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# Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent , Interests-Based Approach

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# UNDUE INFLUENCE, INVOLUNTARY SERVITUDE AND BRAINWASHING: A MORE CONSISTENT, INTERESTS-BASED APPROACH

## I. INTRODUCTION

A "psychotherapeutic community" located in New York City's Upper West Side believes that "parent-child bonds . . . are the root of all evil and the mainspring of psychological maladjustment."<sup>1</sup> Accordingly, parents who are excessively demonstrative towards their children may have their babies taken from them for foster parenting or adoption by other members of the group.<sup>2</sup> Thereafter, parents' subsequent contact with their children may be limited to closely supervised visits where the parents may see the child but physical contact is forbidden.<sup>3</sup> Would any parent, absent the "psychotherapeutic community's" influence, ever consent to such an arrangement?

Two mentally retarded men are found laboring on a farm in poor health, in squalid conditions and isolated from the rest of society.<sup>4</sup> At trial, the evidence shows that the two men worked "seven days a week, often 17 hours a day, at first for 15 dollars per week and eventually for no pay."<sup>5</sup> One of the men had lived and worked on the farm for sixteen years; the other victim had been there more than ten years.<sup>6</sup>

The use of coercion<sup>7</sup> and persuasion<sup>8</sup> to influence another for a specific purpose is prevalent in our society. Coercive persuasion occurs when one is persuaded to do something that, but for the influence or coercion, one would not have chosen to do.<sup>9</sup> In effect, when one is "per-

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1. Randy F. Kandel, *Litigating the Cult-Related Child Custody Case*, 5 CULTIC STUD. J., no. 1, at 122, 123 (1988).

2. *Id.*

3. *Id.*

4. *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

5. *Id.* at 935.

6. *Id.*

7. Coercion is the act of "compel[ing] by force, intimidation, or authority, especially without regard for individual desire or volition," or the act of "dominat[ing] or control[ing], especially by exploiting fear [or] anxiety." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 286 (1979).

8. Persuasion is the act of "prevail[ing] on (a person) to do something, as by advising [or] urging." *Id.* at 1076.

9. Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 5-6 (1977) [hereinafter Delgado, *Religious Totalism*].

suaded" to do something, his or her will is overcome by the persuasion as to that particular act.

In its most innocent guises, coercion is used in such areas as advertising,<sup>10</sup> self-help groups<sup>11</sup> and the armed forces.<sup>12</sup> In these areas, the harm of coercion, resulting from behavior that is not motivated by one's own will, appears to be minimal—one's will is overcome only slightly by the influence.<sup>13</sup> In still other areas, a person's loss of autonomy may be outweighed by the social or individual benefits derived from the use of coercion.<sup>14</sup>

However, in other areas, the "loss of will" is neither minimal nor beneficial to society or to the coerced individual; in these situations, coercion takes on a much more sinister cast. The two main kinds of coercion that offend a sense of fairness and autonomy are short-term physical duress and long-term coercive persuasion (L-TCP).<sup>15</sup> Short-term physical duress occurs when an individual is compelled to do an act as the result of a threat of physical harm to self or to others.<sup>16</sup> This Comment addresses only L-TCP.

L-TCP can be defined as a (1) long-term pattern of influence or control by (2) a stronger personality or presence that purports to care about the best interests of (3) an emotionally or mentally more vulnerable per-

10. *Id.* at 8.

11. See *United States v. Fishman*, 743 F. Supp. 713, 717 (N.D. Cal. 1990).

12. *Id.*

13. For example, one may be convinced as a result of a television commercial to try a new brand of toothpaste. If one originally preferred another type of toothpaste, perhaps one's will may be overcome to the point where he or she becomes willing to try the new toothpaste. Nonetheless, it would be difficult to find this type of influence harmful.

14. There are social benefits, for example, in convincing armed forces' recruits to adhere to a rigid, military discipline. Although the discipline overcomes the recruit's will, the social utility of a disciplined, unified armed force arguably outweighs any individual loss of will suffered by the recruit. See Sanford M. Dornbusch, *The Military Academy as an Assimilating Institution*, 33 *SOC. FORCES* 316, 317-19 (1955).

Similarly, a self-help group such as Alcoholics Anonymous may convince an individual with an overwhelming desire to drink that he or she cannot control his or her drinking, that the person thus should abstain totally from alcohol, and that the only way to do so is by following the Alcoholics Anonymous program. Here, the group may use coercion to overcome the will of the individual to drink; nonetheless, by submitting to the will of the group, the alcoholic is benefitted.

15. This Comment uses "long-term coercive persuasion" (L-TCP) as a term of art to distinguish this type of influence from short-term physical duress. The specific characteristics of L-TCP are defined *infra* note 17 and accompanying text.

16. Duress subjects a "person to improper pressure which overcomes his will and coerces him to comply with [a] demand to which he would not yield if acting as [a] free agent." *BLACK'S LAW DICTIONARY* 504 (6th ed. 1990). Duress can also be a defense to criminal conduct. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.3, at 432 (2d ed. 1986). See *infra* note 347 for a description of this criminal defense.

sonality (4) where the stronger presence actually exploits its position to further its own interests (5) causing harm to the more vulnerable personality.<sup>17</sup>

This Comment focuses on three legal theories that share these characteristics of L-TCP. Undue influence, the first type of coercive persuasion analyzed, occurs when a person who is in a position of trust persuades a donor to confer a pecuniary benefit upon him or her.<sup>18</sup> Under the second type of coercive persuasion, involuntary servitude, one person subjects another to service without compensation.<sup>19</sup> Brainwashing<sup>20</sup> by a religious cult<sup>21</sup> is the final type of coercion discussed.<sup>22</sup>

17. This definition of long-term coercive persuasion has been developed to describe those situations where one's will is systematically *eroded* by the concentrated influence of a stronger personality over a period of time. See generally ROBERT J. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* 8-15 (1961) (describing indoctrination process designed to induce subject to abandon existing political, religious or social belief in favor of system imposed by indoctrinator); Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 2-3 (1978) [hereinafter Delgado, *Criminal States of Mind*] (describing various methods and systematic method used to bring about "behaviorial compliance and attitudinal change"). In these situations, unlike physical duress, one's will is not overcome by an immediate threat of physical violence, which induces the victim of the influence to do a specific act or series of acts. See *supra* note 16 and *infra* note 347 and accompanying text for a definition of physical duress.

18. See *infra* notes 59-95 and accompanying text.

19. See *infra* notes 96-135 and accompanying text.

20. Brainwashing is "the forcible application of prolonged and intensive indoctrination to . . . induce someone to give up basic political, social, or religious beliefs and attitudes and to accept contrasting regimented ideas." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 267 (1986). The specific methods of indoctrination vary, but the basic theory is that brainwashing or coercive persuasion:

[I]s fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and [of] the ability to think independently, which induces a subject's unyielding compliance and the rupture of past connections, affiliations and associations.

Peterson v. Sorlien, 299 N.W.2d 123, 126 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

Many authorities assert that brainwashing exists and has remarkable effects. See, e.g., LIFTON, *supra* note 17, at 3-7; EDGAR H. SCHEIN, *COERCIVE PERSUASION* 15-19 (1961). Some commentators conclude that certain religious groups use brainwashing techniques to recruit and control members. See, e.g., RONALD ENROTH, *YOUTH, BRAINWASHING, AND THE EXTREMIST CULTS* 158-61 (1977); A. JAMES RUDIN & MARCIA R. RUDIN, *PRISON OR PARADISE? THE NEW RELIGIOUS CULTS* 20-26 (1980); Delgado, *Religious Totalism*, *supra* note 9, at 3-9. Courts have recognized the existence of brainwashing in religious settings. See *Peterson*, 299 N.W.2d at 126; *Meroni v. Holy Spirit Ass'n for Unification*, 480 N.Y.S.2d 706 (Sup. Ct. 1984), *rev'd*, 506 N.Y.S.2d 174 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987). Other authorities, however, believe that brainwashing does not exist at all. See Lee Coleman, *New Religions and the Myth of Mind Control*, AM. J. ORTHOPSYCHIATRY 322, 323 (1984).

Furthermore, the use of the term "brainwashing" is controverted. See, e.g., STEVE

Brainwashing differs from the other types of coercive persuasion because the harm stems from both the results and the process of brainwashing itself.<sup>23</sup> The brainwashing victim often appears to have completely sur-

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HASSAN, *COMBATting CULT MIND CONTROL* 55-56 (1988) (contrasting term "brainwashing" which typically involves abusive treatment with "mind control," which typically involves more sophisticated, deceptive methods of changing another's will); LIFTON, *supra* note 17, at 4-5 (proposing use of "thought reform" to describe "brainwashing" process); SCHEIN, *supra*, at 18 (advocating use of term "coercive persuasion" to describe Korean prisoners'-of-war experience).

Notwithstanding any controversy that there may be among psychologists as to the existence or terminology of brainwashing, plaintiffs in many published cases have asserted claims against religious cults for coercive persuasion. See *infra* notes 170-274 and accompanying text. Some plaintiffs have even recovered damages from religious organizations based on brainwashing facts. See, e.g., *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989). This Comment does not seek to enter the brainwashing/no-such-thing-as-brainwashing debate but merely to clarify the standards used in L-TCP.

21. A cult is traditionally viewed as religious in nature. For example, one dictionary defines a cult as "a particular system of religious worship with great devotion to or veneration of its rites and ceremonies." *RANDOM HOUSE DICTIONARY* 353 (1979). However, cults are often completely secular. One commentator has defined four types of cults: (1) religious cults; (2) political cults; (3) psychotherapy cults; and (4) commercial cults. HASSAN, *supra* note 20, at 39-41. This Comment particularly addresses L-TCP practiced by religious cults. The analysis of L-TCP used by religious cults and the proposed legal remedy for religious cults, nonetheless, could also be applied to the three other types of cults.

22. Brainwashing can occur in contexts other than religious cults, such as prisoners-of-war and criminal defendants. See, e.g., *United States v. Fishman*, 743 F. Supp. 713, 717 (N.D. Cal. 1990) (mail fraud defendant raised brainwashing defense); *United States v. Hearst*, 412 F. Supp. 889, 890-91 (N.D. Cal. 1976) (bank robbery defendant raised defense); *United States v. Olson*, 20 C.M.R. 461, 462 (1955) (brainwashing as defense to charge of collaborating with enemy); *United States v. Batchelor*, 19 C.M.R. 452, 464 (1955) (same); *United States v. Fleming*, 19 C.M.R. 438, 440 (1955) (same); see also VINCENT BUGLIOSI & CHARLES GENTRY, *HELTER SKELTER* 310-455 (1st ed. 1974) (attempting to introduce evidence of Charles Manson's influence or brainwashing to mitigate sentencing for murder).

These cases differ from religious cult cases because in these cases brainwashing is used as a defense to criminal behavior. In religious cult cases, an ex-member is typically proceeding on an affirmative action for civil damages caused by the religious cult's brainwashing of the individual. See *infra* notes 169-273 and accompanying text.

23. Doctors Langone and Clark set out six varieties of personal harm that arise in the context of new religions which typically employ coercive persuasion as part of their conversion process: (1) physical harm, (2) financial exploitation, (3) psychiatric symptomatology, (4) diminished personal autonomy, (5) diminished psychological integration, and (6) diminished critical thinking capacity. MICHAEL D. LANGONE & JOHN G. CLARK, JR., *AMERICAN FAMILY FOUNDATION, NEW RELIGIONS AND PUBLIC POLICY: RESEARCH IMPLICATIONS FOR SOCIAL AND BEHAVIORAL SCIENTISTS* 94-96 (1985) (AFF Report 83-06).

An extreme example of the harm that religious cults can cause their followers is the Jonestown tragedy of November 18, 1978. On that day, in an isolated community in the jungles of Guyana, some 900 members of the Peoples Temple followed their charismatic leader, the Reverend Jim Jones, into an unparalleled act of collective suicide. *Nightmare in Jonestown*, *TIME*, Dec. 4, 1978, at 16. Jones exhorted his followers to participate in the "revolutionary suicide" ritual and to partake of a poisonous mixture of purple Kool-Aid, potassium cyanide and potassium chloride. *Id.* Parents and nurses used syringes to squirt the deadly concoction onto the

rendered his or her will and autonomy to the religious organization.<sup>24</sup>

This Comment compares the proof requirements for undue influence,<sup>25</sup> involuntary servitude<sup>26</sup> and brainwashing.<sup>27</sup> While all three are examples of L-TCP and therefore share many common characteristics, the proof requirements for each differ. To prove undue influence, psychological duress or influence must be shown.<sup>28</sup> To prove a charge of involuntary servitude, the prosecutor must show that the victim was enslaved by a threat of physical or legal force.<sup>29</sup> Courts that address brainwashing in religious cult cases impose various standards: some courts require a showing of physical duress,<sup>30</sup> while others allow recovery where a plaintiff shows psychological duress or fraud.<sup>31</sup>

tongues of babies. *Id.* The older children and adults helped themselves to paper cups filled with the poison. *Id.* Within minutes, all were dead. *Id.*

A detailed analysis (or speculation?) of why more than 900 followers willingly took their own lives in this apocalyptic ritual is beyond the scope of this Comment. However, commentators have recounted the group's isolation, the control exerted by Jim Jones, Jones' paranoia, the peer pressure and the cult's comprehensive system of "discipline" (for both children and adults). MARC GALANTER, *CULTS: FAITH, HEALING AND COERCION* 119-24 (1989); GEORGE KLINEMAN ET AL., *THE CULT THAT DIED: THE TRAGEDY OF JIM JONES AND THE PEOPLES TEMPLE* 198-221 (1980). According to one writer, these factors led to "a deluded identification with the leader-aggressor . . . [where the followers also were] realistically afraid of resisting his demands and too emotionally dependent to leave." GALANTER, *supra*, at 122.

24. See LANGONE & CLARK, *supra* note 23, at 95 (describing diminished personal autonomy). One writer has described the brainwashing process as "a system which disrupts an individual's identity." HASSAN, *supra* note 20, at 54. In fact, "[u]nder the influence of [cult brainwashing], a person's original identity, as formed by family, education, friendship, and most importantly that person's *own free choices*, becomes replaced with another identity, often one that he would not have chosen for himself without tremendous social pressure." *Id.* (emphasis added).

25. Undue influence is analyzed in the context of inter vivos gifts to a religious adviser. See *infra* notes 59-95 and accompanying text. Although undue influence can occur in any confidential relationship, this Comment limits its analysis to undue influence exerted by religious advisers because of the factual similarity to brainwashing by religious cults.

26. See *infra* notes 96-135 and accompanying text.

27. See *infra* notes 136-274 and accompanying text.

28. California Civil Code § 1575 states:

Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him [or her], of such confidence or authority for the purpose of obtaining an unfair advantage over him [or her]; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

CAL. CIV. CODE § 1575 (West 1982).

29. *United States v. Kozminski*, 487 U.S. 931, 952-53 (1988) (remanding because jury instructions for involuntary servitude could have permitted psychological duress as sufficient to prove crime).

30. See *Lewis v. Holy Spirit Ass'n for Unification*, 589 F. Supp. 10, 12 (D. Mass. 1983).

31. *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1124-25, 762 P.2d 46, 64-65, 252 Cal. Rptr. 122, 140-41 (1988), *cert. denied*, 490 U.S. 1084 (1989).

This Comment analyzes these three legal theories, their common features<sup>32</sup> and the underlying societal and individual interests protected by each approach.<sup>33</sup> All three share the common elements of L-TCP. This Comment asserts, however, that only the evidentiary requirements for undue influence adequately protect the underlying personal and societal interests that these theories seek to protect.<sup>34</sup> Requiring a showing of physical duress in involuntary servitude and brainwashing cases, when both of these are characterized by a long-term pattern of influence, not only fails to protect the societal and individual interests at stake,<sup>35</sup> but also defies logic and ignores the underlying wrongs caused by involuntary servitude and brainwashing.<sup>36</sup>

This Comment proposes that the undue influence model, requiring proof of only *psychological* duress, be applied in a modified form to both involuntary servitude<sup>37</sup> and brainwashing cases.<sup>38</sup> The undue influence model would better protect the societal and individual interests implicated in these cases.<sup>39</sup>

## II. STATEMENT OF THE PROBLEM

Undue influence<sup>40</sup> is the legal theory by which gifts to religious advisors<sup>41</sup> are set aside when the religious advisors exploit their spiritual authority to exact such "gifts" from individuals over whom they exercise a

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32. See *infra* notes 274-92 and accompanying text for an analysis of undue influence; notes 309-34 and accompanying text for an analysis of involuntary servitude; and notes 351-78 and accompanying text for an analysis of brainwashing cases.

33. See *infra* notes 293-300 and accompanying text for a discussion of the interests protected in undue influence cases; notes 335-39 and accompanying text for the interests protected in involuntary servitude cases; and notes 406-33 and accompanying text for the interests protected by brainwashing cases.

34. See *infra* notes 301-08 and accompanying text.

35. See *infra* notes 340-50 and accompanying text for a discussion of the failure of the current proof requirements to protect the underlying interests in involuntary servitude cases and notes 434-61 and accompanying text which discuss the failure of the current proof requirements to protect the interests implicated in brainwashing cases.

36. See *infra* notes 293-300 and accompanying text for a discussion of the interests protected in undue influence cases; notes 335-39 and accompanying text for the interests protected in involuntary servitude cases; and notes 406-33 and accompanying text for the interests protected by brainwashing cases.

37. See *infra* notes 467-70 and accompanying text.

38. See *infra* notes 471-93 and accompanying text.

39. See *infra* notes 467-93 and accompanying text.

40. *Gilmore v. Lee*, 86 N.E. 568 (Ill. 1908).

41. Although undue influence can be exerted in other contexts, such as between doctor-patient, lawyer-client and parent-child, this Comment focuses on undue influence in the context of inter vivos gifts to religious advisers, because of its analytical and factual similarity to brainwashing by religious cults.

pastoral function or with whom they have a fiduciary relationship.<sup>42</sup> To succeed on a claim for undue influence and void the gift, a plaintiff must show that he or she was "susceptible" to undue influence for the advantage of the donee, that the donee deceived the plaintiff or exerted improper influence over the plaintiff and that the plaintiff submitted to the "overmastering effect" of the donee's influence.<sup>43</sup> The influence can be physical or mental as long as the coercion was such that the donee's dominating purposes substituted for the free expression of the plaintiff's wishes.<sup>44</sup>

A powerful group or individual can subject a less powerful individual, such as a child<sup>45</sup> or a retarded individual with the mental capacity of a child,<sup>46</sup> to involuntary servitude. In these situations, the "master" can use a variety of coercive techniques, such as physical duress,<sup>47</sup> fraud<sup>48</sup> and psychological duress<sup>49</sup> to overcome the will of the "servant." The result is that the servant does his or her master's bidding.<sup>50</sup> To successfully prosecute an involuntary servitude offense, the government must show that the enslaved person was held in the state of servitude by virtue of a physical or legal threat.<sup>51</sup> Psychological coercion is not sufficient to show involuntary servitude.<sup>52</sup>

A religious or pseudo-religious group can use mind control techniques<sup>53</sup> to induce individuals to join them as "devotees, fund raisers and

42. Delgado, *Religious Totalism*, *supra* note 9, at 94; *see, e.g., In re The Bible Speaks*, 73 B.R. 848 (Bankr. D. Mass. 1987) (setting aside gift to religious adviser by disturbed young woman because pastor exerted undue influence), *aff'd*, 81 B.R. 750 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989).

