

Undue Influence: A Review of the Literature Review¹

Lisa Nerenberg

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Since the mid-1990s, interest in the role of undue influence in elder financial abuse has grown. This can perhaps be accounted for by the fact that undue influence offers a compelling explanation for situations that are increasingly coming to the attention of adult protective service workers, law enforcement, and others in the field of abuse prevention. These include incidents in which elders who appear to be acting freely (those with minimal or no cognitive impairment and who are not being overtly coerced) consent to exploitative transactions, remain in abusive relationships, and defend those who seek to harm or exploit them. In many cases, victims have strong emotional attachments to their abusers. Some refuse to believe that abuse has occurred even in the face of significant losses, impoverishment, or homelessness. Some even defend their abusers.

Practitioners in the field of elder abuse prevention recognize that elders with cognitive impairments are often tricked, misled, or intimidated into surrendering money or property by signing documents like powers of attorneys, deeds, or other contracts; and, that under these circumstances, victims are not acting “freely.” They further recognize that abusers may gain compliance through threats and coercion. But cognitive impairment and coercion do not explain those situations in which victims appear to be acting freely.

Most practitioners in the field of elder abuse preventions, including social workers, adult protective service workers, and legal and health care professionals adhere to ethical and practice principles or guidelines that acknowledge clients’ autonomy and right to make their own decisions. This extends to actions or choices that appear eccentric, risky, or even foolish. As a result, they have been reluctant to call seemingly counterproductive actions into question for fear of treading on clients’ civil liberties. But as awareness of abuse increases and more of these paradoxical cases are reported, many

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have begun to look beyond the “autonomy and free choice explanations” to explain how abusers gain compliance or consent through unfair manipulation.

Some have turned to the fields of as psychology, marketing, domestic violence, victimology, criminology, and civil law to understand how individuals exercise control over others. The following sections provide an overview of these diverse perspectives and their potential implications for understanding elder abuse.

The Psychology of Control and Influence

Psychologists have for decades studied how people exercise influence over others’ thoughts and actions under both normal and extraordinary circumstances. In everyday life, persuasion is used to maintain social control, enlist support for political or religious causes, and promote consumerism. Persuasion has also been used for unethical purposes. Totalitarian regimes, cults, hostage takers, batterers, scammers, and corrupt caregivers have used unfair persuasion to gain control over the thoughts, actions, loyalties, and resources of others.

A variety of terms have been used to describe unfair persuasion and its effects, many of which are imprecise and used inconsistently. The term “brainwashing,” for example, which was originally used to describe attempts to achieve deep and permanent behavioral changes in foreign prisoners, especially during the Korean War, is no longer widely used in psychology and other sciences because of its vagueness, history of being used in propaganda, and association with highly controversial and sensationalized events. Today, the terms coercive persuasion, coercive psychological systems, or coercive influence are more commonly accepted. Specific areas of exploration include:

1. How totalitarian regimes control populations
2. How captors induce prisoners of war (POWs) to denounce their countries, collaborate with their captors, and turn on fellow prisoners
3. How cults recruit and maintain members
4. Why victims of domestic violence do not leave abusive relationships or take action against their batterers
5. How caregivers maintain control over those they care for
6. Hostages who bond with their captors

7. How professionals exploit relationships of trust and confidence toward clients
8. How white collar criminals and con artists use manipulation and deception for financial gain

Early Work

Early exploration into coercive persuasion focused on totalitarian regimes (Hunter, 1951; Lifton, 1961, 1989; Schein, 1961; Singer, 1995). In the 1930s, the media revealed “purge trials” in the former Soviet Union in which men and women were accused of committing crimes against the state and manipulated into falsely confessing or accusing others. These accounts were followed in the late 1940s and early 1950s by revelations about thought reform programs used by the Communists in China to induce the population to embrace new political philosophies and behaviors through a coordinated program of psychological, social, and political coercion. The term brainwashing is believed to have originally come from the Chinese term *xǐ nǎo*, which translates as "to wash the brain," which was first applied to methodologies of coercive persuasion used in the "reconstruction" of the “feudal thought patterns” of Chinese citizens raised under prerevolutionary regimes (Lifton, 1961; Schein, 1961). It was later popularized by journalist Edward Hunter, who explained the “education reform” based on personal observations and interviews with persons who had been exposed to the process (Hunter, 1951).

