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Undoing Undue Influence: How the Doctrine Can Avoid Judicial Subjectivity by Omitting the Vulnerability Element

Robin Boyle-Laisure[†]

Introduction

The utility of the doctrine of undue influence has been declining for several decades because of its inclusion of the element of vulnerability or, put another way, inquiry into the mind of the one allegedly being influenced. I argue that the courts' inquiry into the mind of the influencee to determine whether this person was vulnerable is not a useful construct as an element of the doctrine. This Article addresses three contexts in which assessing one's vulnerability is problematic: (1) in the contract formation process occurring in the general population (meaning not within a high-control group), such as the signing of an arbitration agreement in *Martinez-Gonzalez v. Elkhorn Packing Co.*;¹ (2) in disputes resolving whether testamentary bequests went to the rightful beneficiaries

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The author dedicates this Article to the memory of Alan Schefflin, JD, LLM, MA, whose work is cited within and passed before this Article was published. He left an indelible mark in the field of psychology and cultic studies. He was professor emeritus of Santa Clara University and former president of the board for the International Cultic Studies Association.

¹ 25 F.4th 613 (9th Cir.), *on remand*, No. 18-cv-05226-EMC, 2022 WL 10585178 (N.D. Cal. Oct. 18, 2022).

of wills;² and (3) in contract formation processes occurring in high-control groups, such as in the case of *D’Onofrio v. Mother of God with Eternal Life*.³ Because the traditional doctrine of undue influence involves the courts’ assessments of the claimant’s⁴ state of mind, this Article uses the term “vulnerability” to refer to the analysis courts use to determine whether the claimant was free from coercive control.⁵

As this Article shows, inviting courts to assess vulnerability is problematic for several reasons. In the first instance above, demonstrated by the dissenting opinion in the *Martinez-Gonzalez*⁶ case, courts have ignored key findings and misapplied the law, which I refer to below as “judicial subjectivity.” In the second instance, involving will disputes, demonstrated by a research study, courts have imposed their morality on which beneficiaries are more deserving.⁷ In the third instance, one of high-control groups, mentally healthy (seemingly not vulnerable) individuals, such as Dr. Steven Hassan, can be ensnared by predatory groups,⁸ making it impossible to determine when they exercised free will.⁹ For those raised in such groups, like a Second Generation cult member such as the one I interviewed, determining whether they exercised independent decision-making when in the group or shortly upon leaving would be impossible as well. Judges are not trained as psychologists, nor are they in a position to know whether in the past, the testator who is no longer alive or the person who was in a cult, was of sound mind.

² See discussion *infra* Part II (citing the research study of Melanie B. Leslie and the scholarship of others).

³ 79 N.Y.S.3d 902 (Westch. Cnty. 2018).

⁴ I use the word “claimant” here, but I also use it interchangeably throughout the Article with words like “influencee,” borrowing from Alan Schefflin’s Social Influence Model, discussed *infra* Part IV.A. I also use “claimant” interchangeably with words like “victim” or “survivor,” depending upon the context.

⁵ I use “coercive control” as a more modern-day term of what was formerly referred to as “brainwashing.” See generally William Douglas Woody et al., *Investigating Coercion, Abuse, and Manipulation: Recognizing the Legacy of the Cold War*, 1(1) INT’L J. COERCION, ABUSE, AND MANIPULATION 1, 7 (2020) (providing a history of researchers’ use of the terms “brainwashing” and “coercive persuasion”).

⁶ See generally *Martinez-Gonzalez*, 25 F.4th at 629-38 (Rawlinson, J., dissenting).

⁷ See discussion *infra* Part II.

⁸ See discussion *infra* Part III.

⁹ *Id.*

The facts and the court's reasoning of the *Martinez-Gonzalez*¹⁰ case in California bring to light the fundamental flaws of the traditional doctrine of undue influence.

Having just arrived from Mexico on a temporary agricultural worker visa, Dario Martinez-Gonzalez worked in the fields harvesting lettuce.¹¹ He came to the United States to earn five times more money than he did in Mexico and to support his wife and his in-laws still residing in his home country.¹² At the end of a day harvesting lettuce crops, he was tired, hungry, and feeling the need to eat and rest.¹³ But before he could do that, he was told to stand in line in the parking lot, with 150 workers for an orientation, which occurred a few days after his new job started,¹⁴ or following a twelve-hour bus ride,¹⁵ depending upon which set of facts are being relayed from the majority or dissenting court. He stood for forty minutes until he reached the tables at the front of the line.¹⁶ Seated behind the tables were the employer's representatives who showed him a packet of papers to sign, including an arbitration agreement,¹⁷ although he "was not presented with the Arbitration Agreement[] while in Mexico, and was never provided an explanation of the import of the Arbitration Agreement[]."¹⁸ The district court's findings inform us that "[n]o 'real explanation' was provided of the documents the migrant workers were directed to sign."¹⁹ The workers were told to hurry, they were not given copies, nor were they told that they could review the agreements with an attorney.²⁰ Most importantly, workers were not informed that the

¹⁰ See generally *Martinez-Gonzalez*, 25 F.4th at 629-38 (Rawlinson, J., dissenting).

¹¹ *Id.* at 619 (majority opinion).

¹² *Id.*

¹³ *Id.* at 624 (testifying that "he was tired and hungry").

¹⁴ *Id.* at 619 (majority opinion stating "orientation took place at the end of the workday, at around 4 p.m.>").

¹⁵ *Id.* at 629 (Rawlinson, J., dissenting).

¹⁶ *Id.* at 619 (majority opinion).

¹⁷ *Id.*

¹⁸ *Id.* at 629 (Rawlinson, J., dissenting) (noting the plaintiff signed the Arbitration Agreements twice, in 2016 and in 2017, and both times he was transported from Mexico).

¹⁹ *Id.* (Rawlinson, J., dissenting).

²⁰ *Id.* at 630.

documents he signed were optional.²¹ Martinez-Gonzalez mistakenly thought he needed to sign them as a prerequisite to keep his job.²² He signed.²³

Despite facts and law weighing in his favor, Martinez-Gonzalez could not establish that either undue influence or economic duress was used by his employer when he signed the arbitration agreement.²⁴ The Ninth Circuit applied California's landmark statute on undue influence,²⁵ which had been effective in January 2014 to provide more guidance for courts.²⁶ The majority of the Ninth Circuit applied this seemingly objective construct, the dissenting judge explained how the majority misapplied the law to the selective findings of fact and methodically demonstrated how the prevailing state law, factor by factor, weighed in favor of the plaintiff.²⁷

Objectivity faltered when the Ninth Circuit decided the contract dispute in *Martinez-Gonzalez* even though objectivity in contract formation and interpretation has been the approach "since time immemorial."²⁸ However, as scholar and law professor Joseph M. Perillo observes, since the mid-nineteenth century, subjectivity has crept in when deciding matters of contract defenses, such as "mistake, duress, and other grounds of avoidance."²⁹ Professor Perillo explains the reason for sub-

²¹ *Id.*

²² *See id.* (Rawlinson, J., dissenting).

²³ *See id.* at 619.

²⁴ *Id.* at 629.

²⁵ *See, e.g., id.* at 625-26 (citing CAL. CIV. CODE § 1575); *see infra* Part I.B.

²⁶ *See* Mary Joy Quinn, *Defining Undue Influence: A Look at the Issue and at California's Approach*, 35(3) BIFOCAL: J. ABA COMM'N L. & AGING, 72, 73 (2014) (describing research studies finding that until California's "landmark" code was revised to "moderniz[e] the definition of undue influence," the definition being used previously dated back to 1872). *See generally* Dominic J. Campisi et al., *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 AM. COL. TRUST & ESTATE COUNSEL 359, 360 (2018) ("The common law of restitution has been updated to include undue influence" and for other sections of the state code, "California has adopted tests of capacity that reflect twentieth century psychological testing criteria.").

²⁷ *See* discussion *infra* Part I.B.

²⁸ Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000).

²⁹ *Id.*

jectivity: “The explanation for the greater concentration on the claimant’s mental state in case of . . . undue influence . . . is that [they] are based on the wrongful conduct of the promisee that *overwhelmed or corrupted the mental processes* of the promisor.”³⁰ The courts’ focus on mental processes opens a door that permits judicial subjectivity.

This Article shows how the application of undue influence has stumbled not only in contract formation cases in a setting outside of a high-control group but also in two other types of cases: (1) deciding the wishes of testators in will disputes and in (2) deciding whether individuals exercised independent thought, free of the influence of the cult leader, in high-control groups.

California’s landmark statute on undue influence and the state’s detailed factor test are described in Part I.A. Part I.B. examines why the dissenting judge found the majority’s application of California’s laws so disagreeable in the *Martinez-Gonzalez* case. Part II continues with examples of judicial subjectivity when courts use undue influence to determine the wishes of the testator in will disputes. Part III moves the discussion to another level, that of the depths of control by leaders of high-control groups over their members. Part IV describes several formerly proposed theoretical models, criminal laws in the United Kingdom and the United States, and pending state legislation on coercive control. In Part V, I propose a new construct that incorporates the more recent concept of coercive control but eliminates the element of examining the state of mind (the vulnerability) of the one being influenced.

I. Background

A. Judicial Subjectivity in Deciding Undue Influence in Cases of Contract Formation— California’s Statute and Factor-Test

In contract law, courts are concerned about the “fairness of the transaction.”³¹ But the undue influence defense to contract has allowed

³⁰ *Id.* at 474 (emphasis added).

³¹ Joshua C. Tate, *Personal Reality: Delusion in Law and Science*, 49 CONN. L. REV. 891, 894 (2017) (citing RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (AM. L. INST. 1981)).

for subjectivity to creep into judicial decision-making. California put in place safeguards to prevent wayward judicial decision-making.³² Unlike other states, California's law was more detailed on this score, incorporating a statute proscribing undue influence and case law with a factor test.³³ Therefore, it was surprising when, in the case of *Martinez-Gonzalez*, an appellate judge in the Ninth Circuit criticized the majority's decision for essentially not applying the state law objectively.³⁴

The California statute provides as follows:

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, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
- (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.³⁵

California's statute was viewed as bringing the older doctrine into more modern times.³⁶ One commentator explained why it was necessary to take a fresh approach to an old doctrine: "The Common Law discloses a long history of undue influence and elder abuse, now augmented by modern financial stress, increased longevity, and the isolation of elderly or disabled persons from their family and friends."³⁷ The California legislature was heralded for turning the laws involving elder abuse into legislation that was more "refined."³⁸

³² See CAL. CIV. CODE § 1575 (West 1875) (proscribing undue influence); see also *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 541 (Ct. App. 1966) (setting out a factor test for undue influence).

³³ *Odorizzi*, 54 Cal. Rptr. at 541; CAL. CIV. CODE § 1575.

