and supervision", based on "their environment".

The essential causal nexus in the State's position is the association of each child's parent, custodian or guardian with the church in the face of the church's tenet and teachings regarding child discipline. While the State prefers to describe its approach as an "environment theory", seen properly it is an "association theory". As such, it runs obviously afoul of

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6/ The same analysis applies to the State's allegations of truancy and lack of proper medical care.

simple logic as well as both the First Amendment and the Fifth Amendment to the United States Constitution.[7/]

B.

The State's argument fails logically with its first assumption, i.e., that the children and custodians found within the buildings of the church are associated with the church.

Simple logic dictates that the conclusion does not necessarily follow from the premise. In fact, the hearings held on June 22 demonstrated the opposite. By way of example, the State's dragnet ensnared not only church members but also at least three children from Rutland County, one child from Massachusetts, and one thoroughly annoyed lawyer from Hardwick.

The law recognizes this simple logic and is absolutely clear: mere presence at a particular place is not sufficient to establish participation in a particular act. See, e.g., State v. Wood, 143 Vt. 408, 411 (1983); State v. Carter, 138 Vt. 264, 269 (1980); State v. Orlandi, 106 Vt. 165, 171 (1934).

Even were the State able to overcome this threshold problem, it would be met by another logical obstacle. If we assume for the purpose of argument that each child is under the control of a parent, custodian or guardian associated with the church, and further, that it is a tenet of the church to harshly discipline children, simple logic again dictates that the conclusion that each such child has been illegally disciplined does not follow. (Many Catholics, for example, exercise birth control.)

7/ Of course, the State's analogy to a community inflicted by an epidemic of a contagious disease does not share these difficulties.

C.

Even were the Court to ignore these logical flaws in the State's position, the argument fundamentally offends 1.) the Fifth Amendment in that it impermissibly imputes guilt to an individual merely on the basis of his associations rather than because of some concrete personal involvement; see, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964), and 2.) the First Amendment in that it infringes on the free exercise of association, see, e.g., United States v. Robel, 389 U.S. 258 (1967). Such basic and fundamental concerns the Court cannot ignore.

Mr. Justice Harlan has said, "in our jurisprudence guilt is personal"; where the government attempts to impute conduct to an individual by reason of that individual's associations, "that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." Scales v. United States, 367 U.S. 203, 224-25 (1961).

Moreover, "the First Amendment guarantees freedom of association with religious and political organizations, however unpopular. Thus, the government cannot punish an individual for mere membership in a religious or political organization that embraces both illegal and legal aims unless the individual specifically intends to further the group's illegal aims." United States v. Lemon, 723 F.2d 922, 939 (D.C. Cir. 1983).

Therefore, in such cases, "there must be clear proof that a [person] specifically intends to accomplish [the illegal aims of the organization]." Scales v. United States, op. cit. at 229 (emphasis supplied); Noto v. United States, 367 U.S. 290, 299 (1961). The test is well established: the State must not only establish that the individual is a member of an organization embracing illegal aims; it must also show by clear proof that such a person is an active member of such an organization and that he or she specifically intends to carry out such illegal aims. Hellman v. United States, 298 F.2d 810, 812-13 (9th Cir. 1962); United States v. Lemon, op. cit. at 939-40; United States v. Robel, op. cit.; Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, op. cit.; Scales v. United States, op. cit. The State presents no such evidence.

D.

While most of the cases involving these First and Fifth Amendment issues have dealt with the validity of criminal statutes, "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." Healy v. James, 408 U.S. 169, 185-86 (1973) [emphasis supplied]; N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 896, 919 (1982).

These Constitutional principles, for example, have been applied to the government's right to revoke a passport, Aptheker v. Secretary of State, op. cit., to regulate admission to the bar, Baird v. State of Arizona, 401 U.S. 1 (1971), and to deny public employment. Keyishian v. Board of Regents, 385 U.S. 589 (1967). Clearly, they apply to the fundamental liberty interest in one's right to the care, custody and control of one's children which is protected by the Due Process Clause of the Fourteenth Amendment. In re C.L., 143 Vt. 554, 557-58 (1983); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

E.

Child abuse is one of our most serious societal problems. It is, therefore, entirely proper and, indeed, desirable for the State to attack it aggressively. [8/]

Mr. Chief Justice Warren in Robel wrote, "however, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." United States v. Robel, op. cit. at 263. Likewise, the phrase "child abuse" cannot be invoked as

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[8/] However, cases such as Prince v. Massachusetts, 321 U.S. 158 (1944) and State v. Rocheleau, 142 Vt. 61 (1982) are hardly in point. The individual right and interest in the integrity of the family as well as the privacy expectation in one's own residence are far more important than the interest in a minor selling papers or the smoking of marijuana. Moreover, those cases are "free exercise" cases and would support the proposition that that clause of the First Amendment would not protect child abuse. With that proposition the Court emphatically agrees, but it is not here in issue.

a talismanic incantation to support the exercise of state power which egregiously violates both First and Fifth Amendment rights. Even where the State acts in a sphere appropriate to state action, it must act lawfully. 9/

Here, the State can establish probable cause only by adopting a theory of guilt by association. Such a theory is unlawful.

F.

The State argues that it need not establish "probable cause" but rather only "reasonable grounds". Whichever label is used, the State fails to meet its burden.

Mr. Justice Frankfurter once wrote that "it is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge." Mallory v. United States, 354 U.S. 449, 456 (1957). Likewise, it is not the function of the State to take children into custody, as it were, at large and to use physical and psychological examinations during detention in order to determine whom they should make the subject of

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9/ The State in a supplemental memorandum, filed out of time, attempts to justify the Petition on the ground that the children have a due process right to State intervention. It relies upon a single trial court decision from South Carolina, Jensen v. Conrad, 570 F.Supp. 114 (D.C.S.C. 1983). The State, of course, has no standing to assert this right in the first instance. (Of interest in this regard is the fact that of 30 attorneys representing the interests of the children, not one saw fit to raise this issue on their behalf.) Moreover, Jensen at most requires the State to conduct a proper investigation. While the State may be required to take action, it must nevertheless do so properly and with a due regard for the rights of all involved.

juvenile petitions.

The very position of the State reveals the lack of probable cause or reasonable grounds. It attempted to justify its initial action on the ground that it was essential to proceed against the parents and the children by way of temporary detention precisely in order to obtain otherwise unavailable evidence sufficient to support the petition. This lack of intellectual consistency in the State's position with regard to the need for temporary detention when compared with its position in defense of the petition betrays the entire episode for what it was--- a massive fishing expedition.

In Vermont, the law is absolutely clear: "The power... allocated to the State [in juvenile cases] is awesome indeed... . Accordingly, any time the State seeks to interfere with the rights of parents on the generalized assumption that the children are in need of care and supervision, it must first produce sufficient evidence to demonstrate that the statutory directives allowing such intervention are fully satisfied." In re N.H., 135 Vt. 230, 235 (1977)[Hill, J.]; In re J.M., 131 Vt. 604, 607 (1973). (emphasis supplied).

Here, there is presented, at best, mere generalized assumptions. The State, by its own admission, fails to "first present sufficient evidence to demonstrate" that any one of these specific children is in need of care and supervision. It is fundamental that the justification for the State to act with regard to any specific individual "must be...particularized with respect to

that person." Ybarra v. Illinois, 444 U.S. 85 (1979). Demonstrably, the State will be unable to establish the necessary facts to support its petition by a preponderance of the evidence. Compare, In re A.D., 143 Vt. 432 (1983). While State intervention pursuant to 33 V.S.A. §685 might well be justified (if not required) by the evidence available to the State, the filing of the petition was clearly premature.

The Petition, except as to the eight Amended Petitions, is DISMISSED.

Dated at Middlebury, Vermont, this 7th day of August, 1984.

Frank G. Mahady, District Judge

STATE OF VERMONT
ORLEANS COUNTY, ss.

AUG 8 1984

Appendix B 5)

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| IN RE: CERTAIN CHILDREN | ) | DISTRICT COURT OF VERMONT |
| | ) | |
| | ) | UNIT 3, ORLEANS CIRCUIT |
| | ) | |
| | ) | DOCKET NO. 22-6-840sj |

OPINION AND ORDER: SEARCH WARRANT

The parents have moved to suppress evidence seized on June 22, 1984, by the Vermont State Police and social service agencies as well as for the return of the property seized. The motion was heard at North Hero, Vermont, on July 12, 1984.

(I)

A.

The history of western civilization provides a foundation for analysis. It reveals an ancient and profound respect for the dwelling of an individual. It also illustrates the antiquity and importance of the requirement that the authorities must have cause to invade such dwellings and may do so only with specific and particularized authority.

Biblical literature provides many illustrations of this respect for a person's home which was not subject to arbitrary visitation, even on the part of official authority. By way of example, the King of Jericho in the face of enormous "social costs", sent messengers rather than a search party to the home of Rachab. Joshua, 2:1-7. Other examples may be seen at Genesis, 19:4-11 and Joshua, 7:10-26. Under the ancient codes,

even a baliff of the court could not enter a home to obtain security for a debt. See, 14 Rodkinson, The Babylonian Talmud, 113 (Boston, 1918).

The familiar maxim, "every man's house is his castle", is usually credited to Lord Coke. See, Coke, 5 Rep. 92. Actually, it derives from the Roman law: Nemo de domo sua extrahi debet. Digest of Justinian, 50. Cicero, in one of his orations, declares flatly, "What is more inviolable, what better defended... than the house of a citizen... . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful." Verrine Orations; see, Radin, Roman Law (St. Paul, 1927). Of particular note, a Roman search warrant had to describe with particularity that which was sought. Mommsen, Römisches Strafrecht, 748 (Leipzig, 1899). Mommsen quotes the following passage, highly relevant here, from Paulus: Qui Furtum quaesiturus est, antequam quaerat, debet dicere quid quaerat et rem suo nomine et sua specie designare. So cautious were the Romans that the execution of a warrant was ceremonial and done lance et licio; that is, the searcher entered the home clad only in an apron (licio) bearing a platter in his hand (lance) in the presence of required witnesses as well as a court baliff and a public crier. Mommsen, op. cit. 748-49.

In Anglo-Saxon times, Alfred the Great (871-891) sentenced to death one who was responsible for "a false warrant, grounded upon false suggestion." Mirrour of Justices. 246 (Washington, 1903)[attributed to Horne, ca. 1290].

Therefore, Magna Carta, usually cited as the fountainhead

of modern civil liberties, is relatively a historical newcomer. In the context of our Western civilization, the sense that the State conduct involved here seems to touch a raw antecedal nerve becomes more understandable.

By the seventeenth century, salutory rules, founded in this tradition, regarding the use of general warrants were being developed by the British common law. Chief Justice Hale (1609-1676), one of the greatest jurists in English history, see, 4 Holdsworth, History of the English Law, 574-95 (3rd ed.) [London, 1926], held a general warrant to apprehend all persons suspected of having committed a given crime to be void. 1 Hale, History of the Pleas of the Crown 580 (Philadelphia, 1897). He ruled that a warrant must specify by name or description the particular person or persons to be arrested and not be left in general terms or in blanks to be filled in afterwards. 2 Hale, op. cit., at 576-77. Likewise, Hale ruled that warrants to search any suspected place for stolen goods were invalid and should be restricted to search in a particular place suspected after a showing, upon oath, of the suspicion and the "probable cause" thereof, to the satisfaction of the magistrate; he concluded that "searches made by pretense of such general warrants give no more power to the officer...than what they may do by law without them." 2 Hale, op. cit. at 150.