43. *The Bible Speaks*, 73 B.R. at 858.

44. *Id.* at 858-59.

45. *See United States v. King*, 840 F.2d 1276, 1280-81 (6th Cir.) (en banc), *cert. denied*, 488 U.S. 894 (1988).

46. *United States v. Kozminski*, 487 U.S. 931, 934-36 (1988).

47. *See King*, 840 F.2d at 1280.

48. *See Kozminski*, 487 U.S. at 938.

49. *See King*, 840 F.2d at 1280-81.

50. *See, e.g., Kozminski*, 487 U.S. at 934-36 (victims found laboring on defendants' farm).

51. *Id.* at 952. A threat of legal force may also be sufficient for involuntary servitude. *Id.*

52. *Id.*

53. Some of the techniques used in coercive persuasion include:

(1) [isolating] the victim and [exerting] total control over his environment; (2) [controlling] all channels of information and communication; (3) physiological debilitation by means of inadequate diet, insufficient sleep, and poor sanitation; (4) assignment of meaningless tasks . . . (5) manipulation of guilt and anxiety; (6) threats of annihilation by seemingly all-powerful captors, who insist that the victim's sole chance for survival lies in identifying with them; (7) degradation of and assaults on the pre-existing self; (8) peer pressure, often applied through ritual "struggle sessions"; (9) required performance of symbolic acts of self-betrayal, betrayal of group norms, and confession; and (10) alternation of harshness and leniency.

Delgado, *Criminal States of Mind*, *supra* note 17, at 1-3 & n.13.



street-corner proselytizers."<sup>54</sup> Different standards of coercion are applied in brainwashing cases. The California Supreme Court recently upheld an ex-cult member's claim for fraud against the cult on the basis of psychological coercion and brainwashing techniques.<sup>55</sup> In contrast, however, a federal district court in Massachusetts dismissed an ex-cult member's claim for brainwashing holding that "[i]ndoctrination and initiation procedures and conditions of membership in a religious organization are generally not subject to judicial review."<sup>56</sup>

Undue influence, involuntary servitude and brainwashing by religious cults are all examples of coercive persuasion.<sup>57</sup> All three practices offend basic notions of fairness and freedom because in all three, the victim's will and autonomy is overcome by the persuader's will.<sup>58</sup> Furthermore, because all of these practices are characterized by special relationships in which the victim trusts the persuader, who exploits the relationship for his or her own benefit, the exploitation and the victim's loss of will seems particularly unfair. The courts nonetheless persist in treating each of these practices differently, applying inconsistent standards to measure the type and extent of coercion. This makes no sense, because each of these practices is effectively the same wrong—harming others by depriving them of the exercise of their free will. Thus, a consistent, interests-based approach should be developed.

### III. BACKGROUND

#### A. Proof Requirements for Undue Influence

The doctrine of undue influence arises when a party seeks to revoke a gift because the donor's will was overcome by the donee who exploited

54. *Id.* at 4 & n.18.

55. *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1119-20, 762 P.2d 46, 61, 252 Cal. Rptr. 122, 137 (1988), *cert. denied*, 490 U.S. 1084 (1989).

56. *Lewis v. Holy Spirit Ass'n for Unification*, 589 F. Supp. 10, 12 (D. Mass. 1983).

57. See *infra* notes 276-92 and accompanying text for a discussion of undue influence; *infra* notes 319-34 and accompanying text for a discussion of involuntary servitude cases; and *infra* notes 357-78 and accompanying text for a discussion of brainwashing cases.

58. The concept of will and "voluntariness" is particularly valued in our judicial system. For an example in the criminal procedure context, see *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973), which discusses the standard of voluntariness to be used in granting consent to search. The Court quoted *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961), which addressed voluntary confessions:

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has *willed* to confess, it may be used against him. If it is not, if his *will has been overborne and his capacity for self-determination critically impaired*, the use of his confession offends due process.

*Schneckloth*, 412 U.S. at 225-26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (emphasis added).

a confidential relationship.<sup>59</sup> There are two main undue influence “theories”: (1) the “presumption” model, in which the gift itself combined with the identity of the donee creates a presumption of undue influence;<sup>60</sup> and (2) the “susceptibility” model, in which the person contesting the gift is required to show that the donor was susceptible to the donee’s unique position.<sup>61</sup> Both of these theories recognize that psychological duress may be sufficient to overcome another’s will.<sup>62</sup> Both undue influence models seek to protect the more susceptible party from the influence of the stronger personality.<sup>63</sup>

### 1. Presumption model of undue influence

Under the presumption model, courts focus on the relationship between the donor, the more susceptible party, and the donee, the stronger party. Thus, many cases considering the presence of undue influence in a nontestamentary gift to a church, cleric or spiritual adviser<sup>64</sup> have inferred undue influence from the mere existence of a confidential relationship<sup>65</sup> between a parishioner and a cleric, or between a spiritual adviser and an adherent to that spiritual doctrine.<sup>66</sup> This inference can establish a prima facie case of undue influence and place the burden of *disproving* undue influence on the donee.<sup>67</sup>

For example, in *Gilmore v. Lee*<sup>68</sup> the court set aside a deed made by

59. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Held v. Florida Conference Ass'n of Seventh Day Adventists*, 193 So. 828, 832-33 (Fla. 1940); *Nelson v. Dodge*, 68 A.2d 51, 57 (R.I. 1949); *Morley v. Loughnan*, 1 Ch. 736, 752 (Eng. 1893); *Allcard v. Skinner*, 36 Ch. D. 145, 150 (Eng. 1887); *Nottidge v. Prince*, 2 Giff. 246, 259, 66 Eng. Rep. 103, 108-09 (1860); *Norton v. Rely*, 2 Eden 286, 288-89, 28 Eng. Rep. 908, 908-09 (1764).

60. See *infra* notes 64-83 and accompanying text.

61. See *infra* notes 92-95 and accompanying text.

62. See *infra* notes 64-97 and accompanying text.

63. See *infra* notes 64-97 and accompanying text.

64. See, e.g., *Gilmore v. Lee*, 86 N.E. 568, 570-71 (Ill. 1908) (setting aside deed made by elderly parishioner to her priest).

65. Although a confidential and trusting relationship is said to exist between a spiritual leader and a spiritual follower, the reason for the presumption of undue influence is not that the donee is a spiritual leader. Instead, it is well recognized that the spiritual leader may have a fiduciary relationship with the follower “which, if used for the benefit of the donee, will result in the exercise of an influence not possessed by the ordinary person, and sufficient, according to the ordinary experience of mankind, to overcome the will of the donor.” See generally C.S. Patrinely, Annotation, *Undue Influence in Nontestamentary Gift to Clergymen, Spiritual Adviser, or Church*, 14 A.L.R.2d 649, 657 (1950) (discussing different models of undue influence in gifts to religious advisers).

66. *Id.*

67. *Id.* at 653.

68. 86 N.E. 568 (Ill. 1908).

an elderly, illiterate, devout parishioner to her parish priest, who was called to attend to her spiritual needs during her last sickness.<sup>69</sup> The court said:

The law will *presume*, from the mere existence of the relation, that the gift was obtained by undue influence or improper means, and the burden of proof rests upon the donee to show that it was the free and voluntary act of the donor. . . . [W]here a confidential relation exists no other element is necessary to cast the burden of proof upon the beneficiary.<sup>70</sup>

Under traditional undue influence doctrine,<sup>71</sup> three factors can strengthen the presumption. The first is the donor's susceptibility. Thus, courts have set aside gifts where the donor was aged,<sup>72</sup> mentally weak,<sup>73</sup> in a last sickness<sup>74</sup> or a religious or spiritual "fanatic."<sup>75</sup> Second, both English<sup>76</sup> and American<sup>77</sup> law impose a duty on a church, cleric or a spiritual adviser to ascertain that the donor has competent and independent advice before accepting a nontestamentary gift from a person over whom they have the power to exercise dominion.<sup>78</sup> A breach of this duty strengthens the presumption.<sup>79</sup> Third, when a spiritual adviser actively seeks a gift from the donee, the presumption is also strengthened.<sup>80</sup> There are also three circumstances that weaken the undue influence pre-

69. *Id.* at 570-71.

70. *Id.* (emphasis added).

71. See *Patrinelis*, *supra* note 65, at 660-62.

72. See *Dowie v. Driscoll*, 68 N.E. 56, 56 (Ill. 1903) (action to set aside transfer of property by ninety-year-old widower); *Good v. Zook*, 88 N.W. 376, 378-79 (Iowa 1901) (action to set aside transfer of trust deed and promissory note by eighty-seven-year-old donor).

73. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Morley v. Loughnan*, 1 Ch. 736, 752 (Eng. 1893) (donor subject to momentary attacks of loss of consciousness and nearly total losses of memory).

74. See *Gilmore v. Lee*, 86 N.E. 568, 569-70 (Ill. 1908) (gift *causa mortis*—gift given due to perceived impending death); *McPherson v. Byrne*, 118 N.W. 985, 985 (Mich. 1909) (same).

75. See *Connor v. Stanley*, 72 Cal. 556, 560-61, 14 P. 306, 307-08 (1887) (religious devotee); *Good*, 88 N.W. at 378 (religious visions); *Nottidge v. Prince*, 2 Giff. 246, 259, 66 Eng. Rep. 103, 108-09 (1860) (religious delusions).

76. *Norton v. Relly*, 2 Eden 286, 290, 28 Eng. Rep. 908, 909-10 (1764).

77. *Ford v. Hennessy*, 70 Mo. 580, 590-91 (1879).

78. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Ross v. Conway*, 92 Cal. 632, 636, 28 P. 785, 786 (1892); *In re Estate of Miller*, 16 Cal. App. 2d 141, 152, 60 P.2d 492, 497 (1936); *Gilmore*, 86 N.E. at 571 (Ill. 1908); *Corrigan v. Pironi*, 23 A. 355, 356 (N.J. Eq. 1891); *Thompson v. Hefferman*, 4 Drury & Warren 285, 291 (Ir. 1843).

79. See *Patrinelis*, *supra* note 65, at 666.

80. See *Whitmire v. Kroelinger*, 42 F.2d 699, 708-09 (D.C. Cir. 1930); *The Bible Speaks*, 81 B.R. at 759-60; *Gilmore*, 86 N.E. at 570-71; *Caspari v. First German Church of New Jerusalem*, 82 Mo. 649, 652 (1884); *Nelson v. Dodge*, 68 A.2d 51, 57 (R.I. 1949).

sumption: (1) where the spiritual follower had a preexisting intent to make a gift;<sup>81</sup> (2) where the follower had independent advice,<sup>82</sup> or (3) where the follower was of sound mind and body.<sup>83</sup>

As seen by *Gilmore v. Lee*,<sup>84</sup> in which a gift given to a parish priest was set aside for undue influence,<sup>85</sup> the traditional model of undue influence includes the five elements of L-TCP. The donor, Mrs. Knapp, was an elderly, illiterate woman on her death bed.<sup>86</sup> First, the long-term pattern of influence can be seen from the relationship between the devout parishioner and her priest.<sup>87</sup> The priest was the stronger personality purporting to care about Mrs. Knapp's spiritual welfare as she lay on her deathbed.<sup>88</sup> The decedent's advanced age, sickness and illiteracy made her vulnerable.<sup>89</sup> In fact, the priest, in addition to attending to his parishioner's last sickness and spiritual needs, also attended to his own material needs by persuading the dying woman to give him a deed to her property.<sup>90</sup> Mrs. Knapp was harmed in two ways: (1) she did not give the land of her own volition, but rather, at the request of the priest; and (2) she did not provide for her natural heirs.<sup>91</sup> Thus, under this model, undue influence is an example of L-TCP.

## 2. Susceptibility model of undue influence

The susceptibility model focuses on the relative weakness of the donor.<sup>92</sup> To succeed on a claim for undue influence and void the gift, the plaintiff must show that he or she was "susceptible" to undue influence to the advantage of the donee, that the donee deceived or exerted improper influence over plaintiff, and that the plaintiff submitted to the "overmastering" effect of the donee's influence.<sup>93</sup>

The susceptibility model differs from the presumption model of un-

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81. *Kluber v. Unity School of Christianity*, 51 S.W.2d 30, 35 (Mo. 1932); see also *Patrinelis*, *supra* note 65, at 671-77 (discussing several cases in which predisposition to make gift weakened presumption).

82. *Patrinelis*, *supra* note 65, at 666-70.

83. See *id.* at 664.

84. 86 N.E. 568 (Ill. 1908).

85. *Id.* at 570-71.

86. *Id.*

87. *Id.* at 568.

88. *Id.* at 569-70.

89. *Id.*

90. *Id.* at 569.

91. *Id.* at 568-69.

92. See *supra* note 28 for the text of California Civil Code § 1575, which defines undue influence.

93. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989).

due influence in that it focuses on the weakness or susceptibility of the donor. Nonetheless, as discussed below, both the susceptibility and presumption models protect the same individual interest: freedom from having one's possessions taken by another whose unique position or relationship causes one to suspend suspicion and confer upon another a benefit that ordinarily would not be conferred.<sup>94</sup> Both models protect this interest by relying on a model of long-term psychological duress.<sup>95</sup>

### B. Proof Requirements for Involuntary Servitude

A person who holds another in involuntary servitude is criminally liable.<sup>96</sup> In *United States v. Kozminski*<sup>97</sup> the United States Supreme Court defined involuntary servitude as it was set forth in the federal statute declaring involuntary servitude to be illegal.<sup>98</sup>

#### 1. Standards for involuntary servitude in *United States v. Kozminski*

The Court in *Kozminski* defined involuntary servitude:

[F]or purposes of criminal prosecution . . . the term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.<sup>99</sup>

Applying this rule, the Court reversed a conviction against three operators of a farm who were found to have violated 18 U.S.C. § 241<sup>100</sup> by conspiring to "injure, oppress, threaten, or intimidate" two retarded men in the free exercise and enjoyment of their federal right to be free from involuntary servitude."<sup>101</sup>

Although the two men were in their sixties when the government found them working on the farm, they had intelligence quotients of sixty-

94. See *infra* notes 293-300 and accompanying text for a discussion of the interests protected in laws invalidating gifts due to undue influence.

95. See *supra* note 17 and accompanying text which contrasts long-term psychological duress with short-term physical duress.

96. 18 U.S.C. § 1584 states: "Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude any other person for any term [shall be criminally liable]." 18 U.S.C. § 1584 (1988).

97. 487 U.S. 931 (1988).

98. *Id.*

99. *Id.* at 952.

100. 18 U.S.C. § 241 (1988). This section provides, in pertinent part, that "if two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant . . . in the free exercise or enjoyment of any right or privilege secured to him [or her] by the constitution or laws of the United States, [they shall be criminally liable]." *Id.*

101. *Kozminski*, 487 U.S. at 934.

seven and sixty; they viewed the world and responded to authority as would an eight- to ten-year-old child.<sup>102</sup> The two men worked on the Kozminskis' dairy farm seven days a week, up to seventeen hours a day, initially for fifteen dollars per week and eventually for no money at all.<sup>103</sup> The Kozminskis subjected the two men to verbal and physical abuse and told their other workers to treat the victims the same way.<sup>104</sup>

The men were told not to leave the farm.<sup>105</sup> When the men did leave the farm, the Kozminskis brought them back<sup>106</sup> and even threatened one of the men with institutionalization if he did not follow the Kozminskis' orders.<sup>107</sup> The victims were isolated from neighbors, relatives, farm hands and visitors<sup>108</sup> and lived in squalor.<sup>109</sup> They were denied adequate food, housing and medical attention.<sup>110</sup>

The original conviction was based on a jury instruction that permitted the jury to find involuntary servitude in cases involving general psychological coercion.<sup>111</sup> The Court reviewed the history of the Thirteenth Amendment<sup>112</sup> and the legislative histories of the statutes outlawing involuntary servitude.<sup>113</sup>

One of the precursors to 18 U.S.C. § 1584,<sup>114</sup> the statute against involuntary servitude, was the 1874 Padrone statute.<sup>115</sup> The "Padrones" took young Italian boys from their families, brought them to large cities in the United States, and put them to work as beggars or street musi-

102. *Id.* at 934-35.

103. *Id.* at 935.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* In his concurring opinion, Justice Brennan cited evidence introduced by the government that the victims were denied medical care "even when one was gored by a bull and the tip of the other's thumb was cut off." *Id.* at 956 n.3 (Brennan, J., concurring).

111. *Id.* at 937-38. The jury instruction provided:

[B]ased on all the evidence it will be for you to determine if there was a means of compulsion used, sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer.

*Id.* at 937.

112. *Id.* at 940. The Thirteenth Amendment provides in pertinent part: "Neither slavery nor involuntary servitude . . . shall exist within the United States." U.S. CONST. amend. XIII.

113. *Kozminski*, 487 U.S. at 944-48.

114. *See supra* note 96.

115. The Padrone statute was formerly codified at 18 U.S.C. § 446 (1940) (repealed 1947). In 1947 Congress consolidated both the Slave Trade statute, as amended in 1909, formerly 18 U.S.C. § 423 (1940) (repealed 1947), and the Padrone statute, formerly 18 U.S.C. § 446 (1940) (repealed 1947), into 18 U.S.C. § 1584. *Kozminski*, 487 U.S. at 945.

cians.<sup>116</sup> In 1874, Congress enacted the Padrone statute “to prevent [this] practice of enslaving, buying, selling or using Italian children.”<sup>117</sup>

The Court in *Kozminski* concluded that the current statute “was intended to have the same substantive reach as [the prior] statutes,”<sup>118</sup> including the Padrone statute. One of the conditions that the Padrone statute was intended to address—isolation from family so as to be put into a vulnerable position—is an element of psychological coercion.<sup>119</sup> The Court’s reliance on section 1584’s history as rationale for adopting a physical duress standard in *Kozminski*<sup>120</sup> is therefore puzzling. A plausible argument could be made that *Kozminski* actually supports a psychological duress model. Nonetheless, Justice O’Connor, writing for the majority, ultimately articulated a physical or legal duress requirement for involuntary servitude.<sup>121</sup>

Nor does Justice Brennan’s concurring opinion in *Kozminski* support a psychological duress model. Justice Brennan agreed that “the typical techniques now used to hold persons in slavlike conditions are not limited to physical or legal means.”<sup>122</sup> However, he proposed that a court look to the “slavlike” conditions that Congress intended to eradicate with the Thirteenth Amendment.<sup>123</sup> Justice Brennan asserted that “‘servitude’ generally denotes a relation of complete domination and

116. *Kozminski*, 487 U.S. at 947.