³⁴ See generally *Martinez-Gonzalez v. Elkhorn Packing Co.*, 25 F.4th 613, 629-38 (9th Cir. 2022) (Rawlinson, J., dissenting).

³⁵ CAL. CIV. CODE § 1575.

³⁶ Dominic J. Campisi & Evan D. Winet, *Elder Abuse Liability*, PRAC. L., Apr. 2019, at 22, 25.

³⁷ *Id.*

³⁸ *Id.* ("The legislature in California has instituted and refined elder abuse statutes as well as adopting tests of capacity which reflect Twentieth Century psychological testing criteria.").

In addition to its statute on undue influence, California’s case law sets forth a factor test.³⁹ Presumably, factor tests are useful tools for courts when applying objective analysis of law to case facts. The general concept of a factor test is to permit courts to weigh one factor against another, without any factors being more determinative and not requiring that all factors be met.⁴⁰ The leading case from California setting forth the factor test on undue influence is *Odorizzi v. Bloomfield School District*,⁴¹ the same case relied upon by the dissenting judge in *Martinez-Gonzalez*, but misapplied by the majority.⁴² The *Odorizzi* decision provides that undue influence involves “an application of excessive strength by a dominant subject against a servient object.”⁴³ The seven factors, which the court refers to as indicators of “overpersuasion,”⁴⁴ include:

- (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is not time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive.⁴⁵

The *Odorizzi* court gave some examples of “excessive” facts, such as a pregnant widow being approached at her deceased husband’s funeral and persuaded to deed her entire interest in his estate to his children from a prior marriage.⁴⁶ Although the majority in *Martinez-Gonzalez* used

³⁹ *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 541 (Ct. App. 1966) (setting out a factor test to determine undue influence).

⁴⁰ See CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 66 (3d ed. 2018).

⁴¹ 54 Cal. Rptr. 533, 541 (1966).

⁴² *Martinez-Gonzalez v. Elkhorn Packing Co.*, 25 F.4th 613, 637 (9th Cir. 2022) (Rawlinson, J., dissenting).

⁴³ *Odorizzi*, 54 Cal. Rptr. at 541.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

these illustrative examples for the context of extremism,⁴⁷ the dissent pointed out that the *Odorizzi* examples were merely meant to be “‘illustrative’ and in no way reflective of the universe of circumstances that constitute undue influence.”⁴⁸

B. More Pertinent Details of *Martinez-Gonzalez*

Given the detailed legislation and factor test supplied under state law, how did the Ninth Circuit rule in favor of the farm worker’s employer in the *Martinez-Gonzalez* case? As Judge Rawlinson explains in the dissent, the majority got it wrong in three ways—it distorted the facts, misapplied the factor test, and created a non-issue.⁴⁹ First, the dissent pointed out that the majority gave deference to some of the findings of fact from the lower court, but not all.⁵⁰ In the words of the dissent, the appellate court engaged in “oversimplification of the district court’s ruling,”⁵¹ “ignore[d] the detailed factual findings,”⁵² and “turned a blind eye to the factual findings regarding Martinez-Gonzalez’s dire circumstances.”⁵³ The dissent noted that the employer was well aware that the workers were paid five times what they could earn in their home country and that they were likely supporting “three, five, even up to eight people,”⁵⁴ leading these workers to be in “desperate circumstances.”⁵⁵ Second, the dissent took issue with the majority’s application of the *Odorizzi* factors, stating that the “majority seeks to blunt the force of the district court’s factual findings that mirror five of the *Odorizzi* factors”⁵⁶

⁴⁷ *Martinez-Gonzalez*, 25 F.4th at 627 (summarizing *Odorizzi*’s examples of approaching a pregnant woman about her late husband’s estate four days after he was shot to death and seeking the release of claims from a patient who was confined to a cast in a hospital, hysterical, and in significant pain).

⁴⁸ *Id.* at 637 (Rawlinson, J., dissenting).

⁴⁹ *See id.* at 629-38.

⁵⁰ *Id.* at 629-31 (9th Cir. 2022) (Rawlinson, J., dissenting) (listing fact findings of the district court).

⁵¹ *Id.* at 632.

⁵² *Id.*

⁵³ *Id.* at 633-34.

⁵⁴ *Id.* at 632.

⁵⁵ *Id.*

⁵⁶ *Id.* at 637.

by relying upon the extreme illustrative examples in that case.⁵⁷ Third, the dissent pointed to a “strawman argument” created by the majority as to whether an arbitration agreement could constitute a wrongful act, an issue that was not raised by the plaintiff.⁵⁸

The litigation began when in the middle of the third harvest season, Martinez-Gonzalez quit his job, returned home to Mexico, and sued his former employer on behalf of himself and other workers for failure to pay minimum wages, for lack of meals and rest periods, and for privacy violations.⁵⁹ In a federal district court in California, the employer moved to compel arbitration, relying upon the agreement that Martinez-Gonzalez had signed that day in the parking lot.⁶⁰ The district court held that the arbitration agreement resulted from economic duress and undue influence, and was thus unenforceable.⁶¹ The employer appealed to the Ninth Circuit. On the first claim of economic duress, the circuit court described the factual circumstances of the case as less than “ideal,”⁶² but that they did not amount to economic duress.⁶³

The Ninth Circuit also reversed the district court’s decision on the second claim—undue influence.⁶⁴ The Ninth Circuit looked to see if two elements of undue influence were met: (1) “undue susceptibility in the servient person”⁶⁵ and (2) “excessive pressure by the dominating person.”⁶⁶ On the first element, the circuit court held that the facts did not establish a “weakness of mind.”⁶⁷ The circuit court also held that the facts did not establish the second element—excessive pressure—

⁵⁷ *Id.*.

⁵⁸ *Id.* at 633.

⁵⁹ *Martinez-Gonzalez*, 25 F.4th at 619-20.

⁶⁰ *Id.* at 620 (noting the employer relied upon the plaintiff’s signature on two Arbitration Agreements, signed in successive years).

⁶¹ *Id.*

⁶² *Id.* at 622.

⁶³ *Id.* at 625.

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 540 (Ct. App. 1966)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 626 (citing CAL. CIV. CODE § 1575).

because the facts were “a far cry from actions considered ‘oppressive,’”⁶⁸ as compared with the examples of extreme illustrations provided by the *Odorizzi* court.⁶⁹

However, Judge Rawlinson’s dissent provides a detailed analysis of how the majority on the Ninth Circuit was misguided.⁷⁰ Judge Rawlinson took issue with the majority’s reliance on select facts while ignoring others.⁷¹ For instance, Martinez-Gonzalez reasonably believed that he had no option but to sign the arbitration agreement.⁷² Furthermore, he was told that the documents concerned “insurance”⁷³; arguably, he was unaware of what he was signing. In the poignant dissent, Judge Rawlinson wrote that the majority showed “disregard to the trial court’s factual findings.”⁷⁴ Additionally, the judge questioned the majority’s review of the witness testimony: “As we have colorfully observed, ‘[t]o be clearly erroneous, a decision must strike us as wrong with the force of a five-week old, unrefrigerated dead fish.’”⁷⁵ In other words, for inexplicable reasons, the majority engaged in selective facts to which a subjective application of law was applied.

Next, Judge Rawlinson disagreed with the majority’s application of the law. Although Judge Rawlinson disagreed with the majority on its holding of whether economic duress occurred,⁷⁶ he concluded that on the undue influence claim the plaintiff was on even “firmer footing.”⁷⁷ Judge Rawlinson turned to the case of *Odorizzi v. Bloomfield School District*.⁷⁸ In applying each factor to the facts of *Martinez-Gonzalez*, Judge

⁶⁸ *Id.* at 627 (quoting *Odorizzi*, 54 Cal. Rptr. at 539).

⁶⁹ *Martinez-Gonzalez*, 25 F.4th at 627.

⁷⁰ *See id.* at 629-38 (Rawlinson, J., dissenting).

⁷¹ *Id.* at 630.

⁷² *Id.* (Rawlinson, J., dissenting) (listing findings of fact provided by the district court).

⁷³ *Id.* at 635 (Rawlinson, J., dissenting).

⁷⁴ *Martinez-Gonzalez*, 25 F.4th at 638 (Rawlinson, J., dissenting).

⁷⁵ *Id.* (Rawlinson, J., dissenting) (quoting *Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 502 (9th Cir. 1991) (citation and alterations omitted in original)).

⁷⁶ *Id.* at 632-36 (Rawlinson, J., dissenting).

⁷⁷ *Id.* at 636 (Rawlinson, J., dissenting).

⁷⁸ *Id.* (Rawlinson, J., dissenting) (citing *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533 (1966)).

Rawlinson reasoned how five of the seven *Odorizzi* factors were met, namely: after work (and twelve-hour bus ride) was an unusual or inappropriate time; the parking lot was an unusual place; telling the workers to hurry up was the insistence on speedy completion; having more than one representative of the employer at the table was indicative of multiple persuaders; and there was an absence of third-party advisers.⁷⁹ The reasoning of the Ninth Circuit majority in *Martinez-Gonzalez*, as critiqued by Judge Rawlinson, is what I call “judicial subjectivity.”

The case was remanded back to the district court, which this time held for the employer, following the controlling authority exerted by the Ninth Circuit on the claim of undue influence and economic duress.⁸⁰ The district court, on remand, also ruled against the employee on a new and unpreserved claim of fraud.⁸¹

The *Odorizzi* case offers the judiciary a seven-factor test providing a tool for the seemingly objective application of the doctrine of undue influence,⁸² but the case is not without controversy.⁸³ The underlying facts of the case are disputed.⁸⁴ On the one side are facts provided by the arresting officer:⁸⁵ Don Odorizzi, a teacher, was arrested in his home for a crime of homosexual conduct after allegedly dialing a random phone number and inviting the man who answered to have sex with him, but the man turned out to be a police officer.⁸⁶ Odorizzi was tried in a criminal court. The arresting officer informed the school authorities, Don’s employer, of the criminal case, which prompted their visit to his home, where they engaged in high-pressure tactics, the subject of the

⁷⁹ *Id.* at 637 (Rawlinson, J., dissenting).

⁸⁰ *Martinez-Gonzalez v. Elkhorn Packing Co.*, No. 18-cv-05226-EMC, 2022 WL 1058517 8, at *12 (N.D. Cal. Oct. 18, 2022).

⁸¹ *Id.*

⁸² *Odorizzi*, 54 Cal. Rptr. at 541.

⁸³ See Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 46 n.260 (2009) (“A particularly striking example of where a party withheld facts from the court is *Odorizzi* . . .”).

⁸⁴ See *id.* (explaining facts in *Odorizzi* that are disputed).

⁸⁵ *Id.* (citing RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 1003 (3d ed. 2003)).