In 1762, Lord Halifax's infamous general warrant directed against the allegedly seditious publication of John Wilkes, The North Briton, led to the landmark case of Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763). The warrant was held by Chief Justice Pratt to be illegal: "To enter a man's house by

virtue of a nameless warrant," wrote the Chief Justice, "in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."

Two years following the Wilkes decision, a warrant specifically naming John Entick and his publication, Monitor, was held invalid in that it provided for the seizure of Entick's "books and papers". Entick v. Carrington, 19 How. St. Tr. 1029 (1765). That opinion has been described as the "true and ultimate expression of constitutional law." Boyd v. United States, 116 U.S. 616, 626-27 (1886). In Entick, Chief Justice Pratt, who had become Lord Camden, said "this power so assumed by the...state is an execution upon all the party's papers in the first instance. His house is rifled: his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." Entick v. Carrington, op. cit. at 1064.1/

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1/ See, also, Money v. Leach, 3 Burr. 1692, 97 Eng. Rep. 1050 (1765) [Opinion of Chief Justice Mansfield].

In the wake of Wilkes and Entick, the House of Commons adopted two resolutions condemning general warrants in England. 16 Hansard's Parliamentary History of England, 207; Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 49 (1937). In the course of that debate, William Pitt made his famous declaration:

> The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the thresold of the ruined tenement.

Quoted in Lasson, op. cit., at 49-50.

Likewise, the comments of James Otis, Jr., in the course of his unsuccessful 1761 defense of Boston merchants against that form of general warrant known as the writ of assistance, had much to do with the advent of the American Revolution. One of those present at the trial, John Adams, later wrote, "Then and there the Child of Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." 10 C. Adams, The Life and Works of John Adams, 247-48 (1856).

Against this history stands the State's argument that the search warrant here involved was valid, that the State's conduct was "reasonable" and that the State, in any event, acted upon an "objectively reasonable, good faith belief" in the warrant's validity. To ignore history is, indeed, to repeat its mistakes.

B.

Constitutional analysis must focus, in the first instance, upon the Vermont Constitution. As Mr. Justice Linde, of the Oregon Supreme Court, has said, "the states' bills of rights are first things that come first." Linde, "First Things First: Rediscovering the States' Bills of Rights", 9 Univ. of Balt. L.R. 379, 380 (1980).

Former Chief Justice Barney wrote that "a state court reaches its result in the legal climate of the single jurisdiction with which it is associated, if federal proscriptions are not transgressed." State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 268 (1982). Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, there is simply no federal question. Therefore, "a state court should put things in their logical sequence and routinely examine its state law first, before reaching a federal issue." Linde, op. cit.

To first determine whether the state has violated the Federal Constitution and then, only when it has not done so, to reach a question under state law is to stand the Constitution on its head. Id. at 387; see, Falk, "Forward: The State Constitution-A More Than 'Adequate' Nonfederal Ground," 61 Cal. L.Rev. 273 (1973).

Mr. Justice Hill, in a significant opinion, declared that "if our State Constitution is to mean anything, it must be enforced.... Our duty to enforce the fundamental law of Vermont, our role in the federalist system, and our obligation to the parties...compel us to address the [issues] under the Vermont Constitution."

State v. Badger, 141 Vt. 403, 449 (1982). It follows that "a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional issue." Linde, op. cit. at 383. "[T]he Vermont Constitution provides an independent authority. . .of equal importance with the federal charter." State v. Badger, op. cit. (emphasis supplied). As such, Vermont's courts are "free...to interpret the precise meaning of our own constitution...so long as no federal proscriptions are transgressed." In re E.T.C., 141 Vt. 375, 378 (1982)[Billings, J.]

In short, the Vermont courts are not bound to slavishly imitate the Federal judiciary. Were it otherwise, our great national experiment in federalism would be abandoned insofar as it applied to the judicial branch of government.

Of course, certain irreducible standards, as declared under the Federal Constitution from time to time by the United States Supreme Court, bind us as a nation. No state can choose to reject them. Neither are the people of any state, however, bound to be satisfied with the minimum standard allowed to all. Linde, op. cit. at 395.

In this regard, it is interesting to note that, during the months preceding our national Declaration of Independence, it was seriously debated that the Continental Congress should draft uniform constitutions for the states. This idea was rejected in favor of calling upon each state to write a constitution satisfactory to itself. See, Green, Constitutional Development in

the South Atlantic States, 1776-1860, 52-6 (1930). To simply adopt federal decisions under the federal constitution when looking to a state constitution, then, is to compare apples with oranges. See, e.g., State v. Kaluna, 55 Hawaii 361, 369, n. 6, 520 P.2d 51, 58, n. 6 (1974).

It is therefore the duty of the Vermont courts to enforce Vermont's Constitution as an "independent authority and Vermont's fundamental law." State v. Badger, op. cit. Our state, free and independent,[2/] has a proud recent history with regard to the performance of this duty. Ludlow, E.T.C., and Badger are illustrative. Indeed, "the Barney Court's recognition and application of distinct state constitutional standards has been cited as a major development in the jurisprudence of the fifty states." Billings, "Tribute to Chief Justice Barney, " 8 Vt. L.Rev. 203, 205 (1983).

This Court, following the leadership of our Vermont Supreme Court, will take most seriously "the independent responsibility of [a] state court for the condition of liberty in [its] state." Linde, op. cit. at 379 (emphasis supplied).

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2/ "...[W]e will, at all times hereafter, consider ourselves as a free and independent state...." Ira Allen, Clerk, The Westminster Convention, January 15, 1777.

(II)

A.

The search warrant here involved purported to authorize the search of 19 buildings in Brighton, Vermont, and one building in Barton, Vermont, for "the following evidence and people:

1. any and all children under the age of 18 years old found herein [sic] except the children belong [sic] to Carl and Coleen Gamba;...

2. any and all rods or paddles;

3. any and all medical supplies, indicative of the illegal practice of medicine;

4. any and all photographs of discipline and/or illegal medical practices;

5. any and all letters, tapes, writings or records involving the physical discipline of children, education of children, and/or illegal medical practices;... ."

A broader warrant can scarcely be imagined. It is for 20 separate buildings, most of which are residences. The authorization to seize "any and all children under the age of 18 years old" is broader in scope (though admittedly less Draconian in purpose) than that of Herod the Great. The directive as to "any and all letters, tapes, writings or records" as well as "any and all photographs" is broader than those condemned by Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029 (1765) and by the United States Supreme Court in Stanford v. Texas, 379 U.S. 476

(1965). [1]

These four separate aspects (20 buildings, "all children", "all photographs", and "any and all letters, tapes, writings or records"), taken together, created a warrant more general in scope than any which this Court can find, after careful research, in the recorded literature. It may, indeed, set a modern world record for generality; certainly, no competitor for that dubious title has made itself known. [2]

B.

The Vermont Constitutional Convention of 1777 included the following in our Bill of Rights:

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[1] This breadth as to "any and all letters, tapes, writings or records" is not, as a practical matter, narrowed by the purported limitation "involving the physical discipline of children, education of children, and/or illegal medical practices". On its face, the warrant would justify an officer in reading every scrap of paper in its entirety to determine whether such subject matters were involved; the situation is virtually identical to Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) in this regard except that the purusal was to be by the officers and not a wayward judge.

[2] The State's attempt to analogize the general search of all letters, etc., to the situation of an electronic eavesdrop is frivilous. That exception is made necessary by the nature of electronic communications, not present here. Moreover, the existence of tapes allows the judiciary to monitor the warrant's execution after the fact; this is not possible in the non-electronic setting. If the State's analogy is valid, then it would apply to, and save, all general warrants. That is, of course, unthinkable. (The same is true with regard to the photographs.)

> ...the people have a right to hold themselves, their houses, papers and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted. VT. CONST., Ch. I, Art. 11. (emphasis supplied).

It is no historical accident that this provision was adopted but ten years after the decision in Entick, op. cit., and only 12 years after the decision in Wilkes v. Wood, 19 How. St. Tr. 1153 (1763). These famous cases and the events leading up to them were obviously very much in the minds of those early Vermonters responsible for the adoption of Ch. I, Art. 11. 3/

It is significant that our Constitution was adopted in 1777. The Fourth Amendment to the United States Constitution was not concurred upon by the two Houses of Congress until September 26, 1789; it did not become effective until ratified by the necessary eleventh state, Virginia, on December 15, 1791, the year of Vermont's statehood.

The authors of Vermont's Constitution were not only aware of Entick and Wilkes; also "vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled

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3/ "...[E]very American statesman, during our revolutionary and formative period..., was undoubtedly familiar with this monument of English freedom [Entick]...." Boyd v. United States, 116 U.S. 616, 626 (1886).

the colonists." Stanford v. Texas, op. cit. at 481. One need have but a passing knowledge of the lives of the Allen brothers and Thomas Chittenden to appreciate their views of such warrants and the need for a charter which specifically addressed such warrants in the clear and unmistakable language of VT. CONST., Ch. I, Art. 11.

Its obvious contrast to U.S. CONST., Amend. IV is instructive. The Vermont provision focuses very clearly upon searches made pursuant to a warrant; it does so more specifically and in greater detail than does the "warrant clause" of the Federal charter. Our fundamental law commands that a warrant relating to persons or property "not particularly described" is "contrary to...right, and ought not to be granted."

The very language of VT. CONST., Ch. I, Art. 11, reinforced by the historical context of its adoption, unmistakably prohibits the use of general warrants.

C.

The search warrant here in question does not "particularly describe" the children, the photographs, the letters, the tapes, or the records to be seized; it is, therefore, beyond doubt made unlawful by VT. CONST., Ch. I, Art. 11. [4/]

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[4/] None of these items, of course, are contraband. Compare, e.g., State v. Stewart, 129 Vt. 175 (1971), and other cases relied upon by the State in its Memorandum, passim.

Its authorization to seize "all photographs" and "any and all letters, tapes, writings or records" is, if anything, broader than the warrant against Entick authorizing the seizure of his "books and records". It is sobering, indeed, to find a 1765 decision so directly in point. However, it is known that the framers of Ch. I, Art. 11, had Lord Camden's decision very much in mind. The warrant is illegal. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

As to the authorization to seize "all children under the age of 18", it is equally sobering to find the Seventeenth Century precedent of Lord Hale very much in point: a warrant must specify by name or description the particular person to be taken into custody and not be left to general terms or in blanks to be filled in later. 2 Hale, 576-77. Of course, that is precisely what this warrant purported to allow. It was unlawful in Hale's time; it is no less so now. 5/

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5/The State's Memorandum, at page 30, subliminally acknowledges this difficulty. There, the State paraphrases the Search Warrant as follows: "the children to be seized are all of the children in the care and custody of the members of the Northeast Kingdom Community Church, except those of the Gamba family." That, of course, is not what the warrant said; the need for the State to narrow the scope of the warrant is apparent even to the State. Yet, so narrowed, the children to be seized are hardly "particularly described"; it is still left to "general terms" and "blanks to be filled in later."

A part of the common law familiar as well to the framers of the Vermont Constitution was the rule that "searches made by pretense of...general warrants give no more power to the officer... than what they may do by law without them." 2 Hale, 150. Therefore, it follows that the searches and the seizures here in question were, in effect, conducted under no warrant at all within the obvious contemplation of VT. CONST., Ch. I, Art. 11. Under that provision, the obvious violations of our fundamental law "strip the officer of all legal justification and stamps his search and seizure as illegal from the beginning." State v. Pilon, 105 Vt. 55, 57 (1933)[Powers, C.J.].

