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"DEPROGRAMMING": FROM THE DEFENSE COUNSEL'S PERSPECTIVE

ALBERT R. VERMEIRE*

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

Anguished parents and sympathetic judges; concerned attorneys and psychologists; reality-inducing therapists, police officers and adult or minor conservatees and wards: All play integral roles in federal civil rights and state tort religious cult litigation. Characteristically, such actions are brought in the name of the ward or conservatee who was the subject of a temporary guardianship or conservatorship, empowering a guardian or conservator to have his or her child counseled by psychiatrists, psychologists or lay therapists, and issued by a court convinced that the child had become a victim of a form of mind control manifested by abrupt personality changes, radical behavioral modification, unexplained divesting of assets, and general physical debilitation. The counseling, often referred to as deprogramming, is either interrupted or unsuccessfully completed and the ward or conservatee returns to the cult. Soon after the ward's return, federal litigation is commenced, with jurisdiction premised upon both diversity and federal question.

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Causes are pleaded pursuant to 42 U.S.C. §§ 1983, 1985(2), 1985(3), and the various state common law torts of false

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand jury or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.


If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.


The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection
imprisonment, false arrest, assault, battery and intentional infliction of emotional harm.

Due to its controversial nature and its attraction of many commentators to investigate the first amendment questions surrounding the use of this therapy, deprogramming has been analyzed in various articles, notes and comments. However, they have only cursorily examined the procedural and substantive predicates to proving claims under the federal Civil Rights Statutes and the relevant state common law torts. While scholarly, these articles have either analyzed deprogramming in conjunction with brainwashing or totalism,9 investigated deprogramming as a method of conversion10, analogized cultist beliefs with the first amendment religious beliefs11 or have at-

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tempted to formulate a theory of free exercise of religion that would apply to beliefs of religious cult members.12

Drawing on the perspective and background of research into the legislative history of the Civil Rights Act in which 42 U.S.C. § 1983 and § 1985 are embodied and having handled numerous federal trial and appellate cases that have yielded opinions delimiting the standards by which religious cult claims must be proved and pleaded, the author will concentrate on recent developments in the Supreme Court of the United States and the federal district and appellate courts. This article will explore the requirements of stating a cause under 42 U.S.C. § 1983 and § 1985, the test of pleading and proving a conspiracy under these sections, defenses available to the practitioner who must counter claims of first amendment violations and emotional injury, and will conclude with an overview of the present state of the law surrounding religious cult litigation and the civil rights damages available in such cases.

I. A REALISTIC DEFINITION OF DEPROGRAMMING

Early efforts by various legal authors to define deprogramming were for the most part based on undocumented accounts of the experience by persons who were or soon would be plaintiffs in damage actions brought against the deprogrammers. Most commentators have chosen to define deprogramming as a calculated method to disabuse a person of religious beliefs.13


13 Note, People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability and Parental Remedies, 11 Suffolk U.L. Rev. 1025 (1977); LeMoult, Deprogramming Members of Religious Sects, supra note 10, at 599: "It is called 'deprogramming'. It consists of taking adherents of religious groups against their wills, confining them, and subjecting them to intense, mental and emotional and sometimes physical pressures until they renounce their religious affiliation." In Baer v. Baer, 450 F. Supp. 481, 485 (N.D. Cal. 1978), the decision was based on defendant's motion for judgment on the pleadings under Fed. R. Civ. P. 12(f). As such, the well-pleaded facts in the complaint were assumed to be true for purposes of the motion and thus the court accepted the plaintiff's definition of deprogramming as a process whereby "individuals who are members of certain religious groups are subjected to a scheme of brain-washing or mind control in an attempt to dissuade them of their religious beliefs." 450 F. Supp. at 485. See note 62 infra.
These definitions were based on articles in newspapers\(^{14}\) and magazines\(^{15}\) and even the affidavit of a plaintiff's attorney based on his client's version of the experience.\(^{16}\)

In Weiss v. Patrick,\(^{17}\) the court sitting without a jury found the credible evidence to be that the process of deprogramming involves no treatable or apparent physical injury and fails to support a claim that the process inflicts traumatic psychic or emotional injury.\(^{18}\) In Weiss, the court found that the defendants had the right to peaceably dissuade the plaintiff from any particular view, whether religious or not, so long as there was no

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\(^{14}\) Note, Conservatorships and Religious Cults, supra note 12, at 1247 n.3; LeMoult, Deprogramming Members of Religious Sects, supra note 10, at 600 nn. 6 & 7; id. at n. 11; Comment, Federal Statutory Remedy Rejected, supra note 11, at 774 n.3.


\(^{16}\) Note, Conservatorships and Religious Cults, supra note 12, at 1248 n.8. The attorney, described as a person "who has represented several persons 'subjected' to deprogramming described the experience in an affidavit the plaintiffs attempted to introduce in the case of In re Guardianship of Walter Robert Taylor, No. P-76-1228 (Okla. County P. Ct. August 12, 1976). The attorney (or his unnamed client) described a "long interrogation as to their belief", abusive comment and the vilification of the cultist's religious leaders. He alleged sleep deprivation and the shutting off of news from the outside world until the individual will of the person was broken. Id.

The author was defense counsel at all stages of the proceedings in Taylor v. Gilmartin, 434 F. Supp. 909 (W.D. Okla. 1977) (preliminary injunction denied). The affidavit of other counsel relied upon by the commentator in support of his definition of deprogramming was summarily dismissed by the trial court as completely incompetent. The Taylor civil rights damages case was tried in January, 1981, and a verdict in favor of all defendants was returned. Taylor v. Gilmartin, No. CIV-77-0351-D (W.D. Okla. Jan. 16, 1981), appeal docketed, No. 81-1215 (10th Cir. Feb. 25, 1981) Compare Comment, The Deprogramming of Religious Sect Members, supra note 11, at 237 n.56 ("most deprogrammings involve abductions") with Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978) and Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978). See also note 25 infra. Even a cursory reading of these two opinions reveals that the ward was taken into custody on the authority of a court order with the assistance of local law enforcement officials. One should doubt seriously the assertion that the majority of deprogrammings involve abductions.


\(^{18}\) Id. at 721.
form of unlawful compulsion to effect that purpose. The court further found that the plaintiff was encouraged to listen to another point of view, given adequate food and sleep and, rather than characterize the plaintiff's departure as an "escape",\(^{19}\) found that the plaintiff was "determined to exit dramatically."\(^{20}\)

What is at the heart of Weiss is that while deprogrammers do indeed intend to offer a different point of view and to persuade the cultist to change his or her mind, such conduct is itself protected by the first amendment right to freedom of speech and entitled to the same protection as is any other first amendment right.\(^{21}\) In essence, the Weiss rationale is that "the right of every person 'to be left alone' must be placed in the scales with the right of others to communicate."\(^{22}\)

In January of 1981, a jury verdict was returned in favor of a judicially authorized counseling psychologist, attorneys representing the parents of a ward, and the deprogrammers of a young man who claimed affiliation with both Hindu and American Old Catholic Church religions.\(^{23}\) In directing a verdict in favor of the defendants on the issue of intentional infliction of emotional harm, the court ruled as a matter of law that deprogramming, being a form of communication, exchange of ideas and interaction between two or more persons, could not constitute outrageous conduct nor could it be described as "going beyond the bounds of decency."\(^{24}\)

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id. at 722: "To hold otherwise would be to deny Defendants their First Amendment right to freedom of speech, one of the very rights which Plaintiff herself asserts as the basis for her civil rights claim." The court relied on the Supreme Court's dictates in Cantwell v. Connecticut, 310 U.S. 296 (1940), wherein it was held that in spite of the probability of excess and abuse, the freedom and liberty to persuade others to one's own point of view, although based upon exaggeration, vilification or even false statement, is just as essential to enlightened opinion and right conduct on the part of citizens of a democracy as is the right to be left alone. 310 U.S. at 310.


\(^{24}\) Id.
At the heart of deprogramming is a form of communication: conversation which the ward in most cases wishes not to hear, and may attempt to shut out by either not listening or by interrupting through use of chanting or silent prayer. While the offering of contradictory ideas or rhetoric may be offensive to the listener, it is highly questionable whether the expression of a point of view can ever rise to the level of an actionable cause. The questioning of a belief, whether political, social or religious, does not necessarily constitute a wrong under applicable federal or state statutes. Clearly, the mere questioning of a foundation for a purported belief and the offering of antithetical theories does not rise to the level of outrageous conduct or the intentional infliction of emotional harm. It is the infringement of a religious belief that is protected by the first amendment. The statutory embodiment of the right of free exercise is found at 42 U.S.C. § 1983 although some commentators have now urged the protection of such a right under 42 U.S.C. § 1985 as well.

II. THE SECTION 1983 CAUSE OF ACTION


See note 7 supra and accompanying text.

because a party who cannot withstand the burden of proving that the action was taken under color of state law may be able to successfully attack purely private action if the discrimination is either racial in nature or intended to interfere with the right of interstate travel.\textsuperscript{28}

The fundamental requirement of proving a claim under section 1983 is a demonstration that the defendants have acted under color of state law or authority. There has been no pattern in the cult deprogramming cases which would indicate a trend towards naming the judge who issues the order as a defendant. Unless the judge has acted "in the clear absence of all jurisdiction,"\textsuperscript{29} the naming of the judge is most likely futile and unnecessary from a substantive standpoint since co-conspirators may be held liable even if the judicial officer is immune.\textsuperscript{30}

\section{A. The Role of the Judge}

In those cases where the deprogramming is carried out pursuant to a court order of guardianship or conservatorship, the decision to name the judge as a defendant turns on two key questions: (1) Are the acts being complained of truly "judicial" acts, and, if they are, (2) were the judge's actions undertaken in the clear absence of all jurisdiction.

