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William Gordon Childs

GOAT TESTICLES, SCIENTIFIC EVIDENCE, AND CONSEQUENCES: STOPPING A KILLING SPREE WITH NOTHING BUT EVIDENCE LAW

William Gordon Childs[*]

I. INTRODUCTION

In the 1920s and 1930s, legitimate, and not-so-legitimate, doctors were racing to attract patients. Some doctors struggled through medical school and developed methods to carefully evaluate treatments that would develop into the clinical trials and other research with which we are familiar today. Others took what they learned from medical school and treated their patients as best they could, learning more as their careers progressed from literature and personal experience; some of those treatments look foolish today but they were used in good faith. Still others developed methods to extract money from patients regardless of the efficacy of the treatments offered.

One man in particular, John Romulus Brinkley, M.D., Ph.D., M.C., LL.D., D.P.H., Sc.D.,[1] found the cash extraction approach more appealing. His career as a quack started in earnest with implanting goat testicles into men complaining of impotence. This procedure was simultaneously dangerous, ineffective, and, importantly for Brinkley, unlikely to result in complaints from those for whom it had no or negative effects. Thanks to the

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[*] At the time I wrote this article, I was a partner with Bowman & Brooke LLP in Austin, Texas. I am currently senior litigation counsel with 3M Co., St. Paul, Minnesota. This article is my work only and does not necessarily reflect the views of my former firm or its clients, or of 3M. I appreciate the input of Pope Brock, the author of the wildly entertaining Brinkley biography, *Charlatan*. Thanks also to the Val Verde County Public Library, who gave me generous access to its Brinkley archive, and to Katie Kizziar for helping me dig through it. The Reply All podcast's episode about Dr. Brinkley (cited below) introduced me to his story, and I'm grateful to its producers, PJ Vogt and Alex Goldman, for discussions along the way. I also appreciate the assistance of the American Medical Association archive for sharing key portions of the trial transcript. This subject grew out of work I did while a professor at Western New England University School of Law from 2004 to 2012, and I thank my colleagues there and at other law schools for their help developing my thinking about experts and scientific evidence. Thanks also to those who provided comments on drafts, including Elizabeth Green, Ph.D., and the skilled student editors at the UA Little Rock Bowen School of Law, particularly Jake Jankovsky. As always, I am indebted to my wife Dena and our kids for putting up with me talking—a lot—about goat testicles and *Daubert*.

1. His middle name, "Romulus," was an affectation added later, as he was born with the more pedestrian "Richard." His degrees ranged from questionable to entirely notional.

placebo effect, it was also seemingly successful with some patients.[2] Over time, he moved on to other "treatments," some goat-based and others not, but almost none with any demonstrable efficacy and many that were almost certainly affirmatively harmful. Perhaps most cleverly, he exploited the nascent medium of radio to amplify his brand. Thanks to first a radio station in Kansas and then, after that was shut down, an extraordinarily powerful Mexican "border blaster" just across from Del Rio, Texas, Brinkley was able to reach thousands or millions of potential customers.[3] He built an empire of both retail nostrums and in-patient care at his hospitals, with goat glands and serums remaining part of his clinical approach throughout much of his career.

Making medicine more evidence-based, and exposing those who did not, was advanced in part by the American Medical Association (AMA). Founded in 1847, the AMA had always focused on standardizing medicine.[4] That focus grew—and focused on quackery—with its creation of the AMA's Bureau of Investigation in 1913,[5] and with the hiring and advancement of Dr. Morris Fishbein, who joined the AMA as an assistant editor in 1913 and rose to become editor of the *Journal of the American Medical Association* (*JAMA*) in 1924.[6] Fishbein later founded an AMA-published, consumer-oriented magazine, *Hygeia*, providing a wide array of medical information to the masses.

Brinkley and Fishbein were destined to clash—and did so multiple times. After years of skirmishes, Brinkley, outraged by an article in *Hygeia* calling him (accurately) a charlatan, tried to shut down his nemesis Fishbein—and the AMA—once and for all by way of litigation. At this point he was living in the border town of Del Rio, Texas, just across from his mighty broadcast tower. Popular with the locals thanks to his largesse, Brinkley saw a great opportunity: he would, he thought, file a defamation suit against the Chicago-based Fishbein and AMA in south Texas in front of a presumably friendly judge and a friendly jury, bring before the jury a se-

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2. As discussed *infra* n. 23, as with most medicines, studies of erectile dysfunction medicines confirm a significant placebo effect—when efficacy is observed even when the patient is (unknowingly) taking a sugar pill. Nobody has identified any plausible physiological mechanism for Brinkley's approach to have any efficacy. *See* Reply All, *Man of the People*, GIMLET MEDIA (Jan. 18, 2017), https://www.gimletmedia.com/reply-all/86-man-of-the-people (last visited Jan. 29, 2019), ("[B]ecause their impotence is psychological, the placebo effect saves them.").

3. *See generally* Reply All *supra* note 2.

4. *See* POPE BROCK, CHARLATAN 15 (2008). The AMA grew from an 1845 resolution seeking a national convention to regulate physicians. *See also AMA History,* AMA, https://www.ama-assn.org/about/ama-history/ama-history (last visited Sept. 29, 2019).

5. *See AMA History,* AMA, https://www.ama-assn.org/about/ama-history/ama-history (last visited Sept. 29, 2019).

6. *See* BROCK, *supra* note 4, at 23, 110–11.

ries of patients who would testify to the value of his care and their renewed vigor, and wrap it up by charming the jury much as he charmed his radio listeners and patients. Brinkley was confident in his prospects, and Fishbein and the AMA recognized a potentially existential challenge to the AMA's future challenging quackery. If they lost a defamation suit here, the practical effect would be to chill any future exposés.

That legal collision—between quackery and its anecdotal evidence on the one hand, and the medical establishment on the other—is the subject of this article. In particular, I explore here the trajectories that made *Brinkley v. Fishbein*'s existence almost certain, and how it fits in the development of courts' consideration of scientific evidence. The case came during a time with fewer established mechanisms by which scientific evidence was verified, both on the scientific side of the line (e.g., peer-reviewed publication was uncommon even decades later) and on the legal side (e.g., *Frye v. United States*,[7] when considered at all, provided, at most, general guidance to courts in evaluating scientific evidence). The trial court's decision to exclude anecdotal support for Brinkley's methods was *not* inevitable, and it was pivotal to the victory the jury provided to Fishbein and the AMA. Arguably, that victory was essential to the AMA's continued efforts to combat quackery over the following decades and to the precipitous collapse of Brinkley's empire.

I proceed in three parts. In Part I, I lay the factual groundwork, with the intersecting stories of Brinkley and Fishbein, as well as the development of the AMA and its efforts to professionalize medical practice, and to eliminate unproven and ineffective treatments. In Part II, I examine the legal framework for the consideration of scientific evidence at the time of the trial. In Part III, I combine the two to explore what actually occurred in the trial, and how the court ended up excluding the anecdotal evidence that Brinkley proffered. In the Conclusion, I explore the potential impact of that ruling for medicine and quackery.

II. THE RISE—AND INEVITABLE COLLISION—OF THE BRINKLEY EMPIRE AND THE AMA

Brinkley and Fishbein were probably more alike than either would care to admit. Both appear to have been bright, both were hard-working, and both recognized the possibility of the public being taken in by those claiming to be physicians and promising cures for all ailments—but as to the last, Brinkley saw it as an opportunity to exploit, while Fishbein saw it as something that demanded intervention.

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7. 293 F. 1013 (D.C. Cir. 1923).