The Vermont Supreme Court has specifically held that the precedents of Entick and Wilkes, representing the reasoning and conclusions "of the greatest courts of the English speaking nations", are incorporated into the "not particularly described" provisions of VT. CONST., Ch. I, Art. 11. State v. Slamon, 78 Vt. 212, 213-14 (1901)[Taft, C.J.].

Suppression under Art. 11 is required. State v. Badger, 141 Vt. 430 (1982); State v. Slamon, op. cit. at 215.

(III)

A.

The State would have this Court graft onto the Vermont exclusionary rule a so-called "good faith" exception similar to

that recently adopted by the United States Supreme Court in United States v. Leon, ___ U.S. ___, 35 Cr.L.R. 3273 (July 5, 1984) and Massachusetts v. Sheppard, ___ U.S. ___, 35 Cr.L.R. 3296 (1984). This is clearly not allowed under VT. CONST., Ch. I, Art. 11.

The Vermont exclusionary rule is entirely independent of the Federal rule under the Fourth Amendment as announced by the United States Supreme Court in Weeks v. United States, 232 U.S. 383 (1914). Its roots go deeper, and its rationale is different.

Vermont's seminal case dates back to 1802 when our Supreme Court invalidated an arrest for failure to comply with the warrant requirement of VT. CONST., Ch. I, Art. 11. State v. J.H., 1 Tyl. 444, 448 (1802). Not only was J.H. decided some 112 years prior to Weeks; of more significance, it was decided only 25 years after the adoption of Art. 11 in 1777.

In 1901, our Court specifically held that evidence seized in violation of Art. 11 is "inadmissible under Art. 10 of the Declaration of Rights." State v. Slamon, 73 Vt. 212, 215 (1901). Chief Justice Taft, noting the correctness of the ruling to be "clearly manifest" reasoned that "the seizure of a person's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself and...is within the constitutional prohibition." Id. (emphasis supplied).

This rationale differs entirely from that ascribed to the Federal rule by Mr. Justice White in Leon. 6/ It follows that the reasoning of Leon is totally irrelevant to an analysis of the Vermont rule.

While there was a subsequent retreat from our rule, see, e.g., State v. Krinski, 78 Vt. 162 (1905), State v. Stacy, 104 Vt. 379 (1932), and State v. Cocklin, 109 Vt. 207 (1938), it is clear that "the positions adopted in cases such as State v. Krinski... have now been unequivocally repudiated." State v. Badger, op. cit. at 452. (emphasis supplied).

Statements obtained in violation of VT. CONST., Ch. I, Art. 10, were suppressed in State v. Miner, 128 Vt. 55 (1969) and in State v. Hohman, 136 Vt. 341 (1978). See, also, In re E.T.C., 141 Vt. 375 (1982).

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6/ Indeed, the limited basis for the federal rule set forth in Leon departs from Weeks and is of recent vintage finding its origin in United States v. Calandra, 414 U.S. 338 (1974).

The rule was applied, not only to the products of an illegal arrest but also to the indirect products of that arrest as well under VT. CONST., Ch. I, Art. 11 in State v. Dupaw, 134 Vt. 451 (1976)[Smith, J.]. There, the Court noted that "to effectuate the fundamental guarantees provided by...the Eleventh Article of our State Constitution, we feel that the exclusionary prohibition should be extended to cover the indirect as well as the direct products of the unlawful arrest." Id. at 453.

Most recently our Court emphatically distinguished Art. 11's exclusionary rule from that of the Fourth Amendment as it was to be viewed by the Leon majority. State v. Badger, op. cit. On July 12, 1982, the Court unanimously cited with approval the leading scholarly article vigorously attacking the so-called "good faith" exception which the State would have us read into Art. 11, Mertens and Wasserstrom, "Forward: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law", 70 Geo. L.J. 365 (1981). State v. Badger, op. cit. at 453.

More important, Mr. Justice Hill's historic opinion specifically spelled out the reasons behind Art. 11's exclusionary rule. He noted that the "[i]ntroduction of such evidence at trial [1.] eviscerates our most sacred rights, [2.] impinges on individual privacy, [3.] perverts our judicial process, [4.] distorts any notion of fairness, and [5.] encourages official misconduct." Id.

Of these, the fifth and last alone is seen as being involved in the federal exclusionary rule by the Leon majority. The entire rationale of Leon is therefore addressed only to the conceptually narrower rule of the Fourth Amendment and has no relevance or meaning to the broader rule of Art. 11. Moreover, the Leon rationale does not address the reasoning of the Vermont Court in Slamon. There are at least six separate jurisprudential bases for Vermont's exclusionary rule; Leon is relevant to only one.

Badger held that it was the "introduction of such [illegally-obtained] evidence" which eviscerated sacred rights, impinged on privacy, perverted judicial process and distorted any notion of fairness. These results accrue whether or not good faith is involved on the part of law enforcement authorities. At the time of introduction (as opposed to the time of the search), the judicial process is perverted by means of the Court's use of such illegal evidence; at the time of introduction, there is a further invasion of privacy; at the time of introduction, fairness is distorted; at the time of introduction, basic rights are eviscerated. All of these results are recognized and precluded by Ch. I, Art. 11.

Even as to the encouragement of official misconduct, Leon is not persuasive authority. Under the unique facts of this case, there can be little doubt that state law enforcement and social welfare authorities would view an allowance of the use of the

fruits of these searches to be a virtual blank check from the judiciary; conversely, there can be little doubt that exclusion will deter such massive systemic disregard for individual rights in the future.

Moreover, Leon is a tentative and experimental precedent. This is explicitly recognized by two members of the Leon majority. See, United States v. Leon, ___U.S.___, 35 Cr.L.R. 3273, 3281 (1984) where Mr. Justice Blackmun (concurring) noted "the unavoidably provisional nature of today's decisions" and the comment of Mrs. Justice O'Connor that "our conclusions concerning the exclusionary rule's value might change" in Immigration and Naturalization Service v. Lopez-Mendoza, ___U.S.___, 35 Cr.L.R. 3310, 3316 (1984).

If the doctrine of stare decisis is to mean anything in Vermont Constitutional law, certainly our Court will not abandon the recent, clear and well reasoned precedent of Badger required by our Constitution to join such a questionable experiment.[7/]

There is no "good faith" exception available to the State under Ch. I, Art. 11 of the Vermont Constitution.

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7/ The imagined "social cost" of lost, relevant evidence cannot justify such a radical abandonment of our state constitution. Leon is based upon a belief that law enforcement will respect the rights of privacy under an honor code. One would hope so. However, in either event, relevant evidence is lost: a.) the police honor the Constitution and do not obtain the evidence in the first place, or b.) they do not, and the evidence is excluded. The "social cost" argument is a sham.

B.

Even were it necessary to resolve this issue under the Fourth Amendment of the Federal Constitution, the recently announced "good faith" exception to its exclusionary rule would not avail the State.

Mr. Justice White, in setting forth the new rule specifically held that it would not apply under certain circumstances. One of these is where "a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." United States v. Leon, ___U.S.___, 35 Cr.L.R. 3273, 3280 (1984); compare, Massachusetts v. Sheppard, ___U.S.___, 35 Cr. L.R. 3296 (1984).

Therefore, the "good faith" exception of Leon explicitly does not apply to general warrants. It has already been demonstrated that the search warrant here at issue is a general warrant.

C.

The State further argues that suppression is not appropriate to a juvenile court proceeding. However, in Vermont, evidence obtained by means of an unlawful search and seizure "shall not be admissible in evidence at any hearing or trial." V.R.Cr.P. 41(e) (emphasis supplied). This Rule specifically applies to juvenile

proceedings. V.R.Cr.P. 54(a)(2).

While this proceeding may not be "criminal", it is clear that a fundamental liberty interest worthy of constitutional protection is involved. In re C.L., 143 Vt. 554, 557-58 (1983); Santosky v. Kramer, 455 U.S. 745, 753 (1982); see, In re Gault, 387 U.S. 1 (1967).

The first four of the five purposes of Vermont's exclusionary rule set forth in State v. Badger, op. cit., all apply with equal force to juvenile proceedings and to criminal proceedings. The introduction of such evidence, by way of example, perverts the judicial process fully as much in a juvenile court as it does in a criminal court. This is clearly recognized by Rules 41(e) and 54(a)(2).

Moreover, as has been previously noted, the purpose of discouraging systemic, official misconduct must be central to this particular case. Given the fundamental liberty interests involved, the social welfare agencies and the police must not be allowed to perceive that they are being given a blank check with regard to juvenile proceedings. The Vermont judiciary owes its own Constitution the respect of ensuring that no mixed message is sent to these authorities. Application of the exclusionary rule to these proceedings is essential if there is to be any meaning in the real world to the widely-recognized liberty interests involved in the juvenile court. See, Tirado v. C.I.R., 689 F.2d 307 (2nd Cir. 1982).

Even the recent opinion of Mrs. Justice O'Connor in INS v. Lopez-Mendoza, op. cit., relied upon by the State, supports this conclusion. Juvenile authorities do not routinely face the "mass detention" situation experienced by the INS agents; there is no comparable liberty interest involved in deportation proceedings; there is no showing that Vermont social welfare agencies or, for that matter, its State Police, have any comprehensive scheme for deterring constitutional violations such as exist at INS; and our juvenile proceedings are not in the least comparable to INS's deliberately simple deportation system. Under the circumstances of this case, Mr. Justice White's dissenting comment in Lopez-Mendoza would be even more obvious: "...we neglect our duty when we subordinate constitutional rights to expediency in such a matter. 35 Cr.L.R. 3310, 3316, 3318.

Therefore, the exclusionary rule of Ch. I, Art. 11 applies to juvenile proceedings. V.R.Cr.P. 41(e) and 54(a)(2); see, State v. Badger, op. cit.; In re T.L.S., 139 Vt. 197 (1981). Were it necessary to apply the Fourth Amendment, its exclusionary rule would also be applicable. Compare, INS. v. Lopez-Mendoza, op. cit.[8]

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8/ The same analysis applies to the State's argument that the identities of the children should not be suppressed. All of the reasons for suppression set forth in Badger support such action, and no basis to distinguish such information from other evidence appears. See, State v. Emilo, ___Vt.___(1984). (The dicta in INS v. Lopez-Mendoza, op. cit., to the contrary dealt with the federal rule, and none of the cases cited therein support the dicta in any event.) Furthermore, there is no authority in Vermont law to search for a "person" under the circumstances of this case. V.R.Cr.P. 41(b)(4)-(5). Indeed, if identification is a problem, Vermont provides a specific procedure which the State may use if it chooses. V.R.Cr.P. 41.1.

D.

The case law relative to administrative searches applies only in "certain carefully defined classes of cases." G.M. Leasing Corp. v. United States, 387 U.S. 528-29 (1977). The State's attempt to apply that line of authority here is not appropriate.

Administrative searches of private residences, Camara v. Municipal Court, 387 U.S. 523 (1967) and of commercial buildings See v. Seattle, 387 U.S. 523, 534, constitute a "significant intrusion upon the interests protected by the Fourth Amendment." Nevertheless, a special balancing test is sometimes applied to such routine searches "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, [and] they involve a rather limited invasion of the urban citizen's privacy." Camara v. Municipal Court, op. cit. at 537.