In \textit{Stump v. Sparkman},\textsuperscript{31} the Supreme Court extended judicial immunity to a judge who had approved a petition for involuntary sterilization of a "somewhat retarded"\textsuperscript{32} 15-year-old girl. The petition had been presented by the girl's natural mother, but the prospective subject had been given no notice of the nature of the petition. Justice White, writing for the majority, focused on the question of whether the judge had jurisdiction over the subject matter and held that absolute immunity

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} \textit{Stump v. Sparkman}, 435 U.S. 349, 357 (1978).
  \item \textsuperscript{30} As Judge Williams pointed out in \textit{Baer v. Baer}, 450 F. Supp. 481, 488 (N.D. Cal. 1978), assuming that the plaintiff could amend his complaint to allege a conspiracy between the judge and the defendants, he would still have to allege facts sufficient to demonstrate that the court acted "in the clear absence of all jurisdiction." With or without the judge as a party defendant, the lay co-conspirator may be held liable and are not entitled to the umbrella of absolute judicial immunity. \textit{See} note 48 \textit{infra} and accompanying text.
  \item \textsuperscript{31} 435 U.S. 349 (1978).
  \item \textsuperscript{32} This was alleged by the mother in the petition. \textit{Id.} at 351.
\end{itemize}
should be extended in this case since there was no demonstration that the court had acted in the "clear absence of all jurisdiction." Justice White noted that a judge would not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of the court's authority. Evidently there was no consensus reached between all parties to the litigation that the approval and the execution of the petition was indeed a judicial act. In the briefs presented before the Court, however, much emphasis was placed on the totally ex parte nature of the proceeding and on the secrecy and covertness with which the court order was approved. The failure of the litigants to argue this issue is significant to the question of whether actions undertaken prior to the execution of the order by the court, such as bribery, prejudicial agreements and secret contracts, can qualify as a "judicial act" and therefore satisfy the first prong of the immunity test.

In Stump v. Sparkman, it was held that because the court over which the judge presided was one of general jurisdiction, neither lack of specific statutory authority nor procedural errors he may have committed in an effort to execute the petition rendered him liable in damages. Justice White characterized the absence of a docket number, the failure to place the petition on file in the clerk's office and the maintenance of an ex parte proceeding without notice to the ward, without a hearing and without the appointment of a guardian ad litem as mere lack of formality which did not divest the act of its judicial character. What was significant to the Supreme Court was the act in question, rather than any pre-execution secret agreements or meetings between the participants. What rendered this conduct a "judicial" act was the determination that it was a function "normally performed by a judge" and "a function [conforming] to the

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30 Id. at 357, citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).
31 Brief for Respondents, at 3, Stump v. Sparkman, 435 U.S. 349 (1977). Justice White thought the only act questioned to be a "judicial act" was the approval of the petition. 435 U.S. at 362. Stewart, J., dissenting, was concerned that there was no case or controversy, no litigants and not even a pretext of principled decision-making. He would have found that the act was non-judicial because of the total absence of any of the normal attributes of a judicial proceeding. Id. at 369. The Court in no way dealt with the question of whether there was an informal and prior agreement with the judge to grant the petition upon presentation.
32 435 U.S. at 359.
expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity."

Opposing advocates in the cult deprogramming damage cases read with interest the enticing footnotes to the majority and dissenting opinions in Stump v. Sparkman inviting resolution of a split of authority among the federal circuits on the question of the extension of the court's absolute immunity to persons allegedly acting in concert with the court but not themselves state agents. Shortly after the Supreme Court's opinion, the District Court for Arizona employed the "clear absence of all jurisdiction" test and held in Rankin v. Howard that the acts of the defendant judge in issuing the temporary order of guardianship over the cult member were judicial in nature and based upon proper subject matter jurisdiction. The court rejected the argument that it was necessary to find personal jurisdiction over the plaintiff in order to find immunity for the judge. The court then extended the Ninth Circuit point of view extending such immunity to co-conspirators who allegedly acted in concert and in participation with the judge.

While the Rankin appeal was pending before the United States Court of Appeals for the Ninth Circuit two opinions paved the way to the Supreme Court's resolution of the issue. On remand in Sparkman v. McFarlin, the judges in regular active

36 Id. at 382.
37 The majority concluded: "The issue is not presented and we do not decide whether the District Court correctly concluded that the federal claims against the other defendants were required to be dismissed if Judge Stump, the only state agent, was found to be absolutely immune." 435 U.S. 349, 364 n.13 (1978); Compare Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceño, 547 F.2d 1 (1st Cir. 1976) with Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970).

The dissenters also showed self-restraint: The only question before us in this case is the scope of judicial immunity. How the absence of a 'judicial act' might affect the issue of whether Judge Stump was acting 'under color of' state law within the meaning of 42 U.S.C. § 1983, or the issue of whether his act was that of the State within the meaning of the Fourteenth Amendment are, therefore, not questions that need be pursued here.

435 U.S. 349, 369 n.6 (1978).
39 Id.
40 Id.
service in the United States Court of Appeals for the Seventh Circuit voted to resolve the issue en banc and held that the complaint failed to state a claim against the private individuals where it failed to particularize the acts of conspiracy so as to draw the sufficient nexus between the conduct of the judge and the participation of the mother, the attorney who drafted the petition, the doctors who performed or assisted in the sterilization, and the hospital where the tubal ligation was performed. A radically divided court in a plurality opinion failed to resolve definitively the extension of immunity question. The eight Circuit Court judges had the opportunity to answer the question on remand either by applying the test of sufficiency of pleading to prove a conspiracy or by addressing the split among the federal circuits on the question of extension of immunity.

In a concurring opinion, however, it was noted that while the "requisite particularity in alleging a conspiracy" rule would be followed in this circuit, if the factual particulars of a conspiracy could be alleged under a fairly strict standard, private persons would be exposed to section 1983 liability by conspiring with absolutely immune judges. After discussing the policy considerations for and against extension of the per se immunity accorded to judges, the opinion concluded by finding that the Seventh Circuit rule was "flexible enough to accommodate and mediate all of the policy considerations on both sides of the question."

The dissent found that courts previously addressing the issue confused immunity with state action, and would have held that there was state action irrespective of a public official's immunity where the action is one for civil damages. The dissenters did not feel that the purposes of judicial immunity would be undermined or that the allowance of such suits would have a chilling effect on the ability of a judge to perform his duties with independence and without fear of adverse consequence. The possibility of judges having to testify and be subject to other discovery procedures, though not parties to the action, was dismissed as a "slight inconvenience and embarrassment" and

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42 601 F.2d at 266. The concurrence reasoned that "the conferral of immunity upon the judge defendant does not destroy the judicial state action which the judge may have performed."

43 Id. at 267.
nugatory. In the same year, the United States Court of Appeals for the Fifth Circuit plurality apparently agreed in *Sparks v. Duval County Ranch Co., Inc.*

The key act in the *Sparks* case was the entering of an injunction, although much importance was also placed in the appellate rehearing opinion on the fact that one of the defendants bribed the judge to issue the injunction prohibiting the plaintiffs from producing certain oil, and that two other defendants, with full knowledge of the alleged conspiracy, acted as sureties on the injunction bond. Although the act of bribery occurred prior to the time of the undertaking of any judicial act, the plurality opinion simply concluded: "Carrillo [the judge] was, of course unqualifiedly immune from suit for damages occasioned by his judicial act, and as to him the suit was correctly dismissed." The United States Supreme Court tacitly agreed with such a finding in dicta indicating that although the official act of the defendant judge was the product of a corrupt conspiracy involving bribery, the judge himself was correctly held to be immune from damages. Such immunity did not however change the character of the judge's action or that of alleged co-conspirators.

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44 Id. at 274 n.9.
45 604 F.2d 976, 980 (5th Cir. 1979).
46 Id. at 978.
47 Dennis v. Sparks, 101 S. Ct. 183 (1980), aff'g, 604 F.2d 976 (5th Cir. 1979).

Justice White, speaking for a unanimous Court, stated:

The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds. It does not follow, however, that the action against the private parties accused of conspiring with the judge must also be dismissed. *Id.* at 188. This was an interesting statement by Justice White in light of the fact that the Supreme Court had granted certiorari only on the issue of derivative immunity, 445 U.S. 92 (1980), but expressly denied certiorari on the issue of judicial immunity. "As the case came" to the Supreme Court, the Fifth Circuit had held that the judge was "unqualifiedly immune." The United States Court of Appeals for the Ninth Circuit has gone further than the Supreme Court by taking into consideration the alleged non-judicial character of a prior agreement which eventually leads to the issuance of an order within the subject-matter jurisdiction of the court, Rankin v. Howard, 633 F.2d 844, 847 n.9 (9th Cir. 1980), thereby seizing on the dictum in *Dennis v. Sparks* which implicitly confided that the Fifth Circuit had properly upheld the State judge's dismissal. *See generally* note 55 and accompanying text.
The Fifth Circuit panel rehearing opinion came about as a result of the entry of an order by the then majority of judges in active service in the circuit who voted to reconsider *en banc* the previous holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. Indeed, the clerk's notice to counsel made specific mention of the intervening opinion in *Stump v. Sparkman* and the invitation to resolve this issue expressed in footnote thirteen to the majority opinion in *Stump*. Unlike the Seventh Circuit, the Fifth Circuit found that the issue of derivative immunity of private persons who allegedly conspired with the judge was properly before it and it would not sidestep the issue based on the particularized pleading rule. The essential differences between the plurality and dissenting opinions in the Fifth Circuit was the weight given by the respective authors to the two positions respecting the likely degree of infringement on the orderly and proper exercise of the judicial function should the court, technically immune, be required to explain the basis for its decisions in depositions and other discovery procedures.\(^4\)

\(^4\) The Clerk's letter to counsel stated in pertinent part: "In other words the Court wishes to reconsider the holding that Judge Carillo's alleged co-conspirators—the private citizens—effectively share his immunity, since 'they did not conspire with a person against whom a valid § 1983 can be stated.'" See *Stump v. Sparkman* 435 U.S. 349, 364 n.13 (1978) and *Sparks v. Duval County Ranch Co.*, Inc., 604 F.2d 976, 979 n.5 (5th Cir. 1979). Judge Gee, writing for the plurality in *Sparks*, stated: "Mischievous damage suits of this sort license the ill-disposed to require judges to appear and testify. But the benefit that the derivative immunity would accord in protecting judges from an obligation to testify in the trial of their alleged co-conspirators, while not wholly illusory, is comparatively insignificant." 604 F.2d at 980. Coleman & Ainsworth, JJ., dissented and took strong exception to the suggestion of the comparative insignificance of possible forced testimony by judges and characterized this finding as a "very small portion of the iceberg." *Id.* at 986. The dissenters were concerned that any individual who had lost a case and who knew how to sufficiently plead enough misconduct to withstand a motion to dismiss, without consideration given to the merits of the complaint, could force the judge or the prosecutor to besmear their integrity. The judge is not a party defendant so he would not be entitled to trial participation as a party litigant. If he wished such participation, he would have to move to intervene, thus "surrendering the cornerstone of his judicial independence ...." *Id.* The court would have to employ its own counsel. If he did not become a party defendant, he could not guarantee himself the right to testify in behalf of his own vindication. What most concerned the dissenters was that the imaginative litigant and his counsel could achieve by the back door of discovery what they could never achieve directly because of the court's immunity. *Id.* at 986.

