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Virginia M. Fournier

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THE ADMISSIBILITY OF EXPERT TESTIMONY IN
BRAINWASHING-RELATED CASES—SHOULD
WITNESSES BE FRYED?

I. INTRODUCTION

Imagine that you are an attorney whose client wants to bring an action against a religious cult for brainwashing. Your client claims to have been falsely imprisoned, fraudulently deceived into giving money to the cult, and subjected to emotional distress. The only way that you can prove that the brainwashing has occurred and that the cult group is subject to tort liability is through expert testimony. But then you learn that courts have impeached such experts for all purposes because their views on brainwashing are not “generally accepted.” Does this leave your client with no cause of action for the brainwashing-related tortious conduct of the religious cult?

Webster’s Ninth New Collegiate Dictionary defines brainwashing as “a forcible indoctrination to induce someone to give up basic political, social, or religious beliefs and attitudes and to accept contrasting regimented ideas.” One psychology textbook defines brainwashing as “[t]he most extreme form of attitude change, accomplished through peer pressure, physical suffering, threats, rewards for compliance, manipulation of guilt, intensive indoctrination, and other psychological means.” Brainwashing, a word coined by journalist Edward Hunter in 1951 to criticize thought reform in China, conjures up visions of human zombies wandering about in a trance with their eyes rolled back and their arms held straight out in front of them. One may also recall Korean prisoners of war, the

1. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 175 (1987). Brainwashing has also been defined as “[i]nducing a person to modify his attitudes and behavior in certain directions through various forms of pressure or torture.” STEDMAN’S MEDICAL DICTIONARY 192 (5th unabr. Law. ed. 1982).
2. JAMES HASSETT, UNDERSTANDING PSYCHOLOGY 349 (3d ed. 1980).
Charles Manson murders, Patty Hearst and religious cults in determining the impact of brainwashing.4

In Molko v. Holy Spirit Association for the Unification of World Christianity,5 the California Supreme Court held that the plaintiffs, who had been persuaded coercively to join the Church,6 could maintain a cause of action against the Church for fraud and deceit as well as intentional infliction of emotional distress in connection with their brainwashing claims.7 While a church is generally immune from tort liability under the Free Exercise and Free Speech Clauses of the First Amendment of the United States Constitution,8 the Molko court stated that “[t]he religion clauses protect only claims rooted in religious belief,”9 and “while religious belief is absolutely protected, religiously motivated conduct is not.”10 The court went on to state that religiously motivated conduct “remains subject to regulation for the protection of society.”11 In other words, religious belief and religiously-motivated conduct could be bifurcated, and the Church would not necessarily be immune from all tort liability related to its religiously-motivated conduct based on its First Amendment rights. This is important because if the Church were immune from all tort liability under the First Amendment, then the plaintiffs would have no

4. Id. at 23.
5. 762 P.2d 46 (Cal. 1988). The Unification Church will be referred to hereinafter as the “Church.”
6. See infra notes 36-81 and accompanying text.
7. Molko, 762 P.2d at 67. See also Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989). In Wollersheim, the plaintiff was awarded $500,000 in compensatory damages and $2,000,000 in punitive damages for his claim against the Church of Scientology for intentional infliction of emotional distress. Id. at 355.
8. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates the rights set forth in the First Amendment because such rights are “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), and “fundamental to the American scheme of justice,” Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Accordingly, states may not interfere with an individual’s freedom of speech or exercise of religion.
10. Id. (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).
11. Id. (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).
cause of action against the Church. Since the Molko court held that such immunity was only partial (with respect to religious conduct only), then the plaintiffs were able to proceed with a cause of action against the Church for non-religious conduct, and could present evidence to demonstrate that brainwashing had occurred.

The Molko court recognized that the plaintiffs' causes of action did involve an element of brainwashing, and held that they should be given an opportunity to present evidence to support their claims. However, in a recent United States District Court case, United States v. Fishman, the court held that the evidence required to support such an element of brainwashing was not admissible, since certain views of brainwashing are not generally accepted by the scientific community. The primary problem that the Fishman opinion presents is that the court essentially negates the cause of action established by Molko by holding that expert testimony on brainwashing is inadmissible. If brainwashing cannot be proven by means of expert testimony, which is the only way that brainwashing can be proven, then the plaintiff's cause of action must necessarily fail. It is important that expert testimony concerning brainwashing be deemed admissible so that plaintiffs with Molko-type claims can obtain relief against a defendant such as the Church. Otherwise, defendants such as

12. Id. at 61.
15. It is acknowledged that the Fishman case is not binding precedent for the California Supreme Court or any other California court. However, the Fishman case has far-reaching ramifications and presents serious issues with respect to any plaintiff's assertion of a brainwashing-related cause of action or defense. See infra note 145 and accompanying text.
16. The terms "brainwashing," "mind control," and "coercive persuasion" will be used interchangeably in this comment, although some commentators view brainwashing to be at the extreme right end on the continuum of influence, with mind control and coercive persuasion a few notches to the left. According to these commentators, completely independent thought would be to the extreme left of the spectrum, and high-pressure sales would be a few notches to the right. See Fishman, 743 F. Supp. at 717 (where the court discusses the teachings of Robert J. Lifton, M.D., Thought Reform and the Psychology of Totalism—A Study of "Brainwashing" in China (1963) and Edgar H. Schein, Coercive Persuasion—A Socio-Psychological Analysis of the "Brainwashing" of American Civilian Prisoners by the Chinese Communists (1961)).
the Church in *Molko* would be rendered immune from liability for brainwashing-related torts such as fraud, deceit, intentional infliction of emotional distress and retribution, since the plaintiffs could not successfully sue such defendants.

This comment addresses the future admissibility of expert testimony in brainwashing-related cases in light of the *Fishman* decision. First, the comment discusses mind control and how it works. Next, the comment examines applicable case law allowing causes of action in coercive persuasion situations. The comment discusses the standards for the admission of expert testimony under Federal Rule of Evidence 702 and related case law, and then addresses the proof problem that *Fishman* and the application of the *Frye* standard present. Section III of the comment analyzes the applicability of the *Frye* rule to expert testimony relating to brainwashing and suggests potential alternative tests which may be more appropriate. Finally, Section IV proposes a new standard which will ensure that expert testimony continues to meet the standards mandated by Federal Rule of Evidence 702, while at the same time allowing the plaintiff to maintain a cause of action in coercive persuasion cases.

II. BRAINWASHING AND THE PROOF PROBLEM

A. Brainwashing

The modern history of coercive persuasion began in the 1950's, during the Korean conflict, although coercive persuasion has probably existed for at least several hundred years. In 1951, Edward Hunter presented his theory about the "brainwashing" of Americans held as prisoners of war in Korea.
Hunter believed that the scientific theories of Ivan Pavlov, a Russian neurophysiologist, were at the foundation of brainwashing. Hunter claimed that communists were using brainwashing to convert people to their way of thinking and believed that the intent of this form of mind control was extreme; in his words the purpose of brainwashing was "to atomize Humanity."

By the time Hunter had written his second book, the concept of brainwashing was becoming accepted by the American public and had become a household word. Many psychologists, psychiatrists and medical specialists began to hypothesize about brainwashing and, as a result, a number of controversial theories surfaced. Robert Lifton and Edgar Schein, two highly-respected authorities in this field, believe that brainwashing is both possible and extremely effective. Another group of commentators believes that brainwashing is nonexistent or ineffective, while yet another group believes that persuasion alone is not enough and must be combined with aggression or

BRAINWASHING IN RED CHINA: THE CALCULATED DESTRUCTION OF MEN'S MINDS (1953).

25. SCHEFLIN & OPTON, supra note 3, at 86. Ivan Pavlov, a Russian physiologist and Nobel Prize winner, conducted a number of famous experiments on dogs. In one familiar experiment, Pavlov struck a tuning fork immediately before giving food to a dog. The dog would naturally begin to salivate as soon as it saw the food, but eventually, as it began to associate the sound of the tuning fork with the appearance of food, the dog would begin to salivate upon hearing the tuning fork, even in the absence of food. JAMES HASSETT, UNDERSTANDING PSYCHOLOGY 13-14 (3d ed. 1980). This "conditioned reflex," a stimulus eliciting a desired response which is different from what the usual response would have been (e.g., dogs, absent conditioning, would not salivate at the sound of a tuning fork) became known as "classical conditioning." Id. at 24.

26. SCHEFLIN & OPTON, supra note 3, at 87.


28. Some of the more colorful descriptions of brainwashing are "menticide," "brain warfare," and "mental douche." SCHEFLIN & OPTON, supra note 3, at 87.


30. Molko, 762 P.2d at 55 (citing LEE COLEMAN, M.D., New Religions and the Myth of Mind Control, 54 AM. J. ORTHOPSYCHIATRY 322, 323 (1984)).
violence, "otherwise any successful attempt at persuasion, such as education or advertising, would be brainwashing."

Albert Somit borrows from a variety of sources to establish what he views as nine elements which are necessary in the brainwashing process. They are: (1) identification with the inquisitor, (2) impairment of one’s mental ability through fatigue and hunger so that the subject is not strong enough to resist, (3) disorientation and “stimulus hunger” resulting from solitary confinement, (4) suggestion, (5) repetition, (6) guilt which may be manipulated to exact confession and compliance, (7) ego destruction through humiliation, degradation and self-betrayal—again, one is not strong enough to resist, (8) non-rational behavior in the face of sudden stimulus, and (9) alternation of fear (of pain—psychological and/or physical) and hope (i.e., relief from the pain).