Here, the search was hardly routine. The searches were intensely personal in nature and clearly aimed, among other things, at the discovery of evidence of crime. The massive invasion of privacy, was, of course, extreme. Compare, Michigan v. Tyler, 436 U.S. 499 (1978). 9/

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9/ It should be noted that these children and their parents are citizens and not "illegal alien[s]--essentially fugitive[s] outside the law." Compare, Blackie's House of Beef v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981) at State's Memo, pg. 33. This case involves personal residences, not a commercial establishment owned by a stranger to the proceedings as in Blackie's. Moreover, the intrusion there was far more limited and was authorized by a specific statute. See, United States v. Biswell, 406 U.S. 31 (1972).

The State attempts in its memoranda to justify the warrant as an administrative warrant and/or as a search warrant relating to evidence of a crime. However, the State never picks a horse and rides it to the finish line. As expediency dictates, the State's position shifts from "administrative" to "criminal" analysis depending upon which most nearly fits the State's position on any given issue. The resultant inconsistencies and lack of clear analysis are blatant.

(IV)

A.

Not only is the warrant facially defective, being a general warrant. It was also issued without particularized probable cause.

A search warrant may be issued only upon "oath or affirmation first made, affording sufficient foundation." VT. CONST., Ch. I, Art. 11. Probable cause must exist before such a warrant may be issued. See, State v. Stewart, 129 Vt. 175 (1971).

"Where the standard is probable cause, a search...must be supported by probable cause particularized with respect to that person." Ybarra v. Illinois, 444 U.S. 85 (1979) [emphasis supplied]. Therefore, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person... ." Id.

Here, the State admits that it had no specific evidence of abuse, truancy or illegal medical practices on the part of any

of the individuals whose residences were searched. It relies, instead, upon the mere assumed association of these residences with some other people for whom there was some reason to suspect such activities at some time in the past.

This theory stretches probable cause to dwellings on the basis of the "mere propinquity" of the structures to others.

Moreover, as is demonstrated elsewhere, the State's "environment theory" is, in truth, an "association theory" violative of the Due Process clause of the Fifth Amendment and the Association Clause of the First Amendment. [See this Court's "Opinion and Order: Motion to Dismiss", filed concurrently with this Opinion and Order, sec. II(C) - (D), pgs. 9 - 12]. Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Scales v. United States, 367 U.S. 203 (1961); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983); Noto v. United States, 367 U.S. 290 (1961). The State can no more rely upon such a theory to support the search warrant than it can to support the petition. Even with the assistance of this unavailable theory, however, particularized probable cause does not exist.

B.

As to each of the items "enumerated" in the search warrant there is no probable cause. The State, as has been seen, does not even attempt to show particularized reason to believe that "any and all children under the age of 18 found" were the victims of abuse. (Paragraph 1 of the Search Warrant).

There is no showing that "rods or paddles" would be located in any particular residence. (Paragraph 2 of the Search Warrant).

While "medical supplies, indicative of the illegal practice of medicine" might reasonably be expected to be found in the residence of one individual, a Mr. Cantwell, or in the so-called clinic, there is absolutely no basis to believe they might be found elsewhere. (Paragraph 3 of the Search Warrant).

There is no mention anywhere that any "photographs of discipline and/or illegal practice of medicine" were ever taken or existed. (Paragraph 4 of the Search Warrant).

Likewise, there is only the reference to <u>one</u> letter from a Mr. Spriggs to an identified individual which supports a belief in the existence of letters or writings involving the physical discipline of children, education of children and/or illegal medical practices. (Paragraph 5 of the Search Warrant)

Yet, authority was granted to search <u>20</u> buildings, mostly residences, for "all children under the age of 18", rods or paddles, medical supplies, "any and all photographs" and "any and all letters, tapes, writings or records." The above dramatically illustrates the obvious: the State was engaged in a massive, albeit arguably well-motivated, fishing expedition which involved the intensive search of many private residences. This is exactly what Ch. I, Art. 11 sought to prohibit and does prohibit.

C.

It does not avail the State to claim that an "expert" concluded that the children in question were "at risk". Most certainly, "experts" could be found who would conclude that all children in certain neighborhoods with single parents living below the poverty level are "at risk" to abuse. No person who cares the least about individual dignity would claim that such evidence would allow the State to round up all such children to be inspected for evidence of abuse. To select an unpopular neighborhood labeled a "cult" compounds the threat.

If the Court were to allow the State action here, a Pandora's Box would be opened which would prove difficult, if not impossible, ever to close again.

(V)

The State's claim that the parents lack standing to present a motion to suppress lacks merit. It is the expectation of privacy which controls the issue of standing, not the ownership of the items seized. Rawlings v. Kentucky, 448 U.S. 98 (1980). "It cannot be questioned that [one] has standing, as an occupant, to challenge the lawfulness of [a] search." State v. Stewart, 129 Vt. 175, 179 (1971). As an occupant, each parent had a legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. 128 (1978).

The items taken must be restored to the owners, and they shall not be admissible at any hearing or trial. V.R.Cr.P. 41(e).

Dated at Middlebury, Vermont this 6th day of August, 1984.

Frank G. Mahady, District Judge

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# CONTENTS



# 'BRAINWASHING' EVIDENCE IN LIGHT OF *DAUBERT*

## *Science and Unpopular Religions*


*Gerald Ginsburg and James Richardson*


### Introduction

A revolution occurred in American evidence law in 1993 when the United States Supreme Court rendered the *Daubert* decision, overturning 70 years of law governing the area of novel scientific evidence.[1] Previously, admissibility of expert evidence had been governed in federal courts (and many state courts as well) by the *Frye* rule of 'general acceptance', which meant that novel scientific evidence could not be admitted unless the methods and principles under which it was found had achieved general acceptance within the relevant discipline(s).[2] The *Frye* rule was conservative and was subjected to much criticism.[3]

The *Frye* rule was incorporated into the *Daubert* guidelines, so the notion of general acceptance was not entirely abandoned. However, other guidelines included by the *Daubert* court go far beyond *Frye*, and have major implications for all scientific evidence, including, we will claim, social and behavioural evidence being proffered to courts.[4]

[1] *Daubert* v. *Merrell Dow Pharmaceuticals Inc*, 113 S. Ct. 2786 (1993); 125 L. Ed. 2d 469 (1993).

[2] *Frye* v. *United States*, 293 F. 1013; 54 App. D.C. 46 (D.C. Cir. 1923).

[3] A major reason for criticism of the *Frye* rule that is germane here concerns the fact that general acceptance does not always equate with scientific reliability. As M. Saks, 'Enhancing and Restraining Accuracy in Adjudication' (1988) 51 Law and Contemporary Problems 243, has noted, some forms of forensic evidence that are readily accepted in courts have little scientific research to support them, while other, more scientifically based, techniques may not be acceptable.

[4] See J. T Richardson, G. P. Ginsburg, S. Gatowski, and S. A. Dobbin, 'Problems Applying *Daubert* to Psychological Syndrome Evidence' (1995) 79(1) Judicature 10.

The other three guidelines include: (1) establishing the 'falsifiability' of a theory being presented; (2) the 'known or potential error rate' associated with applying the theory; and (3) whether the findings have been subjected to peer review and publication in scientific forums. This list is not exhaustive, as the court also said that other sound criteria have been suggested and: '[t]o the extent that they focus on the reliability of evidence as insured by the scientific validity of its underlying principles, all these versions may well have merit'.[5] Thus the US Supreme Court has weighed in heavily in favour of judges being required to make sound, scientifically based decisions concerning admissibility of proffered evidence claimed to be scientific.[6]

The issue of admissibility of scientific evidence is not confined to the US. It is clear that most Western countries, at least, are grappling with how to handle such evidence.[7] Courts in many other countries are dealing with this issue and related issues, as more and more allegedly scientific evidence is offered in various types of court cases. Interest in this issue is evidenced by the amount of attention which has been given to the *Daubert* decision itself outside the US.[8]

[5] N. 1 above, 2796–7, n. 12.

[6] Not all the justices shared this view, however, as Rhenquist CJ filed a dissent (joined by Stevens J) to this part of the opinion, which said, 'I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be too. I do not doubt the Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role' (at 4811).

[7] See S. Gatowski, S. A. Dobbin, J. T. Richardson, C. Nowlin, and G. R. Ginsburg, 'Diffusion of Scientific Evidence: A Comparative Analysis of Admissibility Standards in Australia, Canada, England, and the United States' (1995) 4 Expert Evid. 86.

[8] See S. Odgers and J. T. Richardson, 'Keeping Bad Science out of the Courtroom: Changes in American and Australian Expert Evidence Law' (1995) 18 Univ. of New South Wales LJ 108; J. T. Richardson, 'Dramatic Changes in American Expert Evidence Law: From *Frye* to *Daubert*' (1994) 2 The Judicial Review: J Judicial Commission of New South Wales 13; I. Freckleton, 'When Plight makes Right: The Forensic Abuse Syndrome' (1994) 18 Crim. LJ 29; P. Roberts, 'Admissibility of Expert Evidence: Lessons from America' (1995) 4 Expert Evid. 93, for examples. The first author has been asked to make presentations on the implications of *Daubert* to appeal court judges in Canada and in 4 of the 6 states in Australia, as well as to contribute to scholarly publications from other countries on the topic.



## *Daubert* and Social and Behavioural Science Evidence

A problem immediately arose with the *Daubert* decision in the United States because it was not clear whether the court intended to apply the decision to social and behavioural science evidence. Some have claimed that this was not the intention of the court, and that such evidence falls under the 'technical, or other specialized knowledge' phrase of Federal Rule of Evidence 702.[9] Others, including the present authors, believe that the social and behavioural sciences are indeed sciences, and that social and behavioural evidence should be forced to meet the more rigorous guidelines of *Daubert*.[10] There are court decisions on both sides of this issue, as well, which leaves the situation ambiguous. Richardson *et al.*[11] note that the Supreme Court itself referred several times in the *Daubert* decision to a case that turned on admissibility of evidence concerning the efficacy of eyewitness testimony,[12] which suggests that the court did not intend to differentiate between types of scientific evidence.

## Psychological Syndromes and Scientific Validity

It is true that nowhere in *Daubert* did the court refer to psychological syndromes, thus leaving open the interpretation of its applicability to such evidence. For reasons given elsewhere,[13] we assume the applicability of *Daubert* to social and behavioural science evidence, including psychological syndromes.[14] Furthermore, we

[9] See T. Renaker, 'Evidentiary Legerdemain: Deciding when *Daubert* should Apply to Social Science Evidence' (1996) 84 California LR 1657; but see also D. Faigman, 'The Evidentiary Status of Social Science under *Daubert*: Is it "Scientific, Technical, or Other" Knowledge?' (1995) 1 Psychology, Public Policy, and Law 960.

[10] See R. Underwager and H. Wakefield, 'A Paradigm Shift for Expert Witnesses' (1993) 5 *Issues in Child Sex Abuse Accusations* 156; Richardson, 'Dramatic Changes' n. 8 above; Richardson *et al.*, 'Problems Applying *Daubert*', n. 4 above; T. Moore, 'Scientific Consensus & Expert Testimony: Lessons from the Judas Priest Trial' (1997) 17 Amer. Psychology-Law News 3.

[11] See Richardson, 'Dramatic Changes', n. 8 above, 12.

[12] *US* v. *Downing*, 753 F.2d 1224 (3d Cir. 1985).

[13] See Richardson *et al.*, 'Problems Applying *Daubert*', n. 4 above.