\(^4\) The dissenters felt that such discovery was without precedent, would
The Supreme Court of the United States had no trouble in resolving the conflict surrounding the anticipated incursion on the judge's role and duties. The Court found that it did not follow that actions against private individuals need necessarily be dismissed on immunity grounds even if the only state actor were absolutely immune. Justice White made it clear that the requirement of acting "under color of state law" for section 1983 purposes did not require that the defendant be a state officer, but that it was enough if he was a "willful participant in joint action with the State or its agents." The prerequisite in this case was found to be the allegation of a corrupt conspiracy involving bribery, since, as noted by the Court, mere resort to the court and being on the winning side of a lawsuit does not make that party a co-conspirator or a joint actor with the judge. The only exception the Court noted it might recognize was that the immunity would extend to any private party who "was actually performing a judicial act or was in any sense an official aide of the judge."

Finding that there was no constitutionally-based privilege that would protect the judge from responding to questions about his judicial activities and decisions at the damage trial of the private persons who allegedly conspired with him, the Supreme Court agreed that testifying takes time and energy that might otherwise be devoted to the courtroom and, indeed, the integrity of the judge and of the entire judicial process might be at stake in such cases. Basically, Justice White could simply not find any statutory or common law authority exempting a judge from testifying as a witness when he had information material to a civil proceeding. Thus, in federal district court litigation where all the circuits require pretrial order compliance at the completion of discovery, assuming the "where, when and how" rules of proving a conspiracy can be demonstrated, it is likely that the judge who issued the order of guardianship or conservatorship in cult deprogramming cases will have to testify as a witness unless the federal district judge

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50 Dennis v. Sparks, 101 S. Ct. at 186.
51 Id.
52 Id. at 187.
53 Id.
believe that such testimony will result in an undue interference with the state judicial system.\textsuperscript{54}

After the granting of the petition for certiorari in \textit{Dennis v. Sparks}, but before the opinion was handed down on November 17, 1980, \textit{Rankin v. Howard} was argued before the United States Court of Appeals for the Ninth Circuit. That court applied the Supreme Court's reasoning in \textit{Dennis} and held that neither the district court judge, the counsel for the parents, nor the deprogrammers were immune from section 1983 liability.\textsuperscript{55} In light of the Supreme Court's findings in \textit{Dennis v. Sparks}, the holding as against the private individuals was not surprising but the reasoning used to find the judge liable as a defendant was. Like the case of \textit{Baer v. Baer},\textsuperscript{56} \textit{Rankin} concerned a motion where the well-pleaded facts in the complaint were either taken as true or viewed in the light most favorable to the party opposing the motion.\textsuperscript{57} The plaintiff alleged that prior to the presentation of the temporary guardianship petition, the judge privately agreed in advance with the other private persons that he would issue the order of guardianship although he knew he had no jurisdiction to do so.

The Ninth Circuit found that there was not the clear absence of all subject matter jurisdiction but wrestled with the question of whether the "clear absence" test applied to personal jurisdiction as well. Noting that the question appeared to be one of first impression, Judge Wright extended the test so that a judge who knowingly acted "in the clear and complete absence of personal jurisdiction loses his judicial immunity."\textsuperscript{58} That is to say, the Ninth Circuit stressed the allegation that the judge knew he lacked jurisdiction and that Kansas law, according to the plaintiff's contentions, expressly prohibited the defendant judge from exercising jurisdiction over the prospective ward. The Court went on to hold that if \textit{as alleged} the judge knew that

\textsuperscript{54} Id. at 188 n.7: "Whether the Federal Courts should be especially alert to avoid undue interference with the state judicial system flowing from demands upon state judges to appear as witnesses need not be addressed at this time."


\textsuperscript{56} 450 F. Supp. 41 (N.D. Cal. 1978).


\textsuperscript{58} \textit{Rankin v. Howard}, 633 F.2d at 849.
the jurisdictional allegations of the residence of the ward were fraudulent, or if the applicable Kansas law did expressly foreclose personal jurisdiction over a proposed ward in an *ex parte* proceeding, then it could be found that the judge acted in a clear and complete absence of personal jurisdiction.\(^69\)

The curious aspect of *Rankin* is reconciling the finding therein that a private agreement in anticipation of the issuance of the order of the act favorably thereon was not a judicial act,\(^60\) with the Supreme Court’s finding in *Dennis v. Sparks* that the judge who was allegedly bribed prior to the issuance of the injunction had been “properly dismissed from the suit on immunity grounds.”\(^61\) The “act” challenged in each case was one normally done by a judge: issuing court orders in *Rankin* for temporary guardianship, and in *Dennis*, for sterilization.

It is hoped that the Supreme Court’s fear of undermining the judge’s independence in his judicial role by discovery devices inquiring into the bases of his opinions, rulings, and decisions will not be borne out in the cult deprogramming damage cases. Needless to say, however, imaginative and inventive plaintiff’s attorneys can draft artful pleadings which can defeat any motion to dismiss as to the section 1983 cause of action since all the well-pleaded facts in the complaint are assumed to be true.\(^62\) This means that any disgruntled litigant, through a pro-

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\(^69\) *Id.* The court relied upon Bradley v. Fisher, 80 U.S. (13 Wall.) at 351 (1872), wherein it was stated that: “When the want of jurisdiction is known to the judge, no excuse is permissible . . . .”

\(^60\) “Although a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his ‘judicial capacity,’ the other party’s expectation, i.e., judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not ‘a function normally performed by a judge.’” 633 F.2d at 847.

\(^61\) *Dennis v. Sparks*, 101 S.Ct. at 186. The Ninth Circuit concluded that a judge’s private, prior agreement to decide in favor of one party was simply not a judicial act. *Rankin v. Howard*, 633 F.2d at 847. There is no analytical difference between a secret meeting and agreement in advance of the presentation of a petition for sterilization, a bribe completed prior to the presentation of a motion for preliminary injunction insuring the issuance of the order, and a private, prior agreement to decide in favor of a parent presenting a petition for an order of temporary guardianship, that would reasonably explain Judge Wright’s conclusion that such a prior arrangement is simply not a judicial act and therefore unworthy of immunity.

\(^62\) This is true both for motions to dismiss, *FED. R. CIV. P. 12(b)(1)-(6)* and motions for judgment on the pleadings, *FED. R. CIV. P. 12(c)*. As to motions for summary judgment brought pursuant to *FED. R. CIV. P. 56(c)*, the facts are viewed in
properly pleaded conspiracy count in conjunction with a section 1983 cause of action, will be able to depose the judge even before the complaint can be challenged by way of summary judgment. The only and most important control that can be placed upon such practice is for the federal courts to very strictly enforce the particularized pleading rule.63

B. Liability of Attorneys, Conservators and Guardians, Police Officials, and Deprogrammers

As the Supreme Court noted in Dennis v. Sparks, mere resort to the courts in an effort to seek a remedy does not constitute the requisite state action or active participation with a state official sufficient to state a claim under 42 U.S.C. § 1983. Absent a successful conspiracy theory, there is simply no basis for alleging a cause under color of state law against attorneys who counsel parents, or apply to the courts for orders of guardianship or conservatorship, and who carry out their duties assisting parents as guardians or conservators pursuant to the ensuing court order.64 Only when the private individual is clothed with the authority of the state, i.e., when his actions are substantially identical to those taken by state officials, can state action under section 1983 be found.65 Only if the individual possesses the power the ordinary citizen does not possess "which allows the individual [defendant] to take actions normally associated with those taken by public officials acting on behalf of the state . . . " does the lay person become "clothed" with such authority.66 Indeed, the federal courts have aptly stated that the "requirement of 'State action' can rarely be satisfied when the action is taken by one not a State official."67

In cult deprogramming damage cases, the attorney's function consists of: counseling parents, preparing pleadings, appear-

63 See note 41 supra and accompanying text.
67 Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972) (emphasis added); See also Dobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).
ing before the court and arguing his client’s case, preparing a form of order of guardianship or conservatorship, presenting an order directing the sheriff or law enforcement officials in the county or district to assist in service of the order and, on occasion, obtaining a temporary restraining order to prevent any disturbance of the peace when the order taking the ward into custody is served. Not one of these acts can be characterized as clothing the attorney with the authority of the state such that his actions become state action.\textsuperscript{68}

After obtaining the order, the attorney or the parent serving as guardian or conservator will seek the assistance of law enforcement officials to help effect service of the order and to avoid any possible breach of the peace. As the Supreme Court has pointed out, police officers enjoy a qualified immunity for their acts taken in performance of their official functions.\textsuperscript{69} If a court deems issuance of an order as necessary, it is certainly an official function of a law enforcement agency to respond to that court order and to avoid any unnecessary confrontation between cult members, parents, and attorneys.\textsuperscript{70}

In their capacity as parents, the ward’s mother and father should be treated no differently than psychiatrists, psychologists, religious counselors, lay assistants, or deprogrammers who communicate with the ward during the term of his guardianship or conservatorship. The mother and father can be viewed no differently than any other litigants who apply to the court for relief, because the state merely provides a forum for their legal action. As to his or her conduct as the conservator or guardian, however, it could well be argued that in such a role the parent is actually performing a quasi-judicial act or is in one sense an official aide of the judge and acts in his stead pursuant to the pro-

\textsuperscript{68} Dennis v. Sparks, 101 S.Ct. at 187; Harley v. Oliver, 539 F.2d 1143, 1145-46 (8th Cir. 1976); Orlando v. Wizel, 443 F. Supp. 744, 751 (W.D. Ark. 1978).