Brainwashing appears to have been used for some time, and there seem to be a variety of views on the subject. However, one common element of the theories of those believing that brainwashing is possible is that a person’s mind is taken hostage by another who then exercises control over the “weaker” individual.

B. Cause of Action Allowed in Brainwashing-Related Cases: Molko v. Holy Spirit Association for the Unification of World Christianity

More recently, some courts and commentators have agreed that certain religious cults may be employing brainwashing initially to “recruit” members and then to control them. In a 1988 decision, Molko v. Holy Spirit Association for
the Unification of World Christianity, the California Supreme Court held that the brainwashing theory of the plaintiffs, David Molko and Tracy Leal, did present a question of fact in their claim against the Church for fraud and deceit as well as intentional infliction of emotional distress, thus precluding a grant of summary judgment in favor of the Church.

1. The Case of David Molko

The facts of Molko seem to be typical of those cases involving coercive religious cults. David Molko had just graduated in June of 1978 from Temple University School of Law, and passed the Pennsylvania bar examination. As David was unsure about his future, he decided to visit San Francisco. While David was in San Francisco in January of 1979, Mark Bush and Ernest Patton, members of the Church, approached him at a bus stop. The Members told David that they belonged to an “international community” of socially conscious individuals, and that the community held discussion groups in the evenings. The Members invited David to come to dinner that evening. David asked the Members if they had a “religious connection” and they replied that they did not.

David attended the dinner, along with guests who had been invited by other Members. However, he was isolated


34. 762 P.2d 46 (Cal. 1988).
35. Id. at 67. By allowing the causes of action, the court implicitly recognized that brainwashing does occur.
37. Molko, 762 P.2d at 49-50.
38. Id.
39. Bush and Patton, collectively with the other members of the Unification Church, will hereinafter be referred to as the “Members.”
40. Molko, 762 P.2d at 50.
41. Id.
42. Id.
43. Id.
44. Id. “Workshop” guests of the Church are typically single, white, with an average age of 22. GALANTER, supra note 36, at 140. They are also typically individuals who feel a higher level of emotional distress and social alienation than the average person. GALANTER, supra note 36, at 141-42. See, e.g., Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 335 (Ct. App. 1989) (plaintiff was “an
from other invited guests and was kept occupied by the Members. After dinner, David attended a lecture and then a slide show describing "Boonville," a "farm" where the Members went to relax. After the slide show, David was invited to go to Boonville, and after much encouragement by the Members, he agreed to go. At this point, he was still unaware that the Members were affiliated with the Church, and that Boonville was an "indoctrination facility" for the Church.

David arrived at Boonville several hours later. He fell asleep and woke the next day with many other "guests." Once at the farm, a Member accompanied him at all times, no matter what he did or where he went. Expecting to be able to relax, David was surprised to learn of the day's rigorous schedule which included calisthenics twice a day, lectures, and discussions. David was never left alone and was always involved in some activity with the Members.

Each day at Boonville was as strenuous, and David began to feel "tired, uncomfortable and concerned about the direction his life was taking." He told the Members that he wanted to return to San Francisco, but he was urged to stay. After a week at the farm, the Members told David that they were about to leave for "Camp K," a weekend retreat. David was hesitant to go, but after another round of encouragement he agreed to make the trip. At this time, David was still unaware of the Members' and his connection with the Church.

incipient manic-depressive for most of his life). One tactic that the Church uses on these distressed individuals is to shower them with positive attention so that they will feel better about themselves and want to remain with the cult. This has been referred to as "love-bombing." GALANTER, supra note 36, at 134-35.

45. Mokko, 762 P.2d at 50.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. at 50-51.
56. Id. at 51.
57. Id.
58. Id. The Church uses two types of induction: open entry and induction by deception. Under open entry induction, used in the northeastern United States
The schedule at Camp K was no less rigorous than that at Boonville. David became more confused and despairing. After almost two weeks of calisthenics, lectures (some of which were repeated verbatim) and group discussions, David again inquired as to whether the group was affiliated with a religious organization. One of the Members finally confirmed David’s fears and told him that, in fact, the group was part of the Unification Church. David felt “confused and angry,” and was told that deception was necessary to increase receptivity. He was also convinced to remain with the group to “try to work out his confusion.”

David remained at Camp K for “advanced training” which lasted several weeks. His parents became concerned and traveled from Florida to urge him to return home. David refused to go as, by that time, the Members had convinced him that “his parents were agents of Satan trying to tempt him away from the Church.” After his training, David was allowed to go to San Francisco to recruit new members. He also became a Member himself, and was urged to give the Church money for its taxes.

and Southern California, recruits are made fully aware that the activities in which they are participating are associated with the Church. In the San Francisco Bay area, the induction by deception method is more common, and “[p]otential members [are] approached under the guise of introducing them to an innocuous socially oriented group and only when the potential recruits became fully involved in the group [are] they made aware of its association with the church.” GALANTER, supra note 36, at 133. It appears that sect leaders are reluctant to identify the affiliation with the Church until after recruits are “hooked” for fear of scaring off potential members. GALANTER, supra note 36, at 135.

59. Molko, 762 P.2d at 51.
60. Id.
61. Id. See also supra note 58.
62. Molko, 762 P.2d at 51.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id. David Molko’s experience with the Moonies, see infra note 75, is not unlike those of other religious cults. See, e.g., Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989), where plaintiff was persuaded, against his objections, to recruit members aboard a Scientology ship. The daily routine aboard the ship was very strenuous; the day began at 6:00 a.m. and did not end until 1:00 a.m. Plaintiff and others had to sleep in extremely cramped quarters. Plaintiff lost 15 pounds in his six-week stay on the ship. He tried to escape from the ship because he was afraid of dying and losing his mind, and he was captured by other Scientology members who coerced him into staying aboard
The Members persuaded David to take the California bar examination so that he could help the Church. As David left the examination, he was abducted by "deprogrammers" whom his parents had hired. David relinquished his membership with the Church after three days of "deprogramming" in a motel room.

2. The Case of Tracy Leal

Tracy Leal had an experience similar to that of David Molko. While Tracy was in San Francisco waiting for a bus to Humboldt, she was approached by a Member. She was invited to dinner and attended the same type of lecture and slide show on Boonville as David had. She endured the same rigorous routine of twice-a-day calisthenics, lectures and discussions. Tracy also went to Camp K, and experienced doubts and fears similar to David's. She inquired as to whether the Members were "Moonies," and they said they were not.

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68. Molko, 762 P.2d at 51.
69. Id.
70. Id. "Deprogramming" involves using physical restraint to "dislodge a member from one of these zealous groups." GALANTER, supra note 36, at 166. The restraint involved can range from observation by parents at home to physical abuse by strangers in unfamiliar settings. GALANTER, supra note 36, at 166-72. "Deprogrammers" are generally hired to kidnap and psychologically "recapture" individuals who have been brainwashed by religious cults. Some commentators believe that "deprogramming" has risen to the level of becoming a new vocation. Frequently, "deprogrammers" are people who have failed as cult members themselves. Sometimes the religious cults even accuse the "deprogrammers" of brainwashing. SCHEFLIN & OPTON, supra note 3, at 52-53. See also GALANTER, supra note 36, at 166-72. Generally, deprogrammers will expose the cult member to negative information about the religious sect with which he or she is involved, and explain the principles of brainwashing with the intent that the cult member will come to a realization about his or her treatment by the cult. GALANTER, supra note 36, at 168-69.
71. Molko, 762 P.2d at 51-52.
72. Id.
73. Id.
74. Id.
75. The Unification Church follows the teachings of the Reverend Sun Myung Moon and the members are sometimes pejoratively referred to as "Moonies." SCHEFLIN & OPTON, supra note 3, at 52-53.

Reverend Moon, a self-ordained minister, began his religious sect in the mid-1950s in South Korea. Moon arrived in the United States around 1972. The
After Tracy had been with the Members for twenty-two days, they admitted that they were part of the Unification Church.\(^77\)

Tracy stayed with the Members even after learning that they were "Moonies."\(^78\) After being with the Members for three months, Tracy became a formal Member of the Church and flew to Colorado for a one-month series of lectures.\(^79\) She then went to Los Angeles to raise funds for the Church by selling flowers.\(^80\) In Los Angeles, deprogrammers hired by Tracy's parents abducted her and convinced her to relinquish her membership and involvement with the Church.\(^81\)

3. Causes of Action Upheld

The California Supreme Court, in an opinion written by Justice Mosk, held that David Molko could maintain causes of action for fraud, intentional infliction of emotional distress, and restitution of the $6,000 "gift" he had given to the Church for payment of its taxes.\(^82\) The court also held that Tracy Leal could maintain causes of action for fraud and intentional infliction of emotional distress.\(^83\)

The Church argued that under the Free Exercise Clauses of both the First Amendment of the United States Constitution and Article I, Section 4 of the California Constitution, the

United States, unlike Japan and Korea where the cult was already in existence, was conducive to formation of the religious sect due to the protection afforded by the First Amendment. Moon maintains that "[f]rom childhood I was clairvoyant. I could see through people, see their spirits." He claims to have met with both Moses and Buddha. The elaborate religious beliefs of the sect are set forth in the Divine Principle, which is Moon's interpretation of the Old and New Testaments and which is entirely inconsistent with American Christianity. Moon's religious beliefs also involve an element of anti-Communism. In 1985, Moon spent 11 months in federal prison for filing false tax returns. The Unification Church is notable for its mass engagements and marriage ceremonies, where over 4,000 members would be engaged and later wed en masse (up to three years later with cohabitation and sexual relations prohibited in the interim). GALANTER, supra note 36, at 129-66.