[14] The term 'syndrome' implies that the condition being so described is a medical entity or has a medical basis. Thus, successfully designating some characteristic or behaviour as a syndrome has value, both economically and in terms of social control.

argue that psychological syndromes are based on claims that can only be viewed as scientific, and that therefore the claims should be subjected to rigorous criteria such as appear in *Daubert* before they are accepted as scientific evidence.

To take this position suggests that we are dubious about much psychological syndrome evidence, and that we generally agree with several other critics of such evidence being admitted.[15] Our reasoning is based on the failure of most such evidence to meet the key criteria of falsifiability and reliable error rates. Psychological evidence, including syndrome evidence, can sometimes meet the other guidelines of *Daubert*—that is, it might be generally accepted within certain disciplinary groups and published in peer review journals for those groups. But we argue here that these characteristics by themselves do not guarantee the scientific validity of evidence.

Indeed, we would even suggest that political and popular opinion about certain issues can influence decisions to admit allegedly scientific evidence. For instance, it seems clear that decisions to admit Child Sex Abuse Accommodation Syndrome evidence have been influenced by popular concern about child sex abuse.[16] And similar considerations may have influenced the rapid spread of acceptance of repressed-memory evidence by the courts.[17]

For the purpose of this paper, we examine in some detail the evidentiary basis for one type of purportedly scientific evidence offered in cases involving controversial new religions—organizations that have sometimes been called 'cults'.[18] Despite the fact that such evidence in 'cult' cases has a weak scientific basis, the

[15] See I. Freckleton, 'Battered Woman Syndrome' (1992) 17 Alternative LJ 39; Freckleton, 'Forensic Abuse Syndrome', n. 8 above; Underwager and Wakefield, 'Paradigm Shift', n. 10 above. Similar comments might be made about psychological profiles, such as those of airline hijackers or drug couriers, etc.

[16] See Freckleton, 'Forensic Abuse Syndrome', n. 8 above.

[17] See E. Loftus, 'The Reality of Repressed Memories' (1993) 48 *Amer Psychologist* 518. See J. Richardson, '"Brainwashing" Claims and Minority Religions outside the United States: Cultural Diffusion of a Questionable Concept in the Legal Arena' (1996) Brigham Young Univ. LR 873 and S. A. Gatowski, S. T. Dobbin, J. Richardson, and G. P. Ginsburg, 'Globalization of Behavioral Science Evidence about Battered Women: A Theory of Production and Diffusion' (1997) 15 Behavioral Science and the Law 273 for other examples of syndrome evidence that are scientifically problematic.

[18] See J. T. Richardson, 'Definitions of Cult: From Sociological-Technical to Popular Negative' (1993) 34 *Rev. of Religious Research* 348; J. Dillon and J. T. Richardson, 'The "Cult" Concept: A Politics of Representation Analysis' (1994) 3 *SYZYGY: J Alternative Religion and Culture* 185.



underlying ideas enjoy considerable popular support,[19] and have been accepted in courts of law.[20]

## 'Brainwashing', 'Mind Control', and 'Destructive Cultism'

There have been hundreds of court cases involving controversial new religions over the past several decades, since they came into prominence in the late 1960s.[21] Many of the cases involve claims that participation in the new religious groups was coerced and destructive, an evidentiary theory often referred to as 'brainwashing' or 'mind control'. These are popularized notions sometimes associated with what has been claimed to be a new psychological syndrome—'destructive cultism'.[22] It is supposed that 'cult' recruiters use this powerful psychotechnology to recruit unsuspecting youth, who then evidence 'destructive cultism' in their behaviours.[23]

[19] See D. Bromley and E. Breschel, 'General Population and Institutional Élite Support for Control of New Religious Movements: Evidence from National Survey Data' (1992) 10 Behavioral Science and the Law 39; J. T. Richardson, 'Public Opinion and the Tax Evasion Trial of Reverend Moon' (1992) 10 Behavioral Science and the Law 53.

[20] See F. Flynn, 'Criminalizing Conversion: The Legislative Assault on New Religions' in J. Dayand and W. Laufer (eds.), *Crime, Values, and Religion* (Norwood, NJ, 1987), 153; J. T. Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe, and Australia' (1995) 18 Univ. of Queensland LJ 183; Richardson, 'Brainwashing Claims', n. 17 above; J. T. Richardson, 'Cult/Brainwashing Cases and the Freedom of Religion' (1991) 33 *J Church and State* 55; D. Anthony, 'Religious Movements and Brainwashing Litigation: Evaluating Key Testimony' in T. Robbins and D. Anthony (eds.), *In Gods We Trust* (2nd edn, New Brunswick, 1990), 295; D. Anthony and T. Robbins, 'Law, Social Science, and the "Brainwashing" Exception in the First Amendment' (1992) 10 Behavioral Sciences and the Law 5; D. Anthony and T. Robbins, 'Negligence, Coercion, and the Protection of Religious Belief' (1995) 37 *J Church and State* 509.

[21] See Flynn, 'Legislative Assault', n. 20 above; J. T. Richardson, 'Legal Status of Minority Religions in the United States' (1995) 42 *Social Compass* 249; D. Bromley and T. Robbins, 'The Role of Government in Regulating New and Unconventional Religions' in J. Wood and D. Davis, (eds.), *The Role of Government in Monitoring and Regulating Religion in Public Life* (Waco, Texas, 1993).

[22] See R. Shapiro, 'Of Robots, Persons, and the Protection of Religious Beliefs' (1983) 56 Southern Calif. LR 1277; J. Clark, 'Problems in Referral of Cult Members' (1978) 9(4) *J National Assoc. of Private Psychiatric Hospitals* 19; J. Clark, 'Cults' (1979) 242 *J Amer. Medical Assoc.* 279.

[23] But see R. Straus, 'Religious Conversion as a Personal and Collective Accomplishment' (1979) 40 *Sociological Analysis* 158; J. T. Richardson and B. Kilbourne, 'Classical and Contemporary Applications of Brainwashing Theories: A Comparison and Critique' in D. Bromley and J. T. Richardson, (eds.), *The Brainwashing/Deprogramming Controversy* (Toronto, 1983), 29; R. Shapiro, 'Of

In the early court cases involving such ideas there was a willingness to accept the claims that brainwashing and mind control were being used, sometimes with apparently dramatic effects. Such evidence seemed relevant to cases involving the 'cult problem', and it was often offered by a professional mental health specialist such as a psychologist or psychiatrist, usually with little effective rebuttal testimony.[24]

Initially, such evidence was used to undergird requests for conservatorships, to assist in obtaining court orders sanctioning 'deprogramming' of participants.[25] Later, accusations of 'brainwashing' and 'mind control' supported civil action claims of intentional infliction of emotional distress or false imprisonment.[26] Also, some deprogrammers who were charged with kidnapping in criminal actions or with false imprisonment in civil actions used brainwashing notions to underpin their 'necessity' defences.[27] For about two decades, these brainwashing-based claims and defences were generally accepted. Eventually, though, those being negatively affected by the acceptance of such evidence tried to rebut it, or even have it disallowed completely,[28] and its acceptance became less certain.

Robots', n. 22 above; E. Barker, *The Making of a Moonie: Brainwashing or Choice?* (Oxford, 1984); J. Richardson, 'A Social Psychological Critique of "Brainwashing" Claims about Recruitment to New Religions' in J. Hadden and D. Bromley (eds.), *The Handbook of Cults and Sects in America* (Greenwich, CT, 1993), 75; J. T. Richardson, 'Religiosity as Deviance: Use and Misuse of the DSM with Participants in New Religions' (1993) 14 *Deviant Behavior* 1; J. T. Richardson, 'Active versus Passive Converts: Paradigm Conflict in Conversion/Recruitment Research' (1985) 24 *J for Scientific Study of Religion* 163; J. Saliba, 'The New Religions and Mental Health' in Hadden and Bromley, *Handbook*, above, 99; J. Muffler, J. Langrod, J. T. Richardson, and P. Ruiz, 'Religion', in J. Lowinson, P. Ruiz, R. Millman, and J. Langrod (eds.), *Substance Abuse: A Comprehensive Textbook* (3rd edn, Baltimore, 1997), 492; B. Kilbourne and J. T. Richardson, 'A Social Psychological Analysis of Healing' (1988) 7 *J Integrative and Eclectic Psychotherapy* 20; B. Kilbourne and J. T. Richardson, 'Cults versus Families: A Case of Misattribution of Cause?' (1981) 4 *Marriage and Family Rev.* 81; Bromley and Richardson, *The Brainwashing/Deprogramming Controversy* (above); M. Galanter, R. Rabkin, F. Rabkin, and A. Deutsch, 'The "Moonies": A Psychological Study of Conversion and Membership in a Contemporary Religious Sect' (1979) 136 *Amer. J Psychiatry* 165.

[24] One clinical psychologist claims to have testified in over 40 such cases. See Richardson, 'Cult/Brainwashing cases', n. 20 above.

[25] A conservatorship is a method whereby a court can grant control of the financial affairs of a person to another. The laws were developed many years ago to deal with situations involving elderly people who were becoming senile and could not manage their own financial and personal affairs. Under such laws courts could grant the legal right for such persons to be cared for personally and financially by someone else, usually their children. In the 3 decades during which so-called 'new religions' have existed in the US such laws have been used on occasion by parents seeking control of their children, even those who are of age, who have joined these unpopular groups. Such use of conservatorship laws has now generally ceased as a result of court decisions overruling such practices on the grounds that they violate the religious freedom of the person over whom the conservatorship is sought. See D. Bromley, 'Conservatorships and Deprogramming: Legal and Political Prospects' and J. LeMoult, 'Deprogramming Members of Religious Sects', both in Bromley and Richardson (eds.), *Brainwashing/Deprogramming Controversy*, n. 23 above, 267, 234; Anthony and Robbins, 'Negligence, Coercion' n. 20 above.



## Brainwashing and the *Frye* Rule

The use of brainwashing-based testimony was developed under a climate of admissibility dominated by the *Frye* rule of general acceptance. Those offering brainwashing-based testimony were usually seated as experts and allowed to offer their views either because judges thought such testimony particularly relevant or because they thought it was generally accepted among relevant disciplines. In cases during the late 1960s and through the 1970s, there was not much serious effort to rebut testimony attesting to the occurrence of brainwashing, and typically judges and juries agreed with such views. Appeal courts sometimes disagreed with jury decisions, but overall, triers of fact seemed willing to accept a view of reality concerning 'cults' that included notions of brainwashing and mind control.

Later, however, a number of social and behavioural scientists and some professional organizations became concerned about such testimony, which they viewed as prejudicial and not scientifically sound, as well as misrepresenting the relevant disciplines. A

[26] See Richardson, 'Cult/Brainwashing cases', n. 20 above.

[27] See Anthony, 'Religious Movements', n. 20 above; Richardson, 'Legal Status', n. 21 above. A necessity defence basically claims that if a law is not broken then a greater harm will result. The classic example often used in law school classes is that it is all right to 'break and enter' a burning building to rescue people in the building. Apparently the analogous logic is that a greater harm is caused by leaving an adult in a new religious group than by forcibly removing him or her for purposes of deprogramming. Such defences represent a way to avoid the constitutional provisions against evaluation of religious beliefs and practices. That is, if such defences are allowed, triers of fact are required to evaluate the extent of the harm that would be done by not removing the person, and that assessment seems to call for learning about the beliefs and practices of the group in question.