⁸⁶ *Id.*

opinion that spawned the seven-factor test.⁸⁷ However, Odorizzi gave a different version of these facts to Dean Kellye Testy in an unpublished essay.⁸⁸ According to Odorizzi, he never called a random number but purposefully called the police to report homosexual activity in his apartment between his boyfriend and another man.⁸⁹ Thus factual context for the leading case in California on the doctrine of undue influence, and one often cited in Contracts textbooks,⁹⁰ is disputed.⁹¹ More importantly, the case's functionality in employing objective criteria raises questions.⁹² Professor Joseph Perillo refers to the *Odorizzi* case as one "clearly employing a subjective test."⁹³

Another example of judicial subjectivity is the case of *Methodist Mission Home of Texas v. N—A—B—*.⁹⁴ The issue was whether the unwed mother voluntarily gave up her newborn child for adoption.⁹⁵ Professor Perillo points to this case as one in which the court applied subjective, rather than objective, reasoning.⁹⁶ The adoption agency had interviewed the mother over a period of five days, ostensibly to discuss the pros and cons of adoption, but the agency primarily focused on reasons why she should give up the baby for adoption.⁹⁷ In reasoning whether the influence was more than a modicum of "persuasion,"⁹⁸ the court found that the testimony supported the "conclusion that plaintiff was subjected to excessive persuasion."⁹⁹ However, the court added to the witnesses' testimony its subjective view of the mother's circum-

⁸⁷ *Id.*

⁸⁸ *Id.* (citing BARNETT, *supra* note 85, at 1003-04).

⁸⁹ *Id.*

⁹⁰ See, e.g., MICHAEL HUNTER SCHWARTZ, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK (2010).

⁹¹ Caplan, *supra* note 83, at 46 n.260.

⁹² Perillo, *supra* note 28, at 472 n.291.

⁹³ *Id.*

⁹⁴ 451 S.W.2d 539 (Tex. Civ. App. 1970).

⁹⁵ *Methodist Mission Home*, 451 S.W.2d at 540-41.

⁹⁶ Perillo, *supra* note 28, at 472 (citing *Methodist Mission Home*, 451 S.W.2d at 543-44).

⁹⁷ *Methodist Mission Home*, 451 S.W.2d at 541-42.

⁹⁸ *Id.* at 543.

⁹⁹ *Id.*

stances: “an unwed mother who has just given birth is usually emotionally distraught and peculiarly vulnerable to efforts, well-meaning or unscrupulous, to persuade her to give up her child.”¹⁰⁰

The infusion of subjectivity into what should be objective-decision making is not isolated to contract-based disputes. Judicial subjectivity also creeps into other contexts when deciding whether undue influence was exerted on a testator or whether a participant in a high-control group exercised free decision-making.

II. Judicial Subjectivity in Deciding Undue Influence in Cases of Will Disputes

The definition of undue influence varies by jurisdiction, but a treatise synthesizes the doctrine and provides this helpful generic explanation: “Most jurisdictions have adopted a definition characterizing undue influence as a type of coercive conduct aimed at destroying the testator’s free agency and substituting in its stead the will of another.”¹⁰¹ Definitions such as this one invite courts to engage in objective determinations in will disputes. However, the practical application of this doctrine often results in subjective analysis.

One of the explanations for why courts inject a subjective review of the facts lies in the doctrine itself. The *Odorizzi* court described a sliding scale of the weakness of mind, all three characterizations worthy of a finding of undue influence:

Undue susceptibility may consist of *total weakness* of mind which leaves a person entirely without understanding; or, a *lesser weakness* which destroys the capacity of a person to make a contract even though he is not totally incapacitated; or . . . a *still lesser weakness* which provides sufficient grounds to rescind a contract for undue influence.¹⁰²

This sliding scale of mental capacity invites courts to borrow from the field of psychology when determining whether undue influence occurred.

¹⁰⁰ *Id.* at 543-44.

¹⁰¹ See EUNICE L. ROSS & THOMAS J. REED, §7.2 *Elements of Undue Influence*, WILL CONTESTS (2d ed. 2023).

¹⁰² *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 540 (Ct. App. 1966) (emphasis added) (citations omitted).

It is no wonder that a court would impose its understanding of the facts by resorting to the subjective use of circumstantial evidence or any tool at its disposal.

Professor Melanie B. Leslie conducted a review of cases spanning five years to determine whether courts were injecting subjectivity into decisions regarding will disputes.¹⁰³ The results revealed that courts vary the rules they apply depending upon who brings the challenge.¹⁰⁴ Courts were more likely to find that undue influence was asserted when family members were disinherited.¹⁰⁵ The courts' use of rules could be implicit or explicit.¹⁰⁶ An example of implicit rule-making is when a court would favor family members trying to assert their rights into an inheritance by shifting the burden of proof to the non-family member who was named as a beneficiary.¹⁰⁷ For instance, a court would "emphasize the beneficiary's inability to explain the 'unnatural' nature of the bequest to the court's satisfaction and the good behavior of the contesting relative (as though a testator could not possibly have meant to disinherit a relative with whom he or she was on good terms)."¹⁰⁸ Express burden shifting occurred when, for example, a "confidential relationship" was declared between the testator and beneficiary.¹⁰⁹ Leslie found in both scenarios, "there is an unspoken presumption that a testator would always want to benefit family members as opposed to others."¹¹⁰ Leslie concluded in her study that a court often "substituted its judgment for the judgment

¹⁰³ Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 245 (1996).

¹⁰⁴ *See id.* (explaining the circumstances under which many courts placed the burden on a different party).

¹⁰⁵ *See id.* ("[A] significant number of courts confronted with wills that disinherited family members in favor of non-family members upheld or imposed findings of undue influence based on minimal evidence or evidence that would be insufficient to meet the contestant's burden of proof in a case where the will's primary beneficiaries were non-relatives; instead, courts implicitly relieved the contestant of the burden of proof, shifting the burden to the will's beneficiary.").

¹⁰⁶ *See id.* (explaining the methods through which the courts placed the burden on a different party).

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 246.

of the testator; the issue became not whether the document represented the testator's intent, but whether the testator's intentions offended the court's sense of justice or morality."¹¹¹

Leslie is not alone in her observations. Professor Ray D. Madoff observes that "rather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families."¹¹² And Professor Carla Spivack takes the extreme position of advocating that the doctrine of undue influence be abolished altogether.¹¹³ In her view, courts put "blindness" on when applying the doctrine of undue influence.¹¹⁴

The pernicious problem inherent in the doctrine of undue influence applied in testamentary bequests stems from the requirement that courts know the mind of the testator. Courts engage in examining the susceptibility of the testator, which leads to circumstantial evidence that can be subjectively determined. For example, Madoff points to examples of circumstantial evidence such as an "'unnatural' bequest"¹¹⁵ or "gifts"¹¹⁶ bestowed while the testator was alive to the beneficiary.¹¹⁷ These bare facts have led courts to find "proof of weakened intellect and susceptibility to undue influence."¹¹⁸

Thus, in determining vulnerability in the mind of the testator, courts often inject judicial subjectivity into the collection of evidence to deduce how much independent thought the testator invoked when creating his or her will. As these scholars point out, courts are substituting their morality and their limited knowledge of psychology for the decisions of

¹¹¹ *Id.*

¹¹² Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997).

¹¹³ Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 245 (2010).

¹¹⁴ *Id.* at 284; see also David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 572 (2021) ("A parade of scholars has argued that incapacity and undue influence are flawed.").

¹¹⁵ Madoff, *supra* note 112, at 589 (citing *Carpenter v. Horace Mann Life Ins. Co.*, 730 S.W.2d 502, 507 (Ark. Ct. App. 1987)).

¹¹⁶ *Id.* (citing *Estate of Auen*, 35 Cal. Rptr. 2d 557, 564-65 (Ct. App. 1994)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

testators without fully knowing the testator's motivations. In addition to contract formation and testamentary bequests, the dilemma of examining the mind of the person at the center of the controversy is even more challenging in a third context—that of high-control groups.

III. Judicial Subjectivity in Deciding Undue Influence in Cases of High-Control Groups

As shown in Parts I and II, when resolving claims of undue influence in the context of contract formation in a business setting or in will disputes, the traditional definitions used by courts and their analytical approaches have invited courts to apply judicial subjectivity, which can result in inconsistent decision-making and interjection of the judges' own moral compass. The definitions of undue influence and analyses utilized by the courts become particularly problematic when they seek to resolve claims by former members of high-control groups.

High-control groups are often referred to as “cults” and “are centered on an ideology, led by a charismatic leader who dominates the thoughts and daily activities of its members for the betterment of the group or of the leader.”¹¹⁹ Although religious cults are ones that come to mind when most people conjure what the term “cult” means, there are other types of cults as well—political, terrorist, psychotherapy/education, and commercial cults.¹²⁰ The self-help industry, including books and workshops, is a multi-billion dollar industry that promotes health, fitness, and wellness,¹²¹ yet some of the promoters are charlatans and have been

¹¹⁹ Robin Boyle-Laisure, *Preventing Predatory Alienation by High-Control Groups: The Application of Human Trafficking Laws to Groups Popularly Known as Cults, and Proposed Changes to Laws Regarding Federal Immigration, State Child Marriage, and Undue Influence*, 1(2) INT'L J. COERCION, ABUSE, AND MANIPULATION 27, 27 (2021) (citing *FAQs*, INT'L CULTIC STUD. ASS'N, <http://www.icsahome.com> (last visited Dec. 17, 2023)).

¹²⁰ STEVEN HASSAN, *COMBATING CULT MIND CONTROL* 85-87 (25th Anniv. Ed. Freedom of Mind Press 2015).