117. *Id.* (quoting 43d Cong., 1st Sess., 2 CONG. REC. 4443 (1874)).

118. *Id.* at 945. Justice O’Connor, writing for the majority, stated:

Congress believed these terms to be limited to situations involving physical or legal coercion [which] is confirmed when we examine the actual physical conditions facing the victims of the padrone system. These young children were literally stranded in large, hostile cities in a foreign country . . . without . . . assistance, without family, and without other sources of support, these children . . . had no choice but to work for their masters or risk physical harm. The padrones took advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave.

*Id.* at 947-48.

119. Delgado, *Criminal States of Mind*, *supra* note 17, at 2.

120. *Kozminski*, 487 U.S. at 947-48.

121. *Id.* at 948.

122. *Id.* at 956 (Brennan, J., concurring). Justice Brennan’s description of the techniques used in the *Kozminski* case are very similar to techniques used in coercive persuasion or brainwashing:

[D]isorienting the victims with frequent verbal abuse and complete authoritarian domination; inducing poor health by denying medical care and subjecting the victims to substandard food, clothing and living conditions; working the victims from 3 a.m. to 8:30 p.m. with no days off, leaving them tired and without free time to seek alternative work; denying the victims any payment for their labor; and active efforts to isolate the victims from contact with outsiders who might help them.

*Id.* (Brennan, J., concurring); see Delgado, *Criminal States of Mind*, *supra* note 17, at 1, 2-3 & n.13.

123. *Kozminski*, 487 U.S. at 961 (Brennan, J., concurring).

lack of personal liberty resembling the conditions in which slaves were held prior to the Civil War."<sup>124</sup> Thus, a defendant who, as a result of intentional coercion, employs persons in conditions resembling slavery would be guilty of involuntary servitude.<sup>125</sup>

Finally, Justice Stevens's concurring opinion advocates a case-by-case approach to evaluating what conduct constitutes involuntary servitude.<sup>126</sup> Justice Stevens rejected the majority's position that the reach of the involuntary servitude statute "extends beyond compulsion . . . accompanied by actual or threatened physical means or by the threat of legal action."<sup>127</sup> He also rejected Justice Brennan's requirement that the victims be coerced into a "slavelike condition of servitude"<sup>128</sup> because it "simply mirror[ed] the term 'involuntary servitude' "<sup>129</sup> and added a "level of definitional complexity."<sup>130</sup> Justice Stevens then proposed that in ascertaining whether the victim was in servitude involuntarily, a court should use a "totality of the circumstances" approach, as used in cases determining "whether a custodial statement is voluntary or involuntary."<sup>131</sup>

The physical duress requirement the Court imposes in *Kozminski* does not alter the fact that involuntary servitude is another example of L-TCP. *Kozminski* illustrates the long-term pattern of influence on enslaved workers even if physical duress were present.<sup>132</sup> The defendants were the stronger individuals not only because their victims were mentally retarded, but because they owned the farm and were the "employers" of their victims.<sup>133</sup> Although they brought their victims off the streets, supposedly so that the victims could avoid institutionalization, they exploited the victims by forcing them to work long hours with no pay.<sup>134</sup> The victims were harmed by their exploitation and by the abuse the defendants dealt them, whether or not the United States Supreme Court acknowledged their enslavement.<sup>135</sup>

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124. *Id.* (Brennan, J., concurring).

125. *Id.* at 964 (Brennan, J., concurring).

126. *Id.* at 965-66 (Stevens, J., concurring). Justice Blackmun joined in this concurrence. *Id.* at 965 (Stevens, J., concurring).

127. *Id.* at 969 (Stevens, J., concurring).

128. *Id.* at 961 (Brennan, J., concurring).

129. *Id.* at 969 (Stevens, J., concurring).

130. *Id.* (Stevens, J., concurring).

131. *Id.* at 970 (Stevens, J., concurring).

132. One of the men had "worked" for the Kozminskis for 10 years; the other had been there 16 years. *Id.* at 935.

133. *Id.*

134. *Id.*

135. *Id.*



### C. Proof Requirements for Brainwashing by Religious Cults

First Amendment free exercise and free establishment of religion issues arise when a plaintiff claims coercive persuasion by a religious group. Therefore, these constitutional constraints must first be addressed.<sup>136</sup> Assuming that the plaintiff surmounts the constitutional limitations, the indoctrination process by which religious cults obtain converts—including coercive persuasion—is not tortious per se.<sup>137</sup> Therefore, plaintiffs use evidence of brainwashing by sects to prove an element of a tort, such as fraud,<sup>138</sup> intentional infliction of emotional distress<sup>139</sup> or false imprisonment.<sup>140</sup>

#### 1. Constitutional issues in cult brainwashing cases

Under the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>141</sup> The Free Exercise Clause guarantees that the government will not prevent the people from freely pursuing any chosen religion.

The First Amendment only protects claims rooted in religious belief,<sup>142</sup> and the Free Exercise Clause protects these beliefs absolutely.<sup>143</sup> While a court can inquire into the sincerity of a person's beliefs, it may not judge the truth or falsity of those beliefs.<sup>144</sup>

136. See *infra* notes 141-53.

137. *Lewis v. Holy Spirit Ass'n for Unification*, 589 F. Supp. 10, 12 (D. Mass. 1983); *Murphy v. I.S.K.CON.*, 571 N.E.2d 340, 348 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991); *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 177 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987); *Application of Conversion Center, Inc.*, 130 A.2d 107, 110 (Pa. 1957); see *infra* notes 154-68 and accompanying text.

138. See *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1101, 762 P.2d 46, 49, 252 Cal. Rptr. 122, 125 (1988), *cert. denied*, 490 U.S. 1084 (1989). See also *infra* notes 171-79 and accompanying text for a discussion of the *Molko* case.

139. See *Molko*, 46 Cal. 3d at 1101, 762 P.2d at 49, 252 Cal. Rptr. at 125; *George v. International Soc'y for Krishna Consciousness (ISKCON)*, 262 Cal. Rptr. 217, 231 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991); *Meroni*, 506 N.Y.S.2d at 175; *Christofferson v. Church of Scientology*, 644 P.2d 577, 581 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983); see also *infra* notes 188-238 and accompanying text.

140. See *Molko*, 46 Cal. 3d at 1123, 762 P.2d at 64, 252 Cal. Rptr. at 140; *George*, 262 Cal. Rptr. at 231; see also *infra* notes 239-73 and accompanying text.

141. U.S. CONST. amend. I.

142. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

143. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

144. *United States v. Ballard*, 322 U.S. 78 (1944), defined the parameters of the constitutional protection of religious faith. There defendants, founders of the "I am" movement, were alleged to have fraudulently represented that they were divine messengers, that they had miraculous powers to heal all diseases and that they, in fact, had cured hundreds of afflicted

While religious belief is absolutely protected, religiously motivated conduct is not.<sup>145</sup> Religiously motivated conduct "remains subject to regulation for the protection of society."<sup>146</sup> Traditional First Amendment analysis requires that governmental action burdening religious conduct be subjected to a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed on religion.<sup>147</sup> The more severe the burden on religion, the more compelling the government interest must be.<sup>148</sup>

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people. *Id.* at 86-87. As a result of these misrepresentations, they obtained money from the public through the mail. *Id.* At trial, the court refused to allow the issue of the truth or falsity of defendants' claims of divine designation and miraculous powers to go to the jury; the sole issue submitted was whether defendants' held a good faith belief in these claims. *Id.* The Supreme Court affirmed and reasoned:

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

*Id.* at 87.

A similar case where the court held that the act or conduct of a religious organization was protected from judicial scrutiny because the proof offered called into question the truth or falsity of the religious beliefs is *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1149 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

145. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

146. *Cantwell*, 310 U.S. at 304.

147. *Yoder*, 406 U.S. at 214. After the United States Supreme Court decision in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990), it is unclear whether the compelling state interest test will continue to be used where religiously motivated conduct conflicts with civil actions. *Smith* addressed a criminal prohibition against using peyote where the challengers used peyote as part of a Native American religious ceremony. *Id.* at 1597-98. Justice Scalia, writing for the majority, asserted that the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), would not "require exemptions from a generally applicable criminal law." *Smith*, 110 S. Ct. at 1603.

The United States Supreme Court has yet to address the applicability of the compelling state interest test to non-criminal law. Nonetheless, several circuits have held that under *Smith*, the state need no longer show a compelling state interest when a generally applicable civil law impinges on religiously motivated conduct. *See Vandiver v. Hardin County*, 925 F.2d 927 (6th Cir. 1991) (enforcing equivalency testing requirement for high school student to gain credit for his religious home study program did not violate Free Exercise Clause); *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990) (religious group that operated family center for disadvantaged persons not exempt from state statute regulating boardinghouses); *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (limiting church's options to raise revenue as result of city's Landmarks Preservation Law not violation of Free Exercise Clause); *Intercommunity Center for Justice & Peace v. INS*, 910 F.2d 42 (2d Cir. 1990) (religious organization not exempt from compliance with Immigration Reform and Control Act); *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990) (statute mandating autopsies of all violent deaths not violation of First Amendment).

148. *Compare Yoder*, 406 U.S. at 221-25 (government's strong interest in education insufficient to justify educational requirement threatening continued survival of Old Order Amish

If the government action passes this balancing test, it must also meet two additional requirements. First, there must be no less burdensome alternative which would satisfy the government's interest.<sup>149</sup> Second, the action must have the purpose and effect of advancing the state's secular goals and must not discriminate between religions, or between religion and non-religion.<sup>150</sup>

Judicial sanctioning of tort recovery constitutes a state action which is sufficient to invoke constitutional protection.<sup>151</sup> This does not mean, however, that religious groups are immune from all tort liability. Religious groups may be held liable in tort for secular acts.<sup>152</sup> Moreover, courts will recognize tort liability even for acts that are religiously motivated.<sup>153</sup>

## 2. Coercive persuasion is not tortious per se

When a religious sect subjects potential recruits or members to highly programmed behavior techniques<sup>154</sup> to indoctrinate them into the group, that religious indoctrination is not in itself tortious. The three main cases holding religious indoctrination to be not tortious, if unaccompanied by physical force or threat, are *Lewis v. Holy Spirit Ass'n for Unification*,<sup>155</sup> *Meroni v. Holy Spirit Ass'n for Unification*,<sup>156</sup> and *Applica-*

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communities) *with* Goldman v. Weinberger, 475 U.S. 503, 508-10 (1986) (government's reasonable interest in uniform military attire sufficient to justify mild burden on religious expression created by ban against Jewish officer wearing yarmulke).

149. Thomas v. Review Bd., 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 407-08; *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

150. *Braunfeld*, 366 U.S. at 607.

151. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

152. *See, e.g.*, *Malloy v. Fong*, 37 Cal. 2d 356, 372, 232 P.2d 241, 250-51 (1951) (holding religious corporation liable for negligent driving by employee).

153. *See, e.g.*, *Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp. 505, 516 (M.D. Ala. 1983) (allowing action for false imprisonment against religious group); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1135 (D. Mass. 1982) ("Causes 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 if organized for a religious purpose."); *O'Moore v. Driscoll*, 135 Cal. App. 770, 778, 28 P.2d 438, 444 (1933) (allowing priest's 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 (Pa. 1975) (allowing action for interference with marriage and business interests when church ordered congregation to "shun" former member).

154. These techniques would include intensive physical exercise, isolation, lectures, confession, strict work and study schedules. *See, e.g.*, *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 177 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987); see also Delgado, *Religious Totalism*, *supra* note 9, at 50-55, for a general discussion of coercive techniques used by religious cults.

155. 589 F. Supp. 10 (D. Mass. 1983).

156. 506 N.Y.S.2d 174 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

*tion of Conversion Center, Inc.*<sup>157</sup>

In *Lewis* a former member of the Unification Church<sup>158</sup> sued in tort alleging, inter alia, that the Church subjected him to brainwashing resulting in psychiatric disorders.<sup>159</sup> The court dismissed the plaintiff's claims and said:

Both of the plaintiff's claims in tort are seriously flawed. Indoctrination and initiation procedures and conditions of membership in a religious organization are generally not subject to judicial review. Similarly, the plaintiff has not indicated any precedent for recognition of the tort of brainwashing, and my own research has revealed none.<sup>160</sup>

The plaintiff's son in *Meroni* had entered the training and indoctrination program of the Unification Church.<sup>161</sup> One month later he left the program and committed suicide.<sup>162</sup> His father contended that the Church subjected the decedent, an emotionally disturbed youth, to highly programmed behavior techniques to brainwash the youth into joining the Church.<sup>163</sup> The court dismissed the action and opined that the Church's indoctrination methods were not tortious<sup>164</sup> in the absence of physical violence.<sup>165</sup>

Similarly, the court in *Application of Conversion Center, Inc.*<sup>166</sup> rec-

157. 130 A.2d 107 (Pa. 1957).

158. *Lewis*, 589 F. Supp. at 11-12.

159. *Id.* at 12.

160. *Id.*

161. *Meroni*, 506 N.Y.S.2d at 175.

162. *Id.*

163. *Id.* (father claimed Church had used intensive physical exercise, isolation, lectures, confession, strict work and study schedules as method for indoctrinating son).

164. The court in *Meroni* said:

The conduct of the defendant Unification Church . . . which the plaintiff seeks to classify as tortious, constitutes common and accepted religious proselytizing practices, e.g., fasting, chanting, physical exercises, cloistered living, confessions, lectures, and a highly structured work and study schedule. To the extent that the plaintiff alleges that the decedent was 'brainwashed' as a result of the church's program, this claim must be viewed in the context of the situation as a whole, i.e., as a method of religious indoctrination that is neither extreme nor outrageous.

*Id.* at 177.

165. *Id.* at 177-78. The court stated:

It is important to note that no facts are set forth which would warrant the conclusion that the plaintiff's decedent was falsely imprisoned by the appellant or that he was subjected to any form of violence. . . . The claim of brainwashing is based upon the activities heretofore described, which, as previously noted, are commonly used by religious and other groups, and are accepted by society as legitimate means of indoctrination. They are not classifiable as so extreme or outrageous, or offensive to society, as to incur liability therefor.

*Id.*

166. 130 A.2d 107 (Pa. 1957).

ognized that persuasion is an integral part of many religious organizations and a positively protected aspect of the free exercise of religion.<sup>167</sup> Brainwashing was thus held not to be a tort.<sup>168</sup>

### 3. Brainwashing as an element in a tort action against a cult

Assuming that judicial review is constitutional, the inquiry becomes even more complex. The process of coercive persuasion or brainwashing is not a tort by itself, but is an element of different torts, including fraud, intentional infliction of emotional distress and false imprisonment.

#### a. fraud

*Molko v. Holy Spirit Ass'n for Unification*<sup>169</sup> addressed claims of brainwashing in a suit for fraud<sup>170</sup> by two former members of a religious cult. The plaintiffs, Leal and Molko, contended that certain members of the Unification Church knowingly misrepresented the Church's identity with the intent to induce each of them to associate with and to eventually join the Church.<sup>171</sup> They claimed justifiable reliance on the misrepresen-

167. The court stated:

The 14th Amendment of the Constitution of the United States which incorporates the 1st Amendment, guarantees the free exercise of religion . . . . Not only is a citizen of this country entitled to the free expression of his religious beliefs, but he may by peaceful persuasion endeavor to convert others thereto, and we are aware of no bar to individuals organizing to effectuate their guaranteed rights in this regard. . . . Propagation of belief—or even of disbelief in the supernatural—is protected whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse.

*Id.* at 110 (quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 593 (1940)).

168. *Id.*

169. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

170. The plaintiffs also sued for intentional infliction of emotional distress, false imprisonment and restitution. *Id.* at 1101, 762 P.2d at 49, 252 Cal. Rptr. at 125.

171. In *Molko* the plaintiffs David Molko and Tracy Leal were each approached by members of the Unification Church on two separate occasions while waiting at bus stops in the San Francisco area. The members represented to Molko that they were members of "an 'international community' of socially conscious people from different occupations who met in the evenings to discuss important issues." *Id.* at 1102, 762 P.2d at 50, 252 Cal. Rptr. at 126. Different members of the Church told Leal that they were "part of the 'Creative Community Project,' . . . a group of socially concerned professional people involved in good works such as giving food to the poor." *Id.* at 1105, 762 P.2d at 52, 252 Cal. Rptr. at 128. Both Molko and Leal asked the members if they were part of religious groups; the Church members responded that they were not. *Id.* at 1102, 1106, 762 P.2d at 50, 52, 252 Cal. Rptr. at 126, 128. In fact, the Church members' purpose in inviting the plaintiffs to dinner was to recruit Molko and Leal into the Church. *Id.*

At dinner, the plaintiffs were isolated and group members held them in constant conversation. *Id.* Molko and Leal then heard lectures on general social problems and saw a slide show on "Boonville"—a "farm" or rural getaway owned by the people at the house. *Id.* at 1103, 1106, 762 P.2d at 50, 52, 252 Cal. Rptr. at 126, 128. They were invited to visit the farm at the

tations when they unknowingly agreed to participate in the Church's activities and "suffered psychological and financial damage as a result of their involvement."<sup>172</sup> Leal and Molko claimed that they would not have chosen to associate with the group had they known the members belonged to the Unification Church.<sup>173</sup>

The Church asserted that there was no justifiable reliance because Molko and Leal discovered the group's true identity prior to becoming formal members of the Church.<sup>174</sup> In response, plaintiffs asserted that by the time the Church disclosed its true identity, the Church's intense indoctrination process had already rendered plaintiffs incapable of refusing to join.<sup>175</sup> Molko and Leal asserted that "the Church deceived them into a setting in which they could be 'brainwashed,' and that the Church could not then 'cure' its deception by telling plaintiffs the truth after their involuntary indoctrination" was already accomplished.<sup>176</sup>

The court reviewed the concept of brainwashing and found support

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conclusion of the presentation; within a few minutes they were on a bus headed for Boonville. *Id.*

Molko and Leal were led to believe that they would receive some relaxed time in the country at Boonville. *Id.* Instead, the day's schedule was a tightly planned regimen of group calisthenics, lectures and discussions, interrupted only by meals and shower breaks. *Id.* at 1103, 762 P.2d at 50, 252 Cal. Rptr. at 126. This exercise-lecture-discussion regimen continued for several days. *Id.* at 1104, 762 P.2d at 51, 252 Cal. Rptr. at 127. Both Molko and Leal became tired, confused and uncomfortable, but each was assured that the group was not affiliated with the Unification Church and each was urged to give the group a few more days. *Id.* at 1103-04, 762 P.2d at 50-51, 252 Cal. Rptr. at 126-27.