A. Fraud Finds a Way

Brinkley's earliest days are not terribly well documented. We know that he was born around 1885,[8] and by 1908 or so, he was in Chicago, attending Bennett Eclectic Medical College there for a year or two—still a year short of graduation, leaving apparently because he could not pay any more tuition.[9] After a few years of wandering and avoiding creditors, he ended up back in Chicago, and connected with one James Crawford.[10] Together, they headed to South Carolina and opened the Greenville Electro Medic Doctors, offering electricity-themed "cures" to men who felt they lacked "vigor."[11] The cure, costing $25 per treatment, was colored water that Brinkley and Crawford declared to be "electric medicine from Germany."[12] After just a few months, they got out of Greenville and headed for Memphis, where Brinkley met and married Minerva Jones, who became Minnie Brinkley.[13] He also became reacquainted with the Greenville sheriff, who tracked them down, arrested him, found and arrested Crawford as well, and brought them back to Greenville to face justice.[14] They managed to settle their disputes with the locals and Minnie and John Brinkley roamed for a few years.[15] He ultimately bought a medical school diploma, having never actually finished the work, and, thanks to that diploma, was licensed in eight states, including Arkansas and Kansas.[16] After a brief time in Arkansas and less than three months in the army, in October 1917, the Brinkleys set up shop in Milford, Kansas, about a hundred miles north of Wichita.[17]

In Milford, Brinkley came into his own, quackery- and goat-testicle-wise. His future was kicked off, the story goes, by a visit from a middle-aged farmer named Bill Stittsworth. It is impossible to know, a century later, how much (if any) of the story is true, but, apocryphal or not, Stittsworth is said to have complained of impotence. Brinkley admitted that he had no

8. MORRIS FISHBEIN, HISTORY OF THE AMERICAN MEDICAL ASSOCIATION, 1847 TO 1947 at 503 (1947).

9. *See* FISHBEIN, *supra* note 8, at 504–05. Bennett was not accredited by the AMA, but it was less quackish than some other medical schools. *See* BROCK *supra* note 4, at 15–16. I do not intend this to be even close to an exhaustive biography of Brinkley; Pope Brock and others have done that already. I enthusiastically recommend those works, as well as Penny Lane's entertaining film *Nuts*. Here, I aim to provide enough to give a sense of the rise of his profile and how his trajectory intersected the AMA's.

10. *See* BROCK *supra* note 4, at 17.

11. *See id.* at 19–21.

12. *See id.* at 17–21; *see also* FISHBEIN, *supra* note 8, at 505–06.

13. *See* BROCK *supra* note 4, at 21.

14. *See id.* at 22; *see also* FISHBEIN *supra* note 8, at 506.

15. *See* BROCK, *supra* note 4, at 22–25.

16. *See id.* at 25. The diploma cost him $100.

17. *See id.* at 28; *see also* FISHBEIN, *supra* note 8, at 507.

useful treatment for that, and Stittsworth bemoaned the fact that he didn't have "billy-goat nuts," as goats, in his view, never faced that problem.[18]

Whether it was at Stittsworth's insistence or Brinkley's we cannot be sure, but eventually, Brinkley operated on Stittsworth and implanted two goat testicles into Stittsworth's scrotum.[19] A couple of weeks later, Stittsworth returned, delighted with the results. Other locals with the same complaint came in and were likewise happy with the results—or at least enough were for Brinkley to recognize a business opportunity.[20]

Brinkley stayed in Milford for another sixteen years, and that's also where he built the model for much of his intertwined medical and media empires. Not long after that first implantation, he opened a new clinic, the Brinkley Institute of Health.[21] He aggressively marketed the value of goat testicles (and, for the women, goat ovaries) for both sexual purposes and otherwise, including a claim that implanting them could cure insanity, emphysema, and more.[22] The surgery was crude and occasionally fatal: "A carpenter from New Jersey who has received one of these operations died in St. Louis of tetanus. The Milford technicians had fastened an old rubber heel over his wound to keep the tissues from extruding the goat glands as a foreign substance."[23] Of course, there was no evidence for this beyond the anecdotal, and, per Brock, "dozens of patients died over the years, either in the operating room or shortly after their return home. Many others were permanently maimed."[24] But those stories didn't get the attention that the claimed miracles did, and people who still suffered from impotence were unlikely to advertise that fact.

To the extent his patients had any improvement, it was plainly from the placebo effect. But that effect is powerful, as medical literature confirms.[25]

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18. *See* BROCK, *supra* note 4, at 29. This seems unlikely at best.

19. *See id.* at 28–29. Fishbein, in his history of the AMA, quotes Brinkley as saying that he tried to talk the man out of the procedure and that the results were, as Brinkley put it, "amazing and startling because I expected bad results and disastrous results and instead of that happy results were obtained." FISHBEIN, *supra* note 8, at 507.

20. Brinkley's interest in implanting glands was part of a general trend, including a number of more mainstream doctors, published in, among other places, *JAMA*. *See generally* BROCK, *supra* note 4, 33–35. Some of that work arguably contributed to the recognition and development of endocrinology, but there's no plausible argument that Brinkley's work was even that close to legitimate.

21. *See* BROCK, *supra* note 4, at 39. He had developed a positive reputation in the area as generous to his staff; he was also apparently legitimately helpful in a flu epidemic. *See id.* at 39–40.

22. *See* BROCK, *supra* note 4, at 41.

23. FISHBEIN, *supra* note 8, at 509.

24. BROCK, *supra* note 4, at 43.

25. *See, e.g.*, Mulhall et al., *Predictors of Erectile Function Normalization in Men with Erectile Dysfunction Treated with Placebo*, 15 J. SEX MED. 866 (2018) (analyzing outcomes

And the patient anecdote—the testimonial—was a powerful marketing tool for Brinkley. He was ultimately able to promote his work with a glowing testimonial from no less than a United States Senator, Wesley Staley of Colorado, who declared, "I wear goat glands and am proud of it."[26]

These testimonials were enough to let Brinkley continue to build his practice, and he did so while trying to figure out how to continue that growth beyond Milford. While visiting Chicago, he saw a radio station and was immediately enthralled. He saw the opportunity, in a barely regulated field, to launch an unfiltered feed to thousands of people, expanding his advertising reach. And so, in 1923, he began construction of KFKB ("Kansas First, Kansas Best").[27] After launching KFKB, he used it to promote his glandular rejuvenation surgery, and to expand his reach even beyond those who could or would visit him in person.

One regular feature, starting around 1926, was the "Brinkley Medical Question Box," where he'd read letters from listeners and recommend specific prescription numbers—that is, specific products branded as part of the "Brinkley Pharmaceutical Association."[28] These products were nothing new or special—simply relabeled ordinary medicines, marked up considerably.[29] One apparently representative episode of the Question Box had inquiries from 44 patients, a full 34 of whom, Dr. Brinkley concluded, needed Brinkley-branded medicines, often more than one.[30] In the same timeframe, he moved on to claims that he could shrink the prostate, initially again as a benefit of the goat gland transplant, but later he claimed he could do so without any surgery at all.[31] In short, Brinkley was finding ways to extract more and more money out of Kansas residents and those who would travel there, none of them based on testable or tested science or medicine.

Brinkley was, nonetheless, wildly popular in Milford. He donated money to local causes and he paid people well, and money was, it seems, enough to make a lot of people look away, even if they suspected he was a bit of a quack.[32] And he was making a *lot* of money: his profits from the Question Box were $14,000 per week—Brock estimates that to be over $6.5

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of men in sildenafil/Viagra clinical trials who were treated with placebo and still showed improved sexual function).