77. Id.
78. Id. at 52.
79. Id.
80. Id.
81. Id.
82. Id. at 67.
83. Id. The Molko and Leal actions were consolidated by the California Court of Appeal. Id. at 49.
former Members (Molko and Leal) could not bring a cause of action against it.\textsuperscript{84} The court of appeal agreed, and did not allow the actions imposing tort liability under a false imprisonment theory.\textsuperscript{85} The California Supreme Court conceded that Tracy Leal's false imprisonment claim could not survive constitutional scrutiny since the claim was based solely on divine retribution,\textsuperscript{86} which is viewed as a form of free speech and expression of religious belief.\textsuperscript{87} Tracy Leal believed that she could not leave the Members or the Church or else her family "would be damned in Hell forever and they would forever feel sorry for having blown their one chance to unite with the Messiah and make it to Heaven."\textsuperscript{88} The court held that "such threats are protected religious speech and cannot provide the basis for tort liability."\textsuperscript{89}

\textsuperscript{84} Id. at 48.
\textsuperscript{85} Id. at 64.
\textsuperscript{86} Divine retribution is the Church's form of punishment, and usually involves threats of going to Hell. Divine retribution is held to be a protected form of religious speech, and cannot be the basis for a false imprisonment claim. \textit{Id. See also} Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1139 (D. Mass. 1982). \textit{But see} Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 341-43 (Ct. App. 1989) (Church retributive conduct, although central to Church practices, is not protected by the Constitution).
\textsuperscript{87} \textit{Molko}, 762 P.2d at 64.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 64 (citations omitted). False imprisonment is defined as "the unlawful violation of the personal liberty of another," and "the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." \textit{Id.} at 63 (citations omitted). An additional element often included in the false imprisonment prima facie case is that there can be no reasonable means of escape. \textsc{William L. Prosser et al., Cases and Materials on Torts} 39 (7th ed. 1982).

Perhaps if Tracy Leal had asserted that there was no reasonable means of escape from either Boonville or Camp K because she was always accompanied by a Member, and because there was no transportation other than the Church bus, the cause of action for false imprisonment would have been stronger, since it would not have been based solely on a fear of divine retribution. \textit{See, e.g.}, Candy H. v. Redemption Ranch, 563 F. Supp. 505, 510 (M.D. Ala. 1983) (plaintiff at a Baptist girls' home could not receive communications from outside persons, was not allowed to talk to other "new" girls or say anything bad about the home, plaintiff's calls were monitored and her mail was censored, and plaintiff was confined to the home, which was locked on both the interior and exterior).

In George v. Int'l Soc'y for Krishna Consciousness of Cal., 262 Cal. Rptr. 217 (Ct. App. 1989), \textit{cert. granted and judgment vacated}, 111 S. Ct. 1299 (1991), the California court of appeal was presented with a similar false imprisonment claim. This opinion was ordered depublished by the California Supreme Court, 89 CDOS 6814 (1989). Subsequently, the United States Supreme Court vacated the judgment
With respect to the claims of fraud and deceit, intentional infliction of emotional distress, and retribution, though, the court held that:

[N]either the federal nor state constitution barred the plaintiffs from bringing traditional fraud actions against the Church. These actions were based on the Church's alleged inducement of them, by misrepresentation and concealment of its identity, into unknowingly entering an atmosphere in which they were then subjected to coercive persuasion . . . . Because triable issues of fact existed as to . . . whether Molko and Leal were, by means of coercive persuasion, rendered unable to respond independently upon learning that they had been deceived, the supreme court held that the court of appeal erred in affirming the summary judgment for the Church as to plaintiffs' actions for fraud.90

The California Supreme Court's rationale for allowing the causes of action for tort liability was that "while religious belief is absolutely protected, religiously motivated conduct is not,"91

and remanded the case to the appellate court. 111 S. Ct. 1299 (1991). In George, the plaintiff "recognized this was not a prototypical case of false imprisonment. Robin [plaintiff] admitted she was never physically restrained by the defendants and that her residence in the various Krishna temples was not against her will." 262 Cal. Rptr. at 231. Plaintiff introduced testimony from Drs. Margaret Singer and Sydney Smith that Robin had been brainwashed into joining the cult. Dr. Singer testified that plaintiff's "will had been overborne" and that her decision to run away from home and join the cult "was not a product of her own free will." Id. at 232. Dr. Singer and Dr. Smith both testified that there were several factors of Krishna cult dynamics which "contributed to rendering Robin incapable of exercising freedom of choice including a low-carbohydrate vegetarian diet, reduced amounts of sleep and chanting as a means of religious ritual." Id. The George court stated that it was unwilling to "extend what we believe are the clear limits of Molko. To begin with, we read Molko as a reaffirmation that physical force or the threat of it is a necessary element of a false imprisonment cause of action even in the context of a brainwashing claim." Id. at 236. The George court stated that there was no evidence that the cult had acted fraudulent-ly, so the causes of action allowed by Molko were not applicable to this case. Id. The court concluded that "[a]bsent such evidence [of religious fraud], Robin's brainwashing theory of false imprisonment is no more than an attempt to premise tort liability on religious practices the Georges find objectionable. Such a result is simply inconsistent with the First Amendment." Id. (alteration in original).


90. Molko, 762 P.2d at 46.
91. Id. at 56 (emphasis in original) (citations omitted).
and that such religiously motivated conduct "remains subject to regulation for the protection of society." In other words, the Church's actions are analyzed, and religious belief is separated from religiously motivated conduct. Belief is absolutely protected under the Constitution, while religiously motivated conduct is not, and tort liability may lie for such conduct.

The court also set forth a balancing test in connection with the regulation of such conduct, wherein "the importance of the state's interest is weighed against the severity of the burden imposed on religion," and the government's interest must be more compelling as the burden on religion grows. If government action can pass this balancing test, it must also (1) not impose a greater burden on religion than is necessary to satisfy the government's interest and (2) "not discriminate between religions, or between religion and nonreligion." The court added that "religious groups are not immune from all tort liability. It is well settled, for example, that religious groups may be held liable in tort for secular acts." The court acknowledged that "in appropriate cases courts will recognize tort liability even for acts that are religiously motivated."

In applying the balancing test, the court concluded that the imposition of tort liability would not affect religious belief, the burden on religion would not be substantial, and that the marginal burden imposed on the Church's free exercise of

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92. Id. (citing Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).
93. Molko, 762 P.2d at 56 (citing Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)).
94. Molko, 762 P.2d at 56-57.
95. Id. at 57 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
96. Molko, 762 P.2d at 57.
97. Id. at 57. The court gives several examples. See, e.g., Candy H. v. Redemption Ranch, Inc., 563 F. Supp. 505, 516 (M.D. Ala. 1983) (allowing cause of action for false imprisonment against religious group); Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1135 (D. Mass. 1982) ("[c]auses of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose."); O'Moore v. Driscoll, 28 P.2d 438, 440, (Cal. 1933) (allowing priest's cause of action against his superiors for false imprisonment as part of their effort to obtain his confession of sins); Bear v. Reformed Mennonite Church, 341 A.2d 105, 107 (N.Y. 1975) (allowing cause of action for interference with marriage and business interests when church ordered congregation to "shun" former member); Carrieri v. Bush 419 P.2d 132, 137 (Wash. 1966) (allowing cause of action for alienation of affections when pastor counseled woman to leave her husband who was "full of the devil").
religion was justified by the state’s compelling interest in protecting “individuals and families from the substantial threat to public safety, peace and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion.” The court concluded that no lesser restriction would satisfy the state’s interest. The court similarly determined that the conduct involved in the intentional infliction of emotional distress and retribution claims could be separated from religious belief. Again, this is significant since a plaintiff could not sue a religious cult and present evidence of brainwashing if the cult’s conduct was held to be entirely protected by the Constitution.

The plaintiffs, in support of their brainwashing theory, sought to introduce testimony from two experts on coercive persuasion and its use by groups such as the Church. The expert witnesses were Dr. Margaret Singer, a psychologist, and Dr. Samuel Benson, a psychiatrist. Both were expected to testify that they believed the Church’s “sophisticated indoctrination techniques” had caused the plaintiffs’ incapacity to exercise free will, judgment or independent response upon learning of the deception used in their recruitment. Both the trial court and the court of appeal held that the doctors’ testimony was inadmissible based on the fact that it conflicted with the plaintiffs’ testimony and would cause a violation of the Free Exercise Clause of the First Amendment.

The California Supreme Court disagreed with the lower courts as to the admissibility of Singer and Benson’s expert testimony. The court stated that “[a]lthough the Singer and Benson declarations provide a scientific basis for and lend support to [the] plaintiffs’ brainwashing theory, we find that the basic theory is amply stated in [the] plaintiffs’ own declarations.” The court’s rationale was that both plaintiffs had stated that they felt they had lost the ability to act independently and freely choose or decide on their own. They

98. Molko, 762 P.2d at 59-60.
99. Id. at 60.
100. Id. at 61-65.
101. Id. at 55.
102. Id.
103. Id. Neither court held that the evidence was inadmissible based on Federal Rule of Evidence 702 or the Frye standard.
104. Molko, 762 P.2d at 55.
described themselves as having been manipulated both psychologically and emotionally and as having been rendered "robot-like." While the California Supreme Court has been supportive of such expert testimony, not all courts have been as willing to allow brainwashing-related testimony, as will be discussed below in connection with the decision of the United States District Court for the Northern District of California in United States v. Fishman.