Finally, after twelve days with the group, a church member revealed to Molko that the group was part of the Unification Church, but that the deception had been "necessary because people who had heard negative stories about the Church tended to be unreceptive if they knew the group's identity before hearing what it had to say." *Id.* at 1104, 762 P.2d at 51, 252 Cal. Rptr. at 127. Molko was confused and angry; nonetheless, at the group's urging he stayed with the group for several weeks before formally joining the Church. *Id.* at 1104-05, 762 P.2d at 50-51, 252 Cal. Rptr. at 127. Several months later, Molko was abducted by "deprogrammers" hired by his parents. *Id.* at 1105, 762 P.2d at 51, 252 Cal. Rptr. at 127. Molko ended his association with the Unification Church after three days of deprogramming. *Id.* See *infra* note 195 for a discussion of deprogramming.

Leal was subjected to twenty-two days of the exercise-lecture-discussion regimen before the group informed her that it was affiliated with the Unification Church. *Molko*, 46 Cal. 3d at 1106, 762 P.2d at 52, 252 Cal. Rptr. at 128. Prior to that, Leal had specifically inquired on at least two occasions whether the group members were "Moonies;" she was assured that they were not. *Id.* Leal nonetheless remained with the Church after learning its identity and became a formal Church member. *Id.* She then went to work on the streets of Los Angeles, selling flowers to raise money for the Church. *Id.* Two months later, she was abducted by deprogrammers hired by her parents and renounced her affiliation with the Church. *Id.*

172. *Id.* at 1108, 762 P.2d at 53, 252 Cal. Rptr. at 129.

173. *Id.*

174. *Id.* at 1108, 762 P.2d at 54, 252 Cal. Rptr. at 130.

175. *Id.* at 1108-09, 762 P.2d at 54, 252 Cal. Rptr. at 130.

176. *Id.* at 1109, 762 P.2d at 54, 252 Cal. Rptr. at 130.

for both sides of the debate as to whether brainwashing existed.<sup>177</sup> As the court found no constitutional bars to bringing the action for fraud,<sup>178</sup> the plaintiffs' action survived the Church's motion for summary judgment.<sup>179</sup>

In effect, the court in *Molko* allowed a model of psychological brainwashing to be used to prove justifiable reliance in a fraud action. There were no allegations of physical duress or physical restraint. The Church's practices, which included isolating the members and controlling all channels of information and communication combined with physiological debilitation by means of inadequate diet and insufficient sleep, were sufficient to show brainwashing.<sup>180</sup>

*Molko* also illustrates how brainwashing fits into the L-TCP model. The long-term influence is shown by the length of time the members of the Unification Church spent influencing the plaintiffs before revealing their true identity.<sup>181</sup> By outnumbering and isolating the plaintiffs, the

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177. *Id.* at 1109-10, 762 P.2d at 54-55, 252 Cal. Rptr. at 130-31. "[T]he existence of such differing view[s] compel[led] the conclusion that Molko and Leal's theory indeed raise[d] a factual question—viz., whether Molko and Leal were brainwashed—which, if not prohibited by other considerations, preclude[d] a grant of summary judgment for the Church." *Id.* at 1110, 762 P.2d at 55, 252 Cal. Rptr. at 131.

178. The court in *Molko* analyzed the constitutionality of the fraud action according to traditional First Amendment analysis and prior to the decision in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990). See *supra* note 147 for a description of *Smith's* likely impact on traditional First Amendment analysis. The court in *Molko* found that "the Church's practice of concealing its identity in order to bring unsuspecting outsiders into its highly structured environment" was religiously motivated conduct that could be regulated for the protection of society. *Molko*, 46 Cal. 3d at 1117, 762 P.2d at 59, 252 Cal. Rptr. at 135. Furthermore, judicial sanctioning of fraud claims against a religious institution's deceptive practices was justified by a compelling state interest and was the least restrictive means available. *Id.* at 1117-19, 762 P.2d at 61-62, 252 Cal. Rptr. at 136-37. Finally, allowing such fraud claims "ha[d] the purpose and effect of advancing the state's secular goals and . . . [did] not discriminate between religions, or between religion and nonreligion." *Id.* at 1119, 762 P.2d at 61, 252 Cal. Rptr. at 137.

This result would not be changed by the *Smith* decision, which, according to many commentators, effectively eliminated the compelling state interest test. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990); Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1, 11-18 (1991); Eddie Lam, Note, *Employment Division, Department of Human Resources v. Smith: The Limits of the Free Exercise Clause*, 16 T. MARSHALL L. REV. 377, 378 (1991).

179. *Molko*, 46 Cal. 3d at 1120, 762 P.2d at 61, 252 Cal. Rptr. at 137.

180. *Id.* at 1119-20, 762 P.2d at 61, 252 Cal. Rptr. at 137.

181. Plaintiff Molko did not learn the identity of the group until he had spent twelve days with group members. *Id.* at 1104, 762 P.2d at 51, 252 Cal. Rptr. at 127. Plaintiff Leal was subjected to twenty-two days of the exercise-lecture-discussion regimen before the group informed her that it was affiliated with the Unification Church. *Id.* at 1106, 762 P.2d at 52, 252 Cal. Rptr. at 128.

cult members became the stronger parties vis-à-vis the plaintiffs who were rendered more susceptible by the mind-numbing rituals of the group.<sup>182</sup> The cult purported to offer the plaintiffs an opportunity to participate in meaningful social activity,<sup>183</sup> but instead exploited the plaintiffs for their labor.<sup>184</sup> This exploitation harmed the plaintiffs.<sup>185</sup>

The Unification Church group members seemed to offer plaintiffs Leal and Molko the opportunity to make their lives more meaningful.<sup>186</sup> Instead, the Unification Church exploited their idealism and used L-TCP to deprive plaintiffs of their freedom of mentation.<sup>187</sup> Plaintiffs Leal and Molko were thus unfairly deprived of *their* First Amendment right to exercise the religion of *their* choice.

*b. intentional infliction of emotional distress*

Plaintiffs have asserted claims for intentional infliction of emotional distress (IIED) in four cases involving brainwashing by religious cults.<sup>188</sup> Interestingly, the courts often define this tort in a manner similar to undue influence: "an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or

182. See *supra* note 171 for a discussion of the Unification Church's approach to indoctrinating the *Molko* plaintiffs. Furthermore, the plaintiffs were already emotionally vulnerable when the church members approached them. Plaintiff Molko had completed law school, but arrived in San Francisco "unsure about his future." *Molko*, 46 Cal. 3d at 1102, 762 P.2d at 49, 252 Cal. Rptr. at 125. Plaintiff Leal arrived in San Francisco en route to Humboldt State University. *Id.* at 1105, 762 P.2d at 51-52, 252 Cal. Rptr. at 127-28. She was considering transferring there after her freshmen year at San Diego State University. *Id.*

183. *Molko*, 46 Cal. 3d at 1102-03, 1105, 762 P.2d at 50, 52, 252 Cal. Rptr. at 126, 128.

184. *Id.* at 1103-06, 762 P.2d at 50-52, 252 Cal. Rptr. at 127-28.

185. *Id.*

186. *Id.* at 1102, 1105, 762 P.2d at 50, 52, 252 Cal. Rptr. at 126, 128.

187. Mentation relates to cognition, understanding, emotion or generally to any mental function or activity. Michael H. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 246 n.14 (1974). The right of mentation is protected by the First Amendment. *Id.* at 253-76.

188. See *Molko*, 46 Cal. 3d at 1101, 762 P.2d at 49, 252 Cal. Rptr. at 125; *George v. International Soc'y for Krishna Consciousness*, 262 Cal. Rptr. 217, 231 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991); *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 175 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987); *Christofferson v. Church of Scientology*, 644 P.2d 577, 581 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

In denying review, the California Supreme Court ordered that *George* should not be officially published. *George v. International Soc'y for Krishna Consciousness*, No. S012425, 1989 Cal. LEXIS 5077, at \*1 (Nov. 30, 1989). This case is not being cited in this Comment as authority or as precedent. Instead, *George* is discussed to illustrate the treatment accorded brainwashing claims in various torts.



power to affect his interests."<sup>189</sup> Nonetheless, in only one case did a court find brainwashing to violate this standard.

i. *Christofferson v. Church of Scientology*

In *Christofferson v. Church of Scientology*,<sup>190</sup> Julie Christofferson graduated from high school in Eureka, Montana and moved to Portland, Oregon,<sup>191</sup> where she became involved in the Church of Scientology.<sup>192</sup> Her involvement continued to the point where she elected to forego college and move to Delphian, a Scientology training center.<sup>193</sup> When she

189. *Christofferson*, 644 P.2d at 583 (quoting *Turman v. Central Billing Bureau*, 568 P.2d 1382, 1391 (Or. 1977)). See also *Molko*, which states that outrageous behavior may occur where a defendant "(1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. . . ." *Molko*, 46 Cal. 3d at 1122, 762 P.2d at 63, 252 Cal. Rptr. at 139 (quoting *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155 n.7, 729 P.2d 743, 747 n.7, 233 Cal. Rptr. 308, 312 n.7 (1987)).

190. 644 P.2d 577, 581 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

191. *Id.* at 580.

192. *Id.* at 582. On the advice of a friend, shortly after her arrival in Portland Julie Christofferson paid the Church of Scientology \$50 and enrolled in one of their communications courses. *Id.* Two weeks after completing this course, she paid \$250 and signed up for another course. *Id.* at 587. Christofferson then paid \$1880 for a number of hours of "auditing."

Scientology teaches that by "clearing" or "auditing" the mind, one can improve both spiritual and bodily health. L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* 91-108 (1950). The vast literature describing Scientology claims, inter alia, that many bodily ailments, including cancer, may be cured by auditing. See *id.* at 92, 93.

In *Christofferson* the court found:

Because Julie did not have the money to pay for the hours of auditing she was told she would need, she was coached by defendant's staff members to borrow money from friends and family. She succeeded in borrowing \$700-\$800 from friends and family and another \$500 from Freedom Federal Credit Union, which is operated by Scientologists.

*Christofferson*, 644 P.2d at 587.

193. *Christofferson*, 644 P.2d at 582. Julie was led to believe that her courses at Delphian could be applied toward a college degree. *Id.* At Delphian:

[S]he would learn about architecture and engineering "from the ground up" and . . . Delphian was partially funded by government grants for doing research in solar and wind energy and recycling. [Julie] decided that going to Delphian would be the best way to combine her interests in architecture and engineering with her interest in Scientology and Dianetics.

*Id.*

Julie's experience at Delphian was not exactly the typical collegiate experience: Julie was assigned to live in a room with two other women and two children. . . . She worked harvesting crops for a couple of weeks after she arrived and then helped to move an old garbage dump on the property. . . . In the evenings, she worked indoors cleaning floors, washing dishes and other such tasks. . . . Her work day extended from 8:30 a.m. to 11 p.m. or later. . . . She received wages of a few dollars a week.

*Id.* at 589. Delphian also controlled its members' contact with the outside world. "Visitors

returned home several months later to visit her mother,<sup>194</sup> Julie's parents locked her in the house and deprogrammed<sup>195</sup> her.<sup>196</sup>

Julie then filed suit against the Church of Scientology for outrageous conduct,<sup>197</sup> alleging that defendants schemed to "gain control of her mind and to force her into a life of service."<sup>198</sup> The Oregon Court of Appeals reversed the jury verdict for plaintiff and remanded.<sup>199</sup>

The court first discussed Oregon's outrageous conduct laws.<sup>200</sup> The initial consideration was whether there was a "special relationship" between the plaintiff and the defendant because the court characterized outrageous conduct as "an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."<sup>201</sup> The court admitted that this

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were [discouraged] at Delphian . . . Julie was reprimanded [when her mother made an unannounced visit]. . . . [Her] mail was sometimes opened before she received it." *Id.*

194. When Julie communicated to the Scientology group that her mother was unhappy with her involvement in the group, the group told her to leave Delphian until Julie could "handle" her parents. *Id.* "Handling" one's parents entailed convincing them to sign a statement that they would not sue, attack or embarrass Scientology or Delphian. *Id.* If Julie could not handle her parents, she was to "disconnect," or cut off all relations with her parents if she was to stay involved with the Church. *Id.*

195. Deprogramming is "a form of marathon encounter therapy designed to neutralize the effects of cult conditioning and restore the victim's mental independence." Delgado, *Religious Totalism*, *supra* note 9, at 78. This process challenges the basis of the victim's dependence on cult leaders. *Id.* The deprogrammer attempts to show the victim that he or she has been "manipulated and duped" and points out the inconsistencies in the cultist's beliefs. *Id.* at 78-79.

The use of deprogramming to separate cult members from their groups is controversial. See Douglas Aronin, *Cults, Deprogramming and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163, 180-86 (1982); Terri I. Siegel, Comment, *Deprogramming Religious Cultists*, 11 LOY. L.A. L. REV. 807, 826-28 (1978). Cult members and religious groups have brought suit against both deprogrammers and the parents who have hired them. See *Weiss v. Patrick*, 453 F. Supp. 717 (D.R.I.) (alleging deprogrammer violated plaintiff's civil rights by holding her against her will), *aff'd without opinion*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980) (alleging intentional infliction of emotional distress and false imprisonment against deprogrammer), *cert. denied*, 450 U.S. 1031 (1981).

196. *Christofferson*, 644 P.2d at 590.

197. *Id.* at 581. The tort of outrageous conduct is the same as intentional infliction of emotional distress. *Id.* at 583.

198. *Id.* at 580.

199. *Id.*

200. *Id.* at 583.

201. *Id.* (quoting *Turman v. Central Billing Bureau*, 568 P.2d 1382, 1384 (Or. 1977)); see also *Rockhill v. Pollard*, 485 P.2d 29 (Or. 1971) (special relationship found between doctor and patient); *Bodewig v. K-Mart*, 635 P.2d 657 (Or. Ct. App. 1981) (special relationship found between employer and employee), *petition denied*, 644 P.2d 1128 (Or. 1982); *Fitzpatrick v. Robbins*, 626 P.2d 910 (Or. Ct. App.) (special relationship found between landlord and tenant), *petition denied*, 634 P.2d 1346 (Or. 1981).

“special relationship” may not have been an absolute requirement for recovery for outrageous conduct.<sup>202</sup> Nonetheless, because at the close of evidence Julie withdrew the portion of her complaint alleging a special relationship between her and the defendants, the court found this element to be missing.<sup>203</sup>

The second consideration was whether plaintiff was particularly susceptible to distress.<sup>204</sup> In spite of the fact that Julie was seventeen years old<sup>205</sup> and several hundred miles away from home<sup>206</sup> when she first became involved with the Church, the court determined that because Julie did not argue on appeal that “she was in any way particularly susceptible to the infliction of emotional distress,” this consideration was not met.<sup>207</sup>

Finally, the court found that the Church of Scientology’s conduct was not sufficiently outrageous so as to trigger liability for any resultant severe emotional distress.<sup>208</sup> In effect, the Church’s conduct was not “beyond the limits of social toleration.”<sup>209</sup>

## ii. *Meroni v. Holy Spirit Ass’n for Unification*

The court in *Meroni v. Holy Spirit Ass’n for Unification*<sup>210</sup> held that not only was the defendant Unification Church’s subjection of plaintiff’s son to highly intensive coercive persuasion not tortious,<sup>211</sup> it also was not sufficiently outrageous conduct to support a claim for IIED.<sup>212</sup> Because

202. See *Christofferson*, 644 P.2d at 583 & nn.4-5. The court noted that “*Brewer* specifically did not decide whether there could be recovery in a situation in which there was no special relationship and where only recklessness was shown.” *Id.* at 583 n.4. Furthermore, the court distinguished *Bodewig*, stating that “*Bodewig* involved one party defendant who had no special relationship to the plaintiff. However, even in that case, some of the acts necessary to establish the tort were committed only by the employer-defendant, *albeit* with the other party defendant’s encouragement.” *Id.* at 583 n.5. The court also said that “[t]he character of the relationship bears on the mental element required to impose liability.” *Id.* at 583 (quoting *Hall v. May Dep’t Stores*, 637 P.2d 126 (Or. 1981)).

203. *Id.* The court *did* assert that the issue of special relationship was not reached because the outrageous conduct claims were disposed of on other grounds. *Id.* at 583 n.4.

204. *Id.* at 583; see *Turman v. Central Billing Bureau*, 568 P.2d 1382, 1384 (Or. 1977) (plaintiff, blind and suffering from glaucoma, requiring treatment by clinic for which bill was being collected); *Rockhill*, 485 P.2d at 29-30 (plaintiff already distraught because of automobile accident and injury to child); *Fitzpatrick*, 626 P.2d at 913-14 (defendant counter-claimants aged and visibly disabled).

205. *Christofferson*, 644 P.2d at 583 n.6.

206. *Id.* at 580.

207. *Id.* at 583.

208. *Id.* at 585.

209. *Id.* at 590-91.

210. 506 N.Y.S.2d 174 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

211. *Id.* at 176-77. See *supra* notes 161-65 and accompanying text for a discussion of this holding.

212. *Id.* The court therefore granted the Church’s motion to dismiss. *Id.* at 179. The

the subjects of the Church's intensive religious proselytizing practices<sup>213</sup> were there voluntarily,<sup>214</sup> brainwashing was "not considered by our society to be beyond all possible bounds of decency."<sup>215</sup>

The fact that the Unification Church knew that plaintiff's deceased son "was 'emotionally disturbed' and 'susceptible'" did not change the court's finding.<sup>216</sup> The court explained that this did not make defendant's conduct "any more extreme or outrageous, for it is not uncommon for those who are confused and depressed to seek guidance from a religion, and to submit themselves to the dictates of that religion in an effort to solve their problems."<sup>217</sup>

### iii. *Molko v. Holy Spirit Ass'n for Unification*

Unlike the court in *Christofferson v. Church of Scientology*,<sup>218</sup> the court in *Molko v. Holy Spirit Ass'n for Unification*<sup>219</sup> found that the defendant Church's conduct, fraudulently inducing plaintiffs into a setting in which they could be brainwashed,<sup>220</sup> could be construed as sufficiently outrageous conduct so as to trigger liability for plaintiff's extreme emotional disturbances.<sup>221</sup> Thus, summary judgment for the Church on this issue was improper.<sup>222</sup>

The court defined extreme and outrageous conduct to be conduct " 'exceed[ing] all bounds [of decency] usually tolerated by a decent society, [and] . . . of a nature which is especially calculated to cause, and does cause, mental distress.' "<sup>223</sup> Conduct may be characterized as outrageous

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court assumed that the allegations in plaintiff's amended complaint were true. *Id.* at 176. Nonetheless, the Church as a matter of law could not be held liable for intentional infliction of emotional distress. *Id.* at 176-77.