¹²¹ See Tracy D. Gunter, *Can We Trust Consumers with Their Brains? Popular Cognitive Neuroscience, Brain Images, Self-Help and the Consumer*, 11 IND. HEALTH L. REV. 483, 506-07 (2014) (exposing self-help products related to the brain rising in market growth to an estimated \$11-12 billion in 2014, in addition there are \$4 billion in the market place on food and fitness related to the brain).

prosecuted for crimes. A preeminent example is Keith Raniere who ran a purported chain of self-help centers and workshops called “NXIVM.”¹²² Multi-level marketing groups¹²³ are similar to cults in that they both try to recruit people based on relationships.¹²⁴ To be clear, there are no laws in the United States that outright protect people from cults and high-control groups, which is why survivors look to other legal remedies.¹²⁵

One difficulty in applying a common definition of one’s will being overcome by another individual is that some members of high-control groups may have been born into the group, and thus their brains were affected by the group from birth.¹²⁶ Second-Generation Adult members (SGAs) are those who have been raised in the group and would be completely immersed in the influential teachings of the leader and other adults in their group.¹²⁷ Multi-Generation Adult members (MGAs) are those born to SGAs, thus amounting to multiple generations of family

¹²² See, e.g., Boyle-Laisure, *supra* note 119, at 29 (describing the guilty verdict of all seven counts in *United States v. Raniere* and how NXIVM attracted at least 16,000 workshop participants who took courses, some paying tens of thousands of dollars, for their purported self-improvement); Nicole Hong, *NXIVM ‘Sex Cult’ Was Also a Huge Pyramid Scheme, Lawsuit Says*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2020/01/29/nyregion/nxivm-lawsuit-keith-raniere.html#:~:text=keith%2Draniere.html,Nxivm%20'Sex%20Cult'%20Was%20Also%20a%20Huge%20Pyramid%20Scheme%2C,by%20the%20self%2Dhelp%20group> (reporting of a class action lawsuit representing 80 victims who sued Keith Raniere, alleging a pyramid scheme of luring them with false scientific claims and for which they paid thousands of dollars for classes); David K. Li, *NXIVM Sex Cult Leader Keith Raniere Sentenced to 120 Years in Prison*, NBC NEWS (Oct. 27, 2020, 3:26 PM), <https://www.nbcnews.com/news/us-news/nxivm-sex-cult-leader-keith-raniere-sentenced-120-years-behind-n1244919>.

¹²³ Multi-level marketing refers to a structure of a commercial enterprise where products are sold through distributors who receive financial incentives for recruiting new members. Catherine Bouris, *It May Look Attractive, but Beware the Toll of ‘MLM’ on Friendships*, SYDNEY MORNING HERALD (Sept. 4, 2019, 12:00 AM), <https://www.smh.com.au/lifestyle/life-and-relationships/it-may-look-attractive-but-beware-the-toll-mlm-on-friendships-20190830-p52mei.html>.

¹²⁴ Sarah Silverstein et al., *People who Sell for Multilevel Marketing Companies Look Wildly Successful on Facebook, but the Reality Is Much More Complicated*, BUS. INSIDER (Aug. 6, 2019, 11:11 AM), <https://www.businessinsider.com/mlms-use-social-media-facebook-portray-financial-success-2019-7>.

¹²⁵ Boyle-Laisure, *supra* note 119, at 27.

¹²⁶ See Jill Aebi-Mytton, “*That’s Not Me*”: *Multigenerational Adult Leavers of Cultic Groups*, 12(1) ICSA TODAY 5 (2021) (explaining how multi-generational families born into cult groups have a limited narrative outside the cult group).

¹²⁷ See *id.* at 6.

within the group.¹²⁸ The SGAs' and MGAs' thought processes would likely be dictated by the group's ideology—often controlling what they eat, their schooling, clothing, and their labor from an early age.¹²⁹ When an SGA or MGA reaches adulthood, any contract formation is likely heavily influenced by the cult leader, and it would be very challenging, if not impossible, to separate the member's independent cognitive thought process from that imprinted by its leader. Rachel Oblak, a mental health counselor for cult survivors, explains the phenomenon for SGAs, MGAs, or those brought in at a young age:

With no outside influence during their critical stages of development, their critical stages of development, their personalities were formed within the cult. As such, they have no former identity on which to draw. As a result, many second-generation survivors may find choices overwhelming because they have had no previous opportunities to make decisions on their own. In interviews with second-generation survivors, [researchers] found that the extreme black-and-white thinking of the cult makes decision-making a terrifying experience whereby survivors search for the “one right answer.” The concept that there may be multiple good choices or nuance to choice seems foreign.¹³⁰

If employing one of the traditional definitions of undue influence, courts would be attempting to determine where in time the individual's mind and cognitive functions were independent, which would be likely a futile task.

People can become members of high-control groups at any stage of life. Those not born into the cult but who come to it later as an adult are referred to as First-Generation Adult (FGA).¹³¹ Psychologist, Jill Aebi-Mytton, has performed research on the mental health of SGAs, MGAs,

¹²⁸ *See id.* at 12 (“I coined the phrase multigenerational adults (MGAs), to acknowledge and appreciate that some former members come from families whose history is steeped in the cultic group.”).

¹²⁹ *See id.* (“[T]hose born and/or raised in a cultic group . . . usually know no other world than the cultic world; they have no previous life, no previous identity to return to.”).

¹³⁰ Rachel Oblak, *Cultic Abuse Recovery: Counseling Considerations*, 10 INT’L J. CULTIC STUD. 1, 3 (2019) (citations omitted).

¹³¹ *See* Aebi-Mytton, *supra* note 126.

and FGAs.¹³² Her research reveals that FGAs differ from SGAs and MGAs in that FGAs previously experienced childhood outside of the cult and were able to “develop their identities and their values.”¹³³ However, upon joining the group, “the cultic group becomes the FGA member’s family, and the member can then become attached to the leader and the group.”¹³⁴ Thus, their independent decision-making processes are also dominated by the group leader or cult.

Counselor Oblak had similar observations of FGAs in her practice:

For adults who entered a cultic situation later in life (first-generation survivors), the demands, control, and absolute power of the group over the individual can have a regressive effect, infantilizing those who find themselves dependent on the leader or group for making decisions they previously might have been able to make on their own. Healing requires that they regain a sense of autonomy around their decision-making and life choices.¹³⁵

Thus, critical thinking skills for SGAs, MGAs, and FGAs would be severely diminished. If applying the traditional doctrine of undue influence, courts would have the untenable task of deciphering whether members of high-control groups had sufficient independent thought to engage in contractual relations while in the group or shortly upon leaving.

When claims of undue influence are brought against organizations with religious underpinnings, courts look toward whether the claim is based upon secular conduct or religious doctrine.¹³⁶ Professor Jeffrey Shulman explains, “When courts choose to impose tort liability on religious entities, they often do so by finding that the misconduct is entirely secular,”¹³⁷ or at least not entirely based upon church doc-

¹³² *Id.* (Jill Abei-Mytton is a Chartered Counselling Psychologist, practicing in Europe.).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Oblak, *supra* note 130 (citations omitted); see also Leona Furnari, *Born or Raised in High-Demand Groups: Developmental Considerations*, 14(1) ICSA TODAY, 8 (2023) (exploring how a cult or closed, high-demand group using deception and mind control to gain power over its members impacts the development and recovery of former members who were born or raised in such groups).

¹³⁶ See Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN. ST. L. REV. 381, 395 (2008).

¹³⁷ *Id.*

trine.¹³⁸ Balanced against the plaintiffs' claims against religious institutions are often First Amendment challenges based upon the Exercise of Religion clause, which has been known to serve as an obstacle to plaintiffs.¹³⁹ But as Canadian Professor Phil Lord argues, "For religious organizations to benefit from the relative independence which the law affords their legal systems, they must engage with the mainstream legal system."¹⁴⁰

An example of a case brought by a parishioner for undue influence and fraud against her church and her spiritual advisor to recover real estate and personal property that she had turned over to them is *D'Onofrio v. Mother of God with Eternal Life*.¹⁴¹ The complaint alleged that the spiritual leader told the plaintiff that if she did not do as she instructed, which was to turn over to the church her real and personal properties, she would suffer "grave and fatal spiritual consequences"¹⁴² and "die from torment of the souls."¹⁴³ The complaint further alleged that the defendant forced her to reside on church property in small and unsuitable rooms or apartments and to move between properties for ten years on twenty-five occasions.¹⁴⁴ Also, it claimed that the defendant isolated the plaintiff from her family; was verbally, emotionally and physically abusive toward her;¹⁴⁵ and refused her water, which led to her health decline.¹⁴⁶ The plaintiff claimed that the leader coerced her to be named as beneficiary on a bank account with \$100,000 in deposits.¹⁴⁷

¹³⁸ *Id.*

¹³⁹ See generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 22 (2d ed. 2014) (explaining how "Congress enacted the most far-reaching statute in favor of religious entities" when it passed the Religious Freedom Restoration Act of 1993).

¹⁴⁰ Phil Lord, *Religious Legitimacy*, 90 UMKCL. REV. 347, 395 (2021) (describing a new religious movement, Scientology, and its use of the legal system to gain mainstream religious status, such as tax-exemption).

¹⁴¹ 79 N.Y.S.3d 902, 911 (Westch. Cnty. 2018) (denying motion to dismiss as to the claim of undue influence).

¹⁴² *Id.* at 904 (quoting the plaintiff's complaint).

¹⁴³ *Id.* (quoting the plaintiff's complaint).

¹⁴⁴ *Id.* at 905.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

In determining defendant's motion to dismiss, the trial court used this definition of undue influence: "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [actor] to do that which was against [her] free will and desire, but which [she] was unable to refuse or too weak to resist."¹⁴⁸ The court relied upon precedent stating that undue influence is the "product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another."¹⁴⁹ The court explained that the burden of proof typically lies with the claimant, but where there is a confidential relationship, the burden shifts to the beneficiary.¹⁵⁰

Although the court was skeptical about whether the plaintiff alleged facts indicating that the relationship with the defendant was one of trust and confidence, nevertheless, authority in New York had previously found such relationships to exist between other spiritual advisors and their constituents.¹⁵¹ More significantly, the court also took into consideration the mental state of the plaintiff and that she had alleged in the complaint feeling "totally under [defendant's] control"¹⁵² and feeling in a "weakened emotional, psychological and physical state."¹⁵³ Thus, synthesizing what the state law had previously constructed as relationships of trust and confidence (spiritual advisors and their parishioners) and the plaintiff's attestation of her own mental state, the court concluded that the plaintiff sufficiently alleged undue influence to survive the motion to dismiss.¹⁵⁴

This reasoning in the *D'Onofrio* case is consistent with that used by other courts. Courts use a similar definition of undue influence, which

¹⁴⁸ *Id.* at 909 (quoting *Children's Aid Soc'y v. Loveridge*, 70 N.Y. 387, 394 (1877) (alterations in original)).

¹⁴⁹ *Id.* at 910 (quoting *Matter of Burke* 441 N.Y.S.2d 542, 548 (N.Y. App. Div. 1981)).

¹⁵⁰ *Id.* at 911 (quoting *Feiden v. Feiden*, 542 N.Y.S.2d 860, 863 (N.Y. App. Div. 1989)).

¹⁵¹ *D'Onofrio*, 79 N.Y.S.3d 902 at 911.

¹⁵² *Id.* (quoting the complaint).

¹⁵³ *Id.* (quoting the complaint).

¹⁵⁴ *Id.*

involves examining the claimant's mental state. But is it necessary to consider the mental state of the plaintiff? Would it not be sufficient to show in the *D'Onofrio* case that the defendant isolated her from her family, controlled what she used for nourishment, threatened her with beliefs that she held dear, dictated where she would live, and extracted from her large sums of money and real property? Had D'Onofrio not previously undergone a divorce, would the case have been dismissed?