\textsuperscript{70} The requirement that the duty be official in nature is analogous to the requirement that the act of the judge in question be truly “judicial.” See note 35 supra and accompanying text. The act undertaken by the police officer must be in good faith and based upon a reasonable belief that he is carrying out an official function. Pierson v. Ray, 386 U.S. 547, 557. Once it has been established that the police officer was acting pursuant to those official duties, the burden then shifts to the plaintiff to demonstrate that the officer was not acting in good faith. Milton v. Nelson, 527 F.2d at 1160.
bale laws.\textsuperscript{71} In \textit{Holmes v. Silver Cross Hosp.},\textsuperscript{72} a petition was filed without notice to the proposed conservatee for a conservator to be appointed based upon declarations that the subject was incompetent and the appointment was necessary for the purpose of consent to surgery, blood transfusions, medicine, and drugs. Once the ward becomes subject to the powers of the conservator with specific directions as to the purpose of the order, "[h]is liability should be no greater or less than the judge who appointed him."\textsuperscript{73} Indeed, in carrying out the direct order of the court, the conservator or guardian does become an aide of the court and should be treated no differently than a clerk, bailiff or marshall.\textsuperscript{14} Obiously, the predicate for this argument is that the guardian in carrying out his specific orders is indeed acting under color of state law, but is entitled to the same immunity of the judge who issued the order.

Particularly with respect to section 1983 claims which do not require a showing of invidiously discriminatory class-based animus (which \textit{per se} denotes bad faith), a qualified good faith immunity is available not only to the judicial officer and his aides, but to those whose liability under this section is premised only upon active participation or concerted action with him. This qualified immunity requires a good faith belief in the legality of

\textsuperscript{71} This would seem to fulfill the Supreme Court's suggestion in \textit{Dennis v. Sparks} that a private party was actually performing a judicial act or was in a sense an official aide of the court. 101 S.Ct. at 187; \textit{see also} \textit{Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976); \textit{see also} \textit{Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970).\textsuperscript{72}} 340 F. Supp. 125 (N.D. Ill. 1972).\textsuperscript{73} \textit{Id.} at 131. \textsuperscript{14} According to the court, [it did] not view his situation as any different than that of a United States Marshal ordered by this Court to remove demonstrators from the courthouse plaza in violation of their First Amendment rights. Certainly the Marshal's liability and damages to the demonstrators for his actions under direct order of the Court would have to depend on the liability, if any, of the Court. \textit{Id.}

Clerks and bailiffs would clearly come within the Supreme Court's designation of "official aides." \textit{Dennis v. Sparks, 101 S.Ct. at 187; Pierson v. Ray, 386 U.S. at 553-54; Burkes v. Callion, 433 F.2d at 319. Prosecutors are absolutely immune from suit under the Civil Rights Acts on the strength of \textit{Imbler v. Pachtman, 424 U.S. 409 (1976)}, based on the Court's belief that to qualify such immunity would disserve the broader public interest in vigorous and fearless performance of the prosecutor's duty which is essential to the proper functioning of the criminal justice system.
the action.\textsuperscript{76} Although a literal reading of section 1983 would create the impression that the statute creates liability that "admits of no immunities . . .,"\textsuperscript{77} the Supreme Court has on numerous occasions sanctioned qualified immunity for any official actions found to have been taken in good faith.\textsuperscript{78}

The "knew or reasonably should have known test" is closely akin to the common law negligence test. This second tenet of the requirement denies immunity to any state agent acting "with malicious intention to cause deprivation of constitutional rights or other injury to the [plaintiff] . . .."\textsuperscript{79} Thus, as to the latter prong of the test, there appears to be a merging with the same invidious motivation necessary to prove a claim under 42 U.S.C. § 1985(3).\textsuperscript{80} Indeed, it can no longer be gainsaid that any person against whom a viable section 1983 count can be stated can and will defend on the basis of a qualified immunity. It must be emphasized in this regard that \textit{but for} proof that the private individuals participated in active and knowing concerted action with the judge, there would, in most cases, be no successful section 1983 claim stated against them.


\textsuperscript{77} Imbler v. Pachtman, 424 U.S. at 417. The Court went on in \textit{Imbler} to find that prosecutors were entitled to absolute immunity in carrying out their official functions. Earlier, in \textit{Pierson v. Ray}, the Court noted that the 1971 Congress which passed Section 1983 did not intend "to abolish wholesale all common-law immunities." 386 U.S. at 554.

\textsuperscript{78} Obviously, good faith is unnecessary to successfully invoke the absolute immunity accorded judges, prosecutors and legislators. As to legislative immunity, see Gravel v. United States, 408 U.S. 605 (1972) and Tenny v. Brandhove, 341 U.S. 367 (1951). Qualified immunity has been extended to a Governor and other executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974); state hospital superintendents and staff, O'Connor v. Donaldson, 422 U.S. 563 (1976); school board members, Wood v. Strickland, 420 U.S. 308 (1975); and police officers, Pierson v. Ray, 386 U.S. 547 (1967). The various federal courts of appeals have extended such qualified immunity to: parole officers, Wolfel v. Sanborn, 555 F.2d 583 (6th Cir. 1977); jailers, Bryan v. Jones, 530 F.2d 1210 (5th Cir.), \textit{cert. denied}, 429 U.S. 865 (1976); state banking officials, Guzman v. W. State Bank, 540 F.2d 948 (8th Cir. 1976); and correctional administrators, Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975). If the judge is not absolutely immune, he can avail himself of the doctrine of qualified immunity. Scheuer v. Rhodes, 416 U.S. 232, 243 (1974); Gregory v. Thompson, 500 F.2d 59, 65 (9th Cir. 1974).

\textsuperscript{79} See notes 83-88 \textit{infra} and accompanying text where it is discussed that at the heart of a Section 1985(3) action is the requirement that the plaintiff demonstrate an invidiously discriminatory class-based animus.

\textsuperscript{80} Wood v. Strickland, 420 U.S. at 322.
At least one Justice of the Supreme Court has recently opined that the majority opinion in *Procunier v. Navarette*, "when coupled with *O'Connor v. Donaldson*, strongly implies that every defendant in a section 1983 action is entitled to assert a qualified immunity from damage liability."\(^{22}\) In all damage cases where a cause of action has been pleaded against private participants in an alleged conspiracy with an absolutely immune or qualifiedly immune state official, the good faith defense should be pleaded as an affirmative defense and the defendants should be prepared to prove that their conduct as well as that of the judge, the key actor in an alleged conspiracy, was undertaken neither with the malicious intention to cause deprivation of the ward's constitutional rights nor with any reasonable expectation that the action taken would violate such rights.\(^{81}\)

III. THE SECTION 1985 CONSPIRACY

The cult deprogramming damage cases may well resolve the single most compelling question left unanswered in *Griffin v. Breckenridge*:\(^{43}\) In the absence of a claim of racial discrimination or the intention to interfere with the right of interstate travel, what other rights were intended to be protected by the phrase "equal protection of the laws or of equal privileges and immunities under the laws . . ."?\(^{83}\) Justice Stewart made it clear in *Grif-

\(^{22}\) 434 U.S. 555, 568 (Stevens, J., dissenting) (1978). The defendants in *Procunier* were state prison officials. In *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), the court rejected qualified immunity for state social workers and the mother of a deaf mute who agreed to the mute's sterilization but accorded such immunity to the physician who performed the surgery if he negligently interpreted the plaintiff's own communications concerning consent. 574 F.2d at 11-13. The Chief Judge of the United States Court of Appeals for the First Circuit dissented on the authority of *Wood v. Strickland*, 420 U.S. 308 (1975) and argued that since the Supreme Court of the United States had extended qualified immunity to hospital administrators, legislators, school officials, police officers, prison officials and executive officers, *supra* note 77, he failed to see "why one would doubt that social workers would be included in this official continuum." 574 F.2d at 16. He also would have extended a good faith defense to the private person "when his state actor collaborator has not manifested sufficient bad faith to breach a qualified immunity." *Id.*

\(^{81}\) *Wood v. Strickland*, 420 U.S. at 322.

\(^{82}\) 403 U.S. 88 (1971).

\(^{83}\) The phrase "equal privileges and immunities under the laws . . ." does not appear in sub-section 2 of § 1985. Sub-section 2 proscribes conspiracies to prevent witnesses from testifying in the United States courts, to injure such a party or witness on account of his having testified, to influence the verdict of any grand or
fin v. Breckenridge that Section 1985(3) must not be transformed into a general federal tort law, yet an inter-circuit split of authority on the issue of the rights to be protected raises serious questions as to whether the Supreme Court's caveat is being ignored.

Many of the questions surrounding section 1985(3) litigation, such as the requirement that a conspiracy must be pleaded and proved, and that the defendants must have agreed to act in concert and in furtherance of a specific agreement were resolved in the Griffin opinion. The Court also partially answered the question of what is meant by equal protection, or equal privileges or immunities in the statute defining those terms as a requirement "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Later circuit cases following the Supreme Court's lead petit jury to injure the juror on account of his verdict or to obstruct the due course of justice "with intent to deny to any citizen the equal protection of the laws . . . ." The federal courts have uniformly construed the obstruction of justice section of § 1985(2) as requiring the same class-based, invidiously discriminatory animus essential to a cause of action under sub-section 3. Dacey v. Dorsey, 568 F.2d 275, 277 (2d Cir. 1978); Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). See also People ex rel. Snead v. Kirkland, 462 F. Supp. 914, 920 (E.D. Pa. 1978).

44 403 U.S. at 102-03.

45 403 U.S. at 102. The Ninth Circuit Court of Appeals has commented: [T]he statutory action is restricted to injuries inflicted upon the victim because of his status as a member of an identifiable class; the statutory 'purpose to deprive of equal rights' requirement is inferred from the racial or other class motivation underlying the tortious conduct. . . . Under Griffin, we think the class status providing the motivating animus must be created by a fact other than possession of the right deprived—otherwise virtually every conspiratorial deprivation of a primary right would be actionable under § 1985(3).

Lopez v. Arrowhead Ranches, 523 F.2d 924, 927-28 (9th Cir. 1975).

A critical element of the holding in Weiss v. Patrick that the plaintiff failed to prove her case under § 1985(3) was that she failed to show the existence of a class-based animus:

While it may be true that Defendants disapprove of the views of the Unification Church, there is not sufficient evidence to suggest that this factor alone translates into the required animus under § 1985(3). In fact, it was shown, and this Court finds, that Defendant's actions were primarily, if not entirely, motivated by the maternal concerns of Plaintiff's mother. Mrs. Weiss' [sic] actions, which resulted in her combination with Defendants, arose not from her abhorrence of the Unification Church per se, but rather arose directly from the solicitude which a
have uniformly established as a threshold requirement of proving a claim and availing oneself of the protection of this statute a demonstration that the injuries were inflicted upon the victim solely because of his status as a member of an identifiable and protected class. It is settled that the statute affords protection to one who has been invidiously discriminated against solely by virtue of his membership in a bona fide religious group. Nor can it be debated seriously that once challenged by the defendants, it does not suffice for a plaintiff to simply rest on his allegations that he was a member of a “religious group” and only because of this was he the victim of the purposeful deprivation. The plaintiff must be prepared to prove, and his cult must be prepared to defend on cross-examination, the premise that it is indeed a bona fide religion.