213. The plaintiff alleged that defendant Unification Church subjected his deceased son to "highly programmed behavioral control techniques in a controlled environment thereby narrowing his attention and causing him to go into a trance. He was subjected to an intense fasting from foods and beverages, a program of chanting and related activities." *Id.* at 176. This intense program, which included isolation, intense physical exercise, confessions, lectures and highly structured work and study schedules, allegedly resulted in plaintiff's son's emotional breakdown, *id.* at 177, and subsequent suicide, *id.* at 175.

214. *Id.* at 177.

215. *Id.*

216. *Id.*

217. *Id.*

218. 644 P.2d 577 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

219. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

220. *See supra* notes 171-79 and accompanying text.

221. *Molko*, 46 Cal. 3d at 1122-23, 762 P.2d at 63, 252 Cal. Rptr. at 139.

222. *Id.* at 1123, 762 P.2d at 63, 252 Cal. Rptr. at 139.

223. *Id.* at 1122, 762 P.2d at 63, 252 Cal. Rptr. at 139 (quoting *Cole v. Fair Oaks Fire*

when the defendant “(1) abuses a relation or position which gives [the defendant] power to damage the plaintiff’s interest; (2) [the defendant] knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.”<sup>224</sup>

The court held that the Church’s continued deception could be construed to be conduct “breaching plaintiffs’ trust in the integrity of those who were promising to make their lives more meaningful.”<sup>225</sup> Thus, the Church’s actions could reasonably be seen as an abuse of a relation of power and therefore it was a jury question as to whether these actions were extreme and outrageous.<sup>226</sup>

#### iv. *George v. International Society for Krishna Consciousness*

Plaintiff Robin George sued the International Society for Krishna Consciousness of California (ISKCON) alleging that ISKCON’s coercive persuasion practices constituted extreme and outrageous conduct.<sup>227</sup> At trial, a jury awarded Robin \$250,000 compensatory damages and \$12,250,000 punitive damages for IIED.<sup>228</sup> Robin argued that this award was amply supported by the “evidence of [ISKCON’s] misconduct toward [her]” as a Krishna devotee.<sup>229</sup>

In reversing the judgment for IIED in favor of Robin, the California

Protection Dist., 43 Cal. 3d 148, 155 n.7, 729 P.2d 743, 747 n.7, 233 Cal. Rptr. 308, 312 n.7 (1987)).

224. *Id.* (quoting *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155 n.7, 729 P.2d 743, 747 n.7, 233 Cal. Rptr. 308, 312 n.7 (1987)).

225. *Id.* at 1122, 762 P.2d at 63, 252 Cal. Rptr. at 139.

226. *Id.* at 1122-23, 762 P.2d at 63, 252 Cal. Rptr. at 139.

227. *George v. International Soc’y for Krishna Consciousness*, 262 Cal. Rptr. 217, 230-31 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

228. *Id.* at 231. The punitive damages award for intentional infliction of emotional distress was a joint award to Robin and her mother Marcia. *Id.* Plaintiffs also were awarded damages for false imprisonment, wrongful death and libel. *Id.* The total damages awarded were over \$32 million. *Id.* The Georges accepted a remittitur, reducing the damages by approximately \$23 million. *Id.* The court of appeal, however, reversed the damages awarded to Robin for false imprisonment, intentional infliction of emotional distress and libel. *Id.* at 259.

229. *Id.* at 237 n.24. To wit, Robin George argued that as a Krishna devotee:

—Robin was made to work grueling hours with very little in the way of sleep or sustenance.

—All of her possessions were taken away; she was forced to plead for such common items as shoes, clothing and health care.

—She was required to do menial labor and forced to beg for money.

—Robin was deprived of any meaningful contact with the outside world. She was separated from the nurturing influence of family and friends; she was not even allowed to correspond.

*Id.*

Court of Appeal asserted that defendant's acts were not outrageous; in fact, they were not uncommon practices among cloistered religious groups.<sup>230</sup> Moreover, Robin's allegations that she was "forced" to do certain things were not supported by the record, because "there [was] no evidence [that she] was ever threatened with physical force if she failed to comply."<sup>231</sup>

There was no evidence suggesting that defendants engaged in conduct intended to inflict severe emotional distress on Robin, or even in reckless disregard of that possibility.<sup>232</sup> "Robin's religious duties and living conditions were identical to . . . other Krishna devotees who voluntarily chose [that] lifestyle."<sup>233</sup>

The court in *George* then distinguished *Molko v. Holy Spirit Ass'n for Unification*,<sup>234</sup> which held that the plaintiff *did* have a claim for IIED<sup>235</sup> because the outrageous conduct in that case was based on the Church's fraudulent practices.<sup>236</sup> In her petition for rehearing, Robin asserted for the first time that she was fraudulently induced to join the Krishna movement based on representations that she could not practice the religion at home. According to the court, however, this claim came too late to constitute the basis for an outrageous conduct claim.<sup>237</sup> Thus, the verdict for Robin *George* for intentional infliction of emotional distress was reversed.<sup>238</sup>

### c. *false imprisonment*

False imprisonment has been described as the "nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short."<sup>239</sup> When a person is "wrongfully deprived of his freedom to leave a particular place by the conduct of

230. *Id.* at 237.

231. *Id.* at 237 n.4. "Apart from the metaphysical question of brainwashing, there was every objective indication that Robin actively sought defendants' assistance and fully cooperated in their efforts to hide her from her parents." *Id.*

232. *Id.* at 237.

233. *Id.*

234. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

235. *Id.* at 1122-23, 762 P.2d at 63, 252 Cal. Rptr. at 139.

236. *George*, 262 Cal. Rptr. at 237.

237. *See id.* at 236.

238. *Id.* at 221.

239. *City of Newport Beach v. Sasse*, 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476, 480 (1970); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 11, at 47 (5th ed. 1984) ("False imprisonment protects the personal interest in freedom of movement.").

another," that person is falsely imprisoned.<sup>240</sup>

Coercive persuasion or brainwashing has been asserted to show that the plaintiff did not voluntarily consent to confinement.<sup>241</sup> Although false imprisonment may "be effected by . . . fraud, or deceit,"<sup>242</sup> many courts require that a plaintiff be held involuntarily by physical force<sup>243</sup> or by threat of force.<sup>244</sup> No courts have held that brainwashing alone is sufficient to vitiate a plaintiff's "consent to confinement." Nevertheless, plaintiffs have asserted false imprisonment in two religious cult cases.

i. *Molko v. Holy Spirit Ass'n for Unification*

In *Molko v. Holy Spirit Ass'n for Unification*<sup>245</sup> plaintiff Leal<sup>246</sup> contended that she was falsely imprisoned at the Unification Church's Boonville, Camp K, Boulder, Los Angeles and San Francisco centers.<sup>247</sup> According to Leal, her imprisonment did not stem from immediate physical restraint, immediate threat of physical force or immediate subjective fear of physical force.<sup>248</sup> Instead, her confinement was caused by fear of the future harm that would come to her family if she left the community.<sup>249</sup> Specifically, she was led to believe that 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

240. *Schanafelt v. Seaboard Fin. Co.*, 108 Cal. App. 2d 420, 422-23, 239 P.2d 42, 43 (1951).

241. See *infra* notes 245-52 and accompanying text for a discussion of the false imprisonment claim in *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989), and *infra* notes 253-73 and accompanying text for a discussion of the false imprisonment claim in *George v. International Soc'y for Krishna Consciousness*, 262 Cal. Rptr. 217 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

242. CAL. PENAL CODE § 237 (West 1988); see *People v. Rios*, 177 Cal. App. 3d 445, 450, 222 Cal. Rptr. 913, 916 (1986).

243. *St. Louis, I. Mtn. & So. R.R. v. Wilson*, 66 S.W. 661, 663 (Ark. 1902); *Reese v. Julia Sport Wear*, 21 N.Y.S.2d 99, 100-01 (App. Div. 1940); *Salisbury v. Poulson*, 172 P. 315, 317 (Utah 1918); see also KEETON et al., *supra* note 239, § 11, at 49 ("restraint may be made by means of physical barriers").

244. *George*, 262 Cal. Rptr. at 231; *People v. Haney*, 75 Cal. App. 3d 308, 313, 142 Cal. Rptr. 186, 189 (1977); *Parrott v. Bank of America*, 97 Cal. App. 2d 14, 23, 217 P.2d 89, 94-95 (1950); *Mahan v. Adam*, 124 A. 901, 904-05 (Md. 1924); see also KEETON et al., *supra* note 239, § 11, at 49 & nn.29-30 (stating that restraint may be "by threats of force which intimidate plaintiff into compliance . . .").

245. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

246. See *supra* notes 171-76 and accompanying text for a discussion of the facts of the *Molko* case.

247. These were the locations Tracy Leal visited while an indoctrinee and convert of the Unification Church. *Molko*, 46 Cal. 3d at 1123, 762 P.2d at 64, 252 Cal. Rptr. at 140.

248. *Id.*

249. *Id.*

Heaven.' »<sup>250</sup>

The court found that this threat was not sufficient to establish false imprisonment.<sup>251</sup> Indeed, as a threat of divine retribution, it was constitutionally protected religious speech.<sup>252</sup>

ii. *George v. International Society of Krishna Consciousness*

In *George v. International Society for Krishna Consciousness* (ISKCON),<sup>253</sup> plaintiff Robin George became a Krishna devotee when she was fifteen years old.<sup>254</sup> The president of the Laguna Beach Hare Krishna temple, defendant Roy Christopher Richard ("Rsabadeva") told Robin that she could not live at home and practice her religion and suggested that she run away from her parents.<sup>255</sup> "Leave home," Rsabadeva said, "and we will send you someplace where your parents will never find you."<sup>256</sup>

When Robin ran away two weeks later,<sup>257</sup> Rsabadeva made good on his promise. For almost a year Robin was sent away to different temples in California, Canada, New York and Louisiana.<sup>258</sup> The Krishnas also engaged in a series of ruses to hide Robin from her parents, including disguising her,<sup>259</sup> denying they knew where she was<sup>260</sup> and sending false letters from Robin to her parents.<sup>261</sup> Finally, after Robin's parents exerted legal pressure on the Krishnas and threatened criminal prosecution,<sup>262</sup> Robin returned to her parents.<sup>263</sup>

In her claim for false imprisonment, Robin asserted that although she was never physically restrained by the defendants,<sup>264</sup> she was brain-

250. *Id.*

251. *Id.*

252. *Id.* at 1123-24, 762 P.2d at 64, 252 Cal. Rptr. at 140; *see also* *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (holding religious sermon by Jehovah's Witness in park to be protected).

253. 262 Cal. Rptr. 217 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

254. *Id.* at 223.

255. *Id.* at 222.

256. *Id.* at 222-23.

257. *Id.* at 223.

258. *Id.* at 223-29.

259. *Id.* at 225-26, 228.

260. *Id.* at 224, 226.

261. In these letters, Robin asserted she had left the Krishnas and "was traveling with a group of musicians in Mexico." *Id.* at 227. The letters were mailed from Mexico when Robin was actually in Canada. *Id.* at 228.

262. *Id.* at 228-29.

263. *Id.* at 229.

264. *Id.* at 231.



washed into joining the Krishna movement.<sup>265</sup> Robin's will had not been overcome by violent means, but by the coercive practices of the Krishna movement.<sup>266</sup> Thus, she was held without her consent.<sup>267</sup>

The California Court of Appeal did not accept this claim<sup>268</sup> and overturned the lower court's award of damages for false imprisonment.<sup>269</sup> The court discussed *Molko v. Holy Spirit Ass'n for Unification*<sup>270</sup> and concluded that as *Molko* had found that imposing tort liability for threats of divine retribution was unconstitutional, so too "[t]ort liability based on dietary restrictions, methods of worship and communal living arrangements and schedules is just as surely inimical to the free exercise of religious liberty as that based on threats of divine retribution."<sup>271</sup>

Furthermore, as Robin failed to suggest that the schedules, practices and duties required of her differed from those of any other disciple, she could not premise her "brainwashing theory of false imprisonment . . . on religious practices the Georges [found] objectionable."<sup>272</sup> Such tort liability would violate the First Amendment guarantee of the free exercise of religion.<sup>273</sup>

#### IV. ANALYSIS

##### A. L-TCP in Undue Influence

The doctrine of undue influence arises when a party seeks to revoke a gift because the donor's will was overcome by the recipient who ex-

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265. *Id.* at 232. Robin introduced the expert testimony of Drs. Margaret Singer and Sydney Smith to support this assertion. *Id.* Dr. Singer testified that Robin's "will had been overborne" such that her decision to run away from home was not a product of her own free will. *Id.* Both Dr. Singer and Dr. Smith argued that several features of the Krishna faith contributed to rendering Robin incapable of exercising freedom of choice: the movement's low-carbohydrate vegetarian diet, reduced amounts of sleep and chanting as a means of religious ritual. *Id.*

266. *Id.* at 235.

267. *Id.*

268. *Id.* at 236.

269. *Id.* at 259.

270. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

271. *George*, 262 Cal. Rptr. at 236. The court supported this by citing dicta in which the *Molko* court, in concluding that religious fraud is actionable, stated that "[a]lthough fasting, poverty, silence or cloistered living may constitute intensive religious practice, we have already determined that fraud, even though purported to be religiously motivated, is actionable conduct." *Id.* (citing *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1122, 762 P.2d 46, 63, 252 Cal. Rptr. 122, 139 (1988), *cert. denied*, 490 U.S. 1084 (1989)).

272. *Id.*

273. *Id.*

ploited a confidential relationship.<sup>274</sup> Undue influence in the context of a gift to a cleric, spiritual adviser or church contains the five elements of L-TCP discussed above.<sup>275</sup>

### 1. Common elements of L-TCP

The first element of L-TCP is a long-term pattern of influence, which is viewed in two ways: (1) as contrasted with the short-term coercion of physical duress,<sup>276</sup> and (2) the length of time the minister or spiritual adviser spends with the donor.<sup>277</sup> Short-term physical duress is an immediate pressure applied to an actor to perform an act.<sup>278</sup> Alternatively, long-term persuasion is characterized by constant pressure applied over a period of time.<sup>279</sup>

The second common element is that the long-term pattern of influence be exerted by a stronger personality or presence that purports to care about the interests of the weaker party.<sup>280</sup> In undue influence in the context of inter vivos gifts to religious or spiritual advisers, the stronger personality may arise in several contexts. First, in the eyes of adherents to a faith, a minister is likely to be construed as a spiritual authority of that faith, either because he or she is guided by a higher authority or because he or she is more educated in the tenets or belief systems of that faith. Also, a spiritual or religious adviser "ministers"<sup>281</sup> to believers. Therefore, a minister is construed to have a confidential relationship with

274. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (Bankr. D. Mass. 1988), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Held v. Florida Conference Ass'n of Seventh Day Adventists*, 193 So. 828, 831-33 (Fla. 1940); *Nelson v. Dodge*, 68 A.2d 51, 57 (R.I. 1949); *Morley v. Loughnan*, 1 Ch. 736, 752 (Eng. 1893); *Allcard v. Skinner*, 36 Ch. D. 145, 157-58 (Eng. 1887); *Nottidge v. Prince*, 2 Giff. 246, 267-70, 66 Eng. Rep. 103, 112-13 (1860); *Norton v. Rely*, 2 Eden 286, 288-89, 28 Eng. Rep. 908, 908-09 (1764).

275. See *supra* note 17.

276. See *supra* notes 15-17 and accompanying text.

277. See *Patrinelis*, *supra* note 65, at 657-59 (requirement of fiduciary relationship).

278. For example, if Sally holds a gun to Joe's head and asks him to sign over the deed to his house to her, Joe would be responding to the immediate pressure to do the act induced by Sally's physical threat.

279. Using the example from note 278, Sally might induce Joe to sign over the deed to his house to her, by telling him that she was the only one who cared for him in his last illness, that her ministry could do many wonderful things with Joe's house, and that Joe's daughter would be damned to Hell forever if Joe did not give his house to Sally. Joe would not be responding to an immediate pressure of violence if he signed over his house. Instead, Sally's constant, long-term influence would cause him to do so.

280. The "stronger" personality is stronger *relative* to the influenced personality.

281. To "minister" is defined as "to attend to the wants and comforts of someone." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1439 (1976).

the donor and thus care about the donor.<sup>282</sup>

Third, the influenced personality is emotionally or mentally vulnerable.<sup>283</sup> In undue influence the influenced personality or donor may be vulnerable due to inherent traits, such as illness,<sup>284</sup> age<sup>285</sup> or mental deficiency.<sup>286</sup>

Fourth, the stronger personality exploits its position of trust or power to further its own interests.<sup>287</sup> In undue influence, when a spiritual or religious adviser, who purportedly puts the spiritual or emotional interests of the donor ahead of his or her own interest, receives a gift from the donor, there is a presumption that this exploitation has occurred.<sup>288</sup>

Finally, this exploitation harms the more vulnerable personality.<sup>289</sup> The harm arises in undue influence cases because it is presumed that without the minister's influence, the donor would have done something different with the property (either keep the property or give it to someone else).<sup>290</sup> Thus, the donor loses not only a property interest when undue influence is exerted, but also the attached right of alienation, or the right to do with the property as he or she sees fit.<sup>291</sup> In effect, the donor's will is overcome by the undue influence. It is this unfair exploitation which offends basic notions of freedom and fairness.<sup>292</sup>

282. See *Connor v. Stanley*, 72 Cal. 556, 558-59, 14 P. 306, 307 (1887); see also *Cox v. Schnerr*, 172 Cal. 371, 378, 156 P. 509, 513 (1916) (recognizing that "attorneys, physicians, trustees, clergymen, kinsmen" have "formal relation of trust to those with whom they deal"); *Ross v. Conway*, 92 Cal. 632, 635-37, 28 P. 785, 786 (1892) (holding that relationship between donee and priest was confidential relationship in which priest should not take advantage of parishioner).

283. See *supra* note 17 and accompanying text.

284. See *Gilmore v. Lee*, 86 N.E. 568, 570-71 (Ill. 1908) (gift *causa mortis*); *McPherson v. Byrne*, 118 N.W. 985, 985 (Mich. 1909) (same).

285. See *Dowie v. Driscoll*, 68 N.E. 56, 56 (Ill. 1903) (action to set aside transfer of trust deed and promissory note by eighty-seven-year-old donee); *Good v. Zook*, 88 N.W. 376, 377 (Iowa 1901) (action to set aside transfer of property to church by ninety-year-old widower).