[28] See Anthony and Robbins, 'Negligence, Coercion', n. 20 above.

few scientists worked on cases as rebuttal witnesses or as consultants, assisting attorneys in handling such evidence when it was offered.[29] Some social scientists also helped develop a few *amicus* briefs that were submitted in some cases on appeal, usually for professional organizations and individual scholars in the field.[30]

At the trial level it was found that just asking better cross-examination questions or offering rebuttal witnesses was generally not adequate, because juries would none the less find in favour of the side offering brainwashing-based perspectives.[31] Given this circumstance, in a few cases a new effort was made to seek a separate hearing on the validity and reliability of brainwashing-based testimony. This was done via requests for '*Frye*' hearings on the specific claims that made use of brainwashing-based testimony. Thus, pre-trial hearings were held in some cases to determine whether or not the brainwashing evidence should be accepted, and in other cases, a ruling might be entered on appeal that a retrial was required after there had been a separate evaluation of brainwashing-based testimony that had been offered and which was significant to the case.[32]

In one major case, *United States* v. *Fishman*,[33] a decision was made to flatly reject brainwashing-based testimony on the basis of the *Frye* rule of general acceptance. The plaintiff in a mail fraud case had sought to use as a defence that he had been brainwashed by Scientology and that this was what led to his breaking the law.

[29] See Anthony, 'Religious Movements', n. 20 above; J. T. Richardson, 'Sociology, "Brainwashing" Claims about New Religions, and Freedom of Religion' in P. Jenkins and S. Kroll-Smith, (eds.), *Sociology on Trial: Sociologists as Expert Witnesses* (New York, 1997), 115.

[30] See Richardson, 'Sociology', n. 29 above. The first author participated in the activities described in this paragraph. The *amicus* briefs, which are available from the first author, presented data-based research conclusions refuting the brainwashing theories being offered. See Anthony, 'Religious Movements' (n. 20 above) for the most thorough critical analysis of brainwashing-based testimony, and also see Richardson and Kilbourne, 'Applications of Brainwashing Theories' (n. 23 above) for a comparison of classical and contemporary uses of such theories as ideological weapons and J. Fort, 'What is "Brainwashing", and Who says so?' in B. Kilbourne, (ed.), *Scientific Research and New Religions: Divergent Perspectives* (San Francisco, 1985), 57 for a contemporary history of use of the term.

[31] See J. DeWitt, J. Richardson, and L. Warner, 'Novel Scientific Evidence in Controversial Cases: A Social Psychological Examination' (1997) 21 Law and Psychology Rev. 1 for evidence relevant to this point.

[32] See Anthony, 'Religious Movements', n. 20 above

[33] (1990) Case No. CAR-88-0616-DLJ No. Cal.



This defence was rejected after a spirited exchange during the pre-trial phase of the case that included submission of considerable material critical of brainwashing theories.[34]

In a case decided after *Fishman* and referring to it as precedent, *Green and Ryan* v. *Maharishi et al.*,[35] brainwashing-based testimony was again rejected. This time the rejection occurred after an initial trial court decision in favour of civil plaintiffs who sought damages for being brainwashed into participating in the Divine Light Mission. On appeal, the decision was overturned and the case remanded for further evaluation of the testimony of a well-known brainwashing 'expert'.[36] The trial court's subsequent review of brainwashing testimony applied a criterion of 'substantial acceptance', a lesser standard than general acceptance, but the testimony was still rejected.

These two federal court decisions have since been cited in other cases, and the decisions have apparently had something of a deterrent effect. Claims of brainwashing and mind control are heard less in courts across America now.[37]

## Brainwashing Evidence and *Daubert*

Anthony and Robbins raised an interesting question concerning application of *Daubert* to brainwashing-based testimony and claims in 'cult cases'.[38] They suggest that the 1993 decision might allow a 'regression' to a time when more brainwashing-based testimony was admitted. They may be suggesting that the greater discretion granted to judges under *Daubert* could allow those who were not sympathetic to 'cults' to admit more evidence against

[34] See Anthony and Robbins, 'Law, Social Science' and Anthony and Robbins, 'Negligence, Coercion', both n. 20 above.

[35] USDC No. 87-0015 and 0016 (1991).

[36] The expert in this case was also one of the two experts disallowed from offering brainwashing-based testimony in the *Fishman* case.

[37] See Anthony and Robbins, 'Negligence, Coercion', n. 20 above. However, negative sentiments against newer controversial religious groups run deep, fed by such events as the tragic death of nearly 100 people at Waco in 1993 and more recently the mass suicide of 39 Heaven's Gate members at San Diego (1997). Thus, although there are fewer overt uses of brainwashing-based claims in contemporary court actions, new religions still do not fare well in court cases, as judges and juries [illegible] See Richardson [illegible] 'Status in' above and Bromley and Robbins, 'Perpetuating Polarization' in [illegible]

[38] See Anthony and Robbins, 'Negligence, Coercion', n. 20 above, 523.

them. However, later in the same paper they seem to suggest that *Daubert* will not work in a more liberal fashion;[39] that is, it will not let in more of the kinds of testimony that had finally been ruled inadmissible under *Frye*. They say:

> Vague and indeterminate identifications of the purported theoretical foundation of proffered testimony . . . will probably fail to meet criteria of falsifiability. More precise applications of 'classical' models of brainwashing and related constructs to formally voluntary associations may also fail to pass muster due to the difficulty of specifying precisely how much non-physical coercion produces involuntariness. . . . Also pertinent is the general vagueness and lack of reliable diagnostic criteria for 'Atypical Associative Disorder' supposedly produced by cultist mind control.[40]

Richardson, in a lengthy critique of brainwashing ideas and how they have spread to other legal systems around the world, says, '[u]nder recent, more rigorous, criteria established in Daubert . . . for the acceptance of scientific evidence, brainwashing-based claims should . . . be excluded.'[41] In another paper, after a discussion of the consequences of applying *Daubert* criteria to child sex abuse cases, Richardson further notes:

> In another area of high emotion and considerable misinformation, a new syndrome of 'destructive cultism' has seen use. The author and others have been involved in criticizing questionable psychological and psychiatric testimony alleging negative effects of participation in new religious groups ( . . . 'cults') that cannot be substantiated by well-done research.[42]

Thus we have seen several comments made in passing, usually in footnotes, to the issue of the application of *Daubert* criteria to brainwashing-based testimony. In the present paper, we apply the four guidelines of scientific reliability from *Daubert* to such testimony in a more direct fashion, in an effort to establish with more precision whether such testimony meets the *Daubert* criteria. We focus on the two more complex guidelines, falsifiability and error rates, but with comments on the other two guidelines as well.

[39] Anthony and Robbins, 'Negligence, Coercion', n. 20 above, 531.

[40] *Ibid.*, n. 74 (references omitted). A similar footnote appears in Odgers and Richardson, 'Bad Science', n. 8 above, 119, n. 51.

[41] See Richardson, ' "Brainwashing" Claims', n. 17 above, 883, n. 37.

[42] See Richardson, 'Dramatic Changes', n. 8 above, 34, n. 50 (references omitted).



## Falsifiability and Brainwashing

As far as we are aware no case has yet seen the evaluation of brainwashing-based testimony in light of *Daubert*. But if this were done the analysis would probably start with the most fundamental of the criteria, falsifiability.

Richardson discusses the concept of falsifiability in some detail, including its application to social and behavioural science evidence.[43] He notes that the *Daubert* opinion cites major figures in the philosophy of science, including Sir Karl Popper, whose writings made the term falsifiability well-known. Popper claimed that scientific knowledge in a given area developed incrementally, by the establishment of testable hypotheses at the boundaries of knowledge. By 'testable' Popper meant that a method could be devised to test the hypothesis such that the hypothesis could actually fail the test.

This kind of precision requires a clear statement about what is predicted by the theory being tested. For instance, it is not scientifically defensible to make both of the following claims about the effects of child sex abuse:

1. If a child being examined for possible sex abuse does not like his or her genitals being examined, this is evidence of the child having experienced sexual trauma through sex abuse and thus of having been sexually abused.
2. If a child seems not to mind having its genitals examined this means that the child is accustomed to such activity, which is evidence that the child has been sexually abused.

Similarly, the following statements about actions of a perpetrator of child sex abuse cannot jointly be defended as scientifically justified:

1. He shows guilt and remorse, which indicates his guilt.
2. He shows no guilt and remorse, indicating that he is in denial about the abuse he perpetrated, a sure sign of his guilt.[44]

These examples are not just a problem of logic in that both A and not-A are claimed, but illustrate a problem with the falsifiability

[43] *Ibid.*, 19–27.

[44] See Underwager and Wakefield, 'Paradigm Shift' (n. 10 above) for a discussion of this and the previous example and Richardson *et al.*, 'Problems applying *Daubert*' (n. 4 above) for related discussion.

of a supposedly scientific theory. That is, in each example, the referent person (the child, or the perpetrator) need not be the same person; one perpetrator could show remorse, while another might not. The important point is that the theory in each case makes two opposite predictions—that a behaviour is evidence of a prior act, and that the absence of that behaviour is evidence of that same prior act. If all behaviours, including exactly opposite behaviours, can be said to support a theory, then the theory cannot be falsified. If a theory cannot be falsified, according to Popper it is not a scientific theory. Under *Daubert* such theories should not be admissible as scientific evidence.

Popper used Marxism and Freudian thought as two examples of major theories that cannot, by definition, be tested.[45] The latter is directly relevant to our concerns, since much of modern psychiatry and clinical psychology is Freudian-based. For instance, the frequently cited *Diagnostic and Statistical Manual* ('*DSM*') of the American Psychiatric Association[46] is derived in large part from Freudian thought, and its many entries of mental disorders often lack solid scientific basis.[47] To the extent that testimony based on the *DSM* is not supported by sound science, such evidence should not be admitted as scientific under *Daubert*.[48]

The issue of brainwashing testimony raises a serious falsifiability problem. Part of the problem is definitional: what does the claim that participants have been brainwashed really mean? This problem makes it difficult to state a hypothesis about the brainwashing of participants that is truly falsifiable.

Some would apparently say that anyone in a new religion has been brainwashed, by definition, because otherwise it is not logical that they would choose to participate in such strange groups.[49]

[45] See K. Popper, *The Open Society and Its Enemies* (Lawrenceville, NJ, 1952).

[46] American Psychiatric Association, *The Diagnostic and Statistical Manual* (4th edn rev., Washington, DC, 1995).

[47] See S. Kurt and H. Kutchins, *The Selling of DSM: The Rhetoric of Science in Psychiatry* (New York, 1992); Richardson, 'Religiosity as Deviance', n. 23 above.

[48] Such evidence might be admitted on other grounds, of course, but not as scientifically based. Admission of such testimony on other grounds would, however, be controversial. See Underwager and Wakefield, 'Paradigm Shift', n. 10 above.

[49] See M. Singer, 'Therapy with Ex-Cult Members' (1978) 9 (4) *J National Association of Private Psychiatric Hospitals* 14; M. Singer, 'Coming out of the Cults' (1979) 12 *Psychology Today* 72; Clark, 'Problems in Referral', n. 22 above.



Others might say that anyone who gives up a promising career to join an exotic religious group and sell flowers and books on streets and in airports has been brainwashed. These are not testable notions, but instead are normative statements that reveal a view of human volition that some may find offensive. Such statements are saying, in effect, that because a person is not doing what was expected, and because their behaviour is not easily understood, they have been brainwashed.