26. BROCK, *supra* note 4, at 70.

27. *See* BROCK, *supra* note 4, at 81; FISHBEIN, *supra* note 8, at 510. While it is well beyond the scope of this article, the parallels between the use of radio by Brinkley and the use of Twitter by President Trump and others are addressed, in fascinating form, by the makers of the Reply All podcast. *See* Reply All *supra* note 2. I strongly recommend it.

28. *See* FISHBEIN, *supra* note 8, at 509; *see also* BROCK, *supra* note 4, at 122–124.

29. *See* BROCK, *supra* note 4, at 123.

30. *See* FISHBEIN, *supra* note 8, at 509–10.

31. *See* BROCK, *supra* note 4, at 120.

32. *See* FISHBEIN, *supra* note 8, at 508 (describing his generosity to the Milford church).

million per year from just that operation.[33] His radio station was named as the most popular radio station in the nation in 1930, according to a survey by *Radio Digest*.[34] He eventually owned three yachts and an indeterminate number of cars—something over a dozen.[35]

But despite his local largesse and consequent popularity, the Kansas State Medical Board was increasingly suspicious and, in 1930, required him to provide a demonstration of his methods.[36] He did so, apparently unconvincingly, and, not long after, the Board revoked his license to practice medicine.[37] The following year, the Supreme Court of Kansas upheld that decision, calling him "an empiric without moral sense, and having acted according to the ethical standards of an impostor."[38] The Court continued, seemingly with some grudging respect: "[T]he licensee has perfected and organized charlatanism until it is capable of preying on human weakness, ignorance, and credulity to an extent quite beyond the invention of the humble mountebank who has heretofore practiced his pretensions under the guise of practicing medicine and surgery."[39]

Perhaps even worse for his business, on June 13, 1930, just weeks before his medical license was revoked, the Federal Radio Commission voted not to renew Brinkley's broadcast license—even after he offered to cancel the Question Box feature.[40] The FRC concluded that his station was not broadcasting in the public interest, but only in Brinkley's interest.[41]

Brinkley, then, faced a crisis. He'd lost the two licenses he needed to continue making his fortunes. His initial move, unexpectedly, was to run for governor of Kansas twice, and to almost win the first race (as a write-in candidate).[42] But after that tangent—fascinating but beyond the scope of this article—he found himself unable to broadcast and unable to work as a doctor, both critical to continuing his fraudulent empire.

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33. *See* BROCK, *supra* note 4, at 130.

34. *Id.* at 135.

35. *See* FISHBEIN, *supra* note 8, at 513.

36. *See* BROCK, *supra* note 4, at 139.

37. *See id.* at 149–154.

38. Brinkley v. Hassig, 289 P. 64, 65 (Kan. 1931) (quoting Brinkley v. Hassig, 83 F.2d 351, 356 (10th Cir. 1936), in which the Tenth Circuit affirmed a federal district court's conclusion that the revocation of his license did not violate the constitution).

39. *Id.*

40. *See* BROCK, *supra* note 4, at 147.

41. *See id.*

42. *See* BROCK, *supra* note 4, at 155–63 (detailing that Brinkley may have prevailed if votes were counted correctly and Kansas Secretary of State did not impose unconstitutional restrictions on discerning voters' intent from write-in votes); BROCK, *supra* note 4, at 182–89 (losing a second run for governor); BROCK, *supra* note 4, at 218 (earning endorsement of Rev. Gerald B. Winrod during second run for office due to form of Christianity that became expressly anti-Semitic).

But fraud finds a way, and Brinkley, who was nothing if not flexible, saw his future in—or at least broadcasting from—Mexico. In early 1931, just months after losing the gubernatorial race, he visited Mexico to explore obtaining a license for a radio station to transmit from the border, facing north (a so-called "border blaster" with 50,000 watts).[43] Mexican regulators welcomed him, and so he started making plans. He sold KFKB and fended off an attempt by Fishbein to get his Texas medical license revoked, as well as an attempt by the U.S. State Department to stop the construction of his new radio station.[44] Radio station XER—"The Sunshine Station Between the Nations"—came on the air in October 1931, reaching far into the United States, just over a year after catastrophe had seemed to strike Brinkley.[45] He moved to Del Rio, a small town west of San Antonio, near the border, with cables run across the border so he could broadcast from his new hometown.

With this station—upgraded to 150,000 watts in January 1932, to 500,000 watts in August of the same year, and then to a truly ludicrous million watts not long after—XER became the most powerful radio station in the world, quite possibly the most powerful radio station in history.[46] It could be heard throughout the United States and in multiple foreign countries.[47] He expanded the programming, too: while it still featured plenty of him pitching his medicines and treatments, he also gave some of the first airtime ever to now-legendary country musical artists, including the Carter Family, Cowboy Slim Rinehart, and many others.[48] Brinkley sold air time to other (medical and non-medical) hucksters, including "Crazy Water Crystals, electric bow ties, rupture cures, 'genuine simulated' diamonds, tomato plants, life insurance, live poultry, and an array of religious items including Last Supper tablecloths and autographed pictures of Christ."[49]

After another run, and another loss, for governor of Kansas, Brinkley moved fully to Del Rio, opening a hospital there in 1933. There, as in Milford, he became wildly popular, paying employees at his hospital well, pro-

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43. *See* BROCK, *supra* note 4, at 165.

44. *See id.* at 167.

45. *See id.* at 168; FISHBEIN, *supra* note 8, at 511; *see also* WALL OF VOODOO, "MEXICAN RADIO" (I.R.S. Records 1983) ("I'm on a wavelength far from home/I feel a hot wind on my shoulder/I dial it in from south of the border.").

46. *See* BROCK, *supra* note 4, at 176. With few grandfathered exceptions, the maximum power for U.S. FM stations today is 100,000 watts. *See FM Broadcast Station Classes and Service Contours*, FCC, (Dec. 11, 2015), https://www.fcc.gov/media/radio/fm-station-classes. Among the listeners were the Mayo brothers in Minnesota, whom Fishbein describes as "annoy[ed]." *See* FISHBEIN, *supra* note 8, at 511.

47. *See* BROCK, *supra* note 4, at 176.

48. *See* Gene Fowler & Bill Crawford, *Border Radio*, TEX. ST. HIST. ASS'N (June 12, 2010), https://tshaonline.org/handbook/online/articles/ebb01 (last visited February 5, 2019).

49. *See* BROCK, *supra* note 4, at 177–78.

moting the town on XER, and spreading the wealth.[50] Even during the Depression, he was making $12 million per year, with plenty to share to keep the locals happy.[51]

Soon after his move, he also made another change in his practice: he abandoned the goat gland process, claiming he had developed a new surgical technique, apparently essentially a vasectomy with a minor adjustment—no more likely to actually have efficacy than the goat-based process.[52] He continued, too, to provide his supposed prostate treatment, now presented at three price points (Poor Folks', Average Man's, and Business Man's, priced from $150 to $1,000), and he also added a hospital in San Juan, Texas, focusing on rectal issues.[53] Later, upset that the Del Rio government had not done more to block the success of a lower-cost charlatan doctor, he moved his main facility to Little Rock, Arkansas, while staying resident, and remaining popular, in Del Rio.[54]

In short, nothing that the U.S. government, regulatory entities—or anything else—had thrown at Dr. Brinkley had stopped him from expanding his empire and increasing his wealth. Over the years, he owned three yachts; he had a mansion in Del Rio (impressive to this date, I can report from personal observation); he traveled the world in extraordinary comfort; and, at one time, he held the record for the largest tuna caught in the western hemisphere.[55] After a trip to Germany in the 1930s, he also amplified his anti-Semitism (always lurking in the background, and likely made stronger by his hatred of Fishbein), to the extent that he added swastikas to the tile around his pool and welcomed three American Nazis to his radio station.[56] As medicine improved and became more empirically based, his practice and a sense of paranoia somehow continued to grow.