286. See *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 752-53 (Bankr. D. Mass. 1988) (donor sought return of monetary gifts totalling six million dollars), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.) (reversing rescission of \$80,000 and \$1,000,000 in gifts but affirming rescission of \$5,000,000 gift), *cert. denied*, 493 U.S. 816 (1989); *Morley v. Loughnan*, 1 Ch. 736, 740-41 (Eng. 1893) (epileptic donor subject to momentary attacks of loss of consciousness and nearly total loss of memory).

287. See *supra* note 17 and accompanying text.

288. See *supra* notes 64-83 and accompanying text.

289. See *supra* note 17 and accompanying text.

290. See *Patrinelis*, *supra* note 65, at 655-56.

291. *Id.*

292. See *supra* notes 64-95 and accompanying text.

## 2. Interests protected by the doctrine of undue influence

Whenever a legal theory determines that certain rights or interests are to prevail over others, that theory is either balancing or deciding the importance of the rights of the parties in the suit,<sup>293</sup> affected parties outside the suit<sup>294</sup> or societal interests.<sup>295</sup>

In undue influence the parties in the suit are typically the donor or family of the unduly influenced donor,<sup>296</sup> the more vulnerable personality, and the donee,<sup>297</sup> the stronger personality. The more vulnerable personality is favored at the expense of the stronger personality because under the presumption model,<sup>298</sup> the presumption of undue influence is given to the more vulnerable personality.<sup>299</sup> The susceptibility model also focuses on the more vulnerable personality.<sup>300</sup>

In undue influence the more vulnerable personality's interests are identical to the harms caused by undue influence: the donor's interest in property and the donor's autonomy interest in the ability to make choices of alienation of that property without being misled or influenced by a stronger personality.<sup>301</sup> In fact, the doctrine of undue influence attempts to balance the power of a stronger personality over a weaker personality by increasing the presumption when the donor is particularly susceptible.<sup>302</sup>

The families of donors are often affected by the unduly influenced gift because in many cases, if not for the unduly influenced transfer, they would receive the natural bounty of the donor's affection.<sup>303</sup> Thus, family members often bring suit against the donee to have the gift revoked for undue influence.<sup>304</sup> The doctrine of undue influence protects the family's interest by strengthening the presumption of undue influence when-

293. LIEF H. CARTER, *REASON IN LAW* 13-14 (1988).

294. *Id.*

295. *Id.*

296. *See, e.g.,* *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 752-53 (Bankr. D. Mass. 1988) (donor sought return of monetary gifts), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Gilmore v. Lee*, 86 N.E. 568, 569 (Ill. 1908) (daughter successful in revoking gift to priest by her dying mother); *McClellan v. Grant*, 82 N.Y.S. 208, 209 (App. Div. 1903) (son brought suit to revoke deed from mother to pastor).

297. *See, e.g.,* *The Bible Speaks*, 81 B.R. at 752-53 (donor sought return of monetary gift made to pastor).

298. *See supra* notes 64-83 and accompanying text.

299. *See supra* notes 64-83 and accompanying text.

300. *See supra* notes 92-95 and accompanying text.

301. Patrinelis, *supra* note 65, at 655-56.

302. The donor is deemed particularly vulnerable when he or she is aged, mentally weak, in last sickness or a religious "fanatic." *See supra* notes 71-78 and accompanying text.

303. *See* Patrinelis, *supra* note 65, at 677-78.

304. *See, e.g.,* *Gilmore v. Lee*, 86 N.E. 568, 569 (Ill. 1908) (daughter successful in revoking

ever the donor, in an inter vivos gift to a religious adviser, fails to provide for his or her family.<sup>305</sup>

Finally, the doctrine of undue influence protects the societal interests in family stability,<sup>306</sup> trust in our clergy<sup>307</sup> and societal economic interests.<sup>308</sup> Thus, the proof requirements of undue influence adequately balance and protect the personal interests of the parties, the affected non-parties and societal interests.

### B. *L-TCP in Involuntary Servitude*

A powerful group or individual can subject a less powerful individual, such as a child<sup>309</sup> or a retarded individual with the mental capacity of a child,<sup>310</sup> to involuntary servitude. To successfully prosecute an involuntary servitude offense under the majority's decision in *United States v. Kozminski*,<sup>311</sup> the government must show that the enslaved person was held in the state of servitude by virtue of a physical threat.<sup>312</sup> Psychological coercion is not sufficient.<sup>313</sup> This physical threat requirement is nonsensical because involuntary servitude, like undue influence, is often the result of L-TCP.<sup>314</sup>

Nor does Justice Brennan's concurrence in *Kozminski* adequately address the problem.<sup>315</sup> His proposal—that the court should focus on the "slavelike conditions" of the victim—looks to the result rather than the enslaver's actions.<sup>316</sup> These conditions are not clearly defined be-

gift to priest by her dying mother); *McClellan v. Grant*, 82 N.Y.S. 208, 209 (App. Div. 1903) (son brought suit to revoke deed from mother to pastor).

305. See *Ford v. Hennessy*, 709 Mo. 580, 592 (1879) (presumption of undue influence increased where priest received money from dying donor when priest had heard that donor had wife).

306. By protecting family property from undue influence of outsiders, the family unit is more stable. See *Patrinelis*, *supra* note 65, at 677.

307. By discouraging clergy from accepting gifts from their parishioners, the undue influence model thereby secures the image of the clergy as being spiritual advisers above all. See *id.* at 657-58.

308. By attempting to keep the property "in the family," the social costs of supporting possibly destitute relatives is reduced. See *id.* at 677-78.

309. See, e.g., *United States v. King*, 840 F.2d 1276 (6th Cir.) (en banc) (young boy), *cert. denied*, 488 U.S. 894 (1988).

310. See, e.g., *United States v. Kozminski*, 487 U.S. 931 (1988) (mentally retarded farm workers found working for no salary on isolated farm).

311. *Id.*

312. *Id.* at 952.

313. See *id.*

314. See *supra* notes 132-35 and accompanying text where five elements of L-TCP are shown in involuntary servitude.

315. *Kozminski*, 487 U.S. at 956 (Brennan, J., concurring).

316. *Id.* at 961-65 (Brennan, J., concurring).

cause they work backwards from the result to track the intentional conduct of the enslaver. "Slavelike conditions" is an ambiguous term and many different situations could meet this definition. Thus, one court could conceivably find that a defendant employed a person as a slave, because the victim worked long hours and was underpaid; yet another court would find involuntary servitude only when the victim worked long hours, received no compensation and was housed in substandard housing.

Justice Stevens's case-by-case,<sup>317</sup> "totality of circumstances"<sup>318</sup> approach is not helpful either. Because Justice Stevens does not articulate which circumstances should be analyzed in which cases, this approach effectively offers no guidelines for courts trying to define involuntary servitude.

### 1. Common elements of L-TCP in involuntary servitude

The first element common to both L-TCP and involuntary servitude is a long-term pattern of influence which can be viewed in two ways. Long-term influence must be contrasted initially with the short-term coercion of physical duress, as in undue influence.<sup>319</sup> Under short-term physical duress, an actor is given the immediate choice of performing a specific act or facing a violent consequence.<sup>320</sup> Furthermore, because "servitude" is a "*condition* of having to work for others and having no freedom,"<sup>321</sup> it is not limited to performing one specific act. Rather, as documented by the plight of the victims in *United States v. Kozminski*,<sup>322</sup> *United States v. King*<sup>323</sup> and the padrone victims,<sup>324</sup> involuntary servitude is a result of a long-term system of persuasion that leaves victims powerless to do anything but obey their masters' commands.<sup>325</sup>

The second common element, "a stronger personality or presence purportedly acting in the best interests of a less powerful personality,"<sup>326</sup> can be found in many involuntary servitude cases.<sup>327</sup>

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317. *Id.* at 965-66 (Stevens, J., concurring).

318. *Id.* at 970 (Stevens, J., concurring).

319. *See supra* notes 15-17 and accompanying text.

320. *See supra* note 16 and accompanying text.

321. OXFORD AMERICAN DICTIONARY 831 (1st ed. 1982) (emphasis added).

322. 487 U.S. 931 (1988).

323. 840 F.2d 1276 (6th Cir.) (en banc), *cert. denied*, 488 U.S. 894 (1988).

324. *See Kozminski*, 487 U.S. at 946-49 (discussing plight of child victims under padrone system).

325. *See, e.g., id.* at 934-45 (mentally retarded victims rendered powerless by being isolated, denied adequate food, shelter and medical care).

326. *See supra* note 17 and accompanying text.

327. For example, in *Kozminski* the defendants found one of the victims living on the

The third common element that involuntary servitude shares with other forms of L-TCP is that the victim be emotionally or mentally more vulnerable.<sup>328</sup> All three involuntary servitude cases involved either children<sup>329</sup> or retarded adults.<sup>330</sup>

The fourth common element of exploitation is shown by the crime itself: the victims are forced into a state of slavery and denied freedom.<sup>331</sup>

The fifth common element of "causing harm to the more vulnerable party" stems not only from the loss of freedom, but from the additional abuse the victims suffered. In *Kozminski* the victims were denied adequate health care and nutrition and lived in squalor.<sup>332</sup> One victim in *King* was a child beaten to death for a violation of an order to work.<sup>333</sup> Similar conditions existed under the padrone system.<sup>334</sup>

## 2. Interests asserted under the doctrine of involuntary servitude

The main interest protected by the criminal laws against involuntary servitude is the victim's liberty interest—to be free from slavery.<sup>335</sup> The

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streets of Ann Arbor and offered him employment at their farm so that the victim could avoid institutionalization. *Kozminski*, 487 U.S. at 935. In *King* the defendants who enslaved the children were the adult spiritual leaders who ran the religious camp. *King*, 840 F.2d at 1278-79. In fact, the defendants strengthened their authority by beating the children's parents in front of them so that the children would see that their parents' authority or strength was no match for the religious leaders. *Id.* at 1280. Under the padrone system, the defendants were the adults who had offered the boys' parents money so that they could bring the children to America. See *Kozminski*, 487 U.S. at 946-49 (discussing plight of child victims under padrone system).

328. See *supra* note 17 and accompanying text.

329. E.g., *King*, 840 F.2d at 1278. See *Kozminski*, 487 U.S. at 946-49 for a discussion of the padrone system.

330. See, e.g., *Kozminski*, 487 U.S. at 934.

331. See *id.* at 935; *King*, 840 F.2d at 1280-81.

332. *Kozminski*, 487 U.S. at 934-35.

333. See *King*, 840 F.2d at 1280.

334. See *Kozminski*, 487 U.S. at 945-48, 957-58 (discussing padrone system and reason for adapting statute).

335. U.S. CONST. amend. XIII. The long history of the involuntary servitude statute, 18 U.S.C. § 1584 (1988), illustrates our societal condemnation of this crime. Section 1584 dates from 1948, 62 Stat. 773, and represents a consolidation of two older statutes. See 18 U.S.C.A. § 1585 reviser's notes (West 1984). The first statute, the Act of April 20, 1918, ch. 91, § 6, 3 Stat. 452, later Rev. Stat. § 5377, § 248 of the Criminal Code of 1909, 35 Stat. 1139, and 18 U.S.C. § 423 (1940), penalized any "person who brings within the jurisdiction of the United States . . . any person of color . . . as a slave, or to be held to service or labor." *United States v. Shackney*, 333 F.2d 475, 481 (2d Cir. 1964). The second statute, the Act of June 23, 1874, 18 Stat. 251, was "an act to protect persons of foreign birth against forcible constraint or involuntary servitude." *Shackney*, 333 F.2d at 482. This statute was known as the Padrone statute and was aimed at abusive practices against Italian children brought into the United States to perform as street musicians. *Id.*

defendant's interests are the constitutional protections accorded any person accused of a crime.<sup>336</sup>

Unlike undue influence cases, in which the donor's family may bring suit to recover a rightful inheritance,<sup>337</sup> involuntary servitude cases rarely involve anyone but the government, the criminal defendant and the victim.<sup>338</sup> Thus, there are rarely any affected non-parties in an involuntary servitude case whose interests need to be protected. Our societal interest in making involuntary servitude illegal is a combination of the victim's interest in freedom from slavery and society's moral condemnation of this conduct.<sup>339</sup>

Interpreting the laws to require physical duress as an element of involuntary servitude favors the defendant. By requiring the prosecutor to show that the defendant threatened the victim with violence or legal action to prove a charge of involuntary servitude, a victim who could not prove physical threats were used may nonetheless be enslaved by other methods and yet denied protection through the legal system.<sup>340</sup> Adhering to this higher burden of proof may pose a difficult, if not insurmountable, barrier to proving involuntary servitude.<sup>341</sup>

For example, using the facts of *United States v. Kozminski*,<sup>342</sup> assume that in lieu of physical threats, the retarded, isolated victims were denied food if they did not work for defendants. Denying food is tradi-

336. For example, the defendant is protected by: U.S. CONST. amend. IV (right to be free from unreasonable search and seizure); *id.* amend. V (right to due process); *id.* amend. VI (right to counsel, confrontation, jury and speedy trial); and *id.* amend. VIII (right to be free from excessive bail as well as cruel and unusual punishment).

337. See *supra* notes 303-05 and accompanying text.

338. See, e.g., *Kozminski*, 487 U.S. at 934 (government brought criminal charges against farm owners where government found two enslaved farm workers on defendants' farm).

339. American society's long-term condemnation of slavery is reflected in the Thirteenth Amendment, which provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII. The Northwest Ordinance of 1787 also contained language barring slavery and involuntary servitude: "There shall be neither slavery nor involuntary servitude in the said territory otherwise than in punishment of crimes . . ." Northwest Ordinance, Art. VI, 33 Journals of Continental Congress 343 (1787).

340. See, for example, *supra* note 111, which describes the original jury instruction in *Kozminski* that would have allowed a psychological model of duress to be sufficient to prove involuntary servitude. *Kozminski*, 487 U.S. at 937-38.

341. Unless there are witnesses, the issue of whether a physical or legal threat was used may turn on the testimony of the victim, who will assert that a physical threat was made, versus the defendant's testimony, who will assert that no violence or legal action was threatened. Even if the defendant does not testify, the standard to prove the criminal charge of involuntary servitude is "proof beyond a reasonable doubt."

342. 487 U.S. 931 (1988); *supra* notes 100-10 and accompanying text.



tionally not construed as a physical threat;<sup>343</sup> nonetheless, without food, one cannot survive. Yet, under the *Kozminski* test, although the victims would be forced to work against their will, their enslavers could not be criminally prosecuted.<sup>344</sup>

Second, our interest in propounding involuntary servitude laws is based on the societal moral fabric of protecting vulnerable people.<sup>345</sup> The physical duress requirement set forth in *Kozminski*<sup>346</sup> does not adequately protect these people, especially when the victim, due to age, mental condition or isolation, is weaker than the enslaver. In fact, a physical duress model focuses more on what would make "the reasonable person" agree to work without pay.<sup>347</sup> The victims in *Kozminski*, *King*

343. Physical threats, at least under the traditional physical duress defense, are normally threats of imminent death or great bodily harm. Although denying a victim food if he or she does not work would eventually cause starvation, which is a form of bodily harm, there is nonetheless no imminence in a threat to deprive a victim of food.

344. *Kozminski*, 487 U.S. at 952.

345. There are many general laws that protect vulnerable people. *See, e.g.*, CAL. CIV. CODE §§ 33-42 (West 1982 & Supp. 1991) (addressing legal status and protection of minors and incompetents); CAL. LAB. CODE §§ 1301-12 (West 1982 & Supp. 1991) (prohibiting employment of minors).

As to involuntary servitude, one of the earliest statutes enacted by Congress was the Act of June 23, 1874, known as the Padrone Statute. Act of June 23, 1874, ch. 464, § 1, 18 Stat. 251. The Padrone statute provided in pertinent part "[t]hat whoever shall knowingly and wilfully bring into the United States . . . any person . . . with intent to hold such person . . . in confinement or to any involuntary service . . . shall be deemed guilty of a felony." This Act was specifically aimed at curtailing the system of importing and selling the labor of Italian children in the United States. *United States v. Shackney*, 333 F.2d 475, 485 (2d Cir. 1964).

346. 487 U.S. at 952.

347. The physical duress model may be compared to the criminal defense of duress. Under the defense of duress:

A person's unlawful threat [is one] (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress.

LAFAYE & SCOTT, *supra* note 16, § 5.3, at 432-44 & n.2. The rationale behind the defense of duress is that the defendant's conduct, which violates the literal language of the criminal law, is justified because he or she has thereby avoided a harm of greater magnitude. *Id.* at 433 & n.6.

This defense has several limitations, which are implicitly based on the factors that would overcome a reasonable person's will and make him or her perform the crime rather than incur the threatened harm: (1) duress can never justify the intentional killing of an innocent third person; (2) threatened future harm will not suffice; (3) threatened immediate nonserious harm will not suffice; (4) threats creating an unreasonable fear of harm will not suffice; and (5) the defendant may lose his or her defense of duress if he or she does not take advantage of a reasonable opportunity to escape, if escape is possible without exposing himself or herself to death or serious bodily harm. *Id.* at 434-47.

Both common law and the Model Penal Code endorse the "reasonableness" standard. The threatening conduct must be "sufficient to create in the mind of a reasonable person the

and under the padrone system should not be held to the same standard as "reasonable people" in deciding whether to submit to the will of the enslaver because as mentally retarded men<sup>348</sup> and as children,<sup>349</sup> they are different from, and more vulnerable than, "reasonable people."

Finally, requiring a threat of violence to overcome one's will is more consistent with short-term physical duress<sup>350</sup> because even if one is enslaved by threat of physical force, the question is when the threat begins and ends. In the *Kozminski* case, for example, would it be sufficient if the Kozminskis had told the victims "should you try to run away, we will beat you" and then never showed any other sign of violence? Would it make a difference if the victims were physically bigger than their captors? In short, a physical threat requirement is just a start into the inquiry of which of the defendant's acts was sufficient to enslave the victim.

### C. *L-TCP in Brainwashing by Religious Cults*

The indoctrination process by which religious cults obtain conversion, including coercive persuasion, is not tortious per se.<sup>351</sup> Subject to constitutional First Amendment considerations,<sup>352</sup> the indoctrination or brainwashing process is an element of different types of torts brought by ex-members against the cult. Brainwashing has been an element of fraud,<sup>353</sup> intentional infliction of emotional distress<sup>354</sup> and false imprisonment claims.<sup>355</sup> These torts have differing standards of proof.<sup>356</sup>

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fear of death or serious bodily harm." *People v. Luther*, 232 N.W.2d 184, 187 (Mich. 1975) (emphasis added). The Model Penal Code also uses a measure of reasonableness to determine whether a duress defense is justified; under this proposed statute, one who is unlawfully threatened by another is justified in committing what would otherwise be a crime if the threat which compels him or her to commit it is such that a person of reasonable firmness in his or her situation would have been unable to resist it. MODEL PENAL CODE § 2.09(1).