C. The Proof Problem

1. Federal Rule of Evidence 702

Federal Rule of Evidence 702—Testimony by Experts, reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 adopted the long-held position that:

The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.

This rule is significant with respect to the admissibility of expert testimony in brainwashing cases because expert witnesses are of vital importance in demonstrating that coercive persuasion has occurred and in describing its effects. There may not be any outward evidence apparent to a layperson that an

105. Id. at 55 n.12.
108. MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 228-29 (2d ed. 1987).
individual has been brainwashed; an expert is required to determine if and to what extent brainwashing has occurred. If testimony relating to such persuasion is not deemed to be admissible, then the plaintiff will have the extremely difficult, if not impossible, task of proving that the brainwashing has occurred.

2. Relevant Case Law

a. United States v. Amaral

In United States v. Amaral,\textsuperscript{109} which was used by the Fishman court to interpret Federal Rule of Evidence 702, a four-part test was developed to determine the admissibility of expert testimony. In order to be admissible, the testimony must: (1) come from a qualified expert, (2) be of a proper subject, (3) conform to a generally accepted explanatory theory, and (4) have probative value that exceeds its prejudicial effect.\textsuperscript{110} In addition, the Fishman court cited United States v. Gwaltney, which stated that “[t]he proponent of expert testimony has the burden of laying a proper foundation showing the underlying scientific basis and reliability of the testimony.”\textsuperscript{111} Therefore, according to Amaral and Gwaltney, if the testimony of an expert witness can meet the four-part test and be shown to be reliable, then it is admissible under Federal Rule of Evidence 702.

b. The Frye Test

Frye v. United States\textsuperscript{112} has long been the standard for the admissibility of scientific evidence. Frye involved a murder prosecution in which the defendant attempted to admit expert testimony involving the use of a systolic blood pressure deception test, an ancestor of today's polygraph test.\textsuperscript{113} The court

\begin{footnotesize}
\begin{enumerate}
\item 109. 488 F.2d 1148 (9th Cir. 1973).
\item 110. Id. at 1153. Although the Amaral case does not specifically mention Federal Rule of Evidence 702, the Fishman court views the Frye standard and the four-part test set forth in Amaral as necessary principles to determine “the admissibility of expert testimony from mental health professionals.” United States v. Fishman, 743 F. Supp. 713, 716 (N.D. Cal. 1990).
\item 111. Fishman, 743 F. Supp. at 716 (citing United States v. Gwaltney, 790 F.2d 1878, 1882 (9th Cir. 1986)).
\item 112. 293 F. 1013 (D.C. Cir. 1923).
\item 113. A polygraph test is a lie detector test. One psychologist, David Lykken,
held that the evidence was inadmissible because "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Since the systolic blood pressure deception test had not yet been generally accepted by the scientific community, the court could not allow testimony "from the discovery, development, and experiments thus far made."

For many years, the Frye standard was almost blindly followed by courts, although the standard was initially only applied to tangible, mechanical components. However, the Frye standard was eventually applied to such intangible concepts such as hypnotic and drug induced testimony, psychologist believes that several million polygraph tests are given each year. The polygraph machine measures the amount of perspiration, rate of breathing, heart rate and blood pressure. The basic idea is that any or all of these factors will increase if an individual is lying. The subject's physiological state when relaxed is compared to his or her physiological response to a question that is emotionally charged. The person giving the polygraph test will ask three types of questions: nonemotional ("What is your address?"), emotional but irrelevant to the investigation ("Have you ever been unfaithful to your spouse?"), and questions specifically relating to the investigation ("Did you steal money from your place of employment?"). Some commentators believe that it is possible to outsmart a polygraph test by visualizing sexual acts, contracting muscles or self-infliction of pain (for example, putting a tack in your shoe and stepping on it as you respond to each question) so that the response to all questions will indicate physiological arousal and, therefore the results will be inconclusive. JAMES HASSETT, UNDERSTANDING PSYCHOLOGY 155-57 (3d ed. 1980).

114. Frye, 293 F. at 1014 (emphasis added). See infra note 148 and accompanying text.

115. Id. It bears noting at this point that the court's emphasis is on the machine, that is, does it work?

116. In California, the Frye standard has been applied to voice print analysis, polygraph tests, blood tests to establish paternity, and hypnotically-induced testimony. Steven M. Garrett, Comment, People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 CAL. L. REV. 1069, 1085 (1982) (citing People v. Shirley, 641 P.2d 775 (Cal. 1982); People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976); Huntingdon v. Crowley, 414 P.2d 382 (Cal. 1966); People v. Wochnick, 219 P.2d 70, 72 (Cal. Ct. App. 1950)). In addition, Reed v. State, 391 A.2d 364, 368 (Md. 1978) lists several areas which have been subjected to the Frye "general acceptance" standard, e.g. paraffin tests, breath analysis, blood tests, gunshot residue tests, and ink identification tests.

117. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE 606 (3d ed. 1984) For more information concerning drugs and hypnosis, see id. at 631-34 and accompanying notes.
chological profiles of battered women,\(^{118}\) rape trauma syndrome,\(^{119}\) and, in Fishman, to brainwashing.\(^{120}\)

Recently, however, the Frye standard has been criticized, limited, modified, rejected, and even ignored. Some courts have concluded that the Frye standard goes to the weight of evidence rather than to its admissibility.\(^{121}\) Other courts have determined that the standard only applies to scientific tests themselves, or to the principles or methodology related there-to, and not to the studies or results based thereon.\(^{122}\)

Supporters of the Frye standard applaud it because they believe that it assures the uniformity of evidence, shields juries from a tendency to treat scientific evidence as infallible, avoids the expense (in time and money) of litigation, and insulates the courts from what judges deem to be novel and unproven evidence.\(^{123}\) However, those opposed to the Frye standard believe that the same objectives can be met in other ways; for example, that the witness’s expertise and the relevancy of the evidence should control.\(^{124}\) This method of evaluation would eliminate the problems of interpreting what constitutes “general acceptance” and what community must be measured for acceptance.\(^{125}\)

c. United States v. Fishman

In United States v. Fishman,\(^{126}\) the United States District

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\(^{118}\) For information concerning “battered women’s syndrome” see CLEARY ET AL., supra note 117, at 635 n.91, and JACK B. WEINSTEIN ET AL., CASES AND MATERIALS ON EVIDENCE 394 (7th ed. 1988). See also infra note 208 and accompanying text.

\(^{119}\) CLEARY ET AL., supra note 117, at 606. For further information concerning rape trauma syndrome, see id. at 635 n.92 and JACK B. WEINSTEIN ET AL., CASES AND MATERIALS ON EVIDENCE 394-96 (7th ed. 1988).


\(^{121}\) CLEARY ET AL., supra note 117, at 606.

\(^{122}\) CLEARY ET AL., supra note 117, at 606.

\(^{123}\) CLEARY ET AL., supra note 117, at 607. See, e.g., Clifford A. Knaggs, Comment, The Admissibility of Evidence and Expert Testimony Based on Science, Technology or Other Specialized Knowledge-Is the “Frye” Standard Consistent with the Federal Rules of Evidence?, 4 COOLEY L. REV. 641 (1987) (“Frye should not fade away, but should be held high and applauded.”).

\(^{124}\) CLEARY ET AL., supra note 117, at 608. For a more detailed discussion of the applicability of alternative tests, see discussion infra notes 162-88 and accompanying text.

\(^{125}\) CLEARY ET AL., supra note 117, at 608.

\(^{126}\) 743 F. Supp. 713 (N.D. Cal. 1990). The court states that “[t]he issue of
Court for the Northern District of California dealt a fatal blow to the admissibility of expert testimony in brainwashing-related cases. This case involved a defendant who was indicted on eleven counts of mail fraud, and who had defrauded various district courts by fraudulently obtaining judgments through shareholder class action suits. The defendant, Steven Fishman, intended to rely on an insanity defense, claiming that brainwashing by the Church of Scientology was to blame for his state of mind when the offenses occurred. Dr. Margaret whether or not the proffered testimony [regarding brainwashing] in this case satisfies the Frye test is not one of first impression among the federal courts. In Kropinski v. World Plan Executive Council-U.S., 853 F.2d 948 (D.C. Cir. 1988)—the Court of Appeals unanimously reversed the trial court for permitting Dr. Singer to testify on coercive persuasion.” Id. at 718. While the Kropinski court stated that there was not general acceptance of Dr. Singer’s theory, the testimony was not admitted due to an incomplete record. Id. at 719.

It bears noting that in Fishman, the criminal defendant was trying to use a theory of brainwashing to support an insanity defense. In Molko, however, the plaintiffs were stating a civil cause of action based on brainwashing. Even though Fishman is a criminal case, it still has the effect of permanently impeaching expert witnesses on brainwashing, such as Dr. Singer, for all cases, since their views are not “generally accepted.”