A. Purely Private Action: Which Rights Were Intended to be Protected?

Given the burgeoning use of section 1985(3) as a general federal tort law, the Supreme Court will soon have to decide

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mother holds for her daughter's health and well-being. Defendants, as agents of Mrs. Weiss, derived their motivations from this same maternal solicitude. Whenever an alleged conspirator's actions are directed against one as an individual, and not because that individual is a member of a particular class, a cause of action under § 1985(3) is not provided.

453 F. Supp. at 723-24, citing Griffin, 403 U.S. at 102 (emphasis in original).

Section 1985(3) protects "any person or class of persons .... " In Griffin, Justice Stewart specifically avoided identifying other classes which would be entitled to protection under the statute. 403 U.S. 88, 102 n.9 (1975). While the majority made it clear that the class must be one which was historically intended to be entitled to such protection, it refused to trace the "constitutionally permissible periphery" of such classes or to define their scope. 403 U.S. at 107. The federal courts have utilized either the "insular minority" requirement espoused in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), or the related principle that "some groups require and warrant special federal assistance in protecting their civil rights." DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 333 (9th Cir. 1979). Compare United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). The Fifth Circuit has found that members of a class of persons who have had contract rights infringed were never meant to be protected. McClellan v. Miss. Power & Light Co., 545 F.2d 919, 929 (5th Cir. 1977). But see Note, The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach, 64 MINN. L. REV. 635 (1980).

what, if any, limitations ought to be placed upon the nature of the rights sought to be protected by the original drafters of the legislation. As Justice Stewart indicated in *Griffin v. Breckenridge* and as has been noted in several cult deprogramming damage cases, either racially motivated conspiracies or conduct intended to interfere with the right of interstate travel is actionable under the section and is not subject to the "under color of state law" requirement.\(^9\) In the two deprogramming opinions in which this issue has been addressed, the holdings are distinguishable because of the absence in one complaint and the inclusion in the other of an allegation that the plaintiff was transported against his will across state lines as part of the conspiracy.\(^9\) The *Rankin v. Howard* court satisfied itself as to the presence of the "right to interstate travel" element of the section 1985(3) cause of action and therefore refused to go further in finding additional independent sources of congressional power such as state action or the thirteenth amendment.\(^1\) The *Baer* Court, on the other hand, having found no racial discrimination or interference with the right to travel, undertook an exhaustive review of the legislative history of the statute to conclude that when rights originating specifically in the fourteenth amendment are sought to be protected through the use of section 1985(3), the requirement of showing action taken under color of state law persists and must be satisfied.\(^2\)

Reconciling *Collins v. Hardyman*\(^3\) with *Griffin v. Breckenridge* has never been difficult. In *Collins*, the Court held that

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\(^{9}\) See notes 110-138 *infra* and accompanying text.

\(^{9}\) 403 U.S. at 104-06.

\(^{9}\) In *Baer v. Baer* the plaintiff complained that he was "abducted while on a street in Sausalito and was thereby deprived of his right 'to travel freely.'" 450 F. Supp. at 492. The court reasoned that the allegation that the plaintiff was deprived of his right to travel freely on the public streets in no way established that his federal right of interstate travel was impaired. It must be remembered that in *Griffin*, in addition to being black, the petitioners were travelling on a federal highway at the time they were set upon. In *Rankin v. Howard*, the plaintiff alleged that the purpose of the conspiracy was to take him into custody and transport him across state lines from Kansas to Arizona in order that he might be deprogrammed. There, the court found that "the second ground for congressional power stated in *Griffin* is clearly present in this case—[the] right to interstate travel." 457 F. Supp. at 75.

\(^{1}\) *Id.*

\(^{2}\) 450 F. Supp. at 493.

\(^{3}\) 341 U.S. 651 (1951).
section 1985(3) did not apply to a private conspiracy undertaken by members of the American Legion who threatened members of a certain political club with violence. The Court felt that Congress intended to protect first amendment rights, such as those of assembly and free speech, against federal or state invasion only, and not against purely private conspiracies. Thus under Collins, if first amendment rights are indeed protected by the enactment clause of the fourteenth amendment, only state-enforced conspiracies are actionable under the statute. To the contrary, the Griffin Court never addressed this question because its finding that state action was not required in respect to every section 1958(3) claim was premised upon identifying the congressional sources of power as the thirteenth amendment and the right of interstate travel. The Supreme Court conspicuously avoided a discussion of the fourteenth amendment.

While some commentators have taken the position that the legislative history of the congressional debates is inconclusive as to whether Congress intended to protect against private conspiracies aimed at infringement upon all fourteenth amendment rights, a close analysis of the drafters' intent reveals that restriction of the use of the statute under those circumstances to state-enforced discrimination is not only warranted, but indicated.

Having established a conspiracy and an invidiously class-based animus, the rights sought to be protected and claimed to have been infringed must be isolated in the complaint. If the discrimination is indeed racial or is intended to interfere with interstate travel, the court need look no further. If the right falls under the umbrella of the first amendment or the fourteenth amendment, a source of a congressional power must be identified to determine whether a purely private conspiracy is actionable. To suggest that infringement of the freedoms of assembly, association, religion, and free speech are "badges and in-

94 Id. at 658-59.
95 403 U.S. at 107. Stewart, J., declared that the Court refused to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under Section 1985(3). 403 U.S. 88, 102 n.9.
96 Comment, The Deprogramming of Religious Sect Members, supra note 11, at 243; See generally G.S. Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 331 (1975) [hereinafter referred to as Buchanan, The Quest for Freedom].
cidents of slavery" such that Congress could prohibit such infringements under the thirteenth amendment and therefore pursuant to the terms of section 1985(3), does violence to the separate and individual bases for the establishment of those rights and also preempts a discrete legislative function; moreover, it presumes a judicial interpretation that must be left only to the United States Supreme Court.97

An entire review of the recorded legislative history surrounding the passage of the respective Civil Rights Acts of 1866 and 1871 reveals that many House and Senate leaders who had advocated a broad view of congressional power in support of the passage of the 1866 Bill either remained silent during the 1871 debates or actually reversed their position and advocated a narrow interpretation of the scope of the Act. in Baer, Judge Williams88 characterized such history as "equivocal,"89 and even the most liberal of commentators who have advocated an expansive reading of the statute have conceded that the debates surrounding passage of the bill are "not conclusive as to whether Congress intended to protect against private infringement of Fourteenth Amendment rights. . . ."100

No court has come to grips with this issue more authoritatively than Judge Spencer Williams in Baer v. Baer. Since that

97 Justice Stewart believed that such a question must be deferred to Congress. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) he found that 42 U.S.C. § 1982, enacted in the Civil Rights Act of 1866, reached private racial discrimination in the sale and rental of real property and that Congress had such power under the banner of "badges and incidents of slavery" inherent in the power vested in it by the enforcement clause of the thirteenth amendment. Jones went no further nor has the Supreme Court since then expanded the scope of the definition of "badges and incidents of slavery" to include first amendment rights. The Supreme Court forwent a chance to comment on this topic in Runyon v. McCrory, 427 U.S. 160 (1976) (extending the reach of 42 U.S.C. § 1981 to private schools that refused to enter into contractual relationships with the respondents because of their race) but declined to do so. 427 U.S. 160, 167 n.6: . . . "the Free Exercise Clause of the First Amendment is . . . in no way here involved."

88 Buchanan, The Quest for Freedom, supra note 96, at 399-40.

The debate in the House is reported at CONG. GLOBE, 42d Cong., 1st Sess. 141 (1871), and the Senate debate is reported at CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

99 450 F. Supp. at 496.

100 Comment, The Deprogramming of Religious Sect Members, supra note 11, at 243.
court's analysis, the Supreme Court decided in *Great American Federal Savings & Loan Ass'n v. Novotny* that section 1985(3) creates of its own no substantive rights but "merely provides a remedy for violation of the rights it designates." The Supreme Court went no further, however, and carefully avoided setting forth exactly which rights were included. The narrow holding in the case was that the section did not provide a remedy for violations of Title VII. At least one concurring Justice clearly believes that as to "other" privileges and immunities such as the right to due process and the right to equal protection of the laws, as contrasted to the right to engage in interstate travel and to be free from the badges of slavery, protection is afforded under the Constitution "only against state action." Indeed, Justice Stevens directly endorsed the general *Baer* view that if private persons engage in purely private acts of gender-based discrimination, they do not violate the equal protection clause of the fourteenth amendment and, thus, there can be no claim for relief under Section 1985(3) based upon a violation of that amendment if there is insufficient involvement by the state. "The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties."

This explication by Justice Stevens' concurring opinion seems to put to rest the ingenious and overbroad assertions by some commentators that the section "permits actions against private persons for conspiracies which involve no state action..." Such assertions rely essentially on a 1975 Second Circuit opinion reversing a dismissal of a section 1985(3) cause of action based on private sex discrimination.

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102 442 U.S. at 372.  
103 442 U.S. at 378.  
104 442 U.S. at 384.  
105 *Id.* In the other concurring opinion, Justice Powell agreed and found that the Constitution does not "create any right to be free of gender-based discrimination perpetrated solely through private action." *Id.* at 381.  
106 *LeMoult, Deprogramming Members of Religious Sects, supra* note 10, at 639. Such assertions fail to consider that a valid § 1985(3) claim against persons acting in purely private capacity requires one of the two sources of congressional power noted in *Griffin v. Breckenridge*: § 2 of the thirteenth amendment or the right of interstate travel. *See Baer v. Baer*, 450 F. Supp. 481, 491 (N.D. Cal. 1978).  
107 *Weise v. Syracuse Univ.*, 522 F.2d 397, 403 (2d Cir. 1975). In a recent federal district court case by a male nursing director who brought suit against
The Baer reasoning has been examined in numerous federal authorities since and has yet to be rejected. At least one court has stopped short of holding that section 1985(3) provides no remedy for private violations of the first amendment but has done so only on the basis that the case could not be distinguished from, and therefore was controlled by, the Supreme Court’s opinion in Novotny.\(^{169}\) In those opinions where the issue has been squarely addressed, the courts have uniformly adopted the Baer view and held that private conspiracies to infringe a first amendment right, such as freedom of religion, are not actionable under section 1985(3).\(^{169}\) It is no longer open to serious debate.