The Supreme Court in *United States v. Kozminski*, 487 U.S. 931 (1988), rejected the government's assertion that involuntary servitude included compulsion *by any means* that could overcome the victim's will or deprive the victim of the power of choice because: (1) such a standard could criminalize a wide range of activity; and (2) the prohibited behavior would depend entirely on the *subjective* factor of the victim's state of mind. *Id.* at 949. Thus, it is conceivable that the Supreme Court adopted the physical duress standard because the Court believed that physical duress is an objective standard and that such duress would *reasonably* be likely to overcome any individual's will.

348. *Kozminski*, 487 U.S. at 934.

349. *United States v. King*, 840 F.2d 1276, 1276 (6th Cir.) (en banc), *cert. denied*, 488 U.S. 894 (1988).

350. *See supra* notes 16, 347 and accompanying text.

351. *See supra* notes 154-68 and accompanying text.

352. *See supra* notes 141-53 and accompanying text.

353. *See supra* notes 171-79 and accompanying text.

354. *See supra* notes 188-238 and accompanying text.

355. *See supra* notes 239-73 and accompanying text.

Brainwashing by religious cults nonetheless shares the five common elements of coercive persuasion found in undue influence and involuntary servitude.

### 1. Common elements of L-TCP and brainwashing by religious cults

As in undue influence and involuntary servitude, brainwashing is characterized by a long-term pattern of influence.<sup>357</sup> The influence of a religious group over a convert is usually long-term as contrasted with short-term immediate physical duress.<sup>358</sup> For example, plaintiffs were under defendants' religious cult influence for times varying from several days in *Molko v. Holy Spirit Ass'n for Unification*<sup>359</sup> to more than a year in *George v. International Society for Krishna Consciousness*.<sup>360</sup>

In these cases, the religious group is the stronger personality purporting to care about the best interests of the influenced personality. In *Molko* both plaintiffs were initially told that the Unification Church was an international society of concerned citizens.<sup>361</sup> Later Leal was told that if she did not continue on with the Unification Church 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."<sup>362</sup> The plaintiff in *Christofferson v. Church of Scientology*<sup>363</sup> sought to improve herself by enrolling in the Scientology communications courses<sup>364</sup> and was promised a method for relieving her communication problems.<sup>365</sup> Similarly, in *George*, Robin George was encouraged to run away and join the Krishnas to avoid the "karmic doom" that would befall her if she continued to live with her sinful, meat-eating par-

356. See *supra* notes 171-273 and accompanying text.

357. See *supra* notes 276-92, 319-34 and accompanying text for a discussion of the L-TCP elements for undue influence and involuntary servitude.

358. See *supra* notes 15-17, 347 and accompanying text.

359. 46 Cal. 3d 1092, 1104, 762 P.2d 46, 51, 252 Cal. Rptr. 122, 127 (1988) (plaintiff Molko subjected to influence of Unification Church for 12 days prior to being told Church's identity), *cert. denied*, 490 U.S. 1084 (1989); *id.* at 1106, 762 P.2d at 52, 252 Cal. Rptr. at 128 (plaintiff Leal subjected to 22 days of exercise-lecture-discussion regimen before group informed her it was affiliated with Unification Church).

360. 262 Cal. Rptr. 217 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991). Robin George became involved with the Hare Krishnas in July 1974, ran away from home to live with the Krishnas on November 15, 1974 and returned home to her family on November 4, 1975. *Id.* at 222-29.

361. *Molko*, 46 Cal. 3d at 1102-05, 762 P.2d at 50-52, 252 Cal. Rptr. at 126-28.

362. *Id.* at 1123, 762 P.2d at 64, 252 Cal. Rptr. at 140.

363. 644 P.2d 577 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

364. See *id.* at 585.

365. *Id.* at 587.

ents (who, according to the cult, were not her actual parents).<sup>366</sup> In these cases, it is clear that the religious groups were stronger parties purporting to watch out for the best interests of their followers.

In all these cases, the plaintiffs were emotionally or mentally vulnerable due to their age,<sup>367</sup> the period in their lives<sup>368</sup> or their preexisting mental condition.<sup>369</sup> Furthermore, the indoctrination procedures rendered the plaintiffs more vulnerable. By subjecting the *Molko* plaintiffs to the intense exercise-lecture-discussion regimen, with little time for rest or self-reflection, *Molko* and *Leal* were weakened by the program.<sup>370</sup> Similarly, as a fifteen-year-old girl working long hours and isolated from her family and friends, the plaintiff in *George*<sup>371</sup> was highly susceptible to the religion's influence.<sup>372</sup>

The more powerful religious groups exploited their followers. Robin *George* was sent out into the streets to beg for the Hare Krishnas.<sup>373</sup> *Leal* sold flowers by the side of the road for the Unification Church.<sup>374</sup> *Christofferson* was taught how to beg and borrow money from relatives so that she could take courses that she could not afford.<sup>375</sup>

Finally, by losing contact with their friends and families,<sup>376</sup> working long hours with little sleep or sustenance,<sup>377</sup> and in many cases losing their ability to think independently of their pre-programmed religious cultish responses,<sup>378</sup> the more vulnerable plaintiffs were harmed by their

366. *George v. International Soc'y for Krishna Consciousness*, 262 Cal. Rptr. 217, 222 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

367. *See id.* at 221 (victim was only 14 years old when she joined Krishna cult).

368. *See Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1102, 1105, 762 P.2d 46, 49, 52, 252 Cal. Rptr. 122, 125, 128 (1988), *cert. denied*, 490 U.S. 1084 (1989); *Christofferson*, 644 P.2d at 580.

369. *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 177 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

370. *Molko*, 46 Cal. 3d at 1102-06, 762 P.2d at 50-52, 252 Cal. Rptr. at 126-28.

371. *George*, 262 Cal. Rptr. at 222-29.

372. RONALD M. ENROTH & J. GORDON MELTON, WHY CULTS SUCCEED WHERE THE CHURCH FAILS 60 (1985) (discussing religious cults' emphasis in recruiting young people near "university campuses and in the young adult-singles-high-school-dropout communities . . . out there where people are hurting.") .

373. *George*, 262 Cal. Rptr. at 224.

374. *Molko*, 46 Cal. 3d at 1106, 762 P.2d at 52, 252 Cal. Rptr. at 128.

375. *Christofferson v. Church of Scientology*, 644 P.2d 577, 587 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

376. The *Molko* plaintiffs, for example, were brought to the Unification Church retreat Boonville, which is several hours north of San Francisco. *Molko*, 46 Cal. 3d at 1103, 1106, 762 P.2d at 50, 52, 252 Cal. Rptr. at 126, 128.

377. *See supra* note 229 in which Robin *George* in her suit for intentional infliction of emotional distress described the conditions under which she was held by the Krishnas.

378. *See Delgado, Religious Totalism, supra* note 9, at 21-22 & n.130.

exploitation.

## 2. Proof requirements for brainwashing by religious cults

Brainwashing is not a tort, but is instead used as an element of many torts asserted against religious organizations.<sup>379</sup> The court in *Molko v. Holy Spirit Ass'n for Unification*<sup>380</sup> accepted a psychological model of brainwashing, as proof of justifiable reliance, to allow a fraud claim to survive a summary judgment motion.<sup>381</sup>

In IIED cases, coercive persuasion was held to constitute extreme and outrageous conduct, although the definitions of outrageous conduct varied. In *Christofferson v. Church of Scientology*<sup>382</sup> the plaintiff asserted that Scientology's indoctrination program met the outrageous conduct test of "an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."<sup>383</sup> The court also examined plaintiff's susceptibility to distress.<sup>384</sup>

The court in *Meroni v. Holy Spirit Ass'n for Unification*<sup>385</sup> defined extreme and outrageous conduct as that "considered by our society to be beyond all possible bounds of decency."<sup>386</sup> In *Meroni* the plaintiff's susceptibility and emotional disturbance did not change the court's finding that the Church's conduct was *not* extreme and outrageous.<sup>387</sup>

The court in *Molko* held that the Unification Church's continued deception and fraudulent induction of plaintiffs into a setting in which they could be brainwashed could be construed as IIED.<sup>388</sup> Such deception would be an abuse of a relation that gave the Church power to damage plaintiffs' interests.<sup>389</sup>

379. See *supra* notes 171-273 and accompanying text.

380. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

381. See *supra* notes 171-87 and accompanying text.

382. 644 P.2d 577 (Or. Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

383. *Id.* at 583 (quoting *Turman v. Central Billing Bureau*, 568 P.2d 1382, 1384 (Or. 1977)).

384. See *supra* notes 190-209 and accompanying text for a discussion of *Christofferson*, in which the court held that although plaintiff was only 17 years old and several hundred miles away from home for the first time, failure to plead "susceptibility to emotional distress" barred recovery.

385. 506 N.Y.S.2d 174 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

386. *Id.* at 177.

387. *Id.* at 177-78.

388. *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1122-23, 762 P.2d 46, 63, 252 Cal. Rptr. 122, 139 (1988), *cert. denied*, 490 U.S. 1084 (1989).

389. *Id.*

Finally, in *George v. International Society for Krishna Consciousness*,<sup>390</sup> the court held that the Church's indoctrination practices did not constitute outrageous conduct.<sup>391</sup> In fact, the court found the indoctrination methods not "uncommon [practices] among cloistered religious groups."<sup>392</sup> Furthermore, the court stated that Robin George could not have been forced to participate in these indoctrination practices, because she was not threatened with physical force if she failed to comply.<sup>393</sup> Nor was she fraudulently induced to participate in these practices.<sup>394</sup> The court also held that the Krishnas' conduct could not have been extreme or outrageous<sup>395</sup> because the Krishnas lacked the requisite state of mind.<sup>396</sup>

In *Molko*<sup>397</sup> and in *George*<sup>398</sup> the plaintiffs charged that by being brainwashed, they were in effect falsely imprisoned.<sup>399</sup> In both cases, however, the courts adhered to a requirement that there must be physical force or a threat of physical force for the plaintiff to prevail.<sup>400</sup> Threats of divine retribution are constitutionally protected religious speech<sup>401</sup> that cannot be used to prove false imprisonment.<sup>402</sup> Low-carbohydrate vegetarian diets, reduced amounts of sleep and endless chanting are all constitutionally protected methods of religious conversion and practice under the Free Exercise Clause of the First Amendment.<sup>403</sup> These practices are not sufficient to prove brainwashing or false imprisonment unless they are not required of all disciples and are particularly directed towards the plaintiff.<sup>404</sup>

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390. 262 Cal. Rptr. 217 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

391. *Id.* at 237.

392. *Id.* (footnote omitted).

393. *Id.* at 237 n.24.

394. *Id.* at 237.

395. *Id.*

396. *Id.* The court said there was no evidence showing intent or reckless disregard of the possibility of causing Robin George emotional distress. *Id.*

397. 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989).

398. 262 Cal. Rptr. 217 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

399. *See supra* notes 239-73 and accompanying text.

400. *Molko*, 46 Cal. 3d at 1123, 762 P.2d at 64, 252 Cal. Rptr. at 140; *George*, 262 Cal. Rptr. at 236.

401. *Molko*, 46 Cal. 3d at 1123-24, 762 P.2d at 64, 252 Cal. Rptr. at 140; *see also* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (holding religious sermon in park by Jehovah's witness to be constitutionally protected).

402. *Molko*, 46 Cal. 3d at 1123-24, 762 P.2d at 64, 252 Cal. Rptr. at 140.

403. *George*, 262 Cal. Rptr. at 236.

404. *Id.*

Thus, what evidence will be accepted to prove brainwashing, what element of the tort that brainwashing comprises, and what standard of proof will be allowed varies not only with the tort, but also with the jurisdiction or court.

### 3. Interests at stake under brainwashing

The interests sought to be protected in the brainwashing cases are the victim's interest in freedom from coercive persuasion,<sup>405</sup> the victim's interest in free will,<sup>406</sup> and the victim's First Amendment right to voluntary religious choice.<sup>407</sup> As the induction process can cause severe psychological damage,<sup>408</sup> including psychotic breakdown,<sup>409</sup> emotional distress<sup>410</sup> and exacerbation of psychological problems,<sup>411</sup> the brainwashing victim has a right to be free from a process that causes such damage. Plaintiffs bring suit against religious sects under the rubric of the torts of fraud,<sup>412</sup> intentional infliction of emotional distress<sup>413</sup> and false imprisonment<sup>414</sup> because coercive persuasion is not recognized as a tort.<sup>415</sup> In fact, plaintiffs are praying for relief from being subjected to the mind-numbing, will-paralyzing techniques of "religious indoctrination."<sup>416</sup>

Victims of brainwashing are similar to victims of undue influence and involuntary servitude in that they are much more vulnerable, both emotionally and mentally, than the stronger presence of the religious cult and its leaders.<sup>417</sup> Religious cults are interested in the free exercise and establishment of their religion.<sup>418</sup> The First Amendment protects these interests as to religious beliefs and certain religiously motivated con-

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405. Delgado, *Religious Totalism*, *supra* note 9, at 50-51.

406. *Id.*

407. See Shapiro, *supra* note 187, at 253-76 (right of mentation protected by First Amendment).

408. See LANGONE & CLARK, *supra* note 23, at 95.

409. *Id.*

410. Delgado, *Religious Totalism*, *supra* note 9, at 10-15.

411. *Id.*

412. See *supra* notes 171-79 and accompanying text.

413. See *supra* notes 188-238 and accompanying text.

414. See *supra* notes 239-73 and accompanying text.

415. See *supra* notes 154-68 and accompanying text.

416. Delgado, *Religious Totalism*, *supra* note 9, at 15.

417. See *supra* notes 367-72 and accompanying text.

418. U.S. CONST. amend. I. The Free Exercise Clause has been interpreted to protect religious beliefs absolutely. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); see *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); see also *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (inability to prove religious beliefs does not make them suspect).

duct.<sup>419</sup> In fact, in many cases the First Amendment protection completely bars the brainwashed victim from suing the religious cult.<sup>420</sup>

Families who lose contact with the brainwashing victims as the indoctrination process isolates the victims are also affected.<sup>421</sup> Families often bring suit for conservatorship,<sup>422</sup> wrongful death<sup>423</sup> and intentional infliction of emotional distress.<sup>424</sup>

Finally, there is a societal interest in ascertaining that all adherents to a controversial or non-controversial religious faith have consented to join that faith of their own free will.<sup>425</sup> The right to choose one's own belief system is inherent in our protection of freedom of religion.<sup>426</sup> If through isolation,<sup>427</sup> dietary<sup>428</sup> and sleep deprivation,<sup>429</sup> physical depletion<sup>430</sup> and propaganda,<sup>431</sup> a religion can secure adherents who otherwise would not have chosen to join that faith, in effect, the *victim* is deprived of his or her freedom of religion.<sup>432</sup>

419. See *supra* notes 141-53 and accompanying text.

420. See, e.g., *Murphy v. I.S.K.CON.*, 571 N.E.2d 340, 348 (Mass.), *cert. denied*, 112 S. Ct. (1991); *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 177 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

421. See, e.g., *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1118, 762 P.2d 46, 60, 252 Cal. Rptr. 122, 136 (1988), *cert. denied*, 490 U.S. 1084 (1989).

422. *Katz v. Superior Court*, 73 Cal. App. 3d 952, 956-58, 141 Cal. Rptr. 234, 235-36 (1977) (parents of Unification Church members brought action for conservatorship because children brainwashed).

423. *Meroni*, 506 N.Y.S.2d at 175 (father sued for wrongful death of son who killed himself within month after leaving religious cult).

424. *George v. International Soc'y for Krishna Consciousness*, 262 Cal. Rptr. 217, 221 (Ct. App. 1989) (depublished opinion) (mother sued for intentional infliction of emotional distress when cult hid her fifteen-year-old daughter from her), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991).

425. See LANGONE & CLARK, *supra* note 23, at 107. One commentator has asserted another social cost of cult brainwashing: "Our nation is being robbed of our greatest resource: bright, idealistic ambitious people who are capable of making an enormous contribution to mankind." HASSAN, *supra* note 20, at 51. According to this author, "[c]ult members tend to spend all their time either recruiting more people, fundraising or working on public relations projects." *Id.* at 50. Thus, society would benefit if these cult members "were . . . set free to develop their God-given talents and abilities." *Id.* at 52.

426. See Shapiro, *supra* note 187, at 253-76 (right of mentation protected by First Amendment).

427. See LANGONE & CLARK, *supra* note 23, at 107.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. See Shapiro, *supra* note 187, at 253-76.



4. Effectiveness of current proof requirements in protecting interests at stake in brainwashing by religious cults

The current proof requirements do not adequately protect the victim's interests,<sup>433</sup> the affected families' interests<sup>434</sup> nor society's interests<sup>435</sup> in cult brainwashing cases. In stark contrast, the religious organizations' interests appear to be adequately protected by the First Amendment.<sup>436</sup>

The varying standards of proof<sup>437</sup> give no clear guidance to courts, plaintiffs, defendants or society as to what constitutes permissible and impermissible brainwashing.<sup>438</sup> By going to great pains to protect the religious organizations' First Amendment rights,<sup>439</sup> courts lose sight of one important fact: these organizations are seeking emotionally vulnerable people<sup>440</sup> to exploit for their own purposes.<sup>441</sup> The irony is that in undue influence cases courts recognize that a donor of property may be vulnerable to the influence of the donee<sup>442</sup> and presume undue influence.<sup>443</sup> In brainwashing cases, however, where a person's mind or mental health is at stake, the courts do little to protect vulnerable victims.

Furthermore, by requiring plaintiffs to couch their claims for coercive persuasion in traditional tort forms, such as fraud<sup>444</sup> or intentional infliction of emotional distress (which also has varying standards in different jurisdictions),<sup>445</sup> courts increase the plaintiffs' burdens and further

433. See LANGONE & CLARK, *supra* note 23, at 107.

434. *Id.*

435. *Id.*

436. See *supra* notes 141-53 and accompanying text for a discussion of First Amendment protections.

437. See *supra* notes 378-404 and accompanying text.

438. See *supra* notes 378-404 and accompanying text.

439. See *supra* notes 141-53 and accompanying text.

440. See ENROTH & MELTON, *supra* note 372, at 60.

441. "[M]embership in extremist cults literally entails nonstop activities such as fund-raising, witnessing, chanting, indoctrination and forced labor." ENROTH, *supra* note 20, at 166.

442. See Patrinelis, *supra* note 65, at 653.

443. See, e.g., *Gilmore v. Lee*, 86 N.E. 568, 570 (Ill. 1908).

444. See *Molko v. Holy Spirit Ass'n for Unification*, 46 Cal. 3d 1092, 1102-03, 762 P.2d 46, 49, 252 Cal. Rptr. 122, 125 (1988), *cert. denied*, 490 U.S. 1084 (1989), for a discussion of brainwashed plaintiffs' tort claims.