And that's when Morris Fishbein, M.D.—an *actual* M.D., who took a personal and almost visceral offense at medical hucksters—found it important, indeed compulsory, to intervene.

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50. *See id*. at 194.
51. *See id.* at 199.
52. *See id.* at 199–200; FISHBEIN, *supra* note 8, at 511.
53. *See* BROCK, *supra* note 4, at 200–01.
54. *See id.* at 222–23. Brinkley took over the failed Shrine Country Club for his hospital. Since the 1960s, it has been a monastery for the Carmelite Brothers. Although some sources indicate that Brinkley had stopped performing the goat testicle procedure by this point, others indicate that, at least after his bankruptcy, one of his associates was performing it at this facility. *See* John Payne, *Marylake Monastery*, CALS ENCYC. OF ARK., http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=4281 (last updated Nov. 20, 2017).
55. *See* BROCK, *supra* note 4, at 203–10.
56. *See id.* at 216–18.

B. Toward a More Scientific Practice of Medicine

The American Medical Association was founded in 1847 and got to work trying to go after quacks pretty quickly, launching a board to "analyze quack remedies and nostrums" two years later.[57] That board developed into the Department of Investigation, which operated from 1913 through 1975.[58] But at the time of Brinkley, the AMA was small and "upstart,"[59] not the dominant force that it is today.

Dr. Fishbein, a 1912 graduate of Rush Medical College, an accredited medical school, joined the AMA in August 1913 as an editorial assistant for *JAMA*, which had been launched thirty years earlier.[60] A bit untethered when he came out of medical school, Fishbein rapidly found his calling with the AMA.[61] He lacked the charisma of Brinkley, but he possessed, on the other hand, the true intelligence that Brinkley lacked.[62] Fishbein was introduced to the world of quackery, and the AMA's role in trying to eliminate it, by Arthur Cramp.[63] Cramp and Fishbein worked as partners for years.[64]

Given Brinkley's aggressiveness in self-promotion—and the AMA's opposition to any doctors advertising as well as to charlatans—it was unsurprising, and indeed inevitable, that they'd collide.[65] Fishbein, and the AMA, had publicly expressed skepticism of glandular rejuvenation, and in so doing had been part of foreclosing Brinkley's attempt in 1920 to move his operation to Chicago.[66] A while later, Brinkley announced his intention to instead move to California, and received extensive press about it—press that found its way to Fishbein, and which, it seems, motivated Fishbein to become Brinkley's nemesis.[67] Fishbein indeed scuttled Brinkley's California dreams, having informed the medical board of Brinkley's lies and misrepresentations on his resume.[68] But that, too, wasn't enough to end Brinkley's empire; to the contrary, as described above, he just kept growing and growing, expand-

57. *AMA History*, AMA, https://www.ama-assn.org/ama-history (last visited Jan. 29, 2019).

58. *See id.*

59. *See* Reply All, *supra* note 2.

60. *See* BROCK, *supra* note 4, at 23; *AMA History*, AMA, https://www.ama-assn.org/ama-history (last visited Aug. 28, 2019).

61. *See* BROCK, *supra* note 4, at 23.

62. Reply All, *supra* note 2.

63. *See* BROCK, *supra* note 4, at 23–24; *see also* Reply All, *supra* note 2 ("Fishbein was completely lifelong driven to stamp out quackery.").

64. BROCK, *supra* note 4, at 24.

65. *See* BROCK, *supra* note 4, at 44. Interestingly, Brinkley was, at least as of around 1920, a member of the AMA, presumably figuring he could borrow some legitimacy. *See id.*

66. *See id.* at 60.

67. *See id.* at 59–61.

68. *See id.* at 67. Brinkley apparently did not know definitively that Fishbein or the AMA had been behind his failure to get licensed in California, but he suspected it. *See id.*

ing his Milford operation. The AMA, too, had a major role in Brinkley's flight from Kansas to Texas.[69] Fishbein was behind the Kansas Medical Board's decision to revoke Brinkley's license, relying in part on evidence of no fewer than forty-two patients who had died at his clinic.[70]

Fishbein, perhaps discouraged but never deterred by Brinkley's whack-a-mole tendencies, kept trying to fight back against Brinkley and other charlatans. Via *JAMA*, he ran a recurring two-page feature, juxtaposing a testimonial promoting various quack cures with the death certificate of the person providing the testimonial.[71] After exposing a woman who had faked a weeks-long 114-degree fever, Fishbein's profile grew even greater, and he became a celebrity (relatively speaking, anyway) in his efforts to fight quacks—and, critically for our story, he launched *Hygeia*, a consumer-oriented publication from the AMA, in 1923.[72]

The launch of Brinkley's radio station that same year seems to have been an additional factor in capturing Fishbein's attention. Over the following years, Fishbein continued to publicize Brinkley's fraud as best he could through the AMA and its publications. At least partially as a result of those efforts, the Federal Radio Commission challenged Brinkley's license, as noted above, and he lost it in 1930.[73] But we have already seen that Brinkley moved on to Del Rio and simply kept building.

The AMA continued to pay careful attention to Brinkley after his move, ultimately publishing a two-part series, written by Fishbein and entitled "Modern Medical Charlatans," in early 1938 in *Hygeia*. The article, appearing alongside an editorial about Fourth of July Accidents and articles ranging from "Your Age and Your Heart" to "The Choice of a Marriage Mate" to "The Story of Human Energies," provided accessibly written biographies of various of the age's quacks and descriptions of unfounded claims (*e.g.*, "Vitamin Follies").[74]

His discussion of Brinkley introduced its subject without pulling punches:

> In John R. Brinkley, quackery reaches its apotheosis. Without anything resembling a real medical education, with licenses purchased and secured through extraordinary manipulations of political appointees, and with consummate gall beyond anything ever revealed by any other charlatan, Brinkley has achieved an enormous success financially. He con-

69. *Id.*

70. *See* Reply All, *supra* note 2.

71. *See* BROCK, *supra* note 4, at 70.

72. *See id.* at 85–87.

73. *See* FISHBEIN, *supra* note 8, at 510; *see also Broadcasting Bunk,* 94 JAMA 1146, 1146–47 (1930), reprinted in LAWRENCE W. LICHTY & MALACHI C. TOPPING, AMERICAN BROADCASTING 558–59 (urging the FRC to curb quacks' broadcasts).

74. Morris Fishbein, *Modern Medical Charlatans II*, 16 HYGEIA 113, 141–175 (1938).

> tinues to demonstrate his astuteness in shaking shekels from the pockets of credulous Americans, notwithstanding the efforts of various governmental departments and agencies.[75]

The article continues, providing essentially the same history as described *supra*, concluding that, despite all of the evidence of fraud, "[y]et the money rolls in, which proves that the wages of sin is not always death."[76] It directly accuses him of a crime: "Most of [Brinkley's] business . . . seems to come by way of the mail, and it is time for the Post Office Department to do something in regard to the use of the United States mails by John R. Brinkley in his defrauding of the public."[77]

Imagine the situation when Brinkley sees the publication: he is, no doubt, furious. But he's also excited; he thinks this publication—a national publication outright accusing him of being a fraud with no hedging or caveats—is his chance to fight Fishbein on Brinkley's home turf in Del Rio.[78] This is Brinkley's chance to shut the pestering Fishbein and the AMA down.[79]

He's ready to sue the AMA for defamation.