\(^{169}\) Daley v. St. Agnes Hosp., Inc., 490 F. Supp. 1309, 1319 (E.D. Pa. 1980). In Bellamy v. Mason’s Stores, Inc., 508 F.2d 504 (4th Cir. 1974), the plaintiff claimed that the Ku Klux Klan was a religion and that he had been deprived of his right of association by a private conspiracy under Section 1985(3). The United States Court of Appeals for the Fourth Circuit disagreed: “But we think the language of equal protection chosen by the 1871 Congress cannot be interpreted to mean that persons who conspire without involvement of government to deny a person the right of free association are liable under this statute.” 508 F.2d at 506-07. Judge Craven found: “It is perfectly true that the first amendment now speaks to the state by way of the fourteenth amendment, but to say that it also speaks to private persons seems to us an innovation that must come from the Congress or the Supreme court.” but see Ward v. Connor, No. 80-1336, (4th Cir. Aug. 10, 1981). \(^{169}\) Id. at 507. Accord, Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Whitten v. Petroleum Club, 508 F. Supp. 765 (W.D. La. 1981); Williams v. Northfield Mt. Hermon School, 504 F. Supp. 1319 (D. Mass. 1981).

\(^{169}\) In Whitten v. Petroleum Club, 508 F. Supp. 765 (W.D. La. 1981), the court relied upon Novotny, 422 U.S. at 380, and found it clear that private acts of
Members of cults who intend to allege under section 1985 infringements of the rights of free exercise of religion, association, assembly, or any other first amendment right which speaks through the fourteenth amendment must be prepared to prove the same degree of state action that they must under a cause pleaded pursuant to section 1983.

B. The Plaintiffs Must Prove Membership in a Bona Fide Religion

To simply claim that the plaintiff was the victim of an invidiously discriminatory conspiracy because of his membership in the Unification Church, for example, is not enough. The mere allegation that the plaintiff is a member of what he contends to be a bona fide religious group cannot serve on its face to satisfy the requirement that the class must be one which was intended to be protected by Congress. It has recently been held that homosexuals,110 handicapped persons,111 bankrupt debtors,112 and, interestingly, deprogrammers113 are not persons who fall within discrimination based on sex were not proscribed by Section 1985(3). Whitten, 508 F. Supp. at 772. In Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974), the court found the reasoning in Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc), which accorded first amendment protection as against wholly private action, to be "an innovation that must come from the Congress or the Supreme Court." 508 F.2d at 507. Cf. Life Ins. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (finding that women constituted an appropriate class under § 1985(3), but not ruling on whether Congress was authorized under the section to reach private discriminatory practices by insurance companies). Id. at 505. "Moreover, few propositions are better established than that constitutional adjudication should be avoided whenever possible. [citation omitted]. If the defendant insurance companies prevail in a trial on the merits, the constitutional issue need never be reached." Id. at 506.

110 DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979). The court reasoned that it could not be said that homosexuals were historically afforded special federal assistance in protecting their civil rights. 608 F.2d at 333.


112 McLellan v. Miss. Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

113 Alexander v. Unification Church, 634 F.2d 673 (2d Cir. 1980). Curiously, the United States Court of Appeals for the Fifth Circuit has affirmed without opinion a district court holding that families who are harrassed and disrupted by a particular religious group do not themselves constitute a valid class within Section 1985. Smith v. Armstrong, 396 F. Supp. 753 (N.D. Tex.), aff'd without opinion, 524 F.2d 1231 (5th Cir. 1975). Other "classes" which have been held not intended to be protected are ones comprised of: doctors who testified adversely to other
classes which Congress intended to protect as part of the overall scheme of the Civil Rights Act of 1871. Likewise, members of cults which are not *bona fide* religions, but which have as their primary and motivating purpose economic and political gain, are not groups entitled to protection and therefore the members cannot state a cause of action under section 1985(3).

In *Rankin v. Howard*, the defendants moved to compel the plaintiff to answer questions during deposition which related directly to the practices and customs of the Unification Church in an effort to determine whether or not the cult was clearly within the types of groups that were intended to be protected under section 1985(3). The court found: "The case law is clear that all groups are not protected merely because they claim a group status,"\(^\text{114}\) and went on to rule:

> it is, therefore, apparent that § 1985 only extends to certain identifiable groups, one of which is religious groups, of which group the plaintiff claims to be a member. Since a determination of the defendants' defense rests upon their claim that the group of which the plaintiff is a member is not a religion and is not entitled to protection of § 1985, it is hereby ordered that the Motion to Compel be granted and that defendant be allowed to engage in *all discovery* directed toward determining the validity of the group as a religion. . . .\(^\text{115}\)

Whether the Unification Church, in its own capacity and as a model for other cults, qualifies as a *bona fide* religion is seriously open to doubt in light of recent decisions. In May of 1981, the New York Supreme Court, Appellate Division, denied tax exemptions on three buildings owned by the Unification Church in New York City because of its extensive political and economic


\(^{115}\) *Id.* at 3 (emphasis added).
activity. The court's majority also rejected the referee's finding that the church was primarily engaged in religious matters.\textsuperscript{116} The members of the group testified as to their beliefs and their dedication to the teachings of Reverend Moon and their activities on behalf of the group, telling of prayer meetings, discussion groups, fund raising and "evangelical duties."\textsuperscript{117} A representative of the Unification Church initially testified that he and his associates engaged in no fund raising but subsequently conceded that the members had been requested to participate in "mobile fund raising" which was designed as "evangelical work."\textsuperscript{118} While the witness testified that the Unification Church did not actively fund any political or economic activities, the facts indicated that over $20,000 of the cult's checks were made out to cash every month. The referee found that the petitioner's primary purpose was religious but that its theology, as expressed in Moon's writings, bound it to a course of political activity and that the properties in question were indeed not used for religious purposes.\textsuperscript{119} The primary basis for the referee's ruling was that the Unification Church's energy was directed toward political and economic activity, recruitment of new members, and fund raising.\textsuperscript{120}

The appellate division agreed with the referee's recommendations but also specifically rejected his finding that the Unification Church's primary purpose was religious. The court concluded "that political and economic theory is such a substantial part of petitioner's doctrine that it defeats petitioner's claim that its primary purpose is religious."\textsuperscript{121} Recognizing that a traditional analysis of a purported religion is a sensitive and perilous undertaking and that courts are loath to inquire into the merits or truth of any set of purported religious beliefs, the court noted that it was compelled to conduct a broad inquiry into the Unification Church's doctrine and activities in order to determine whether it qualified for the tax exemption.\textsuperscript{122} The court examined


\textsuperscript{117} In re Holy Spirit, 438 N.Y.S.2d at 538.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 524.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 525.

\textsuperscript{122} Id. at 526.
the customs, practices, and beliefs of the group to determine whether it exhibited the minimum requirements of a religion.123 The court adopted both the Macintosh and Seeger definitions in noting that unorthodoxy will not serve to disqualify a group from the exemption.124 Allowing for the possibility that the creed as found in the Divine Principle125 qualified as a theoretical doctrine purporting to establish a belief in a relationship between God and man, the appellate division was similarly impressed with the importance of the Christian Echoes Nat'l Ministry test that the church must establish that it is organized or conducted primarily for religious purposes and that other factors beyond simply the purpose clause of the certificate of incorporation must be examined, including the actual practices and customs of the group.126

First, the court found that the "religious" content of the doctrine "and the leitmotif of religion with which the eclectic teachings [were] tinged . . . analyze[d] and instructed on politics and economics . . . [and] ha[d] substantial secular elements."127 The mere use of the religious terminology in connection with the politics and economics in the doctrine did not obscure the traditionally non-religious nature of these fields to the members of the court. "Petitioner, by undertaking an adventure in semantics, is attempting to cloak politics and economics with the blanket of religious dogma."128

The reviewing court was further impressed with the type of training that the members of the Unification Church went through, including instructions on political and economic matters and the members' later involvement in many political and

123 Id.; See also Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir.), cert. denied, 414 U.S. 864 (1972).
124 Such an examination is seemingly prohibited by United States v. Seeger, 38 U.S. 169 (1965) and by United States v. Macintosh, 283 U.S. 605 (1931). In these cases the United States Supreme Court held that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.'" 380 U.S. at 184.
125 Both sides stipulated that the Divine Principle was regarded by members of the Unification Church as a religious revelation and testament. In re Holy Spirit, 438 N.Y.S.2d at 526-27.
126 Id. at 527.
127 Id. at 527.
128 Id.
economic activities which the petitioner asserted were simply "incidental and insignificant to its primary and religious purpose." Four of the five judges ruling on the case disagreed. They found that the non-religious activities of the Unification Church were not merely incidental or peripheral but were "integral, inextricable and equally important as the religious activities were to the mission of the Unification Church . . . ."  

The court provided important direction in how the judiciary (and thus a properly instructed jury) can analyze a religious creed without infringing upon the constitutional right of free exercise of religion. As is pointed out in United States v. Macintosh, neither court nor jury can determine the truth of the theology espoused, but either can clearly analyze the creed to determine whether it is primarily religious in content; they can surely examine the practices, customs and duties of the members. Like the purported church seeking the protection of state tax exemptions or an IRS section 501(c)(3) ruling, a member of a cult who brings a section 1985(3) action is seeking the protection of a narrowly drawn federal remedial statute of which he can not even begin to avail himself unless he is prepared to demonstrate that his cult is indeed a bona fide religion and not a political, social, or economic group. There can be no clearer example of using the first amendment as a sword as opposed to a shield. As the appellate division pointed out, by denying the tax exemption to the petitioner, "this court is not limiting petitioner's freedom to practice its beliefs and disseminate its doctrines; rather, it is merely declaring that petitioner is not organized and conducted in the manner required by law to entitle it to a tax exemption."  