127. Id. at 715. The Church of Scientology has been called a “hugely profitable racket that survives by intimidating members and critics in a Mafia-like manner.” Richard Behar, The Thriving Cult of Greed and Power, TIME, May 6, 1991, at 50. The Church of Scientology (“TCS”) was originally founded by L. Ron Hubbard, a science fiction writer, to “clear” people’s minds of unhappiness. TCS boasts 700 “religious” centers in 65 countries and “members” include Tom Cruise, John Travolta, Kirstie Alley, Mimi Rogers, Anne Archer, Sonny Bono, Chick Corea and Nancy Cartwright (voice of Bart Simpson). Id. Cynthia Kisser, executive director of the Cult Awareness Network, has said, “[s]cientology is quite likely the most ruthless, the most classically terroristic, the most litigious and the most lucrative cult the country has ever seen. No cult extracts more money from its members.” Id. at 51. Vicki Aznaran, who was a key leader of TCS until 1987 said, “It makes Jim and Tammy [Bakker] look like kindergarten.” Id. at 51.

Ron Hubbard wrote the “Bible” of TCS, Dianetics: The Modern Science of Mental Health, in 1950. In his book, Hubbard discusses the theory of “auditing,” a psycho-therapeutic technique, and presents a simplified lie detector test to detect mental aberrations which cause unhappiness (labeled “engrams”). Allegedly, counseling sessions can eliminate the engrams and the corresponding unhappiness, and also “cure blindness and even improve a person’s intelligence and appearance.” Richard Behar, The Thriving Cult of Greed and Power, TIME, May 6, 1991, at 50, 51. “Psychiatrists say that these sessions can produce a drugged-like, mind-controlled euphoria that keeps customers coming back for more.” Id. at 52.

The “Aims of Scientology” are “[a] civilization without insanity, without criminals and without war, where the able can prosper and honest beings can have rights, and where man is free to rise to greater heights.” Supplement, The Story that Time Couldn’t Tell, USA TODAY, June 14, 1991, at 2. Scientologists say that they abhor drugs and are self-proclaimed to be drug-free. TCS says that it “is
the largest drug reform organization in the world and has so far gotten over 100,000 people off of street drugs. It has taken charge of the area of drug education and prevention with such programs as 'Lead the Way To a Drug-Free USA.'”

The following is a suggested course of “enlightenment,” with an estimate of the time and the cost involved (the entire passage into an enlightened state is estimated to cost from $200,000 to $400,000). There is some evidence that TCS engages in a practice called “freeloader debt” for its members. In other words, members get these services for a reduced fee, but are threatened with having to pay “the difference between the full price normally charged to the public and the price originally charged to the member” if they choose to leave TCS. Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 335 (Ct. App. 1989):

(1) Personality Test. Cost: free. Time: one hour. This is to determine whether a person needs TCS and, apparently, no one is turned away.

(2) Communications Courses. Cost: $250 each. Time: a few weeks. The purpose of these courses is to “pacify and indoctrinate” the client. One type of activity used in this phase is requiring a person to sit in a chair for hours without moving.

(3) Regular Auditing (Grades 0-4). Cost: $500 per hour. Time: indefinite. Goals are effective communication, elimination of problems, and attainment of freedom from guilt and psychosomatic illnesses.

(4) New Era Dianetics. Cost: $500 per hour. Time: indefinite. Goal is to attain the state of “clear.”

(5) Clear Certainty Rundown. Cost: $2,800. Time: 5 hours. Goal is to determine whether or not a person is really “clear.”

(6) Operating Thetan (abbreviated O.T., this means that a person is “at an advanced state of clear.”) (Levels 1-2). Cost: $7,978. Time: as many as 100 hours. Goal is to learn about ideas implanted in man over 75 million years ago.

(7) O.T. (Levels 3-4). Cost: $17,010. Time: several months. Goals are to study the “sacred scriptures” and to free oneself from the effects of past-life drug use.

(8) O.T. (Levels 5-7). Cost: $25,600. Time: several months. Goal is to locate and release body thetans (negative spiritual beings) that have been dormant in a person for millions of years.


Richard Behar, The Thriving Cult of Greed and Power, TIME, May 6, 1991, at 52-53. TCS is behind the war against Eli Lilly, a pharmaceutical company, and its popular anti-depressant drug, Prozac. Id. at 53. It appears that if people take this top-selling anti-depressant, then they will not need TCS.

TCS is also at war with its critics. Psychologist Margaret Singer, (see supra notes 101-04 and accompanying text and infra notes 126-45 and accompanying text), is an “outspoken Scientology critic and professor at the University of California, Berkeley, [who] now travels regularly under an assumed name to avoid harassment [by TCS]." Richard Behar, The Thriving Cult of Greed and Power, TIME, May 6, 1991, at 50, 56. Mr. Richard Behar, who wrote the TIME article, was investigated and harassed repeatedly after having written his article. Id. at 57.

According to the facts in Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989), harassment is nothing new to the Church of
Singer and Dr. Ofshe were expected to testify on behalf of the defendant. 128

Dr. Singer was described by the court as "a well known and highly regarded forensic psychologist" 129 and a "respected member of [her field]." 130 She was expected to testify that the defendant was "incredibly suggestible [sic], compulsive and

Scientology. In Wollersheim, it was shown that TCS "engaged in a practice of retribution and threatened retribution—often called 'fair game'—against members who left or otherwise posed a threat to the organization." Id. at 335. The practice of "fair game" apparently involved the attempt by Scientologists to "neutralize" a person perceived to be a threat to TCS; such neutralization could be through economic, political or psychological tactics. Id. at 336.

Even TIME magazine itself is being harassed for publishing its article. The Reverend Heber C. Jentzsch, current president of TCS, called the TIME story "a hatchet job." Howard Kurtz, Scientology Attacks Time with Ad Campaign, SAN JOSE MERCURY NEWS, June 1, 1991, at 10C. TCS's ad campaign was launched the first week of June, 1991 in USA TODAY and "focused on TIME'S coverage of Hitler and Mussolini because TIME executives 'were wrong then and they're wrong now . . . . These guys [TIME executives] are coming at us with a bully attack and now they're unhappy about being exposed.'" Id. The ad campaign culminated on June 14, 1991 with a 27-page USA TODAY supplement "[p]ublished as a public service by the Church of Scientology International." Supplement, The Story that Time Couldn't Tell, USA TODAY, June 14, 1991. In the article, TCS accuses TIME, inter alia, of (1) promoting the drug Prozac for its own economic gain (id. at 3-6), (2) publishing lies in "the style of a supermarket tabloid" (id. at 7), (3) character assassination (id. at 8), (4) having a reputation of publishing "biased, antagonistic articles against the Church" (id. at 9), (5) offending its readers with religious bigotry (id.), (6) being the most successful liar of our times (id. at 12), and (7) being known as "The Weekly Fiction Magazine" (id. at 13). This last point is particularly interesting because on page 15 of the supplement, it is said that "Dianetics has sold over 14 million copies and appeared on The New York Times Bestseller List more than 93 times." Id. However, the graphics on this page show three fiction bestseller lists from the New York Times, and Dianetics is not on any of them. The rest of the supplement explains the views and accomplishments of TCS from the perspective of the Scientologists. Id. at 19-27.

In addition, TCS seems to be a very litigious organization; it has filed 71 lawsuits against the Internal Revenue Service alone. Howard Kurtz, Scientology Attacks Time with Ad Campaign, SAN JOSE MERCURY NEWS, June 1, 1991, at 10C. TCS claims that it had nothing to do with Steven Fishman's actions in United States v. Fishman, 743 F. Supp. 713 (N.D. Cal. 1990). Mr. Fishman and his psychiatrist, Dr. Uwe Geertz, claim that when Mr. Fishman was arrested, he was ordered by TCS to kill Dr. Geertz and then perform an "end of cycle," which in TCS jargon means to commit suicide. Richard Behar, The Thriving Cult of Greed and Power, TIME, May 6, 1991, at 50, 55.

128. See discussion of Molko v. Holy Spirit Ass'n for the Unification of World Christianity, supra notes 101-05 and accompanying text and supra note 127.
130. Id. at 719. The court also refers to Dr. Singer as a "respected psychologist," and adds that this is "a professional status with which the Court does not quarrel." Id. at 717.
obsessive," and that these qualities existed before he came into contact with the Church of Scientology. Dr. Singer would also testify that the defendant's already weak psychological state had deteriorated to the level of insanity as a result of his contact with the Church of Scientology, and that the defendant had become increasingly confused and delusional.

Dr. Ofshe was described by the court as a social psychologist holding a Ph.D. degree in sociology, and not a mental health professional. The defendant presented Dr. Ofshe to describe the method of coercive influence and behavioral control used by the Church of Scientology. According to Dr. Ofshe, because of the influence of the Church, Mr. Fishman did not know his acts were reprehensible or that the Church had manipulated him for nearly ten years after he was initially recruited. Drs. Singer and Ofshe both believed that coercive persuasion is possible and effective without the use or threat of physical force.

The government challenged the admissibility of the Singer-Ofshe testimony on the grounds that their theories concerning thought reform were not "generally accepted within the applicable scientific community." The district court agreed and held that the evidence was inadmissible, citing the Frye standard with approval.