The examination of the victim's state of mind can be problematic for other reasons, such as determining when the time clock starts to tick, particularly when the claimant (the victim) has experienced trauma.¹⁵⁵ In the *Barba v. Seung Heun Lee* case, multiple plaintiffs brought ten causes of action, including undue influence, against individuals and corporate defendants that operated yoga and health centers on college campuses.¹⁵⁶ The complaint alleged that the defendants recruited members to join the "Dahn organization," which they alleged was a "totalistic, high demand group"¹⁵⁷ with a leader that engaged in "psychological manipulation, thought reform, coercive persuasion and undue influence"¹⁵⁸ of its members. The plaintiffs described the defendants' tactics as subjecting members to "intense and prolonged physical and psychological programs,"¹⁵⁹ as well as "sleep deprivation, a low protein diet, excessive physical exertion and physical punishment"¹⁶⁰ and encouraging them to "sever ties with their families and friends."¹⁶¹

¹⁵⁵ See Doni Whitsett, *Recovering from Sexual Abuse in Cults: What Can We Learn from Neurobiology?* 12(1) ICSA TODAY 14 (2021). Dr. Whitsett is a Clinical Professor of Social Work and has been working with cult survivors for three decades. He explains, "Many neurobiological systems are disrupted due to trauma . . ." *Id.* at 15; see also Steve K.D. Eichel, *Sex Therapy with Former Cult Members*, 8(3) ICSA TODAY 2, 4 (2017) (describing how counseling clients who had undergone sexual abuse in cultic groups is complicated because they "may have felt they were in love with their perpetrator(s), or had been spiritually/psychologically special or chosen"). Dr. Eichel is a counseling psychologist and certified sex therapist.

¹⁵⁶ No. CV 09-1115-PHX-SRB, 2009 WL 8747368, at *1 (D. Ariz. Nov. 4, 2009).

¹⁵⁷ *Id.* (quoting the complaint).

¹⁵⁸ *Id.* (quoting the complaint).

¹⁵⁹ *Id.* (quoting the complaint).

¹⁶⁰ *Id.* (quoting the complaint).

¹⁶¹ *Id.* (quoting the complaint).

One of the issues that the trial court decided was whether the doctrine of equitable tolling applied.¹⁶² Equitable tolling allows courts to extend the time to sue beyond the statutory time period if the plaintiffs “have been prevented from filing in a timely manner due to sufficiently inequitable circumstances.”¹⁶³ The defendants argued that the toll of the limitations period would begin when each plaintiff left Dahn.¹⁶⁴

However, the plaintiffs claimed that they were “unable to appreciate the wrongful nature of defendants’ conduct . . . until they escaped Defendants’ undue influence.”¹⁶⁵ They argued that they were unable to file the complaint within the statutory period “on account of ‘psychological manipulation,’ ‘indoctrination,’ and ‘weakness of mind’ resulting from Defendants’ ‘undue influence.’”¹⁶⁶ One of the plaintiffs alleged that a defendant sexually assaulted her.¹⁶⁷ She argued that it was this sexual assault, along with being over \$50,000 in debt, and being financially unable to leave Korea for her home in Massachusetts that prevented her from filing a complaint on time.¹⁶⁸ She additionally claimed that she was tied to working for Dahn because she had no work visa for Korea.¹⁶⁹ On the pre-trial motion, the court ruled that more facts were needed and, therefore, denied Defendant’s Motions to Dismiss and Motions for Summary Judgment on these claims.¹⁷⁰

The *Barba* case raises the question of whether the courts should inquire when plaintiffs became free from the spell of the defendant to understand that undue influence occurred.¹⁷¹ Over half of child sex abuse

¹⁶² *Id.*

¹⁶³ *Id.* at *25.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting the complaint).

¹⁶⁶ *Id.* at *26 (quoting the complaint).

¹⁶⁷ *Barba*, 2009 WL 8747368, at *26.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *27.

¹⁷¹ *See id.* at *24-26. The law of Massachusetts provides that undue influence occurs when a person can be influenced, when deception is practiced, or improper influence is exerted, and the person was overmastered by this unlawful conduct. *Id.* at *35; *see Miles v. Caples*, 284 N.E.2d 231, 235 (Mass. 1972).

victims do not disclose their trauma until age fifty years or older.¹⁷² For this reason, twenty-nine states and territories have passed laws permitting plaintiffs to bring claims of sexual abuse beyond the statute of limitations period, if the victim was a child at the time the alleged abuse took place.¹⁷³

A retired psychotherapist Leona Furnari, who specialized in recovery from trauma, including recovery from abusive groups, describes survivors of high control groups as having experienced a multitude of personal losses such as “identity, learning capacities, [and] problems sustaining relationships.”¹⁷⁴ Even group members’ basic functions, such as reproduction, are monitored in high-control groups.¹⁷⁵ Ashlen Hilliard is a cult intervention specialist in helping victims of high-control groups.¹⁷⁶ She recently conducted a study with ninety-nine participants who had exited from various high-control groups, with ninety-two participants identifying as female.¹⁷⁷ Reporting on the study, Hilliard found what she called “reproductive coercion” occurring in these groups, meaning women did not have individual autonomy of their reproductive choices or outcomes during their time in high-control groups.¹⁷⁸

Survivors of high-control groups describe psychological, emotional, and often physical trauma that they endured while in the groups.¹⁷⁹ Debby Schriver is the author of *Whispering the Daylight, the Children*

¹⁷² *Statute of Limitations Reform for Child Abuse & Neglect*, CHILD USA, <http://www.childusa.org/sol> (last visited Dec. 18, 2023).

¹⁷³ *Id.*; see also Carla DiMare, *New Hope for Victims of Childhood Sexual Abuse Seeking Justice*, 11(2) ICSA TODAY 16 (2020).

¹⁷⁴ Furnari, *supra* note 135, at 14.

¹⁷⁵ See Ashlen Hilliard, Int’l Cultic Stud. Assoc, Workshop Presenter: The Relationship Between Reproductive Coercion, Psychologically Abusive Environments and the Extent of Group Identity in a Sample of Those Who Have Left Cultic Groups (June 29, 2023) (Annual Conference held in Louisville, KY) (study is under supervision by Drs. Rod and Linda Dubrow-Marshall, University of Salford, MSc, Psychology of Coercive Control).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ DEBBY SCHRIVER, *WHISPERING THE DAYLIGHT, THE CHILDREN OF TONY ALAMO CHRISTIAN MINISTRIES AND THEIR JOURNEY TO FREEDOM* xvii (Univ. of Tenn. Press 2018).

*of Tony Alamo Christian Ministries and their Journey to Freedom.*¹⁸⁰ She interviewed Tony Alamo while he was in prison for transporting young girls across state lines for illicit purposes.¹⁸¹ Schriver also interviewed 337 survivors, including children, of the high-control group.¹⁸² She accompanied children who re-entered the Arkansas cult compound and observed their reactions to their prior trauma, which Schriver describes personally: “I saw firsthand the condemnation, rejection, and torment they experienced regularly.”¹⁸³

A survivor of Tony Alamo Christian Ministries, using the pseudonym of “John” here, explained in an interview with me that he and his sister were SGAs of the Tony Alamo Christian Ministries and that they lived with their parents until the FBI raided the compound in 2008. They were in their teen years when they were rescued.¹⁸⁴ John explained how their minds were completely shaped by the strict dogma of the cult.¹⁸⁵ He reported how they were taught to read bible scripture and to pray daily.¹⁸⁶ John described how they went to sleep at night with Tony Alamo’s preachings playing on a recording.¹⁸⁷ Corporal punishment was inflicted upon those who questioned religious teachings.¹⁸⁸ Schriver and John describe how Tony and his wife ran the cult by use of shunning, instilling

¹⁸⁰ See generally *id.*

¹⁸¹ *Id.* at (Note to Reader) xvi-xvii.

¹⁸² *Id.* at xvi.

¹⁸³ *Id.* at xvii.

¹⁸⁴ Telephone interview with SGA going by the name of “John” for purposes of anonymity. He was born and raised in Tony Alamo Christian Ministries (July 10, 2023) (notes on file with this author) [hereafter *Interview with John*].

¹⁸⁵ *Id.*; see SCHRIVER, *supra* note 179, at 245 (“Irene” described her formative years in the cult as “I feel that we only know a fraction of what happened and how it affected our lives. . . . I will spend the rest of my life decoding those formative years so that I may truly understand . . .”).

¹⁸⁶ *Interview with John, supra* note 184.

¹⁸⁷ *Id.*; see SCHRIVER, *supra* note 179, at 232 (“Audrey” described how Tony Alamo recorded messages that were listened to at home, in church, and sent around the world.).

¹⁸⁸ *Interview with John, supra* note 184; see SCHRIVER, *supra* note 179, at 231 (relaying how “Audrey” described beatings of children); *id.* at 105-06 (“Irene” described severe beatings at age twelve with a board causing a blow that “threw her about five feet forward onto her face,” only to have this done nine more times).

fear, and breaking up family units.¹⁸⁹ For instance, fathers were sent on travel missions to long-distance destinations, such as dropping off donated goods to many of their warehouses where the used goods were resold.¹⁹⁰

John described how children were treated the same with no individual identity.¹⁹¹ According to him, their minds were controlled.¹⁹² John explained that they were taught that the world was going to end any day and that they were just a servant while on this earth and to do what Tony Alamo told them to do.¹⁹³ He and his sister had a hard time adjusting to the outside world when they were put in foster homes and public schools.¹⁹⁴ Up until then, they had not interacted with the rest of society and had been home-schooled with Christian-based books.¹⁹⁵ In the cult, schooling took a secondary priority to work.¹⁹⁶ The children were

¹⁸⁹ See SCHRIVER, *supra* note 179, at 116-17 (describing how Tony Alamo taught “Victoria,” that her mother, an SGA who escaped from the cult, was a “drug addict and a whore” and publicly condemned her).

¹⁹⁰ *Interview with John*, *supra* note 184; SCHRIVER, *supra* note 179, at 121 (reporting how Tony Alamo “effectively controlled the adults. . . [by] mandat[ing] work assignments that took parents away from families, men away from wives, and ejected members from the church”).

¹⁹¹ *Interview with John*, *supra* note 184.

¹⁹² *Id.*; see SCHRIVER, *supra* note 179, at 233 (describing how “Audrey” realized by attending court hearings and talking with others that “everything we had been taught was a lie” and it was “shocking” because “[t]he cult was all that we ever knew” and that the world outside the cult was “evil”).

¹⁹³ *Interview with John*, *supra* note 184; see SCHRIVER, *supra* note 179, at 271 (providing deposition testimony of Tony Alamo, who stated under oath that the members volunteered their services as opposed to “worked” for the church).