The Unification Church's activities have been just as seriously questioned in its attempts to obtain a special use permit before the Zoning Board of Appeals of the Town of Newcastle, New York, for the purpose of conducting a "religious retreat 

120 Id.
129 Id.
132 I.R.C. § 501(c)(3)
center." The Zoning Board of Appeals' concern was not whether the Unification Church was a religious organization, because its entitlement to the permit was "not dependent upon its dogmas, its beliefs, its philosophies, its doctrines or its principles; it [was] dependent upon its practices—what it will actually do with the subject property." The board found that the Unification Church was afforded a full and fair opportunity to counter or refute the evidence that the workshops or seminars it intended to conduct on the subject property were inextricably tied to a regimen, practice, and procedure of indoctrinal thought reform, and were also a form of psychological coercion which deprived many of those upon whom it was visited their free will or freedom of choice. The board found that the record was replete with evidence that the participants in the Unification Church's workshops were subjected to:

(1) repetitive, lengthy and intensive doctrinal lectures constantly reinforced by group leaders or assigned sponsors;
(2) physical isolation at remote and generally inaccessible sites;
(3) personal isolation from friends and family;
(4) deprivations of privacy;
(5) deprivations of time to relax or reflect;
(6) physical labor;
(7) rigorous and frenetic physical exercise;
(8) often poor nutrition;
(9) intolerance of criticism;
(10) constant surveillance by assigned monitors;
(11) ritualistic and frenzied games, chanting and shouting;
(12) attacks on family and traditional values;
(13) the promotion of group dependency;
(14) constant and incessant expressions of love and affection by assigned mentors, alternating with rejection and disapproval, causing intense fear and anxiety; and
(15) often those induced to attend the workshops were misled with respect to their sponsorship and objectives.

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The Board concluded its analysis by finding that it appeared the Unification Church deliberately "seeks out and methodically selects those most vulnerable to the techniques it employs."\textsuperscript{135}

The term "religion" appears in the Constitution only twice: article VI proscribes religious tests as a requirement of qualification to any office or public trust,\textsuperscript{136} and in the first amendment which states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."\textsuperscript{137} None of the major decisions of the Supreme Court which have developed the test of a \textit{bona fide} religious belief negate or in any way contradict the propriety under section 1985(3) of carefully analyzing a cult's tenets solely to determine whether they are primarily religious in content, and scrutinizing the customs, practices, and outside activities of the group to determine if it is entitled to protection by the statute.\textsuperscript{138} Neither the misplaced sincerity of a beguiled cult member nor the pedigree of the group purporting to be a \textit{bona fide} religion is relevant in this determination. The plaintiff claiming membership in the cult must carry his burden of proving that the group is a \textit{bona fide} religion both in its creed and its practices if he intends to withstand a motion for a directed verdict at the close of his case.

C. \textbf{Who is the Real Party in Interest?}

Common to the federal remedies pursued in cult damage cases is a prayer for attorney's fees pursuant to section 1988.\textsuperscript{139} Although the successful defendants need not worry about such exposure,\textsuperscript{140} parties should conduct discovery to determine who

\begin{itemize}
\item \textsuperscript{135} \textit{Id}. at 9.
\item \textsuperscript{136} U.S. CONST. art. VI.
\item \textsuperscript{137} U.S. CONST. amend I.
\item \textsuperscript{140} \textit{See} Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Lopez v. Aransas County Ind. School Dist., 570 F.2d 541 (5th Cir. 1978). The Ninth Circuit has recently held that the organization which provides legal services is entitled on behalf of the successful party it sponsors to recover legal fees directly. Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980). By analogy, if the defendants are the prevailing parties in a cult deprogramming damage case and can prove that the
\end{itemize}
is the real party in interest, in the maintenance and funding of
the litigation. This should be done both in anticipation of a peti-
tion for section 1988 fees, as well as in an effort to dismiss the
suit unless the parties are properly reflected. In depositions and
interrogatories, it should be inquired whether the plaintiff's at-
torney's fees or costs are being funded or advanced by the cult
of which he is a member, or by some organization funded by his
group or in which the church participates. Regardless of whether
the payments are being made directly or through the plaintiff as
conduit, if the cult is financing the lawsuit it may very well be
more than a mere lender of money; it may be an actual subrogee
both prosecuting and controlling the litigation. In United States
v. Aetna Cas. & Surety Co., the Supreme Court espoused
the view that a partial insurer or subrogee was a real party in in-
terest and joinder should be compelled.\textsuperscript{141} Where the cult has a
direct and significant interest in the control of the litigation as
well as the outcome of the lawsuit, a motion to dismiss for
failure to prosecute in the name of the real party in interest pur-
suant to rule 17(a) of the Federal Rules of Civil Procedure should
be filed.\textsuperscript{142} It is uniformly held that courts will allow discovery in
connection with a rule 17(a) objection and "it even may be
necessary to take testimony to determine the relationship of the
persons involved to ascertain which of them is the real party in
interest, a procedure authorized for motions generally by rule
43(e)."\textsuperscript{143}

D. Procedural Aspects of the Common Law Claims

The common law torts of assault, battery, false imprison-
ment, false arrest, and intentional infliction of emotional harm,
arise under state law and, as such, will be controlled by the law
of the forum state.\textsuperscript{144} If the federal claims are dismissed because
the plaintiff has failed to allege facts sufficient to state a claim

cult organization is sponsoring and funding the litigation, such fees should
be recoverable directly from the cult. Cf. Int'l Oceanic Enterprises v. Menton, 614
F.2d 502 (5th Cir. 1980). \textit{See also note 167 infra.}

\textsuperscript{141} 338 U.S. 366, 380 (1949).

\textsuperscript{142} \textit{See e.g.,} Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill.
1969), \textit{aff'd on other grounds}, 420 F.2d 1191 (7th Cir. 1970); Shore v. St. Paul Fire

\textsuperscript{143} 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1554 (1971 &

\textsuperscript{144} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
under sections 1983 and 1985(3), the claims will survive if there is adequate and complete diversity of citizenship. Absent diversity, should the federal claims falter at the threshold and be deemed insubstantial, there is no power in the federal courts to hear the remainder of the state causes. The expenditure of dispos- sal of the federal claims pleaded and the degree to which the federal courts have invested judicial energy in determining the character of the claim will weigh importantly on the question of substantiality. Once it is established that the claim is not clearly insubstantial, federal courts have discretion to preserve and determine the state claims under the banner of "conservation of judicial energy and the avoidance of multiplicity of litigation . . . ."  

Even if the plaintiff survives the primary test of determining whether the court has the power to exercise pendent jurisdiction, the court should be urged to exercise its discretion not to hear the remaining state claims based upon the present policy in the circuit. Given the classical distinction between the words "must" and "should," the teaching of the Court in United Mineworkers v. Gibbs that "the state claims should be dismissed as well" is generally followed in the district courts.

IV. DAMAGES: THE CONTROLLING DOCTRINE OF Carey v. Piphus

Once the cult member has proven his case under sections 1983 or 1985(3), he must be prepared to put on his proof on the issue of actual injury, as plaintiffs are required to do in most tort actions. Justice Powell's opinion in Carey v. Piphus clear-

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145 "Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit . . . ." Hagans v. Lavine, 415 U.S. 528, 538 (1974). Although the doctrine was characterized by the Court as "more ancient than analytically sound," Rosado v. Wyman, 397 U.S. 397 (1970), it reiterated in Hagans that it remained a federal rule and needed no re-examination. 415 U.S. at 538.

146 Rosado v. Wyman, 397 U.S. at 405.


148 Carey v. Piphus, 435 U.S. 247 (1978). The right infringed was the right to due process; the plaintiff, a student, had been given a 20 day suspension without a hearing for alleged violation of the school rule against the use of drugs.
ly established that the common law of torts is the basis for all inquiries into damage actions under the Civil Rights Act of 1871 and that compensation for injuries under general tort principles is the proper standard to use in measuring damage awards under these statutes. Furthermore, and most importantly, the court found that money damages must not be presumed merely because an abstract violation of a constitutional right such as due process has been demonstrated.\(^\text{149}\) In light of this opinion, there simply cannot be money compensation for a constitutional wrong without proof of actual injury. While it has been questioned whether the "actual injury" requirement applies to constitutional violations outside the one right which was discussed in *Carey* (procedural due process), later opinions in the lower federal courts have extended this reasoning to include all constitutional violations.\(^\text{150}\)

Although mental and emotional distress is compensable, the plaintiffs must be put to their proof of actual injury in this regard.\(^\text{151}\) While the Supreme Court sanctioned the awarding of nominal damages not to exceed one dollar, without such proof of actual injury,\(^\text{152}\) later federal decisions have interpreted the

\(^{149}\) "First, it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation and distress." 435 U.S. at 263.

\(^{150}\) In *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980), the Fifth Circuit felt that the rationale of *Carey* "similarly requires an award of nominal damages upon proof of infringement of a fundamental First Amendment liberty." In this case, the right to associate freely with members of an organization was infringed. There was no actual demonstration of injury and, accordingly, the court held that the plaintiff was entitled to nominal damages not to exceed one dollar. *Accord James v. Bd. of School Comm'rs*, 484 F. Supp. 705, 714 (S.D. Ala. 1979).

\(^{151}\) Carey v. Phiphus, 435 U.S. at 266: "[I]t remains true to the principle that substantial damages should be awarded only to compensate actual injury ...." Earlier, the court foresaw no difficulty in requiring the plaintiff to produce evidence that mental or emotional distress was actually suffered and caused by the denial of the procedural due process itself. "Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." *Id.* at 264. In the footnote supporting this statement, Justice Powell, pointed out that juries must be appropriately instructed in this regard and that a claim of genuine injury "must be supported by competent evidence concerning the injury. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)." 435 U.S. at 264 n.20.

\(^{152}\) The Court found that the denial of procedural due process "should be actionable for nominal damages without proof of actual injury. We therefore hold
Supreme Court's direction as mandating an award of no more than one dollar for the abstract injury. While it is true that the phrase "actual injury" is not tantamount to physical impact, a claim of emotional or mental suffering must be substantiated upon actual injury grounds if the plaintiff is to avoid a nominal damage jury instruction. If the plaintiff has not actually suffered an emotional injury provable by some independent means, there should be no surprise at the giving of such an instruction.

There is an interesting dichotomy between the availability of the qualified good faith defense which gives the defendants immunity and the finding of "bad faith" by the jury which would expose those same defendants to exemplary or punitive damages. While Justice Powell made it clear in Carey v. Piphus that there is no evidence that Congress "meant to establish a deterrent, more formidable than that inherent in the award of compensatory damages . . . ", he also recognized that exemplary or punitive damages might be awarded in a proper case under section 1983 with the specific purpose of deterring or punishing violations of constitutional rights. The Supreme Court was specific in neither approving nor disapproving any of the cases allowing the jury to be instructed on punitive damages in federal civil rights actions.