The court reasoned that the application of the theory of coercive persuasion to religious cults was relatively new and, therefore, not generally accepted. The court received many declarations, affidavits and letters from psychologists and sociologists both supporting and criticizing the theory, which reinforced the Fishman court's view that the Singer-Ofshe theory on brainwashing was not generally accepted. The court rejected Dr. Singer's publication of an entry in the Merck Manual of Diagnosis and Therapy, a well-known medical reference work on
group psychodynamics, which included a discussion of religious cults, as an indication of general acceptance.\textsuperscript{139}

The court cited as a "significant barometer of prevailing views within the scientific community" certain professional organizations such as the American Psychological Association ("APA") and the American Sociological Association ("ASA"). Since the court determined that neither the APA nor the ASA endorsed the Singer-Ofshe theories, it held that their views were not generally accepted.\textsuperscript{140} The court's barometer, though, appears to be faulty because the record shows that neither the APA nor the ASA could agree as to what their views were.\textsuperscript{141} If there is no consensus among the group, how can it be used to measure acceptability?\textsuperscript{142}

In fact, the Fishman court discussed at length the general acceptability of the evidence, but did not give a plausible test for determining such acceptance. The court emphasized that the defendant has the burden of proof but did not effectively

\textsuperscript{139} Id. \\
\textsuperscript{140} Id. at 717-18. \\
\textsuperscript{141} Id. For example, the APA named Dr. Singer to chair a task force to study coercive persuasion and induction by deception. Before that task force had finished its report, the APA endorsed a contrary position in an \textit{amicus} brief filed in the \textit{Molko} case; the APA's view was that Dr. Singer's testimony should have been excluded because "her coercive persuasion theory did not represent a meaningful scientific concept." Id. at 718. It is interesting, then, that the APA had named Dr. Singer to chair a task force on that very issue. The APA then withdrew its name from the \textit{amicus} brief after it had been filed with the California Supreme Court. The APA claimed that its signature was withdrawn solely for procedural reasons, and that it had decided to wait for the report from Dr. Singer's task force before endorsing any view on brainwashing. The APA'S motion to withdraw as signatory stated that "the APA did not mean to suggest endorsement of any views opposed to those set forth in the \textit{amicus} brief, nor that it would ultimately be able to subscribe to the views expressed in the brief." Id. at 718. The Fishman court found it significant that the APA later rejected Dr. Singer's report as "lack[ing] scientific merit," and stated that "the studies supporting its findings lacked methodological rigor." Id. It seems, though, that this was not really very significant in that the pendulum could have swung just as easily in the other direction. \\
\textsuperscript{142} The psychological and social sciences seem to be full of differing views and theories. Freud (see infra note 149), Piaget (see infra note 150), Maslow (see infra note 151), Skinner (see infra note 153) and Pavlov (see supra note 25) all had differing views, none of which may have been "generally accepted" by the respective community at the time they were proposed or at any time thereafter. Yet each of these gentlemen was viewed as an expert in his field; this seems to be the more logical test. It is useful to recall that it was not "generally accepted" that the world was round when Columbus set out to find a new route to India.
It seems that the Fishman court thought that the defendant had a bad case for brainwashing (because he had psychological problems before he came into contact with the Church of Scientology) and thus decided that the evidence would not be admissible. The court recognized that Dr. Singer was very reputable, had much expertise in her area and that the APA named her to lead a task force to study and prepare a report on deceptive and indirect methods of persuasion and control but it adhered to the Frye standard anyway. There are some very unfortunate consequences of the Fishman decision: (1) qualified experts, such as Dr. Singer, are disqualified from testifying in all brainwashing cases since there is no general consensus among their peers, and (2) plaintiffs such as those in Molko essentially will not have a cause of action, since the testimony required to prove the coercive persuasion element is not admissible.

III. ANALYSIS

A. Criticism of the Frye Standard

The Fishman court incorrectly applied the Frye standard to the defendant's brainwashing-related testimony in order to deny the admission of such evidence. The problem with the Fishman court's application of the Frye standard to psychology-related testimony is two-fold. First, the Frye standard is only appropriate to measure the admissibility of evidence related to a mechanical or tangible component. Second, by its nature any psychology-related testimony would rarely meet the "generally accepted within the applicable scientific
community" test that Frye requires and, consequently, plaintiffs like Tracy Leal and David Molko would never have a cause of action.

The Frye standard should only apply to tangible, mechanical components which can be measured to a certain degree of accuracy. The standard was originally devised in 1923 by the District of Columbia Circuit Court to determine the admissibility of expert testimony related to the use of a systolic blood pressure deception test. The court set forth the test as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.147

The emphasis under the Frye standard was initially, and has traditionally been,148 on a thing, a tangible and/or mechanical instrumentality and the expert's resulting interpretation thereof. It therefore seems that the application of the Frye standard to anything but a tangible component is an over-extension of the rule and leads to the inappropriate exclusion of evidence.

Due to the nature of psychological evidence (for example, Dr. Singer's testimony in Fishman on brainwashing), such evidence would rarely be deemed to be admissible under the Frye standard. Very few, if any, psychological theories are generally accepted by the applicable scientific community as required by Frye. Nevertheless, the founders of those theories have been viewed as experts based on their individual education, experience and other credentials. For example, Sigmund Freud,149

147. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (emphasis added).


149. Sigmund Freud suggested that human personality is an energy system driven by an unconscious component. Freud divided the mind into three components: the id, ego, and superego. According to Freud, the id embodies a person's
Jean Piaget, Abraham Maslow, Ivan Pavlov, and B. F. Skinner were all viewed as experts in their particular areas of study, even though their theories were not "generally accepted."

In addition, several criticisms that are generally made against application of the Frye standard to physical apparatus may also be made against the application of the standard to brainwashing-related testimony. These criticisms point out the weaknesses of the Frye standard as it was meant to be applied—to mechanical components, and show how these weaknesses would be even more evident when there exists no tangible apparatus to test. Criticisms of the Frye "general acceptance" standard have been grouped into five major categories.
The first criticism made is that courts have not consistently determined which categories of evidence must meet the Frye standard. Second, there has been increasing difficulty in determining the applicable scientific field, as many scientific principles may overlap into more than one field.

A third criticism is that the term "general acceptance" is ambiguous and vague, and that there has been no determination as to what percentage of acceptance is required from the members of a given scientific field. This consideration is significantly relevant to the Fishman case, as there was no consensus among the members of either the American Psychological Association or the American Sociological Association as to any particular view of coercive persuasion. The question becomes, then, what percentage of consensus is required for "general acceptance?"

Additionally, the application of the Frye standard is said to be too conservative since it results in the exclusion of "reliable and often outcome-determinative evidence," as the court will be behind the times if it waits for evidence to become "generally accepted." This criticism is of particular significance as it relates to psychological testimony which may take a long time to gain general acceptance.

Finally, it is said that the Frye standard clouds other more critical issues with respect to the evidence in question. For example, the relevancy of the evidence or the problems of use

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159. Borders, supra note 154, at 861 (citing Imwinkelried, supra note 155, at 265). See also Giannelli, supra note 156, at 1224 ("The critics who argue that the Frye standard is too conservative are saying, in effect, that the general acceptance standard works too well—it excludes much that is reliable along with that which is unreliable. Interestingly, many commentators have overlooked instances in which Frye does not work.").
of a scientific technique may be overlooked in the consideration of general acceptance.\textsuperscript{160}

It seems unjust to deny the admissibility of such psychological evidence and, consequently, to deny a plaintiff's cause of action or to negate a defendant's defense solely because a theory under which an expert is testifying is not "generally accepted." Because the Frye rule was intended to apply only to tangible components and because the application of the standard would lead to the unfair exclusion of relevant evidence, another standard should apply to determine the admissibility of psychological testimony.\textsuperscript{161}

B. Possible Alternatives to Frye

There are several alternative standards which could be utilized to determine the admissibility of brainwashing-related expert testimony while still meeting the requirements of Federal Rule of Evidence 702.\textsuperscript{162} In addition, these alternatives would continue to further certain objectives which supporters of the Frye standard believe to be important: consistency and uniformity of evidence and avoidance of complex litigation\textsuperscript{165} without having the harsh effect of denying admission of rele-

\textsuperscript{160} Borders, supra note 154, at 861-62 (citing Giannelli, supra note 156, at 1226). See infra note 168 and accompanying text for a discussion relating to why this is unacceptable to some commentators. For a discussion of the advantages and disadvantages of the Frye standard as it applies to physical apparatus, see generally Ronald J. Bretz, Scientific Evidence and the Frye Rule: The Case for a Cautious Approach, 4 COOLEY L. REV. 506 (1987); Borders, supra note 154; Giannelli, supra note 156.

\textsuperscript{161} For an argument that the Frye standard should apply to psychology-related testimony, see Steven M. Garrett, Comment, People v. Murlishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 CAL. L. REV. 1069, 1070 (1982) ("[T]he court should have held that expert predictions of dangerousness will be inadmissible in the penalty phase of a capital trial until they meet the Frye test for the admissibility of scientific evidence."). It is important to note at this point that the standards of admissibility that are proposed in this comment are intended to apply to plaintiffs and defendants in civil cases. Criminal prosecution and capital lawsuits are not addressed in any detail in this comment. For an argument that the Frye standard should apply in capital cases, see id. at 1087-90.

\textsuperscript{162} See supra notes 107-11 and accompanying text. It is also interesting at this point to note that Rule 702 does not incorporate the Frye general acceptance standard, and the Advisory Committee's Note does not even refer to Frye. WEINSTEIN & BERGER, supra note 107, at 702-36. "The silence of the rule and its drafters may arguably be regarded as tantamount to an abandonment of the general acceptance standard." Id.

\textsuperscript{163} See supra note 123 and accompanying text.
vant evidence necessary to prove a plaintiff's brainwashing-related cause of action.