¹⁹⁴ *Interview with John*, *supra* note 184; see SCHRIVER, *supra* note 179, at 233 (relaying the story of “Audrey,” who was teased by the students at her first public school that she must have “lived under a rock” because she did not know a popular singer or any new artists or colloquialisms).

¹⁹⁵ *Interview with John*, *supra* note 184; see SCHRIVER, *supra* note 179, at 245 (describing how “Irene” lived in the cult from birth until sixteen-years-of-age and had never been to a movie theater, a bowling alley, a community church, or a public school); SCHRIVER, *supra* note 179, at 146 (noting “Paige” said, in Tony Alamo’s church, “boys and girls were not permitted to talk or interact in any way” and this was purposefully designed by schedules so that the genders were separated at mealtime, during school, and Bible lessons, prayer, and work).

¹⁹⁶ *Interview with John*, *supra* note 184; see SCHRIVER, *supra* note 179, at 151 (reporting how “Stefan” described being sleep-deprived when he was on “watch schedule” to guard the compound from 10 PM to 2 AM and how this duty started as young as age eight).

accompanying relatives to work in some cases before age ten and some of them were sent on road trips to work in the warehouses.¹⁹⁷ When rescued, they had to learn computer skills in school and how to make friends.¹⁹⁸ Trusting friends and sharing personal life stories was hard for them.¹⁹⁹

Not only children but also adults who join high-control groups later in life have experienced diminished critical thinking skills.²⁰⁰ Tony Alamo controlled and punished adults as well as children.²⁰¹ He would embarrass them in front of others and their children, often shaming them.²⁰²

Scholar and law professor Richard Delgado recognizes the abuses inflicted on cultists based upon psychological studies, legislative hearings and court trials.²⁰³ Delgado describes such “harms”²⁰⁴ as

physical injury from malnutrition, inadequate sleep, overwork, and inattention to medical needs, pecuniary loss, psychological injury, including guilt, suicide, maturational arrest, psychosis and neurosis, impairment of

¹⁹⁷ *Interview with John*, *supra* note 184; *see* SCHRIVER, *supra* note 179, at 239 (describing how “Irene” reported cleaning Tony Alamo’s house at age seven, and then working in warehouses sorting donated goods and rubbing expiration dates off food cans); SCHRIVER, *supra* note 179, at 249 (describing “Victoria,” who reported working in a warehouse as a child, cleaning facilities, taking care of other children, and weeding gardens).

¹⁹⁸ *Interview with John*, *supra* note 184; *see* SCHRIVER, *supra* note 179, at 148 (noting “Paige” explained how they had no contact with society outside of the church and had no way to contact anyone on the outside without a church member supervising the phone call and that phones were locked away at night).

¹⁹⁹ *Interview with John*, *supra* note 184; *see* SCHRIVER, *supra* note 179, at 234 (“Audrey,” trying to assimilate into society after being rescued, stated that “[t]rusting people is very difficult for me.”).

²⁰⁰ *See* Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533, 538-39 (1982) (explaining that “impairment of autonomy and decisional capacity” is a harm that may occur in cultists).

²⁰¹ *Interview with John*, *supra* note 184.

²⁰² *Id.*; *see* SCHRIVER, *supra* note 179, at 152 (describing “Stefan,” who noted Tony Alamo made fun of his dad for reading children’s books to his kids and “lashed out at him when he preached at church” calling his dad a “soft weasel soon to be a backslider if he didn’t toughen up”).

²⁰³ Delgado, *supra* note 200, at 538.

²⁰⁴ *Id.*

autonomy and decisional capacity, and loss of opportunity by the convert for normal personal, career, and social development.²⁰⁵

Delgado points out that not all cultists experience these harms and may find “contentment, even joy in the group and view any costs associated with their conversion as acceptable.”²⁰⁶ Yet others leave on their own volition or through expulsion and some experience “deprogramming.”²⁰⁷ Courts are ill-equipped to separate those cultists who have been harmed from those who were not, or those who were but were unaware how much of their thought processes lacked independent free-thinking.

Dr. Steven Hassan is a mental health professional and expert in undue influence tactics used by authoritarian leaders and destructive cults.²⁰⁸ Hassan was once a member of what he described as the “dangerous mind-controlling cult of Sun Myung Moon’s Unification Church”²⁰⁹ otherwise known as the “Moonies.”²¹⁰ In his doctoral dissertation, Hassan described his experience of coercive control while in the Moonies.²¹¹ At age nineteen and having just been rejected by a girlfriend, “three attractive female recruiters flirted”²¹² with him, “distorted information and outright lied”²¹³ to him, and “lured”²¹⁴ him to a recruitment program in a remote upstate location.²¹⁵ After being sleep-deprived for two weeks in the program, Hassan became a member.²¹⁶ The cult taught him that his

²⁰⁵ *Id.* at 538-39.

²⁰⁶ *Id.* at 540.

²⁰⁷ *Id.*

²⁰⁸ *About Steven Hassan Ph.D.*, FREEDOM OF MIND RES. CTR., <https://freedomofmind.com/about/about-steven-hassan> (last visited Dec. 15, 2023).

²⁰⁹ STEVEN HASSAN, *THE CULT OF TRUMP: A LEADING CULT EXPERT EXPLAINS HOW THE PRESIDENT USES MIND CONTROL* (Author’s Note) IX (2019).

²¹⁰ Erin Snodgras, *Mass Weddings and Cult Accusations: Who Are the ‘Moonies’ and What Is the Unification Church?*, INSIDER (July 25 2022, 3:35 PM), <https://www.insider.com/who-are-the-moonies-and-what-is-the-unification-church-2022-7>.

²¹¹ Steven Alan Hassan, *The Bite Model of Authoritarian Control: Undue Influence, thought Reform, Brainwashing, Mind Control, Trafficking and the Law 2* (2020) (Ph.D. dissertation, Fielding Graduate University) (on file with author).

²¹² *Id.* at 1.

²¹³ *Id.* at 2.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

parents were the “products of Satan.”²¹⁷ And in Hassan’s words, “I became a right-wing fanatic who worked 18 to 21 hours a day, 7 days a week for no pay. I dropped out of college, donated my bank account, and recruited and indoctrinated others. Members were programmed to die or kill on command and were sent on various missions to take over the world for ‘God.’”²¹⁸ Hassan fell asleep while driving a fundraising van in a sleep-deprived state and was hospitalized for surgery on his ankle.²¹⁹ He was given “permission” to visit family members.²²⁰ They “begged” him to meet with former “Moonies who had themselves been deprogrammed.”²²¹ Several days later, Hassan came to his senses.²²²

As shown through court findings and by speeches and writings by former cult members, there is a common thread running through descriptions of life in high-control groups, which is that members often have diminished critical thinking skills.²²³ Whether born into the cult or joining later as an adult, the adherents might suffer punishment for thinking outside of the strict dogma of the group.²²⁴ Extreme sleep deprivation is common, which diminishes cognitive acuity.²²⁵ For instance, in the NXIVM cult, women in the inner circle that the leader Keith Raniere controlled were forced to respond to text messages at all times of the day and within a minute of receiving them, for fear of

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 3.

²²² Hassan, *supra* note 211, at 3.

²²³ See, e.g., Richard Heinberg, *You May Think You’re Immune to Cult Thinking, but We’re All Susceptible*, RESILIENCE (Aug. 7, 2023), <https://www.resilience.org/stories/2023-08-07/you-may-think-youre-immune-to-cult-thinking-but-were-all-susceptible> (describing how cult leaders provide an explanation of the world that opposes “critical examination”).

²²⁴ Steven A. Hassan, *Understanding Cults: The Basics*, PSYCH. TODAY, June 5, 2021, <https://www.psychologytoday.com/us/blog/freedom-mind/202106/understanding-cults-the-basics>.

²²⁵ See Sharon K. Farber, *Cults and the Mind-Body Connection*, PSYCH. TODAY, July 19, 2024, <https://www.psychologytoday.com/us/blog/the-mind-body-connection/201407/cults-and-the-mind-body-connection> (explaining that some of the techniques cults use is sleep deprivation).

punishment.²²⁶ Trafficking victims also experience diminished ability to cognitively think independently of their traffickers.²²⁷ A trafficking survivor explained it this way—she was trafficked for commercial sex for thirteen years and met her trafficker at age fifteen.²²⁸ When she was able to break free of him, and after getting out of prison, her mind started to revert to where her teenage brain had left off, as if the development had been on hold for so long.²²⁹

If persons have trouble distinguishing between their thoughts and those of the cult leader, how could courts possibly gauge the claimants' vulnerabilities? If trauma causes survivors to realize that they have an undue influence claim much later than the statutory period of limitations, how can courts assess when this realization should have occurred? These questions necessitate changing the definition of undue influence to remove the burden on courts of relying upon the state of mind (vulnerability) of the claimant or victim.

IV. Models for Undue Influence to be Considered

A. Models Created by Lifton, Schefflin, and Hassan

Psychiatrist Robert J. Lifton is known for his seminal work regarding “brainwashing,”²³⁰ nowadays referred to as “coercive control.”²³¹ Courts

²²⁶ SARAH EDMONDSON, SCARRED: THE TRUE STORY OF HOW I ESCAPED NXIVM THE CULT THAT BOUND MY LIFE 166 (2019) (explaining how Raniere and his accomplices would call the text messages ““readiness drills””).

²²⁷ NJ Safe & Sound Webinar, Wendy Barnes presented (Nov. 1, 2022) (on file with the organization—request from info@safenj.org) [hereinafter NJS&S Webinar]. For more information about this organization, see <http://www.NJsafeandsound.org>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Robert Jay Lifton, ACADEMIC ACCELERATOR, <https://academic-accelerator.com/encyclopedia/robert-jay-lifton> (last visited Dec. 15, 2023) (stating that Robert J. Lifton, M.D., was known for his study of interrogation techniques used against prisoners of war and that he was the Distinguished Professor of Psychology and Psychiatry at John Jay College and the Graduate Center of the City University of New York).

²³¹ See generally EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007) (“Although coercive control can be devastating

have recognized Lifton's work when deciding whether to admit expert testimony regarding coercive control.²³² In the California case of *Noyes v. Kelly Services*, the plaintiff alleged that his employer, a small religious organization, discriminated against him based on his religion.²³³ Based upon evidentiary standards,²³⁴ the defendant raised objections to the expert witness testimony of Rick Ross who was a well-known expert on cults and coercive persuasion.²³⁵ Ross had testified at the *Noyes* evidentiary hearing on the "principles and methods of the study of controversial organizations and destructive cults."²³⁶ Ross supported his testimony with reference to Lifton's published paper "describing three defining criteria of destructive cults: (1) a living leader who becomes the object of worship; (2) a process of indoctrination and undue influence over members that leads to an inability to think independently; and (3) the group does some harm, such as financial exploitation."²³⁷ The court held that Ross had demonstrated a sufficient and reliable basis for his opinions and this source, among others, were of a type reasonably relied on by experts in the field.²³⁸

As a concept, "brainwashing" was significantly difficult to prove in criminal court.²³⁹ For example, in the notorious criminal trial of Patty Hearst for her role in connection with a bank robbery perpetrated by the Symbionese Liberation Army, a radical group, in the 1970s, the court

psychologically, its key dynamic involves an objective state of subordination and the resistance women mount to free themselves from domination.").