III. SCIENTIFIC EVIDENCE IN THE EARLY 20TH CENTURY: *FRYE* FESTIVAL

We'll get to the trial. But first, it will be helpful to have a brief refresher on the state of the law with respect to scientific evidence in 1938. As we shall see, the trial turned in large part on the judge's refusal to permit testimony from the witness equivalent of advertising testimonials; that is, people who were proffered to testify that Brinkley's treatments worked. Testimony about the efficacy of, say, goat testicle implantation, would certainly be beyond the knowledge of an ordinary juror and thus appropriately subject to rules about scientific evidence.[80]

Brinkley v. Fishbein, of course, pre-dated the *Federal Rules of Evidence* by decades, which were first enacted in 1975.[81] Those Rules generally

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75. *Id.*
76. *Id.* at 182.
77. *Id.*
78. Reply All, *supra* note 2.
79. *See id.*; FISHBEIN, *supra* note 8, at 514; CLINTON GIDDINGS BROWN, YOU MAY TAKE THE WITNESS 37 (1955).
80. As discussed further *infra*, the parties (and the judge) varied a bit on how much they considered these witnesses to be presenting expert testimony as opposed to being fact witnesses about their own experiences.
81. Pub. L. No. 93-595, 88 Stat. 1926 (1975). The Texas rules were, as many states' rules, modeled on the federal rules. The *Brinkley* case was heard in federal court.

codified the common law of evidence in the federal courts, including *Frye v. U.S.*[82]

It is worth taking a moment to appreciate the fact that for decades, much of the law of scientific evidence was more or less controlled by a circuit court case that fits on a single letter-sized piece of paper.[83] Moreover, that case gives what could be generously described as general guidance about how to evaluate scientific evidence. The case arose from an appeal from a conviction that was partially based on an early lie-detector test (using systolic blood pressure).[84] The D.C. Circuit concluded first, based on arguments from the appellants, that "[w]hen the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence."[85] It continued, focusing on when the principle is sufficiently established to be admitted:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[86]

The court concluded that the polygraph had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."[87]

That is the extent of the guidance provided by *Frye*. And, for seventy years, *Frye*—generally summarized as holding that "expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community"[88]—largely controlled the admissibility of scientific evidence.[89] It was finally supplanted when, in *Daubert*, the Supreme Court concluded that the adoption of Rule

82. 293 F. 1013 (D.C. Cir. 1923).
83. *See* Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).
84. *See id.* at 1013–14.
85. *Id.* at 1014.
86. *Id.*
87. *Id.*
88. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 584 (1993).
89. *See id.* at 585 ("In the 70 years since its formulation in the *Frye* case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.").

702 required a different approach to scientific evidence—one with specified criteria for application.[90] (One can question whether *Daubert* has made things clearer or more predictable, but it has certainly provided a clearer set of factors to put in bullet point lists in briefs and opinions.)

Despite the overall consensus that courts nationwide largely adopted *Frye*, that adoption is not synonymous with *Frye* providing useful or predictable guidance. As a district court put it in 1972—over three decades after *Brinkley v. Fishbein*—in the nearly 50 years since *Frye*, there was "notably an absence of any discussion of the 'general acceptance' standard in federal decisions."[91] "The cases following the *Frye* rationale have been carefully considered and they offer little guidance."[92] The Fifth Circuit does not appear to have referenced *Frye* in any cases prior to when Brinkley's lawsuit went to trial. In short, *Frye* was nominally controlling but wasn't guiding anyone.

The lack of guidance in *Frye* itself or in the cases that followed, and the fact that it was still more or less accepted as adequate to the task for decades, suggests that scientific evidence was less prevalent in the earlier parts of the twentieth century than it is today. Indeed, the Texas Supreme Court in 1995 spent several paragraphs noting the growth in the use of experts: "As numerous courts and commentators have observed, the use of expert witnesses in litigation has become widespread."[93] The court further noted that "the scientific theories about which these experts often testify have increased in complexity and have become more crucial to the outcome of the case."[94] In addition to the increased frequency of the use of such evidence, the court noted "the difficulty inherent in evaluating scientific evidence. Jurors are often expected to understand complex testimony regarding arcane scientific concepts and are even asked to resolve issues on which the experts cannot agree."[95] So, in light of those issues, "trial judges have a *heightened responsibility* to ensure that expert testimony show[s] some indicia of reliability."[96] The italicized portion suggests that the pre-*Daubert* standard for admissibility was lower, and, by most accounts, the adoption of *Daubert* and the subsequent updates to the Federal Rules have, in fact, increased the scrutiny paid to scientific evidence.[97]

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90. *Id.*
91. U.S. v. Zeiger, 350 F. Supp. 685, 687 n.6 (D.D.C. 1972).
92. *Id.* at 687.
93. EI du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 552 (Tex. 1995).
94. *Id.* at 553.
95. *Id.*
96. *Id.* (emphasis added).
97. *See, e.g.*, D. Alan Rudlin, *The Judge as Gatekeeper: What Hath Daubert-Joiner-Kumho Wrought?*, 29 PROD. SAFETY & LIAB. REP. (BNA) 329, 329–36 (2001). This more exacting examination has occurred despite the Court's references to the opinion reflecting a

In short, the guidance available to courts—and litigants—regarding the admissibility of scientific evidence in 1938 was sparse. The nominally controlling case itself lacked much guidance and the case law that followed was vague at best. A court, faced with purportedly scientific evidence, could understandably feel that it had a lot of discretion in deciding whether to admit it or not.

IV. THE PIVOTAL POINT IN THE PIVOTAL TRIAL

In 1938, Val Verde County had about 15,000 residents.[98] Whether Brinkley filed his suit in federal court or it was removed, the records are not clear; regardless, the suit ended up in front of Judge Robert J. McMillan in the Western District of Texas.[99] Judge McMillan, a 1906 graduate of the University of Texas School of Law, had previously been in private practice in San Antonio and served as in-house counsel for the St. Louis-Brownsville & Mexico Railroad and as a city attorney in San Antonio.[100] A Hoover nominee, McMillan served on the bench from 1932 until his death in 1941. There is no indication that he was scientifically trained.

As noted already, Brinkley lost the case. Fishbein was apparently so pleased with the outcome of the trial—and, presumably, the message it sent to other would-be plaintiffs—that he published *nearly* the entire trial transcript in *JAMA* in four consecutive issues, totaling 57 pages.[101] Early in the third set, however, comes the following paragraph, suggesting that Fishbein either did not appreciate or did not think his readers would appreciate the pivotal moment in the trial, evidence-wise:

"liberalizing" of standards. It might also be that the earlier standard was neither more nor less strong, but simply less predictable.

98. Based on the 1940 census. *See* Texas Association of Counties, *Historic Val Verde County Population: 1850-Present*, http://www.txcip.org/tac/census/hist.php?FIPS=48465 (last visited Nov. 3, 2019).

99. *See The Case of Brinkley vs. Fishbein: Proceedings of a Libel Suit Based on an Article Published in* Hygeia, 112 JAMA 1952 (May 13, 1939) [hereafter JAMA *Transcript 1*]; *see also generally* R. ALTON LEE, THE BIZARRE CAREERS OF JOHN R. BRINKLEY 211–230 (2002).

100. *See McMillan, Robert Johnston*, FED. JUDICIAL CTR., https://www.fjc.gov/node/1384841 (last visited Nov. 3, 2019).