What is clear from the recent federal opinions that have relied upon reasoning in Carey v. Piphus is that a two-step approach is proper if the Supreme Court in the future specifically sanctions the award of exemplary damages in civil rights actions. The qualified good faith defense yielding immunity is wholly distinct from the actual malice or bad faith requirement

that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners." 435 U.S. at 267 (emphasis added).


Carey v. Piphus, 435 U.S. at 264.

435 U.S. at 256-57.

435 U.S. at 257, n.11. The Court noted that there was no basis for such an award in the case being discussed because the district court had found that the petitioners did not act with the malicious intention to deprive the respondents of their rights or to do them any other injury.
that permits the issue of punitive or exemplary damages to go to the jury. First, a compensatory award in a section 1983 or 1985(3) action is appropriate only when the defendants have acted with "impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that [the] action[s] cannot reasonably be characterized as being in good faith."157 This must be the first standard since the finding that the defendants, in fact, acted in good faith unquestionably provides them with immunity. Secondly, the trial court must determine at the directed verdict juncture whether there is sufficient evidence of malicious, intentional, outrageous, or improperly motivated conduct by the defendants. If there is, the jury should be instructed that if they find that the defendants are not entitled to a qualified good faith immunity defense, the question of malicious, intentional, or wanton conduct must be considered separately, and the absence of the immunity defense does not necessarily require a finding of improper motive for bad faith.158 Should a jury deny the defendants the qualified good faith defense immunity, but also find that the defendants were not maliciously motivated, their only award can be compensatory damages for actual injury provable by independent evidence.

The requirement of finding bad faith conduct has served as the sine qua non not only for exemplary and punitive damages, but for attorney's fees as well. In McNamara v. Moody,159 the


158 This distinction is clearly drawn in recent federal decisions and was recognized by Justice Powell in Carey v. Piphus, 435 U.S. at 257 n.11, where there was found no basis for an award of punitive damages because the petitioners did not act "with a malicious intention to deprive respondents of their rights or to do them other injury. ..." In Rheuark v. Shaw, 477 F. Supp. 897, 916 (N.D. Tex. 1979), the court found that punitive damages could be awarded under the civil rights statutes where the trier of fact found that the plaintiff was entitled to receive compensatory damages and where the act that proximately caused the injury to the plaintiff "was maliciously, wantonly or oppressively done." Recent federal opinions have characterized the prerequisites for an instruction on punitive damages to include at a minimum: a demonstration of wanton or oppressive acts, Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979); malice, James v. Bd. of School Comm'rs, 484 F. Supp. 705, 714 (S.D. Ala. 1979); and outrageous conduct, Rogers v. Okin, 478 F. Supp. 1342, 1381 (D. Mass. 1979).

159 606 F.2d 621 (6th Cir. 1979).
Fifth Circuit reviewed the legislative history of section 1988 and found that it "casts some doubt on [the] conclusion" that nominal damages may serve as the basis of an award of attorney's fees. The court's rationale was premised upon a footnote to the Senate Report promising attorney's fees against officials in their individual capacity only upon a finding that they had acted in bad faith. While Perez v. Univ. of Puerto Rico is one of several reported circuit court opinions upholding attorney's fees where the award is only of nominal damages of one dollar with no other form of remedy such as equitable or declaratory relief, other federal courts have followed the "substantial benefit or essential success" tests. The Supreme Court has observed that "nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated . . . " But it has also noted that a prevailing standard

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160 The Fifth Circuit questioned dicta in Perez v. Univ. of Puerto Rico, 600 F.2d 1 (1st Cir. 1979) to the effect that nominal damages alone could serve as the basis for an award of attorney's fees. In Perez, the court noted that the bare award of one dollar nominal damages with nothing more should be a factor taken into consideration by a district court in determining whether to award attorney's fees but the fact of a mere nominal award should not bar the litigant's right to petition for attorney's fees. In Milwe v. Cayuoto, 653 F.2d 80 (2d Cir. 1981), the court found a one dollar award against a law enforcement officer sufficient to support recovery of attorney's fees, but did not satisfactorily explain its earlier and contradictory view that a one hundred dollar award is "only a moral victory of insufficient magnitude to warrant an award under § 1988." 653 F.2d at 84, quoting, Huntley v. Community School Bd., 579 F.2d 738, 742 (2d Cir. 1978).

161 Footnote 7 to the Senate Report states: "Proof that an official had acted in bad faith would also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in Alyeska . . . ." S. Rep. [1976] U.S. Code Cong. & Ad. News 5908, 5913. The Supreme Court held in Alyeska Pipe Line Co. v. Wilderness Soc., 421 U.S. 240 (1975), that state and local officials should not be subject to individual liability for attorney's fees unless they acted in bad faith according to the American common law. Thus, it would appear reasonable to conclude that if the award of one dollar nominal damage is premised upon the absence of bad faith, neither the state actor nor the private individuals should be liable for attorney's fees.


163 Maher v. Gagne, 448 U.S. 122 (1980). In Gagne, the petitioner settled by reason of a consent decree with no determination that her constitutional rights had been violated. The Senate Report to the Bill (§ 1988) expressly contemplated
for the award of such fees is "a determination of the substantial rights of the parties . . . ." With this direction in mind, it can fairly be stated that no federal court has gone so far as to award attorney's fees where the ultimate and complete outcome of the litigation was simply a nominal damage award of one dollar with no equitable or declaratory relief. It would be difficult for a

a consent judgment being entered against the defendants serving as the proper basis for the award of fees. Id. In McManama v. Lukhard, 464 F. Supp. 38 (W.D. Va. 1978), a consent decree was entered prior to a consideration or ruling on the merits of the case. The court held that a party need not win by way of a full trial on the merits to be said to have prevailed, "but the lawsuit must have resulted in or been the catalyst of a victory for the party of the class it represents." Id. at 41. The court reasoned that federal courts had uniformly allowed attorney's fees to plaintiffs "who have successfully terminated litigation by settlement prior to trial." Id. An examination of each case cited, however, reveals that there had been some form of declaratory, injunctive or other equitable relief awarded in each case. Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) (injunction); Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978) (preliminary injunction); Hartmann v. Gaffney, 446 F. Supp. 809 (D. Minn. 1977) (consent decree requiring the State defendants to maintain the plaintiff's present level of hospital privileges and express reservation of attorney's fees to be ruled upon by court); Mental Patient Civil Liberties Project v. Hosp. Staff, 444 F. Supp. 981 (E. D. Pa. 1977) (consent judgment); and Buckton v. NCAA, 436 F. Supp. 1258 (D. Mass. 1977) (injunction and consent decree).

145 See discussion of the Second Circuit's view note 160 supra. Numerous federal courts have indicated reluctance to grant attorney's fees absent some form of relief other than the mere award of one dollar. Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Franklin v. Shields, 569 F.2d 784 (4th Cir.), cert. denied, 435 U.S. 1003 (1978); Williams v. Gen. Food Corp., 492 F.2d 399 (7th Cir. 1974). It would be very difficult for the plaintiff awarded only one dollar to contend that such a nominal award "clearly accomplished the goals of the suit." McManama v. Luckhard, 464 F. Supp. at 41.

Indeed, in the opinions allowing attorney's fees after an award of only one dollar nominal damages, the award has been coupled with either injunctive, equitable or declaratory relief. See Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (plaintiffs successful in having a Texas statute declared unconstitutional and they were awarded $1.00 damages); Pickett v. Milam, 579 F.2d 1118 (8th Cir. 1978) (both declaratory and injunctive relief justified award of fees although no actual money damages awarded). In the "Operation Zebra" case, Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), a preliminary injunction was issued in district court and attorney's fees were awarded as a matter of law after two black males successfully challenged the San Francisco Police Department's policy of stopping and frisking black men who appeared to resemble the composites of the "Zebra killers." While the appeal was pending, four persons were convicted and sentenced and the investigation ceased. The Ninth Circuit dismissed the appeal as moot. Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977). The petitioners successfully moved for attorney's fees and defendants appealed. Because
plaintiff to claim that merely by obtaining a one dollar award he had successfully achieved a purposeful purpose of his litigation or that he had derived a substantial benefit other than forcing the defendants to stand trial. Indeed, such a plaintiff may be viewed as being quite "unsuccessful" if he had previously rejected a timely offer of settlement and succeeds only in recovering one dollar. Moreover, it is clear that successful or "prevailing defendants are likewise entitled to attorney's fees."167

V. CONCLUSION

The religious cult deprogramming damages cases have provided imaginative and progressive analyses of the critical questions of: judicial immunity, qualified good faith immunity, deriv-

the appellees had succeeded on a "significant issue in litigation which achieve[d]... the benefit the parties sought in bringing suit... ", the Ninth Circuit affirmed the award. 625 F.2d at 847, citing Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-98 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980).

166 Because of the uncertainty as to the propriety of attorney's fees awards after settlement, and because § 1988 damages are authorized "as part of the costs... ", see note 8 supra, litigants should be cautious in making an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, which provides in relevant part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

FED. R. CIV. P. 68 (emphasis added).

Although there are no reported decisions analyzing the effect of a Rule 68 offer of $1.00 judgment once accepted and a § 1988 petition, it would appear that since the offer must be "with costs then accrued," attorney's fees post-acceptance are proper. In Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (D. La. 1976), the district court found a basis for the award of attorney's fees following the acceptance of an offer of judgment where the offeror conceded even a bit of the relief prayed for, but there was no discussion of civil rights nominal damages. In Sheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978), the court noted that the offer must include attorney's fees and that Rule 68 simply did not permit the offeror to designate which accrued costs he was willing to pay.

ative immunity accorded to lay co-conspirators who allegedly act in concert with a civilly immune judge, restrictions of the scope of the remedial civil rights conspiracy statutes and the important touchstones by which the claim of a bona fide religion can be measured. Because of the novel and controversial nature of the deprogramming remedy sought by parents of cult members, the amount and quality of litigation remain quite high.

Once the procedural and substantive federal jurisdictional issues have been settled, however, there remains at the center of all such litigation an evaluation of the cultist’s freedom of choice and freedom of thought. The deprogrammers and parents seek to restore such freedoms; the cult member seeks to convince the jury that the freedom was never lost.