One alternative approach to the admissibility of expert testimony based on novel scientific evidence, which seems to be gaining increasing support, is the "relevancy standard." This approach is generally attributed to Professor Charles McCormick, who calls this alternative "the most appealing." The relevancy standard eliminates some of the problems of the Frye rule, including defining the scope of "general acceptance," determining what is subject to Frye, and selecting the applicable scientific field for measuring acceptance. It has been argued that this relevancy standard is codified in the Federal Rules of Evidence.

Professor McCormick describes the relevancy standard as follows:

General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence. Any relevant conclusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion. These reasons are the familiar ones of prejudicing or misleading the jury or consuming undue amounts of time.

Innovative scientific evidence is treated no differently than other evidence under the relevancy standard. Professor McCormick does suggest, however, that when "the nature of the technique is more esoteric," as brainwashing-related testimony may be perceived to be, then a "stronger showing of probative value should be required." Factors used to determine such probative value include:

(1) the potential error rate in using the technique, (2) the existence and maintenance of standards governing its use, (3) presence of safeguards in the characteristics of the technique, (4) analogy to other scientific techniques whose

164. Giannelli, supra note 156, at 1203.
165. CLEARY ET AL., supra note 117, at 608.
166. CLEARY ET AL., supra note 117, at 608.
168. CLEARY ET AL., supra note 117, at 608.
169. Giannelli, supra note 156, at 1204.
170. CLEARY ET AL., supra note 117, at 609 (footnote omitted).
results are admissible, (5) the extent to which the technique has been accepted by scientists in the field involved, (6) the nature and breadth of the inference adduced, (7) the clarity and simplicity with which the technique can be described and its results explained, (8) the extent to which the basic data are verifiable by the court and jury, (9) the availability of other experts to test and evaluate the technique, (10) the probative significance of the evidence in the circumstances of the case, and (11) the care with which the technique was employed in the case.\(^\text{171}\)

The relevancy standard appears to have a two-prong test: (1) probative value of the evidence and (2) expertise of the witness.\(^\text{172}\) In other words, under the relevancy approach, if the evidence can be deemed to be relevant and the witness can be demonstrated to be an expert based on qualifications, credentials and experience, then the evidence is admissible.

Another possible standard by which admissibility of expert testimony based on novel scientific evidence could be measured is the “reliability approach.” Under this standard, general acceptance is indicative of the weight to be given to evidence rather than as to whether the evidence is admissible or not.\(^\text{173}\) The reliability approach is said to be an “equivalent to the outright repudiation of the general acceptance standard.”\(^\text{174}\)

It has also been suggested that a less harsh “substantial acceptance test” be applied to innovative scientific evidence in lieu of the general acceptance standard.\(^\text{175}\) The substantial acceptance test would be easier to satisfy, but it warrants many of the same criticisms as Frye; “substantial” is even more vague and ambiguous than “general,” and the problem remains as to which field one should look in order to measure substantial acceptance.

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171. CLEARY ET AL., supra note 117, at 609 n.36. These factors, however, would appear to be more relevant and applicable to techniques involving a physical apparatus.
172. CLEARY ET AL., supra note 117, at 608.
174. CLEARY ET AL., supra note 117, at 606 n.18.
175. CLEARY ET AL., supra note 117, at 608 (footnote omitted).
Another alternative is the "independent commissions and expert tribunals" approach,\textsuperscript{176} which has been called "a radical departure from present practice."\textsuperscript{177} Although there are many variations on this theme, the basic concept is that a group of experts would be designated to evaluate innovative scientific techniques and determine the admissibility thereof.\textsuperscript{178} This approach eliminates some of the problems associated with \textit{Frye}; the field used to measure "acceptability" is narrowed considerably, and "general acceptance" is not required. Only acceptance by the commission is required for admission of the evidence. However, this approach has been criticized as being "inconclusive" and "time-consuming."\textsuperscript{179}

Some commentators have suggested that rather than shielding the jury from evidence via the ultra-conservative \textit{Frye} standard, the court should instead rely on the function of the judicial system.\textsuperscript{180} For example, cross-examination, opposing expert testimony, jury selection, and jury instructions could be used to reduce jury confusion.\textsuperscript{181}

One proponent of this type of alternative has proposed a sort of "jury education program" to help jurors understand and evaluate scientific evidence.\textsuperscript{182} Under this approach, a court could: (1) appoint neutral experts to give instructional lectures to the jury, (2) allow jurors to question expert witnesses during the proceedings, (3) permit note-taking by the jury during expert testimony, (4) summarize expert testimony for the jury, and (5) give jurors pre-trial reading assignments in order to make the jurors familiar with the scientific evidence to be presented at trial.\textsuperscript{183} While this approach may "foster juror involvement and augment juror knowledge,"\textsuperscript{184} it seems

\textsuperscript{176.} See, \textit{e.g.}, Giannelli, \textit{supra} note 156, at 1231; Borders, \textit{supra} note 154, at 871.
\textsuperscript{177.} Giannelli, \textit{supra} note 156, at 1231.
\textsuperscript{178.} Giannelli, \textit{supra} note 156, at 1231.
\textsuperscript{181.} \textit{Id.}
\textsuperscript{182.} \textit{Id.} at 1787-90.
\textsuperscript{183.} \textit{Id.} (footnotes omitted).
\textsuperscript{184.} \textit{Id.} at 1789.
that it would be very costly and time-consuming, if not impossible for some jurors.

Finally, it has been proposed that an alternative to the Frye standard is a shifting of the burden of proving reliability.\(^{185}\)

At the heart of this approach is that “[t]he prosecution in a criminal case should be required to establish the validity of a novel scientific technique beyond a reasonable doubt. Civil litigants\(^{186}\) and criminal defendants,\(^{187}\) on the other hand, should establish the validity of a novel technique by a preponderance of the evidence.”\(^{188}\) General acceptance seems to require something beyond a preponderance of the evidence (more likely than not) standard of proof.

**IV. PROPOSAL**

**A. Need for a New Standard**

As previously discussed, the application of the Frye standard to brainwashing-related testimony leads to inequitable results; a plaintiff’s cause of action based on brainwashing necessarily fails because the expert testimony required in proof thereof cannot meet the general acceptance standard. Under the Frye standard, plaintiffs such as David Molko and Tracy Leal in *Molko*\(^{189}\) would not succeed in a cause of action against the Church because the expert testimony required to show fraud and deceit, and intentional infliction of emotional distress related to brainwashing would not be admissible.\(^{190}\) Consequently, the Church would be essentially immune from lawsuits related to brainwashing brought by plaintiffs such as Molko and Leal. As this is an extremely unacceptable result, another standard must be applied to brainwashing-related psychological testimony so that it is not impossible for expert testimony related to such causes of action to be found admissible.

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186. *E.g.*, the plaintiffs in *Molko*.
187. *E.g.*, the defendant in *Fishman*.
189. See *supra* notes 33-81 and accompanying text.
190. Such psychological testimony could rarely meet the Frye standard. See discussion *supra* notes 145-52 and accompanying text.
In Section III, this comment reviewed a number of alternative approaches to the admissibility of brainwashing-related expert testimony. The best resolution to the admissibility issue presented herein lies in a combination of several of the alternatives previously presented. To be feasible, a proposed standard must (1) comply with Rule 702 and (2) allow brainwashing-related expert testimony to be admissible so that plaintiffs such as those in Molko may proceed with a cause of action based thereon.

B. Proposed Standard

1. Relevancy Standard

First of all, the two-prong test underlying the relevancy standard would be more functional with respect to psychological testimony than the Frye standard has proven to be. For evidence to be admissible under the relevancy standard, it must: (1) be relevant, and (2) come from a witness who has expertise in the area in question.

Illustrations of how the relevancy standard would yield acceptable results can be shown by applying this standard to the Molko and Fishman cases. It is apparent that the California Supreme Court views the occurrence of brainwashing as relevant in cases such as Molko; in that case the court recognized that the plaintiffs' causes of action involved an element of brainwashing and held that they should be given an opportunity to present evidence in support of their claims.

In Fishman, however, brainwashing-related testimony was probably not relevant. In that case, the defendant, Mr. Fishman, intended to rely on a brainwashing defense against charges of mail fraud and fraudulently obtaining judgments through shareholder class action suits. However, Dr. Margaret Singer was to testify on behalf of the defendant that he was already in a weak psychological state before he came into contact with the Church of Scientology, and also that the defendant became insane as a result of his contact with that

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191. See supra notes 146-88 and accompanying text.
192. See supra notes 107-08 and accompanying text.
193. See supra 164-72 and accompanying text.
194. See supra note 12 and accompanying text.
195. See supra notes 126-27 and accompanying text.
Dr. Singer characterized Mr. Fishman as being "incredibly suggestible, compulsive and obsessive," and as "a strange and eccentric person before he came into contact with the Church of Scientology." In addition, Dr. Singer believed that Mr. Fishman's "suggestibleness [sic] is long-standing, as is his peculiar behavior and bizarre reasoning."

The Fishman court rejected the brainwashing-related testimony on the basis of the Frye standard. The problem that this application presents has been discussed in detail in this comment. A further issue presented by the Fishman case is the relevancy of the brainwashing testimony as related to the defendant's insanity defense. Since Mr. Fishman was already in a weak psychological state before he came in contact with the Church of Scientology, the brainwashing defense was not at all convincing and probably not relevant to the case.