101. *See* JAMA *Transcript 1*, *supra* note 93; *The Case of Brinkley vs. Fishbein: Proceedings of a Libel Suit Based on an Article Published in* Hygeia, 112 J. AM. MEDICAL ASS'N 2050 (May 20, 1939) [hereinafter JAMA *Transcript 2*]; *The Case of Brinkley vs. Fishbein: Proceedings of a Libel Suit Based on an Article Published in* Hygeia, 112 J. AM. MEDICAL ASS'N 2138 (May 27, 1939) [hereinafter JAMA *Transcript 3*]; *The Case of Brinkley vs. Fishbein: Proceedings of a Libel Suit Based on an Article Published in* Hygeia, 112 JAMA 2280 (June 3, 1939) [hereinafter JAMA *Transcript 4*].

> TESTIMONY FOR THE PLAINTIFF: TESTIMONY OF I.F. INGRAM
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> I.F. Ingram stated that he was commonly known as Frenchy Ingram. He was a ranchman who had once been a patient of Dr. Brinkley's. At this time the jury was excused from the courtroom, and the attorneys presented arguments concerning the question of admissibility of the testimony of patients. This argument occupies some fifteen pages of the transcript, after which the court ruled that such evidence was inadmissible.[102]

Fortunately, the AMA archives are thorough and well organized, and were kind enough to share those fifteen pages. In those pages, we learn a bit about Frenchy Ingram from his introductory testimony given in front of the jury—he was a 53-year-old rancher who lived in Langtry, an unincorporated area just outside Del Rio, and indeed he had been a patient of Dr. Brinkley's.[103] At that point, Clinton Giddings Brown, the defense lawyer, stood up and objected, initially arguing that the defense was not contending that Brinkley had not helped *any* patients, and thus that the testimony was not probative of any question before the jury.[104] The judge indicated that he was:

> inclined to think that this attempt to go into the question of fifteen or twenty patients and get the various opinions of the patients as to whether they were improved or not improved would be improper in a case of this kind because that would involve always finding out whether there was anything wrong with the man in each case; however, certain charges made in the article with regard to the charges made and the furnishing of ampules, and other things, it might be.[105]

And with that he excused the jury to receive argument.

Morriss, Brinkley's lead lawyer, conceded that Ingram was a "non-expert" and that he "probably wouldn't be qualified to give" a conclusion about the efficacy of Brinkley's treatments in a general way.[106] But, he argued, the defense expert had stated that the operation in question "wouldn't relieve nor be of any benefit," and the testimony of Ingram (and others) would tend to prove, by circumstantial evidence, that the operation was effective.[107] He continued:

> They [the defense] place[d] three expert witnesses, so-called expert witnesses on the stand, who admit they have never seen the operation per-

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102. JAMA *Transcript 3*, *supra* note 95, at 2138.

103. *See* Trial Transcript at 439, Brinkley v. Fishbein, 110 F.2d 62 (5th Cir. 1940).

104. *See id.* at 439–440.

105. *Id.* at 440. Put another way, the judge concluded that the individual patients' experiences would not provide helpful evidence as to the question of whether Brinkley's overall operation was a fraud, as asserted in *Hyegeia*.

106. *Id.* at 441.

107. *See id.* at 441–42.

> formed and haven't witnessed the results of the operation, and, yet, they . . . testify that in their opinion the operation would accomplish no result at all but would have no benefit whatever; how, then, we certainly have a right to overcome that and meet that, and we think we would have the right regardless of their having put on that testimony to meet the charge of quackery and defrauding the public and of being a charlatan . . . [W]e *certainly are not confined in a matter of this sort to expert testimony*, if the court please; as counsel reminded the court, [defense expert] Dr. Venable testified that the best way to judge of new characters of operations . . . is by the results themselves.[108]

Morriss continued, providing a metaphor echoing case law discussed *infra*, arguing that if an expert testified that a particular repair on a motor could not be efficacious, fact testimony that a repair was, in fact, efficacious, ought to be admissible.[109]

JAMA's lawyers countered that such testimony would be wholly subjective, and that the patients would be able to provide nothing but anecdotal information about the treatment.[110] They also noted that patients had, of course, died in Brinkley's care, and that, if these patients were permitted to testify, the defense would feel the need to prove those cases up, as well as testimony of those who "were not benefited by his treatments."[111]

After permitting the plaintiff to make an offer of proof from Mr. Ingram (who confirmed that he felt better after Brinkley's treatment, without getting into any claims of impotence cures[112]), the court ruled. The court stated its concerns that permitting the testimony would open the door to "seventy-five or a hundred patients" in an "unlimited field of evidence."[113] But it seems that his bigger concern was the nature of the evidence. He said that he'd permit factual evidence about non-medical matters—*i.e.*, if Brinkley had an aggressive salesman, if he made loans, and the like—but the court would not permit patients to testify about the symptoms before and after an operation "which, of course, they are not conversant with."[114] Nobody mentioned *Frye*, even in passing.

Clinton Giddings Brown, in his memoir, provides some more color about how the evidentiary question came to a head:

> My law partner Wilbur Matthews investigated most of the important law points in the case, and one very important point of evidence was this: would the judge allow the attorneys for the plaintiff to put an old

108. *Id.* at 443–44 (emphasis added).
109. *See* Trial Transcript at 444, Brinkley v. Fishbein, 110 F.2d 62 (5th Cir. 1940).
110. *See id.* at 446.
111. *Id.* at 446.
112. *See id.* at 447–48.
113. *Id.* at 449.
114. *See id.* at 449–50.

> man on the stand to swear that Brinkley had operated on him, sewed up some billy goat glands inside of him, and made a young man out of him . . . ?
>
> After an investigation of the law, Wilbur Matthews came to the conclusion that none of the testimony of individual patients would be admissible; it is a general rule of evidence that only a qualified expert in possession of the pertinent facts can express an opinion which is admissible as evidence . . . .
>
> But our opponents must have thought that the judge would admit such proof, because, after the jury had been selected and were in the box, when all of the witnesses stood up in court to be sworn and instructed, some twenty old men were in line, and one of them did a couple of steps of the Highland fling, and they were the friskiest bunch of old roosters you ever saw in your life.[115]

Brinkley himself was permitted to testify, as were four other people on the staff of his hospital, who also testified about the success of their treatments.[116]

The parties' briefing on Brinkley's petition for *certiorari* (which was denied summarily) provides somewhat more argument. In arguing that the exclusion of the testimony of Ingram and fifteen others was erroneous, Brinkley cited a series of cases—none of them *Frye*. But he did cite cases that held, among other things, (1) that, in response to a defense that plaintiffs were "quacks," a court properly admitted a witness to testify that "he received beneficial results" from the plaintiffs;[117] (2) that, in a case involving an allegedly useless patented dental invention, the inventor properly was allowed to "offer the testimony of 12 of his patients, not experts, who stated that they had had their teeth filled by the defendant without pain" thanks to the invention;[118] (3) that, where a party's experts contended that it was impossible for a woman to have inserted a sea-tangle tent into her own uterus (in the case, that action resulted in her death), the court should have permit-

115. BROWN, *supra* note 79, at 39–40. It is of course speculative to conclude that allowing the "old roosters" to testify would have made a difference, but the parties certainly seem to have considered it a critical decision, judging from its presence in the appellate briefing and narratives about the case. One can imagine the impact of over a dozen locals testifying about the miraculous cures—such testimony, from people without a financial interest in the outcome of the case, may well have made a difference to the jury. Fishbein may have skipped over it in the *JAMA* publication as less interesting to his (medical) audience.

116. *See* Brief in Opposition to Petition for Writ of Certiorari at 9, Brinkley v. Fishbein, 61 S.Ct. 34 (1940) No. 252.