²³² *Noyes v. Kelly Servs.*, No. 2:02-cv-2685-GEM-CMK, 2008 WL 782846, at *2 (E.D. Cal. Mar. 21, 2008) (citing Robert J. Lifton, *Cult Formation*, 7 HARVARD MENTAL HEALTH LETTER, no. 8 (Feb. 1981)).

²³³ *Id.* at *1.

²³⁴ *Id.* at *3-4 (citing *Daubert v. Merrill Dow Pharms.*, 43 F.3d 1311, 1315 (9th Cir. 1995) and *United States v. Fishman*, 743 F. Supp. 713, 716, 723 (N.D. Cal. 1990)).

²³⁵ *Id.*

²³⁶ *Id.* at *4 (the hearing was called the *Daubert* hearing after the landmark case of *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311 (9th Cir. 1995)).

²³⁷ *Id.* at *2 (citing Lifton, *supra* note 232).

²³⁸ *Id.* at *4, *6 (holding the defendant's motion to exclude expert testimony was denied in part and granted to disallow testimony of sexual misconduct).

²³⁹ See Robin Boyle Laisure, *Employing Trafficking Laws to Capture Elusive Leaders of Destructive Cults*, 17 (2) OR. REV. INT'L L. 205, 227 (2016), reprinted in 9 INT'L J. CULTIC STUD. 1 (2018)) (providing examples of cases where "brainwashing" has been difficult to prove).

rejected the defense theory that she was brainwashed by the SLA after they locked her in a closet, starved, and raped her.²⁴⁰ Similarly, in the case of *United States v. Fishman*, where a former Scientologist who claimed the organization brainwashed him into committing fraud, the court rejected the theory of brainwashing.²⁴¹ Although not all scholars have forgone that term, Canadian Professor Frances E. Chapman proposes a defense to be used in criminal cases when facts indicative of “brainwashing” appear on the part of the perpetrator.²⁴²

Brainwashing as a theory based upon Lifton’s model is unlikely to withstand evidentiary challenges in criminal court, and probably civil court, but a theory to consider is one of the late Alan Schefflin, former Professor Emeritus from Santa Clara University School of Law. He proposes a legal model for the determination of claims of undue influence, particularly actions that are brought against high control groups. He titles his proposal, the “Social Influence Model,” which has six components: Influencer (who did the influencing), Influencer’s Motives (or purpose—usually monetary), Influencer’s Methods (or techniques), Circumstances (or timing and setting—where, when, or what happened), Receptivity/Vulnerability (of the Influencee), and Consequences (Results).²⁴³ Schefflin’s model grew out of other models developed by researchers used to understand “extremely manipulative processes.”²⁴⁴ Schefflin explains that the Receptivity/Vulnerability element refers to some people being more easily persuaded than others.²⁴⁵ Those models include Lifton’s work regarding thought reform,²⁴⁶ psychologist Dr.

²⁴⁰ *Id.* at 227 (2016) (citing *United States v. Hearst*, 412 F. Supp. 863, 870 (N.D. Cal. 1975)).

²⁴¹ *Id.* at 227-28 (citing *United States v. Fishman*, 743 F. Supp. 713 (N.D. Cal. 1990)).

²⁴² Frances E. Chapman, *Implanted Choice: Is There Room for a Modern Criminal Defense of Brainwashing?*, 49(6) CRIM. L. REP. BULL. (Winter 2013).

²⁴³ Alan W. Schefflin, *Supporting Human Rights by Testifying Against Human Wrongs*, 6 INT’L J. CULTIC STUD. 69 (2015).

²⁴⁴ *Id.*

²⁴⁵ NJS&S Webinar, *supra* note 227, Alan Schefflin presented.

²⁴⁶ Schefflin, *supra* note 243 (citing ROBERT J. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF “BRAINWASHING” IN CHINA (1961, 1989 Univ. N.C. Press)). The book described coercive techniques—which he called “thought reform,” LIFTON, *supra*, at 5, or “brainwashing,” *id.* at 3-7—used against American prisoners of war during the Korean War and those held in China’s

Margaret Singer and sociologist Dr. Janja Lalich’s conditions for thought control,²⁴⁷ and Dr. Hassan’s BITE model described below.²⁴⁸ The Social Influence Model improves upon the current legal definitions of undue influence utilized by courts, by focusing on the behavior of the influencer, but it retains the element of vulnerability of the victim.

Hassan’s model—Behavior Control, Information Control, Thought Control, and Emotional Control (BITE)—proposes four principal components to describe “the specific methods that cults use to recruit and maintain control over people.”²⁴⁹ Under each component is a list of possible tactics. Some of the tactics related to Behavior Control include:

1. Regulate [the] individual’s physical reality;
2. Dictate where, how, and with whom the member lives and associates or isolates;
3. [Control] [w]hen, how and with whom the member has sex. . . .²⁵⁰

Under Information Control, the description of tactics begins with the following:

1. Deception:
 - a. Deliberately withhold information;
 - b. Distort information to make it more acceptable,
 - c. Systematically lie to the cult member.

reeducation camps during the 1950s. *See generally* William Douglas Woody et al., *Investigating Coercion, Abuse, and Manipulation: Recognizing the Legacy of the Cold War*, 1(1) INT’L J. COERCION, ABUSE, AND MANIPULATION 1, 3-4 (2020) (relaying the history of research on “brainwashing” techniques).

²⁴⁷ Schefflin, *supra* note 243 (citing MARGARET T. SINGER & JANJA LALICH, *CULTS IN OUR MIDST: THE HIDDEN MENACE IN OUR EVERYDAY LIVES* (1995)). The late Dr. Singer was a researcher in the field of “brainwashing” and often served as an expert witness at trials, such as that of Patty Hearst. Dr. Lalich is an expert in coercive control and has written books and articles on the topic. She is Professor Emerita of Sociology, California State University, Chico; an expert on cults and extreme ideology; and an author and consultant.

²⁴⁸ *Id.* at 76-77 (citing STEVEN HASSAN, *FREEDOM OF MIND: HELPING LOVED ONES LEAVE CONTROLLING PEOPLE, CULTS, AND BELIEFS* (2012)).

²⁴⁹ *BITE Model of Authoritarian Control*, FREEDOM OF MIND RES. CTR. [hereinafter *BITE*], <https://freedomofmind.com/cult-mind-control/bite-model> (last visited Dec. 16, 2023).

²⁵⁰ *Id.*

2. Minimize or discourage access to non-cult sources of information, including:
 - a. Internet, TV, radio, books, articles, newspapers, magazines, media²⁵¹

Under Thought Control, the descriptive tactics begin with this:

1. Require members to internalize the group's doctrine as truth
 - a. Adopting the group's "map of reality" as reality
 - b. Instill black and white thinking.²⁵²

And finally, the fourth item—Emotional Control, includes these descriptions:

1. Manipulate and narrow the range of feelings—some emotions and/or needs are deemed as evil, wrong or selfish
2. Teach emotion-stopping techniques to block feelings of homesickness, anger, doubt. . . .²⁵³

The BITE Model is very detailed and useful for identifying when a group is engaging in cult-like behavior. Not all of the factors must be exhibited to categorize the group as high-control or cult-like.²⁵⁴ The BITE Model focuses on categorizing the organization.²⁵⁵ However, courts are still in need of a useful definition of undue influence that rejects judicial subjectivity into the mind of the victim.

B. Criminal Legislation— Looking Across the Pond: England's Model on Coercive Control

The law in the United Kingdom helps to give some guidance as to the crafting of a workable model for undue influence. One commentator,

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

in contrasting the law in the United States with that of the United Kingdom, had this to say: “Claims of undue influence or unsound mind, which occupy so prominent a place in American probate law, are virtually unknown both on the Continent and in English and Commonwealth legal systems. It is instructive to consider some of the reasons for this striking divergence.”²⁵⁶ Why do United States courts focus on unsound mind?

Criminal legislation in the United Kingdom is of interest on the topic of undue influence. The 2015 Serious Crime Act, in effect in England and Wales, prohibits “controlling or coercive behaviour in an intimate or family relationship.”²⁵⁷ Some of the elements are that the “behaviour in question . . . causes [the victim] to fear, on at least two occasions, that violence will be used against [the victim] or it causes [the victim] serious alarm or distress which has a substantial adverse effect on ‘the victim’s] usual day-to-day activities.”²⁵⁸ This law criminalizes psychological and emotional abuse between domestic partners. Here again, the courts would need to have the victim establish their state of mind, that they felt fear, serious alarm, or distress.

Scotland has a law that makes psychological domestic abuse and controlling behavior a crime, called the Domestic Abuse Act.²⁵⁹ Scotland’s Domestic Abuse Act covers physical abuse, psychological and emotional abuse, and coercive and controlling behavior, including where abusers isolate their victims from family and friends and control their finances.²⁶⁰

²⁵⁶ John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 (1994).

²⁵⁷ Serious Crime Act 2015, c. 9, § 76 (Eng. And Wales).

²⁵⁸ *Id.*

²⁵⁹ Domestic Abuse (Scotland) Act 2018, (asp. 5); see News Summaries, *Psychological Domestic Abuse Becomes Crime in Scotland*, 10(3) ICSA TODAY 36 (2019) (citing INDEPENDENT, Apr. 1, 2019).

²⁶⁰ Maya Oppenheim, *Psychological Domestic Abuse Becomes Crime in Scotland under ‘Groundbreaking’ New Law*, INDEP. (Apr. 1, 2019), <https://www.independent.co.uk/news/uk/home-news/domestic-abuse-scotland-law-psychological-coercive-control-a8848916.html> (“[The Scottish act] ‘covers the full breadth of violent, threatening, intimidating and other controlling behaviour which can destroy a victim’s autonomy and further recognizes the adverse impact domestic abuse can have on children.’”).