It would have been preferable for the Fishman court to hold that in some cases brainwashing would be a persuasive element (either as part of a cause of action or as a defense), but not on the facts presented in Fishman, rather than to completely destroy the admissibility of the expert testimony involved in coercive persuasion cases. The Fishman court needed only to rule that brainwashing-related testimony was irrelevant in that case, thus precluding that defendant's expert testimony about brainwashing. Because of the peculiar facts of Fishman, and because the Frye standard should not have been applied due to the lack of a tangible, mechanical component which could be tested for reliability, the holding in Fishman should be viewed as an aberration rather than the rule.

Once the relevancy prong has been established, the second prong of the relevancy approach mandates that the court evaluate the expertise of the witness who is expected to testify. Here, the court should consider the special knowledge, experience, qualifications and credentials of the expert witness. If the expert witness demonstrates expertise in a field, then that witness should be allowed to testify as to his or her theory, even if that theory is not generally accepted, unless the court

196. See supra notes 128-45 and accompanying text.
198. Id.
has valid reasons for exclusion. After the expert's testimony has been received, it is again up to the opposing party to attempt to impeach the witness and/or contradict the testimony given.

There appears to be no question as to Dr. Singer's expertise. The Fishman court stated that "Dr. Margaret Singer is a well known and highly regarded forensic psychologist" and is a "respected psychologist (a professional status with which the Court does not quarrel)." Dr. Singer also wrote an entry on group psychodynamics in which she also discussed cults in the *Merck Manual of Diagnosis and Therapy*, a well-known medical reference work. The Fishman court found that this contribution helped to "establish [Dr. Singer's] credentials as a respected psychologist."

The Fishman court indicated that "[a] more significant barometer of prevailing views within the scientific community is provided by professional organizations such as the American Psychological Association ("APA") and American Sociological Association ("ASA")." The court then pointed to the fact "that neither the APA nor the ASA has endorsed the views of Dr. Singer and Dr. Ofshe on thought reform." However, when considering Dr. Singer's credentials rather than the general acceptance of her theories, it bears noting that the APA appointed Dr. Singer to head a task force "to study and prepare a report on deceptive and indirect methods of persuasion and control." Accordingly, since Dr. Singer was viewed by both the court and her peers as an expert and had ample experience and qualifications, she would be allowed to testify under the relevancy standard, since the issue of whether her

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199. "These reasons are the familiar ones of prejudicing or misleading the jury or consuming undue amounts of time." CLEARY ET AL., supra note 117, at 608. See also supra note 168 and accompanying text.

200. This discussion will focus on Dr. Singer's qualifications, as the testimony of Dr. Ofshe was excluded on other grounds. Fishman, 743 F. Supp. at 722-23.

201. Id. at 715.

202. Id. at 717.

203. Id. The court cites Dr. Singer's work in *THE MERCK MANUAL OF DIAGNOSIS AND THERAPY* (15th ed. 1987). See also supra note 139 and accompanying text.


205. Id.

206. Id.
views are generally accepted is irrelevant to the admissibility of her testimony under that standard.

2. General Acceptance and Weight of Evidence

It is appropriate in brainwashing-related cases that if general acceptance is to be considered at all, it should go to the weight given to evidence and not to its admissibility. It is then the duty of the opposing party to contest or contradict the theories and evidence presented. Along this same line of reasoning, it is also possible that brainwashing could be declared a scientifically reputable theory through legislative action; that way the judiciary system could focus entirely on the relevancy and weight of the evidence rather than questioning the theory's general acceptability.

207. See supra note 173 and accompanying text.

208. In the August 30, 1991 edition of The Recorder, an article described a similar bill which would "make it easier to get expert testimony on the battered women's syndrome into criminal proceedings." Bill Ainsworth, Bill Recognizes Abuse Syndrome as Defense, THE RECORDER, Aug. 30, 1991, at 1-2. Assembly Bill 785 (the "Eaves Bill") was at that time expected to pass the Senate and go to Governor Pete Wilson for approval. Id. at 1. The Eaves Bill had already passed the Assembly by a 68-to-9 vote. Id. Apparently, the only opponent to the bill was the California District Attorneys Association. Id. "Supporters of the bill explain that the legislation would declare the [battered women's] syndrome a scientifically reputable theory. That would give judges less reason to question its general acceptability," Id. at 2. Rebecca Isaacs, the legal program director for Battered Women's Alternatives in Martinez, said that "[t]his would just allow all relevant evidence to be admitted." Id.

The Eaves Bill was intended to:

Amend the state evidence code to allow expert testimony regarding battered women's syndrome, including the physical emotional or mental effects upon the beliefs, perceptions or behavior of domestic-violence victims. Typically, a victim of the syndrome fails to respond rationally to repeated battering by an intimate because, over the course of the relationship, the victim comes to believe the violence is justified.

Id.

The Eaves Bill was approved by Governor Wilson on October 10, 1991. It reads in its entirety as follows:

SECTION 1. Section 1107 is added to the Evidence Code, to read:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
3. Burden of Proof

Civil litigants and criminal defendants should have the burden of proving, by a preponderance of the evidence, the relevancy of expert testimony and the expertise of the expert witness testifying on their behalf, rather than having the court rule on admissibility based on general acceptance. This proposed standard would be more just and equitable because it would allow essential brainwashing-related testimony that was relevant to the issue to be admitted if such testimony could pass the two-prong relevancy test set forth above, rather than rendering such testimony never admissible, as with the Frye standard.

4. Compliance with Federal Rule of Evidence 702

The only remaining inquiry, then, is whether this proposed standard of admissibility would also comply with Rule 702, which requires that (1) specialized knowledge assist the trier of fact to understand evidence or to determine a fact in issue, and that (2) an expert witness be qualified in the areas of knowledge, skill, experience, training or education. It appears that the above proposed relevancy standard would comply with Rule 702. The first prong of the relevancy ap-
proach, that the testimony be relevant to the issues of the case, would ensure that the expert's testimony would assist the trier of fact. It seems that brainwashing can only be proven by expert testimony. Therefore, if the testimony of a witness is relevant to brainwashing and the witness is an expert, then certainly the testimony would, in fact, assist the trier of fact. The second prong of the relevancy approach, the expertise inquiry, would demonstrate whether or not the expert is qualified.

To take this inquiry a step further, the Fishman court suggested that for expert testimony to be admissible under Rule 702, it must (1) come from a qualified expert, (2) be of proper subject, (3) conform to generally accepted explanatory theory, and (4) have probative value that exceeds it prejudicial effect.\textsuperscript{211} The Fishman court further required that the party on whose behalf the expert would testify has the burden of proving that such testimony is reliable.\textsuperscript{212} It appears that the proposed relevancy standard of admissibility meets all of these requirements except for the conformity to a generally accepted explanatory theory. The proposed standard would demonstrate both that the expert was qualified (expertise prong), and that the evidence was of a proper subject (relevancy prong). Once the two prongs of the proposed test are met, the court should allow the witness to testify unless the evidence is prejudicial or misleading,\textsuperscript{213} thus satisfying the probative value requirement. The proposed standard places the burden of proving the relevancy and expert witness qualification on the party on whose behalf the witness is expected to testify.

The proposed standard does not meet the general acceptance requirement imposed by the Fishman court. This comment has discussed the reasons for abandonment of the general acceptance standard: (1) the Frye standard should only apply, if it should apply at all, to tangible, mechanical components, (2) the Frye standard presents many problems in its application, including the exclusion of relevant and perhaps outcome-determinative evidence and the denial of causes of action for brainwashing-related cases, and (3) Federal Rule of Evidence 702 makes no mention of a general acceptance stan-

\textsuperscript{211.} See supra note 110 and accompanying text.
\textsuperscript{212.} See supra note 111 and accompanying text.
\textsuperscript{213.} See supra note 168 and accompanying text.
For these reasons, the general acceptance test is not an appropriate element in assuring the compliance of an admissibility standard with Rule 702. For the above reasons, it appears that the relevancy standard proposed herein satisfies the requirements of Rule 702 and is a suitable standard to measure the admissibility of expert testimony relating to coercive persuasion cases.

5. Summary of Proposed Standard

The standard that this comment proposes, then, is as follows: (1) if general acceptance is considered at all, it should go to the weight of the evidence and not to its admissibility; and (2) civil litigants and criminal defendants will have the burden of proving by a preponderance of the evidence (a) that the expert testimony is relevant and (b) that the expert witness has expertise in the area in question.

V. CONCLUSION

This comment has discussed the history of brainwashing and current views on the admissibility of testimony regarding coercive persuasion. Specifically, it explored the controversy between Molko, which allows a cause of action for brainwashing-related conduct, and Fishman, which holds that the evidence required to prove such a cause of action is inadmissible. Federal Rule of Evidence 702 was discussed with respect to requirements for the admissibility of expert testimony. The problems of the Frye standard were addressed, and several alternative standards were outlined. Finally, a new standard of admissibility, which draws from several sources and complies with Rule 702, was proposed.

Applying the standard of admissibility proposed in this comment would resolve the controversy between allowing a cause of action in brainwashing-related cases and the admissibility of the requisite expert testimony. Rejection of the Frye general acceptance standard is necessary so that plaintiffs who are coercively persuaded by religious cults may successfully assert causes of action against those entities. Otherwise, religious cults will be essentially immune from tort liability in suits

214. See supra note 162.
related to brainwashing. The proposed relevancy standard must be adopted by the courts in order to maintain equity and justice in cases involving coercive persuasion.

Virginia M. Fournier