117. Collins v. Tansey, 126 A. 536, 537 (N.J. 1924).

118. Reeve v. Dennett, 11 N.E. 938, 941 (Mass. 1887).

ted the testimony of a witness who had in fact inserted such a device;[119] and so on.[120]

The AMA's responsive brief, urging the denial of *certiorari*, focuses primarily on the cumulative nature of any testimony provided by the witnesses that the defense lawyer termed "old roosters" arguing that its admission "would result in introducing collateral matters into the case and unduly and unnecessarily prolonging the trial and would open the opportunity to respondent to put on at least an equal number of dissatisfied patients, which he announced he would seek to do."[121] It also noted that the witnesses were laymen, and thus "incompetent to testify as to these matters."[122]

Were Brown and Matthews right to be confident that the testimony would be found inadmissible? Or were Brinkley's lawyers right to bring twenty "frisk[y] . . . old roosters"[123] on the expectation that they'd be allowed to testify about what it was that put a spring in their collective step?

It is easy, today, to say that the testimony was obviously inadmissible under *Daubert*, either because the layperson patients were being presented as experts, or because the underlying science was not "generally accepted." But the situation eighty-plus years ago was different in important ways, impacting the court's ability to evaluate the acceptance, making the question closer. Among other things, what we think of today as standard peer review wasn't broadly present for another couple of decades.[124] There existed medical literature, of course—*JAMA* most notably here—but there was not the infrastructure available to courts today.

Moreover, it was *not* obviously wrong to think there were important possible breakthroughs coming in the context of glands; to the contrary, endocrinology was developing rapidly. Insulin had been discovered seventeen years prior, with a Nobel Prize being awarded for the work that revolu-

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119. Commonwealth v. Leach, 30 N.E. 163, 163–65 (Mass. 1892) ("[W]here the testimony to be met is the opinion of expert witnesses that it is impossible in the nature of things for a particular thing to be done, it is not necessary to rely on expert opinions to the contrary, if it can be shown as a matter of fact that the thing has been done.") A "sea-tangle tent" is a stick made from a species of kelp that can be used to dilate the cervix. *Sea Tangle Tents*, MUSEUM OF APPLIED ARTS & SCIS., https://collection.maas.museum/object/141910 (last visited Sept. 29, 2019).

120. *See* Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at 15–16, *Brinkley*, 61 S.Ct. 34 (1940) No. 252 (citing seventeen cases and three secondary sources).

121. Brief in Opposition to Petition for Writ of Certiorari at 8–9, *Brinkley*, 61 S.Ct. 34 (1940) No. 252.

122. *Id.*

123. BROWN, *supra* note 109, at 40.

124. *See* Effie J. Chan, Note, *The "Brave New World" of Daubert: True Peer Review, Editorial Peer Review, and Scientific Validity*, 70 N.Y.U. L. REV. 100, 116 (1995).

tionized the treatment of diabetes.[125] And just a couple of years before the trial, Otto Loewi won his own Nobel for his work involving nerve impulses in frogs, another important step in endocrinology.[126] Important and unexpected discoveries likely seemed to be appearing regularly, and many of them, especially those that were analogizing from animal studies to humans, likely would seem to a layperson to be no more implausible than the idea of implanting glands providing medical value.

As the citations from Brinkley's brief indicate, there existed considerable authority suggesting that expert testimony could be challenged through lay witnesses.[127] As the Supreme Judicial Court of Massachusetts put it in 1892:

> If, for example, expert witnesses were to testify that it would be impossible to propel a vessel by steam across the Atlantic ocean, or to navigate the air with balloons or flying-machines, or to propel cars by electricity, or to communicate with other persons at a long distance away by telegraph, or by spoken words, or to store up sounds in a machine or instrument so that long afterwards they could be reproduced, or to render one temporarily insensible to pain by anesthetics, it would not be necessary in reply to call other experts to give opinions to the contrary. The direct facts might be testified to by any person who knew them.[128]

Brinkley's lawyers, given that context, could well have provided two straightforward arguments that could plausibly have supported the evidence's admission. First, as they argued below and on appeal, they could note that defendants' experts had stated that the techniques at issue did not work and could not work. Here were seventeen people ready to jog vigorously up to the witness stand and contradict those experts. These witnesses were presented not as experts but merely as fact witnesses to undercut the defendants' experts' assertions. Second, Brinkley's lawyers could have argued that Brinkley was a doctor with extensive experience even if his formal education was incomplete; they also offered expert testimony from Brinkley's colleagues.[129] Brinkley and his colleagues were thus qualified through education and experience to speak as experts—that is, as someone who had knowledge beyond the ken of the jury. The jury could choose not to believe them, but, the argument would go, their lack of training and the like should

125. *See Frederick G. Banting—Facts*, NOBEL PRIZE (Aug. 27, 2019), https://www.nobelprize.org/prizes/medicine/1923/banting/facts/.

126. *See Otto Loewi—Facts*, NOBEL PRIZE (Aug. 27, 2019), https://www.nobelprize.org/prizes/medicine/1936/loewi/facts/.

127. *See supra* text accompanying notes 109–113.

128. Commonwealth v. Leach, 30 N.E. 163, 164 (Mass. 1892).

129. Many of the jurors, and quite possibly the judge, likely were delivered by midwives without formal medical education, and given the prevalence of medical school diploma mills, may well have been receiving treatment from "doctors" with no more training than Brinkley.

go to the weight of the evidence, not its admissibility. If the lawyers got past that first step, they could continue to say that the testimony of the patients—the "old roosters"—was part of the facts upon which Brinkley and the other experts relied to reach their opinions about the efficacy of the testicle implants and the other treatments he provided. The witnesses would not be presented to provide opinion testimony about the treatment, but instead as fact witnesses from which Brinkley (and other experts) could present that opinion testimony. The witnesses' testimony would be roughly the equivalent of case reports in modern litigation—not presented to prove causation or ultimate conclusions, but to provide notice or a foundation for additional conclusions.[130] From what we have, Brinkley's lawyers do not appear to have expressly made this argument. These approaches were not out of the jurisprudential mainstream at the time, especially keeping in mind the fact that many of these issues were simply not regularly addressed in the courts.

None of this is to say that the judge was wrong to exclude the evidence, either under the standards of 1939 or eighty years later. But despite the apparent confidence of the defense lawyer (in his book published years later),[131] it seems likely that the patients' testimony could well have been admitted without the judge being obviously wrong and, given the discretionary nature of evidentiary rulings, might not have been reversed had the case come out differently. Put another way, the judge could have decided that the authority of expertise (*i.e.*, the AMA's experts) should be thrown in the hopper with the authority of consumer experience (*i.e.*, the lively old fellows and their vigor), and let the jury figure it out. From the transcript, Judge McMillan did not suggest that he considered the question an easy one. Indeed, he noted that he had heard "very fully" and "patiently" from the parties, suggesting he had permitted extensive argument, at least in relative terms.[132]

Judge McMillan, though, did not think much of Dr. Brinkley, based on his charge to the jury, which Fishbein described as "one of the strongest

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130. *See, e.g.*, Mary S. Henifin et al., *Reference Guide on Medical Testimony, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 439, 475 (Fed. Jud. Ctr., 2d ed. 2000) (citing Michael D. Green et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 333, 338–39 (Fed. Jud. Ctr., 2d ed. 2000) ("Case reports lack controls and thus do not provide as much information as controlled epidemiological studies do. However, case reports are often all that is available on a particular subject . . . . Casual attribution based on case studies must be regarded with caution. However, such studies may be carefully considered in light of other information available, including toxicological data.") (quoted in *In re* Rezulin Products Liability Litigation, 369 F. Supp. 2d 398, 406 (S.D.N.Y. 2005)).