If one claims that brainwashing causes a fundamental and permanent change in a person, that claim is testable, although its testability requires specification about the kind of change, what is meant by 'fundamental', and what is meant by 'permanent'. For instance, one could assert that some basic and negative personality change will occur with people who have been brainwashed. This might be demonstrated through longitudinal research showing change over time that could be attributed to a process that people agree is brainwashing.[50] Little such research has been done, and much of what there is seems to show either ameliorative effects of participation[51] or no long-lasting negative effects.[52]

Other acceptable scientific procedures that could yield evidence on the effects of joining make use of standardized personality assessment instruments. One could hypothesize that those who join new religions end up being significantly different from 'normals' against whom the tests were standardized. Research of this sort has been done, but the results usually do not confirm the negative effects predicted by a brainwashing-based hypothesis.[53]

[50] Getting agreement on what constitutes brainwashing would be quite difficult, however, since the term itself is a popular and not a scientific term. See Richardson and Kilbourne, 'Brainwashing Theories', n. 23 above; Anthony, 'Religious Movements', n. 20 above; Richardson, 'Cult/Brainwashing Cases', n. 1 above; Richardson, '"Brainwashing" Claims', n. 17 above.

[51] See M. Galanter, 'The "Relief Effect": A Sociobiological Model of Neurotic Distress and Large Group Therapy' (1978) 135 *Amer. J Psychiatry* 588; B. Kilbourne and J. T. Richardson, 'Psychotherapy and New Religions in a Pluralistic Society' (1984) 39 *Amer. Psychologist* 237.

[52] See C. Tashni, R. Hood, and P. Watson, 'Assessment of Former Members of Shiloh: The Adjective Checklist 17 years later' (1991) 30 *J for Scientific Study of Religion* 306.

[53] See J. T. Richardson, 'Clinical and Personality Assessment of Participants in New Religions' (1995) 5 *Internat. J for the Psychology of Religion* 145; J. T. Richardson, 'Psychological and Psychiatric Studies of New Religions' in L. Brown, (ed.), *Advances in Psychology of Religion* (New York, 1985), 209 for reviews of a large amount of such research.

Few differences with normals have been found and even some of those are hard to characterize in negative terms.[54] Thus, when tested in this way the hypothesis of major damaging change is not confirmed.

If one assumes that brainwashing leads to *permanent* changes, then again the evidence refutes the notion and falsifies the assertion. Most of the controversial groups are small and suffer extremely high attrition rates.[55] If brainwashing, whatever it is, does take place in those groups, it seems rather ineffectual, with most participants leaving of their own volition after a time. The brainwashing hypothesis, so far as it implies permanency, fails a straightforward test of that permanent effect.

Non-falsifiability is also apparent in the claim that participants in exotic religions have been brainwashed and are consequently suffering from a newly proposed syndrome called 'destructive cultism'.[56] Richardson and Stewart offer the following synopsis of the new syndrome,[57] using language from Shapiro:[58]

> He described destructive cultism as a distinct *syndrome* with a number of discernible characteristics. It strikes most commonly during adolescence or young adulthood, among 'idealistic people under stresses of rapid physical and emotional development.' 'Change in personality is the most prominent characteristic of this syndrome,' and the change may happen suddenly or gradually. People suffering from destructive cultism 'may adopt new and unusual eating habits and peculiarities in dress and hair style.' They may engage in begging for support, and they may develop 'hatred and disrespect for the family, the parents, and society in general.'

[54] For instance, A. Rosen and T. Nordquist, 'Ego Developmental Level and Values in a Yogic Community' (1980) 39 *J Personality and Social Psychology* 1152 found that participants in Ananda Cooperative Village, a Hindu-based communal group in Northern California, were more compassionate than conventionally religious people in the US.

[55] See F. Bird and B. Reimer, 'Participation Rates in New Religious Movements and Para-Religious Movements' (1982) 21 *J for Scientific Study of Religion* 1; J. T. Richardson, J. van der Lans, and F. Derks, 'Leaving and Labeling: Voluntary and Coerced Disaffiliation from Religious Social Movements' in K. Land and G. Lang (eds.), *Research in Social Movements, Conflicts, and Change*, vol. 9 (Greenwich, CT, 1986).

[56] See E. Shapiro, 'Destructive Cultism' (1977) 15(2) *American Family Physician* 80.

[57] See J. T. Richardson and M. Stewart, 'Medicalization of Participation in New Religions: A Test and Extension of the Conrad and Schneider Model' (1997), unpub. paper.

[58] See Shapiro, 'Destructive Cultism', n. 56 above at 83.



> They may display 'a constantly sombre and grave attitude' and become preoccupied with religious rituals and beliefs. Sufferers may also lose personal identity and 'change in mannerisms is common.' Some afflicted with destructive cultism enter into a 'trance-like state, which is intensified during periods of prayer, meditation and rituals.' Shapiro closed his section on the syndrome by stating: 'Destructive cultism is a sociopathic illness which is spreading rapidly throughout the US and the rest of the world in the form of a pandemic.'

Clearly, the claim of a 'destructive cultism' syndrome is not falsifiable, nor is the claim that it is produced by 'brainwashing'. The syndrome can happen 'suddenly or gradually', and it may or may not entail a number of different behaviours.[59]

Although the 'newly discovered' syndrome has not yet been placed in the *DSM*, one prominent clinical psychologist who has testified in dozens of 'cult cases' has inserted references to 'cults' in the *DSM* itself;[60] she and others[61] regularly use the *DSM* as a basis for testimony, even citing *DSM* mental disorders that make no reference to 'cults'.[62] Coupled with the scientifically questionable basis of some aspects of the *DSM*,[63] this raises a serious question about the admissibility as scientific evidence under *Daubert* of any brainwashing-based assertions about the deleterious effects of participation in new religions.

Specifically, it appears that the assertion that participants in new religions are brainwashed lacks scientific merit. What research has been done refutes such claims, and leads to other conclusions about why people participate and to what effect(s). In terms of falsifiability:

[59] The description is also overtly anti-religious, of course, and efforts to promote such views have been very disquieting to a number of religionists and civil libertarians. See D. Kelley, 'Deprogramming and Religious Liberty' in Bromley and Richardson, *Brainwashing/Deprogramming*, n. 23 above, 309; J. Guttman, 'The Legislative Assault on New Religions' in T. Robbins, W. Shepherd, and J. McBride, (eds.), *Cults, Culture, and the Law* (Chico, Calif., 1985); T. Bohm and J. Guttman, 'The Civil Liberties of Religious Minorities' in M. Galanter (ed.), *Cults and Religions* (Washington, DC, 1989), 211, for examples.

[60] See M. Singer, 'Transcript of Testimony in *George v. ISKCON* (1983) Los Angeles District Court, 248 pages; Richardson, 'Religiosity as Deviance', n. 23 above.

[61] See Anthony and Robbins, 'Negligence, Coercion', n. 20 above.

[62] See Anthony, 'Religious Movements', n. 20 above; Richardson, 'Cult/Brainwashing Cases' n. 20 above; Richardson, 'Religiosity as Deviance', n. 23 above.

[63] See Kurt and Kutchins, *The Selling of DSM*, n. 47 above; Underwager and Wakefield, 'Paradigm Shift', n. 10 above.

(1) properly designed empirical studies do not support the brainwashing-based hypothesis of long-term deleterious effects of participation (thus, to the extent that the theory is testable, it has not been supported); and
(2) brainwashing theories of 'cult religion' indoctrination and participation often allow for the derivation of mutually incompatible hypotheses, as exemplified by the 'destructive cultism' concept; (thus, major aspects of those brainwashing theories are untestable, therefore unfalsifiable).

On both prongs of the falsifiability criterion, then, brainwashing-based testimony about participation in 'cult religions' should be inadmissible as scientific evidence.

## Error Rates and Brainwashing

*Daubert* instructs judges, who are given a definite 'gatekeeping' role, to consider the 'known and potential rate of error' of a scientific theory offered as evidence. Voice spectrography is used as an example in *Daubert*, in which the error-rate concept involves the probability of wrongly classifying someone. There are two forms of misclassification:

1. A decision can be made that someone who is actually speaking is not doing so (a 'false negative').
2. A decision can be made that someone who is not speaking is doing so (a 'false positive').

Many examples of error-rate classification problems can be cited from the social and behavioural science literature. Earlier, we discussed difficulties in deciding whether a child has been sexually abused and whether someone is a perpetrator of sexual abuse. Similar classification problems can arise with regard to whether someone is a spouse batterer, or a drug courier, or suffering from some psychological syndrome such as rape trauma syndrome. These types of classifications have immense legal implications. They can cause, or at least contribute to, a person losing freedom and being labelled an abuser, a rapist, or a drug dealer, or to a child undergoing years of therapy for a trauma that never occurred. Thus, the costs to individuals of false positive errors can be immense, so the negative utility of a false positive misclassification must be taken very seriously, and the probability of a classification error should clearly be specifiable. (Parenthetically, false negatives also pose serious problems and can have high costs, often for potential future victims and society as well as for current victims, but it is the false positives that are most relevant to the focus of this paper.)



Brainwashing-based testimony has severe problems passing muster on the error rate guideline, unless one adopts the problematic logic cited above that anyone who participates has, by definition, been brainwashed. If that approach is not applied then any claim that someone has been brainwashed must be accompanied by a list of specific indicators of the state of being brainwashed, so that people can be accurately classified through properly designed research.

One approach sometimes taken by brainwashing proponents is to use the *DSM*, citing characteristics of selected disorders such as Atypical Associative Disorder, which does include a mention of 'cults' in its description, or Post-Traumatic Stress Disorder, which does not mention involvement in 'cults'.[64] This type of reliance on *DSM* categories with regard to brainwashing is fraught with difficulties, since criteria for inclusion and exclusion are not clearly specified, and false positive rates are indeterminable. Both beauty and mental disorder are in the eye of the beholder. If one is looking for signs of mental disorder then one can probably find them,[65] especially given the vagueness of such concepts as Shapiro's 'destructive cultism'.[66]

Shapiro's development of the term 'destructive cultism' is quite instructive on the point of classification and error rates. Shapiro's son Edward was incarcerated and transported from New York to Boston on the basis of having been classified as suffering from membership of the Hare Krishna making him 'incompetent as a result of mind control'. That opinion was tendered by another psychiatrist, John Clark, after very limited contact with the son.[67]

Edward Shapiro was kept in a mental institution, McLean Hospital in Boston, for two weeks while a team of mental health

[64] See Richardson, 'Religiosity as Deviance', n. 23 above.
[65] See D. Rosenhan, 'On Being Sane in Insane Places' (1973) 179 *Science* 250.
[66] See Shapiro, 'Destructive Cultism', n. 56 above.
[67] See J. T. Richardson, 'Mental Health of Cult Consumers: Legal and Scientific Controversy' in J. Schumaker (ed.), *Religion and Mental Health* (New York, 1992), 233 at 236.

professionals at the hospital evaluated him. When those doctors then testified in a conservatorship hearing that he was not suffering from any mental disorder and that he should be released, Dr Clark insisted that mind-control techniques were so powerful that they could actually conceal mental illness (a claim with implications for falsifiability, of course). Clark recommended that Edward be kept in the hospital for further observation under conditions of 'stress testing', which meant that Shapiro was not to be allowed to see any friends or attorneys, and he could not practise his religion.[68]

The Shapiro case clearly shows a classification disagreement. Psychiatrist Clark, as well as the father who was also a psychiatrist, were attempting to gain court approval of a certain classification of the son Edward. To do so would undergird the request for a permanent conservatorship of the son by the father. But a team of doctors from McLean Hospital disagreed with that classification. They testified that Edward was not suffering from any mental disorder at all, and that he was competent to manage his personal affairs.