C. United States Federal Trafficking Statute

In the year 2000, the United States Congress passed the Victims of Trafficking and Violence Protection Act (TVPA).²⁶¹ Under the TVPA, the United States Department of Justice could consolidate efforts and create special units to prosecute traffickers who trafficked humans for labor or sex. Labor trafficking occurs when a perpetrator uses “force” and “threats of serious harm” against another person for their labor.²⁶² Sex trafficking occurs through the use of “fraud, force or coercion,” unless the victim is under the age of eighteen, in which case those elements do not need to be proven.²⁶³ In the federal trafficking statutes, the vulnerability or mental capacity of the victim is not an element of the crime. Instead, the wording of the statute points to the acts of the perpetrator.²⁶⁴ Under the labor trafficking section, it states,

- (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
 - (1) By means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
 - (2) By means of serious harm or threats of serious harm to that person or another person;
 - (3) By means of the abuse or threatened abuse of law or legal process; or
 - (4) By means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint²⁶⁵

Similar construct appears for the sex trafficking statute, which omits the state of mind of the victim and focuses on the acts of the perpetrator:

- (a) Whoever knowingly—

²⁶¹ Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

²⁶² 18 U.S.C. § 1589.

²⁶³ *Id.* § 1591.

²⁶⁴ *Id.* § 1589.

²⁶⁵ *Id.*

- (1) in or affecting interstate or foreign commerce . . . , recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
- (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), . . . will be used to cause the person to engage in a commercial sex act²⁶⁶

Also the benefit of the victim’s commercial sex acts or labor does not necessitate for money, but “anything of value.”²⁶⁷ In both contexts of labor and sex trafficking, the vulnerability of the victim is irrelevant.

D. Pending Legislation in New Jersey— Predatory Alienation Prevention and Consensual Response Act

Finding that the doctrine of undue influence did not go far enough in protecting those whose existing relationships were purposefully disrupted by deception,²⁶⁸ a grassroots advocacy nonprofit organization, NJ Safe & Sound, proposed an encompassing bill for the New Jersey legislature: the Predatory Alienation Prevention and Consensual Response Act.²⁶⁹ Its purpose is to codify the wrongs of coercive control.²⁷⁰ The bill does the following (1) presents findings and defines predatory alienation, (2) describes the tactics that predators use, (3) acknowledges a lack of adequate legal protection for victims, (4) and calls for front-line prevention and response efforts such as extensive public education, proactive screening practices, therapeutic consultation to the families and friends of victims.²⁷¹

²⁶⁶ *Id.* § 1591.

²⁶⁷ *Id.* § 1591(2).

²⁶⁸ FAQs, NJ SAFE & SOUND, <http://www.njsafeandsound.org/faq.html> (last visited Dec. 17, 2023).

²⁶⁹ A2247, 220th Leg., Reg. Sess. (N.J. 2022) (pending in the NJ Assembly by Assemblywoman Carol Murphy).

²⁷⁰ *Id.* § (2)(a)-(c).

²⁷¹ *Id.* § (2)(g).

The New Jersey bill defines “predatory alienation” as

whenever a person or group uses predatory behaviors, such as entrapment, coercion, and undue influence, to establish a relationship with a victim and isolate the victim from existing relationships and support systems, including family and friends, with the goal of gaining and retaining sweeping control over the victim’s actions and decisions.²⁷²

The bill further explains commonly used tactics that could result in predatory alienation:

[U]ndue influence are commonly used by cults, religious sects, gangs, extremist groups, human traffickers, sexual predators, domestic abusers, and other similar persons and groups, as a means to recruit members, carry out crimes, spread their belief systems, advocate their political agendas, or simply impose their will on, and exert power, control, and supremacy over, victims.²⁷³

In a nutshell, the bill recognized predatory alienation as a purposeful disruption of an existing relationship by another often through use of deception for the purpose of taking advantage of that individual and exploiting them for the benefit of the predator. A tactic used is often one of isolating the individual. This bill offers a helpful step in the direction of educating communities about predatory alienation and providing supportive services for it. This bill starts from the premise of preserving the family unit. The vulnerability of the victim is not an element. However, it is not a bill that calls for civil remedies nor criminal punishment against perpetrators, nor does it address the situation in which the predator or the trafficker is within the victim’s family.²⁷⁴

E. Pending New York Legislation—To Amend the Penal Law to Include Coercive Control

Introduced in January 2023 to the New York State legislature was a bill to amend the penal law to add a new section called “Coercive

²⁷² *Id.* § (2)(a).

²⁷³ *Id.* § (2)(b).

²⁷⁴ NJS&S Webinar, *supra* note 227 (presenting was Emily Robinson, who expressed that she was a victim of familial trafficking).

Control.”²⁷⁵ The law would criminalize conduct where a person exercises coercive control over his or her family members.²⁷⁶ It states:

A person is guilty of coercive control when he or she engages in a course of conduct against a member of his or her same family or household . . . , without the victim’s consent, which results in limiting or restricting . . . , the victim’s behavior, movement, associations or access to or use of this or her own finances or financial information.²⁷⁷

If enacted into law, this would criminalize coercive control of one family member over another.²⁷⁸ Like the New Jersey bill, it does not recognize the vulnerability of the victim as an element. Its reach is limited in the sense that it does not address perpetrators outside of the family unit.

V. Proposal to Eliminate Requirement of Vulnerability from Doctrine of Undue Influence

Building upon the models above, I propose an undue influence model that purposefully omits the state of mind (the vulnerability) of the victim (the claimant in a lawsuit or the influencee in Schefflin’s Social Influence Model). Cases involving contract formation and testamentary disputes indicate that judicial subjectivity has seeped into decision-making, with negative effects. Using the traditional doctrine of undue influence in cases involving high-control groups is even more problematic because of the imprint of the group’s leader on the minds of its adherents, and the difficulty courts would have in determining when independent critical thinking was involved. The human trafficking statutes provide guidance in that they emphasize the bad acts of the trafficker, such as acting with

²⁷⁵ A2707, Reg. Sess. (N.Y. 2023); Sponsored by Assembly members Alex Bores, John T. McDonald III, Nily Rozic, & Albert A. Stirpe. The bill seeks to amend the Penal Law by adding a new section 135.80. Senate version of the bill is S6695, and is sponsored by Brad Hoylman-Sigal. The bill provides that coercive control is a class E felony.

²⁷⁶ *Id.* § 135.80.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

“fraud, force or coercion,” and they omit the vulnerable state of mind of the victim.²⁷⁹ The Social Influence Model is a step in the right direction, but it includes the element of the mind of the influencee.²⁸⁰ The BITE Model provides another useful tool for understanding whether an organization operates as cult, but it does not provide a tool for undue influence.²⁸¹ The criminal legislation—both in the United Kingdom²⁸² and in the United States²⁸³—are helpful in guiding us toward how to criminalize coercive control without requiring an analysis of the mind of the victim.

The above-described legislative and proposed models are incorporated into my proposed Coercive Control & Causation Model:

**Undue Influence Model for Use Determining
Contract Formation, Will Disputes, and High-Control Groups,
Called the “Coercive Control & Causation Model” (CC&C)**

Undue Influence occurs when

1. An individual or organization uses coercive control (the “Influencer”);
2. Against another individual (the “Target”);
3. Causing the Target to transfer anything of value for the benefit of the Influencer.

The tactics of coercive control used by the Influencer may include any one or more of the following and are not limited to those on this list:

²⁷⁹ See Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 22 U.S.C.) (omitting the state of mind of the victim).

²⁸⁰ Steven Hassan, *Professor Alan Schefflin’s Social Influence Model by Jon Attack*, FREEDOM OF MIND RES. CTR. (Mar. 3, 2023), <https://freedomofmind.com/blog-professor-alan-schefflins-social-influence-model-sim> (quoting JON ATTACK, OPENING OUR MINDS: AVOIDING ABUSIVE RELATIONSHIPS AND AUTHORITARIAN GROUPS, (Trentvalley Ltd., Colchester, 2021) (including in its model a component for the influencee’s vulnerability).

²⁸¹ See *BITE*, *supra* note 249 and accompanying text.

²⁸² Serious Crime Act 2015, c. 9, § 76 (Eng. and Wales).

²⁸³ Victims of Trafficking & Violence Protection Act, 114 Stat. at 1464.

- a. Control over the Target’s daily living functions, such as where they live, what they eat, where they work, hours of sleep, what they wear for clothing, finances, and reproductive rights;
- b. Incessant requests; display of hostility, anger, violence, or intimidation against the Target; and
- c. Isolation of the Target from family and friends and other support systems, tactics of the Influencer and omits the invitation for courts to analyze the vulnerability of the Target.

By omitting the element of mental vulnerability of the Target from the doctrine of undue influence, the problem of judicial subjectivity is significantly reduced. Furthermore, the anticipated factual findings by the courts will be more properly focused on the overreaching and controlling aspects of the Influencer. In this way, causation can be determined by a more objective analysis.

Conclusion

In summary, when analyzing claims of undue influence, courts should omit from their analyses the element of vulnerability of the claimant. In instances of contract formation, such as the example of *Martinez-Gonzalez v. Elkhorn Packing Co.*,²⁸⁴ courts can be selective in the facts and law they apply, which injects subjectivity into decision-making. In testamentary bequests, a research study revealed that courts imposed their moral judgment as to the rightful beneficiaries.²⁸⁵

And in high-control groups, which could be self-help workshops, religious organizations, or the like, adherents are subjected to coercive control at a point that cannot be determined. “Audrey” who was rescued by the FBI as a teenager from the Tony Alamo cult reflected on her current day surroundings this way: “I’m in Walmart getting my oil changed. It’s funny. I never thought I would be in Walmart with my own

²⁸⁴ 25 F.4th 613 (9th Cir.), *on remand*, *Martinez-Gonzalez v. Elkhorn Packing Co.*, No. 18-cv-05226-EMC, 2022 WL 10585178 (N.D. Cal. Oct. 18, 2022).

²⁸⁵ Leslie, *supra* note 103, at 245-46.

car getting oil changed. This was not possible in our world.”²⁸⁶ Psychiatrist Robert Lifton explains the inherent problem in striving to understand the mind of one who is under coercive control:

When laws are violated through fraud or specific harm to recruits, legal intervention is clearly indicated. But what about situations in which behavior is virtually automatized, language reduced to rote and cliché, yet the cult member expresses a certain satisfaction or even happiness? We must continue to seek ways to encourage a social commitment to individual autonomy and avoid coercion and violence.²⁸⁷

The Coercive Control & Causation model that I propose draws upon several models. Those models include theoretical models of coercive control, enacted criminal statutes in the United Kingdom and United States, and pending civil and criminal state legislation. The CC&C model looks toward the acts of the influencer and purposefully omits the vulnerability of the target (influencee). The CC&C model should save courts from utilizing the field of psychology or tools such as circumstantial evidence to assess the minds of the targets who may no longer be alive or who may have no clear understanding themselves of when their independent thought processes declined.

²⁸⁶ SCHRIVER, *supra* note 179, at 233.

²⁸⁷ Lifton, *supra* note 232, at 6.