131. In a book about Brinkley, the author states that the defense team saw this question as "crucial," suggesting that they were perhaps not as confident as the lawyer later contended. *See* LEE, *supra* note 99, at 212.

132. *See* Trial Tr., *Brinkley v. Fishbein*, at 449.

indictments of charlatanism ever to come from a court."[133] The judge defined "quack" as

> to make vain and loud pretentions, especially of medical ability; to boast, to vaunt aloud or be a boastful pretender to medical skill or to make extravagant claims for a cure-all; to advertise with fraudulent boasts . . . . It has practically always been considered unethical for physicians to advertise, that is to say, to advertise further than to call the attention of the public to the fact that they were ready to practice . . . . The conduct of the plaintiff Brinkley should not be measured against his own personal ideas with regard to what is proper. It should be measured against the ethics and approved conduct of physicians generally, and to such extent that his conduct as a physician varies from the rules of ethics recognized and observed generally he becomes subject to criticism.[134]

Given that charge, which can fairly be read as an unusually harsh, if implicit, criticism of the plaintiff in a jury charge, it is perhaps unsurprising that the jury found for Fishbein and the defendants after "a short stay in the jury room."[135]

It all came tumbling down thereafter. Many lawsuits against Brinkley followed his defeat in Del Rio, apparently inspired by the well-publicized verdict. He was sued in Arkansas for causing sterility, disability, and impotency; he was sued elsewhere for death on the operating table; and the IRS was coming for his back taxes.[136] All told, within a year of the verdict he faced lawsuits claiming damages over $3 million.[137] By 1941 he sought bankruptcy protection, listing over $300,000 in assets and over $1 million in debts.[138] Mexican troops seized XERA in the summer of 1941, enforcing an agreement between the United States and Mexico to allocate radio bandwidth.[139] And then, just days later, he had a heart attack and, due to a blood clot, lost a leg.[140] The federal government came along within a few weeks and charged him and, later, his wife, with mail fraud.[141]

Brinkley never recovered from his heart attack or, it seems, any of the rest of the blows to his business and his reputation. He died in his sleep on May 26, 1942, three years and three months after his loss in the Western District of Texas.[142] He was fifty-six years old.

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133. FISHBEIN, *supra* note 8, at 514.
134. *Id.* at 514–515.
135. *Id.* at 515.
136. *See* BROCK, *supra* note 4, at 267.
137. *See id.*
138. *See id.* at 269.
139. *See id.* at 270.
140. *See id.* at 270–71.
141. *See* BROCK, *supra* note 4, at 271.
142. *See id.* at 273.

V. CONCLUSION

Imagine the alternate universe in which the testimony of Brinkley's happy patients is admitted and, one by one, they tell the jurors of the energy they found coursing through their bodies and how they were cured of impotence and assorted other conditions. The jury—no doubt skeptics at first—could have reached the conclusion that these miracles work. Dr. Brinkley and his colleagues/co-conspirators could have convinced the jury, as they had convinced thousands of patients, that Brinkley had figured out how to cure the previously incurable, and, they'd point out, these vibrant men on the witness stand are the evidence of that. Perhaps that would have enough to convince the jury that Dr. Fishbein's article in *Hygeia* was, in fact, defamatory, and awarded him the hundreds of thousands of dollars he sought.

In that scenario, would Dr. Fishbein have backed down from his mission of going after quacks with the full force of the AMA? It seems unlikely that he would do so voluntarily—but, just as Brinkley's loss led to other suits against him (and arguably to his financial downfall), it seems safe to assume that, in our hypothetical alternate universe, others featured in Fishbein's lengthy two-part article about quacks would have been encouraged to go after Fishbein and the AMA as well. The AMA was established at the time, but nothing like the dominant institution it is today; a loss could have set it back years or even decades. As is still the case today, there was no guarantee that the general public would see through falsehoods, especially from those who contend they have a better way to advance the cause of health.[143]

But even if a broader swell of litigation didn't follow against and drown the AMA, we can be certain that Brinkley would have used any recovery from a verdict to expand his empire and to find more and more patients to treat. He would have trumpeted the victory on his radio station to thousands and thousands of listeners—and that would mean that more and more patients would have died. By 1930, the Kansas Medical Association was able to document 42 people who had died in Brinkley's care, mostly in surgery, and in the trial, the evidence suggested that his death toll was likely

143. *See, e.g.*, Kristine Phillips, *No, Gwyneth Paltrow, Women Should Not Put Jade Eggs in Their Vaginas, Gynecologist Says*, WASH. POST (Jan. 22, 2017) https://www.washingtonpost.com/news/to-your-health/wp/2017/01/22/no-gwyneth-paltrow-women-should-not-put-jade-eggs-in-their-vaginas-gynecologist-says/ (noting that jade eggs, described by the Goop website as a "'strictly guarded secret' of Chinese queens and concubines," was called "'the biggest load of garbage' [a gynecologist had] read on Goop since vaginal steaming and worse than saying wearing bras is linked to cancer"); Gillian Flaccus, *Northwest Measles Outbreak Revives Debate Over Vaccine Laws*, SEATTLE TIMES (Feb. 1, 2019) https://www.seattletimes.com/seattle-news/health/pacific-northwest-measles-cases-prompt-look-at-vaccine-exemptions/ (noting that "four percent of Washington secondary school students have non-medical vaccine exemptions").

in the hundreds.[144] Those numbers reflect only *direct* deaths, too—not taking into account those whose conditions could have been treated properly by actual physicians, but instead took one of Brinkley's numbered nostrums with no efficacy. The actual number may have been an order of magnitude higher.

It's impossible, then, to know with any precision what the total Brinkley body count was by the time of the defamation verdict—or how much larger it would have gotten if his career had continued for years or decades more. But it seems safe to estimate that there would have been more deaths—many more if he lived longer. And even if his death had come at the same time, if not for the loss in the suit against the AMA (and the subsequent litigation), it seems likely that some of his colleagues would have continued the scam into the future. Perhaps something else would have stopped Brinkley eventually, though he had up until this point proven to be tenacious and nearly untouchable.

Judge McMillan could have recognized Brinkley's standing in Del Rio and quietly decided not to make trouble. He could have seen how many locals made a good living working for him, even if the money they were paid with came from victims of scams. He could have appreciated the radio station's playing popular music, Brinkley's inviting people to his estate to watch the lighted fountains, or Brinkley's overwhelming popularity. Judge McMillan could have recognized that the evidentiary question he faced was within his discretion and that the law was sparse, at best. He could have decided to take the easy route. Put simply, even with lifetime tenure, he could have punted and just let the jury hear the evidence.

But he didn't. Whether it was because Dr. Fishbein's lawyers were persuasive, or because (as his jury charge suggests) Judge McMillan saw through Brinkley's act for what it was, we don't know. Regardless of the reason, his evidentiary decision likely saved many lives, both by leading to the end of Brinkley's scam and by contributing to a jury verdict that kept the AMA on course to advocate for science-based medicine. The decision arguably also kept science at the center of litigation about quacks and charlatans, long before the Rules of Evidence, *Daubert*, and their progeny provided more specific guidance to courts.

Most evidentiary decisions don't have that kind of impact. It probably wasn't obvious at the time that Judge McMillan's decision was at a critical juncture, and that the path he chose would save lives. A dispute about goat testicles might have seemed silly—and the story is indeed filled with bizarre and often hilarious turns—but the ruling resonates still.

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144. *See* Reply All, *supra* note 2.