The court decided to follow the expert advice of the McLean team of mental health professionals, perhaps because of the plain outrageousness of some of the assertions of Dr Clark. But this sort of outcome does not always pertain;[69] judges and juries have often shown a willingness to accept brainwashing-based testimony in less egregious circumstances.[70]

The acceptance of such assertions risks false positive errors of classification. People who are not 'brainwashed' are said to be, and leaders of religious groups are said to 'brainwash' when they recruit members. These misclassifications provide definitions of reality that have significant implications for public policy and individual freedom. Such classification schemes fail to recognize the normality of the recruitment and persuasion processes used in most newer religious groups, and that many other human groups

[68] Shapiro was ordered to be released by the court, which did not accept Clark's expert advice, and Clark was eventually reprimanded by his state medical board for apparently equating participation in a religious group with mental illness. See Richardson, 'Mental Health of Cult Consumers', n. 67 above.

[69] See Bromley, 'Conservatorships and Deprogramming', n. 25 above; LeMoult, 'Deprogramming', n. 25 above.

[70] See Richardson, 'Cult/Brainwashing Cases', n. 20 above; Anthony and Robbins, 'Negligence, Coercion', n. 20 above.



use similar techniques to gain and socialize participants.[71] College fraternities and sororities are examples, but so are various community groups as well as the military, correction institutions, and some forms of group therapy. The 'brainwash' misclassifications, then, have serious costs associated with them, both for the alleged 'brainwasher(s)' and for the 'brainwashed' victim; but although it is clear that such misclassifications have occurred in court proceedings, the probability of such errors is unknown.

It seems clear that brainwashing-based testimony does not meet the 'known and potential error rate' guideline from *Daubert*. Therefore, such testimony should be disallowed as scientific evidence, even though it might mesh well with the values and normative positions of the gatekeepers and triers of fact in cases involving exotic religions.

## Peer Review and Publication

This guideline seems straightforward on its face, but contains some problematic elements. It would seem reasonable simply to see what was published in the major refereed journals in a field of scientific endeavour. Similarly, it would seem reasonable to examine the resumés of proposed experts to see if they had published their results in major journals in their field of study. This is the approach taken by judges when they evaluate most scientific testimony and the experts offering it.

In the field of social and behavioural science this straightforward approach has some value. The most prominent scientific journal in the world, *Science*, has, for instance, published at least one article extremely critical of much of the clinical psychological testimony offered in courts of law in America.[72] On the specific issue of participation in new religions, the refereed journal with the largest circulation of any in the field of behavioural sciences, *The American Psychologist*, has published a paper quite critical of brainwashing-based theories as they apply to contemporary religious groups.[73]

[71] See Richardson, 'Active v. Passive Converts', n. 23 above; *id.* 'Social Psychological Critique', n. 23 above.

[72] See D. Faust and J. Ziskin, 'The Expert Witness in Psychology and Psychiatry' (1988) 241 *Science* 31.

[73] See Kilbourne and Richardson, 'Psychotherapy and New Religions', n. 51 above.

However, problems arise with the assessment of peer review and publication, specifically with respect to what disciplines are relevant and who are the peers of those offering testimony. The *Science* article mentioned earlier aroused strong reaction, especially from clinical psychologists, who defended their turf vigorously. The *American Psychologist* article that critiqued brainwashing-based theories was itself criticized in a newer 'anti-cult' journal that is attempting to achieve respectability.[74]

There appear to be major disciplinary differences on the issue of cult brainwashing. Most sociologists and psychologists of religion reject brainwashing theories, whereas many clinical psychologists and psychiatrists apparently give them some credence.[75] The views of psychiatrists and clinical psychologists are widely accepted among the general public, journalists, and organs of mass media,[76] a circumstance with important implications for admissibility.[77]

Thus, journals in the field of psychiatry may publish brainwashing-based articles with no suggestion of the problematic nature of the evidence for such theories. Also, more popular 'anti-cult' publications and the lay media disseminate brainwashing theories readily. Relatively few people are aware of the vast literature from sociology and psychology of religion which refute brainwashing theories, and which use more mundane and well-substantiated theories to explain participation in such groups and movements.

Similar comments can be made about peer review. When the difference of opinion about the efficacy of expert evidence breaks down along disciplinary lines, this means that apparent peers can probably be found who share the perspective of the one offering the testimony. Indeed, a clinical psychologist or a psychiatrist might even disagree that a sociologist or social psychologist would be a peer (and the sociologist or social psychologist might return the favour).

Thus, gatekeeper judges deciding about admission of brainwashing-based testimony can admit evidence that is questionable

[74] See Richardson and Stewart, 'Medicalization', n. 57 above.
[75] See Richardson, 'Sociology', n. 29 above.
[76] See J. T. Richardson, 'Journalistic Bias toward New Religious Movements in Australia' (1996) 11 *J Contemporary Religion* 289.
[77] See Gatowski *et al.*, 'Globalization', n. 17 above.



to many, but do so under *Daubert* by simply referring to journals or to peer groups that reflect values supportive of those offering the evidence. Because of this problem, it is important that judges making admissibility decisions are informed about the science behind whatever evidence is being presented. Judges must be able to ascertain what disciplines can and should have something relevant to say about the admissibility of testimony being offered as scientifically based evidence.[78] If information necessary to make a proper admissibility decision is not being proffered then the judge must consider how to obtain that information. To decide the admissibility of brainwashing-based testimony under *Daubert* guidelines for scientific evidence, a judge should consider whether the theory or hypothesis being proffered has been published in peer-reviewed scientific journals, but not just in those journals of the proffered expert's discipline or profession. To do so could bias the decision process in favour of the discipline which has a vested interest in the outcome of the decision.[79]

### General Acceptance

This criterion from the 1923 *Frye* decision was retained in *Daubert*, with the understanding that it does make a difference how widely supported a scientific conclusion is among an identified 'relevant scientific community'. The court said that widespread acceptance can be an important factor in ruling particular evidence admissible. The implication of the term 'widespread' is one of inclusiveness, but the court does not explicitly note the problem referred to above of possible disciplinary differences on the value and soundness of a given piece of scientific evidence. And there is no apparent recognition of the fact that popular opinion can potentially influence admissibility decisions in cases involving issues of great interest to the general public or to official authorities.[80]

[78] This problem also pertains in the physical and biological sciences. See R. Bjur and J. Richardson, 'Chemistry in Court: Admissibility Decisions Concerning Chemical Evidence' (1997), paper presented at annual meeting of the American Chemical Society, Las Vegas.
[79] See Kilbourne and Richardson, 'Psychotherapy and New Religions', n. 51 above.
[80] See Dewitt *et al.*, 'Novel Scientific Evidence', n. 31 above; Gatowski *et al.*, 'Globalization', n. 51 above.

We have seen some troubling admissibility decisions made in recent years in controversial, high interest areas such as child sex abuse, repressed memories, and rape trauma syndrome, as well as in so-called 'cult/brainwashing' cases. Judges acting as gatekeepers need to overcome pressures from the media or other sources to accept allegedly scientific evidence, and instead assess the scientific basis of such evidence and make decisions accordingly.

In the particular case of brainwashing-based testimony, a number of interest groups would favour admitting evidence that might be useful in exerting social control over exotic religions or in offering therapy to participants. Some of those interest groups would be represented by people with impressive professional credentials. However, given the strong social values that surround this particular area of knowledge it seems imperative also to seek information based on serious empirical research done in the field by researchers operating without any preconceived normative notions about the groups being studied. General acceptance in this circumstance, then, should encompass more than just the therapeutic community.

Expansion of the notion of relevant scientific community contributed to the decisions cited earlier rejecting brainwashing-based testimony under the *Frye* rule.[81] When psychologists and sociologists of religion became involved, and when their research results were presented to the court, this contributed to an awareness on the part of the court that other relevant information for the court was available, and that the brainwashing-based testimony being offered did not therefore meet the general acceptance criterion.[82]

## Conclusions

Simply put, brainwashing-based testimony was eventually ruled inadmissible under *Frye*, and it should also be ruled inadmissible under *Daubert*. Such evidence does not meet any of the four guidelines. Ambiguity of the brainwashing concept and the existence of mutually incompatible hypotheses from it make major portions of any brainwashing theory of religious indoctrination unfalsifiable. Furthermore, to the extent that testable, operational hypotheses about effects have been generated from it, they have been explicitly disconfirmed. Also, error-rate data do not support brainwashing-based hypotheses, and indeed it is even difficult to devise a plausible test of a classification scheme that makes any sense. The peer review publication guideline is not met when it is properly understood as involving a broader range of disciplines, and that is also the case with the general acceptance criterion.

Given the problematic nature of scientific support for brainwashing-based theories as they are applied to participants in new religions, it is reasonable to ask why such evidence was ever admitted, and why it is sometimes still admitted.[83] The most plausible answer has to do with the operation of biases, prejudices, and misinformation in cases that involve controversial parties and issues, or, as Kassin and Wrightsman say, cases 'involving emotional topics over which public opinion is polarized'.[84]

'Cult/brainwashing' cases fit such a description, raising the possibility alluded to earlier that judges and juries may on occasion have acted out of bias or misinformation in cases involving controversial groups. Their judgement about the scientific viability of the brainwashing-based testimony may have been clouded by values and views about the role of such groups in society. Considerable anecdotal evidence about specific cases suggests that this may be the case,[85] and there is also some experimental evidence supporting the point.[86] Furthermore, the popularization of the term 'brainwashing' by news media,[87] from the Korean War to the present, has made the brainwashing concept highly

[81] See *Fishman*, n. 33 above and *Green*, n. 35 above.

[82] It is worth noting that legal and constitutional arguments also played a major role in these key cases (Anthony and Robbins, 'Law, Social Science', n. 20 above), but it also seems probable that evidence about research which did not support the brainwashing theory was important.

[83] See Richardson, '"Brainwashing" Claims' n. 17 above; Anthony and Robbins, 'Negligence, Coercion', n. 20 above.

[84] See S. M. Kassin and L. Wrightsman, *The American Jury on Trial* (New York, 1988).

[85] See Anthony and Robbins, 'Law, Social Science', n. 20 above; Richardson, 'Cult/Brainwashing Cases', n. 20 above.

[86] See J. Pfieffer, 'The Psychological Framing of Cults: Schematic Representations and Cult Evaluation' (1992) 22 *J Appl. Psychology* 531; DeWitt *et al.*, 'Novel Scientific Evidence', n. 31 above.

[87] See B. van Driel and J. Richardson, 'Print Media Treatment of New Religious Movements' (1988) 38 *J Communication* 377.

familiar and therefore not likely to be seen by a judge or juror as needing scientific validation.[88]

The very possibility that admissibility decisions about proffered scientific testimony might be affected by such extraneous factors should give all involved with the legal system pause for thought.[89] At the very least, this examination of brainwashing theories under *Daubert* guidelines makes clear the importance of enhancing not only the scientific education of judges, but their sensitivity to the special problems which scientific evidence poses in the social and behavioural sciences.

[88] Interestingly, the construct has not been subjected to scientific scrutiny in which conventional scientific procedures are used to establish its validity. See Fort, 'What is "Brainwashing"?', n. 30 above; P. London, Deposition in *Fishman*, n. 33 above; Anthony, 'Religious Movements', n. 20 above.

[89] See T. Robbins, and D. Bromley, 'Social Experimentation and the Significance of American New Religions' in M. Lynn and D. Moberg (eds.), *Research in the Social Scientific Study of Religion*, vol. 4 (Greenwich, CT, 1992), 1.