445. For example, in *George v. International Society for Krishna Consciousness*, the court focused on the Krishnas' state of mind in indoctrinating Robin George. 262 Cal. Rptr. 217, 237 (Ct. App. 1989) (depublished opinion), *cert. denied*, 110 S. Ct. 2168 (1990), *cert. granted and vacated*, 111 S. Ct. 1299 (1991). The court did not address the outrageous conduct claim, the "abuse of a relation or power giving it the power to damage plaintiffs' interest," which survived summary judgment in *Molko*. *Molko*, 46 Cal. 3d at 1122-23, 762 P.2d at 63, 252 Cal.

protect the religious organizations where the facts of conversion do not fit the neatly proscribed limits of these torts.

The reasons for the courts' refusal to recognize brainwashing as a tort are also unclear. As with intentional infliction of emotional distress, there are psychological and physical damages that can occur as a result of coercive persuasion.<sup>446</sup> By requiring brainwashing victims to show fraud or physical duress, courts confuse the distinction between L-TCP and short-term physical duress.<sup>447</sup> In effect, courts claim that there is no L-TCP without short-term physical duress. Yet these two forms of persuasion are directly opposite each other.

Furthermore, courts may be erroneously comparing religious cult brainwashing to the other contexts for brainwashing—prisoners-of-war<sup>448</sup> and criminal defendants.<sup>449</sup> In these contexts, where defendants are asserting brainwashing as a defense to being charged with violent culpable behavior (either collaborating with the enemy or criminal conduct), requiring physical duress makes sense. Because prisoners-of-war who betray their country<sup>450</sup> or criminal defendants who rob or kill people are deviating far from acceptable societal norms of conduct, there must be a compelling reason to explain these defendants' acts.<sup>451</sup> Threats of physical violence or death may be sufficient to overcome the defendant's will.<sup>452</sup>

In contrast, young people as a rule are not taught to hate or fight religious cult influences.<sup>453</sup> In fact, as evinced by the First Amendment, in this country we accept, if not encourage, various belief systems.<sup>454</sup> When someone is emotionally disturbed or in a difficult stage of growth,

Rptr. at 139 (quoting *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155 n.7, 729 P.2d 743, 747 n.7, 233 Cal. Rptr. 308, 312 n.7 (1987)).

446. See *LANGONE & CLARK*, *supra* note 23, at 94-96.

447. See *supra* notes 15-17 and accompanying text for a discussion of the differences between L-TCP and short-term physical duress.

448. See *United States v. Olson*, 20 C.M.R. 461, 462 (1955); *United States v. Batchelor*, 19 C.M.R. 452, 464 (1955); *United States v. Fleming*, 19 C.M.R. 438, 440 (1955).

449. See *United States v. Hearst*, 412 F. Supp. 889 (N.D. Cal. 1976); see also *BUGLIOSI & GENTRY*, *supra* note 22, at 310-455 (attempting to introduce evidence of Charles Manson's influence or brainwashing to mitigate sentencing for murder).

450. American soldiers during the Korean conflict, prior to being captured and brainwashed, were taught to hate and fight their Korean captors. In order to overcome this innate prejudice, therefore, the Korean captors would have to resort to violence or the threat thereof. See Donald T. Lunde & Thomas E. Wilson, *Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited*, 13 CRIM. L. BULL. 341, 344-55 (1977).

451. *LAFAVE & SCOTT*, *supra* note 16, § 5.3, at 434.

452. *Id.* § 5.3, at 436 & nn.28-29.

453. See generally *ENROTH & MELTON*, *supra* note 372, at 47-77 (discussing appeal of cults to adolescents).

454. The First Amendment to the United States Constitution states that "Congress shall

it is not uncommon to seek answers.<sup>455</sup> Religious groups that claim to have the answers to these questions may be naturally attractive.<sup>456</sup> Thus, a religious group is likely to have no need to resort to violence in its indoctrination program. The techniques of isolation from outside influences,<sup>457</sup> dietary and sleep deprivation,<sup>458</sup> physical depletion<sup>459</sup> and group propaganda<sup>460</sup> are sufficient to overcome whatever resistance to conversion there may be, especially if the convert enters the process in an already emotionally vulnerable state.

## V. A MODEL FOR A UNIFIED BALANCING APPROACH FOR L-TCP

The similarities between undue influence, involuntary servitude and brainwashing should be recognized as examples of L-TCP.<sup>461</sup> Therefore, legal tests should protect the interests underlying L-TCP.

Furthermore, undue influence, involuntary servitude and brainwashing by religious cults cases, at their cores, protect the freedom of will interests of the victims. Current laws, however, have failed to render a unified approach towards L-TCP. While permitting a centuries-old model of psychological influence in undue influence,<sup>462</sup> courts nonetheless fail to apply this standard in involuntary servitude and religious cult brainwashing cases.<sup>463</sup> This results in the inconsistent rule that if someone uses psychological influence to deprive a person of free choice in disposing of property, the donor or his or her heirs can recover the property and revoke the gift.<sup>464</sup> Yet, if someone deprives a person of the freedom to work<sup>465</sup> or freedom to choose religious beliefs through coercive methods,<sup>466</sup> they must use violence to do so, or the victim cannot re-

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make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

455. See ENROTH & MELTON, *supra* note 372, at 60.

456. *Id.*

457. Delgado, *Religious Totalism*, *supra* note 9, at 50-51.

458. *Id.*

459. *Id.*

460. *Id.*

461. See *supra* note 17 and accompanying text for a definition of L-TCP.

462. See, e.g., *Norton v. Relly*, 2 Eden 286, 28 Eng. Rep. 908 (1764).

463. See *supra* notes 96-274 and accompanying text.

464. See, e.g., *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 752-53 (Bankr. D. Mass. 1988) (donor sought return of monetary gifts), *aff'd in part, rev'd in part*, 869 F.2d 628 (Bankr. 1st Cir.), *cert. denied*, 493 U.S. 816 (1989); *Gilmore v. Lee*, 86 N.E. 568, 569 (Ill. 1908) (daughter successful in revoking gift to priest by her dying mother); *McClellan v. Grant*, 82 N.Y.S. 208, 209 (App. Div. 1903) (son brought suit to revoke deed from mother to pastor).

465. *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

466. See *Meroni v. Holy Spirit Ass'n for Unification*, 506 N.Y.S.2d 174, 177-78 (App. Div. 1986), *appeal dismissed*, 504 N.E.2d 698 (N.Y. 1987).

cover. Are our property interests more sacred than our freedom of livelihood or freedom to believe?

The tests for undue influence in the context of inter vivos gifts to clergy should be modified and applied to involuntary servitude and brainwashing cases, giving a much needed unified approach to L-TCP analysis.

#### A. Test for Involuntary Servitude

The susceptibility model in undue influence<sup>467</sup> should be modified and applied to the crime of involuntary servitude. First, there must be an enslaved person working for the defendant for little or no money, with no alternative. Second, if the enslaved person is susceptible to overriding influences due to age, mental disability, mental weakness or religious fanaticism, the court should apply an "overmastering" effect test.<sup>468</sup> Under the "overmastering" effect test, the trier of fact asks whether the defendant exerted improper influence over the victim and whether the victim was overcome by the "overmastering" effect. Third, if the victim was of sound mind and body, the court should apply the test in *United States v. Kozminski*.<sup>469</sup> whether the defendant physically or legally threatened the victim.<sup>470</sup>

This three-part test for involuntary servitude first focuses on the victim's enslavement and susceptibility, and then addresses the defendant's actions. Furthermore, this test protects each party's interests better than the *Kozminski* physical or legal threat standard.

When a victim is more susceptible to involuntary servitude, the proof requirements should be reduced. Under this lower standard, the test is whether the defendant exerted improper influence and whether the victim succumbed to the influence. The prosecution need not show physical duress. Thus, as in undue influence, the susceptible victim receives more protection than the non-susceptible victim.

If the victim is able-bodied or able-minded, or if there is other evidence showing that the victim was unlikely to succumb to involuntary servitude without violent or legal force, evidence of violent or legal force should be required. Thus, a less susceptible victim would receive less protection than a more susceptible victim; if less legal protection is needed, less is given. The defendant in an involuntary servitude prosecu-

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467. See *supra* notes 92-95 and accompanying text.

468. Similarly if the enslaved person is rendered susceptible by defendant's treatment, the court should apply an "overmastering" effect test.

469. 487 U.S. 931 (1988).

470. *Id.*

tion would also benefit from this two-pronged test. When the victim is less vulnerable, it is harder to convict the defendant because the standards are higher.

Society benefits under this model because the lower standard of proof for more susceptible victims (1) makes it easier to prosecute those defendants who most egregiously violate our anti-slavery laws, (2) operates as a deterrent for defendants imposing servitude on the most vulnerable victims, and most importantly, (3) more effectively protects the weaker members of society. By strengthening the requirement for stronger victims, this approach would also balance the interests of the criminal defendant, who faces possible imprisonment for his or her crime, and the victim, who is still protected at law. The interests at stake in involuntary servitude cases are thus effectively addressed by this three-part test.

### *B. Test for Brainwashing by Religious Cults*

Brainwashing by religious cults should be addressed directly by the tort laws. In order to protect the interests at stake, courts should allow a tort of coercive influence. *Direct* access to civil redress is the only way to effectively and consistently protect these interests. Requiring brainwashing victims to pigeonhole their causes of action into existent torts causes inconsistent results and confusion for both the courts and the parties.<sup>471</sup> Although there are religious First Amendment problems with any state action against a religious group,<sup>472</sup> there is also another important free exercise right at stake—the right to *freely* choose one's own belief system. When one is subjected to coercive persuasion prior to joining a religious group, one has not *freely* chosen that belief system.<sup>473</sup> The proposed test for brainwashing or coercive persuasion therefore addresses the First Amendment concerns of both the victim and the religious group as well as the societal interests at stake.<sup>474</sup>

The proposed test for brainwashing, like the proposed test for involuntary servitude, is adapted from the proof requirements for undue influence. Under the presumption model, undue influence may be inferred from the mere existence of a confidential relationship<sup>475</sup> between a pa-

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471. See *supra* notes 379-404 and accompanying text for varying standards of proof in brainwashing cases.

472. See *supra* notes 141-53 and accompanying text.

473. See, Delgado, *Religious Totalism*, *supra* note 9, at 4.

474. See *supra* notes 405-32 and accompanying text for a discussion of the societal interests at stake in cult brainwashing cases.

475. Although a confidential and trusting relationship is said to exist between a spiritual leader and a spiritual follower, the reason for the presumption of undue influence is not that

rishioner and cleric, or between a spiritual adviser and an adherent to that spiritual doctrine.<sup>476</sup> This inference can make out a *prima facie* case of undue influence and place the burden of *disproving* undue influence on the donee.<sup>477</sup>

A presumption of brainwashing would arise whenever a group (religious or otherwise) had a system of indoctrination that included isolation, drastic dietary modifications, drastic sleep deprivation, extraordinarily long working hours, taxing physical activity or incessant propaganda with little or no time for reflection or individual thought *prior* to membership. This presumption would be strengthened whenever the victim displayed signs of brainwashing such as loss of will, or the inability to respond to simple questions without reciting the cult's jargon or propaganda. When the victim, due to age, mental condition, life crisis, illness or mental disability was more vulnerable to the group's influence, the presumption would also be *strengthened*. Active pursuit of new converts to the group, particularly "easy targets"—those individuals most susceptible—would also *strengthen* the presumption of brainwashing.

In fact, before the indoctrinee submits to this process, there should be a duty for the religious group to seek the indoctrinee's informed consent after disclosing the group's practices to the indoctrinee.<sup>478</sup> Evidence of the religious group's compliance with this duty could be shown in two ways: (1) if the indoctrinee obtained adequate, independent advice prior to commencing indoctrination,<sup>479</sup> or (2) if the indoctrinee was entitled to a seven-day waiting period between the time he or she was first approached by the group and the time he or she started the indoctrination process. During the waiting period, the indoctrinee should be entirely free from any influence by the religious group. Evidence of the indoctrinee's effective consent by one of the above methods, or of a predisposition to join this group would *weaken* the presumption of brainwashing.

In sum, there should be a presumption of brainwashing whenever an indoctrination process employs coercive methods. This presumption would be *strengthened* by (1) the religious follower's vulnerability (age, mental condition, life crisis, illness or mental disability), (2) active pur-

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the donee is a spiritual leader. Instead, the spiritual leader may have a fiduciary relation with the follower "which, if used for the benefit of the donee, will result in exercise of an influence not possessed by the ordinary person, and sufficient, according to the ordinary experience of mankind, to overcome the will of the donor." Patrinelis, *supra* note 65, at 657.

476. *Id.* at 657-60 (fiduciary relation exists between the parties).

477. See *supra* notes 64-83 and accompanying text.

478. Delgado, *Religious Totalism*, *supra* note 9, at 61-62.

479. *Id.*

suit of new converts, particularly "easy targets," and (3) the spiritual group's breach of its duty to get the victim's informed consent. The spiritual group could *weaken* this presumption by showing that (1) the spiritual group obtained the follower's informed consent or (2) the follower had a preexisting intent to join the group before submission to the indoctrination process.

This test more effectively protects the rights involved in brainwashing cases than the current methods. The victim receives more protection, because there is a separate tort of brainwashing that will allow recovery if the victim was subjected to this process without his or her consent. The informed consent requirement, by giving the victim the benefit of independent advice or a waiting period before submitting to indoctrination, guarantees that the decision to join or not join the religious group will be the convert's—not the result of coercive persuasion. In this way, the informed consent requirement protects the religious follower's First Amendment rights. Both the presumption of brainwashing when coercive practices are used prior to joining the group, and the strengthening of the presumption when the victim is more vulnerable or when the religious group is more aggressive in its pursuit of converts, further protect the victim from the potentially overpowering influence of the spiritual group.

Weakening the presumption when the religious group has complied with the consent requirement, or when the convert has a preexisting intent to join the group, protects the religious group as well. If the group complies with certain consent requirements, the risks of a lawsuit by an unhappy convert would be reduced in two ways. First, there would be less unhappy converts when the religious group painstakingly ascertains that its convert has freely decided to join the group. Second, even if a lawsuit were brought, evidence of the convert's informed consent to join the group, absent other tortious conduct, would weaken the presumption of brainwashing and therefore strengthen the group's case.

Nor does this proposed test for brainwashing pose any First Amendment problems for religious groups. First, the test addresses *conduct*, not religious belief.<sup>480</sup> Under *Employment Division, Department of Human Resources v. Smith*,<sup>481</sup> religious conduct that is incidentally regulated by a law against coercive practices likely will not even be subject to the

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480. See *supra* notes 141-44 and accompanying text for a discussion of the First Amendment's absolute protection of religious beliefs, as contrasted with the qualified constitutional protection of religiously motivated conduct.

481. 110 S. Ct. 1595 (1990).

traditional compelling state interest test.<sup>482</sup> However, even if *Smith* ultimately is held not to apply to civil regulations,<sup>483</sup> and the indoctrination process is construed as religiously, and not secularly, motivated conduct,<sup>484</sup> there are nonetheless pressing societal interests. For example, the convert's free exercise rights<sup>485</sup> and society's interest in protecting converts from coercive persuasion are important countervailing interests.<sup>486</sup> These governmental interests outweigh the minimal restrictions<sup>487</sup> that consent requirements and suits for brainwashing would impose upon religious groups.

No less burdensome alternative could effectively satisfy the government's interests in protecting a cult victim's freedom of religion or society's interest in protection from brainwashing.<sup>488</sup> Certainly, the current practice of suing religious groups through tort causes of action such as fraud, intentional infliction of emotional distress and false imprisonment does not adequately protect these interests.

This test for brainwashing has the purpose and effect of advancing the government's secular goals.<sup>489</sup> It does not discriminate among religions,<sup>490</sup> or between religion and non-religion.<sup>491</sup> Thus, tort liability for brainwashing does not violate a religious group's First Amendment rights.

The proposed test for brainwashing should protect the victim's family's interests as well.<sup>492</sup> By placing a consent requirement on groups engaging in coercive practices, the family may have the opportunity to intervene before the victim is isolated from the family and submits to the indoctrination process. Even if the convert chooses to submit to the indoctrination process after either receiving independent advice or a week's

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482. See *id.* at 1603; see also *supra* note 147 and accompanying text.

483. See *supra* note 147 which discusses the implication that it *will* be applied in civil cases.

484. See *supra* notes 145-50 and accompanying text for the traditional First Amendment analysis which does not protect secular conduct, but offers qualified protection to religiously motivated conduct.

485. See Shapiro, *supra* note 187, at 253-76.

486. See *id.*

487. See *supra* notes 147-48 and accompanying text for a description of the compelling state interest test used in traditional First Amendment analysis.

488. See *supra* note 149 and accompanying text for an explanation of how the First Amendment requires that the regulation burdening religiously motivated conduct be the least restrictive alternative.

489. See *supra* note 150 and accompanying text for a description of this requirement under traditional First Amendment analysis.

490. See *supra* note 150 and accompanying text.

491. See *supra* note 150 and accompanying text.

492. See *supra* notes 421-24 and accompanying text for a discussion of the family's interests in brainwashing cases.



reflection period, at least the family will know that it was the convert's decision to submit to the process.

Finally, this proposed test for brainwashing addresses the societal issues arising in religious coercive persuasion cases.<sup>493</sup> The test adequately protects the indoctrinee's freedom of religion and freedom of will interests, as well as his or her family's interests. Nor is protecting the convert's interests done at the expense of the religious groups, because the proposed test does not violate the groups' First Amendment rights. Therefore, societal interests are well protected by this proposed test for brainwashing.

## VI. CONCLUSION

Not all forms of coercive persuasion are harmful. In fact, certain methods of persuasion may offer benefits to the coerced individual or to society. There are, however, harmful forms of coercive persuasion. A person in a confidential relationship can use undue influence to obtain a gift or valuable property from the other party. A person with a stronger personality can subject another with a more vulnerable personality to involuntary servitude, with or without threats of violence or legal action. Cults can use brainwashing to indoctrinate followers before they can reasonably consent to joining the group.

These forms of long-term coercive persuasion should be treated similarly, because although the oppression may take different forms, they all deprive the victim of his or her exercise of free will. As a result, allowing even one individual to be deprived of freedom of choice in this manner debases everyone's freedom of choice.

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493. See *supra* notes 425-32 and accompanying text for a discussion of the societal interests at stake in brainwashing cases.

\* B.A., Pomona College, 1982. This Comment is dedicated to Paul and to my parents John and Jacqueline Penners as thanks for all their love and support.