Lifton (1961) identified eight criteria used by the Chinese to explain thought reform:

- “Milieu control” is the control of information and communication that results in isolation from society.
- “Mystical manipulation” is the manipulation of events and experiences that appear to be spontaneous but in fact are planned and orchestrated to allow the controller to reinterpret them.
- The “demand for purity” refers to exhortations to conform to the ideology of the group as a means to achieve perfection. Guilt and shame may also be induced.
- Confession. “Sins, attitudes, and faults,” (as defined by the group) must be confessed and are then exploited by leaders.

- Sacred science. The group's doctrine or ideology is considered to be the ultimate truth, beyond questioning or dispute. The leader, as the spokesperson for God or for all humanity, is likewise above criticism.
- Loading the language. The group interprets or uses words and phrases in new ways that the outside world does not understand. This jargon consists of clichés that serve to alter members' thought processes to conform to the group's way of thinking.
- Doctrine over person. Members' personal experiences are subordinated to the sacred science and any contrary experiences are denied or reinterpreted to fit the ideology of the group.
- Dispensing of existence. The group has the prerogative to decide who has the right to exist and who does not. This is usually not literal but means that those in the outside world are not saved, unenlightened, unconscious. Those that do not join the group and accept its ideology must be rejected by members.

Following the Korean War of 1950-53, the United Nations and individual governments assigned intelligence officers, psychiatrists, and psychologists to debrief returning prisoners of war (POAs), many of whom had collaborated with their captors, renounced their governments, and turned on fellow prisoners (Singer, 1995).

Subsequent studies and first-person reports from former prisoners began to appear in the academic literature and popular media. The investigators identified a variety of techniques that had been used to gain control over the prisoners, including:

- Dehumanizing the soldiers by keeping them in filth
- Sleep deprivation
- Partial sensory deprivation
- Psychological harassment
- Inculcation of guilt
- Group social pressure
- Withholding information

These early explorations into thought reform had far reaching implications. They revealed the extent to which human will can be subverted and the powerful tools and methods that can be brought to bear in doing so. Although they focused on politically

motivated acts and campaigns in Asia, they set the stage for psychologists to explore a wide range of conduct in the West. In the following decades, theories of mind control were applied to such disparate phenomena as cults, hostage situations, domestic violence, and advertising.

Cults

In the early 1960s, mental health professionals began to apply what had been learned from these early studies of brainwashing to explain how cults induct and maintain members. Psychologist Margaret Singer, who had interviewed Korean War prisoners in the 1950s, later was among those who served as expert witnesses in court cases involving cults (Singer, 1992; Singer, 1995). Drawing from her experiences with POWs and interviews with cult members and their families, Singer described six conditions needed for thought reform:

1. Keep the person unaware of what is going on and the changes taking place.
2. Control the person's time and, if possible, physical environment.
3. Create a sense of powerlessness, covert fear, and dependency.
4. Suppress old behaviors and attitudes.
5. Instill new behaviors and attitudes.
6. Put forth a closed system of logic; allow no real input or criticism.

Distilling elements from Singer's and Lifton's earlier work, Steven Hassan proposed the BITE (an acronym for behavior, information, thoughts, and emotions) model to describe cults' use of control (Hassan, 1988).

- **Behavior Control** is regulating cult members' physical reality, including where, how, and with whom they live and associate. Cults control the clothes members wear, the food they eat, how much sleep they get, and how their money and time are spent. Members are made to ask permission for major decisions and to report their thoughts and feelings. Behavior is also controlled through rigid rules, regulations, rewards, and punishments.
- **Information Control** includes the use of deception or the withholding or distorting of information. Access to non-cult sources of information is minimized or

discouraged and leaders decide who needs to know what. Members are encouraged to spy on each other and to pair up with "buddies," which helps them do so. The cult generates its own information and propaganda, and distorts or misquotes information from others.

- **Thought Control.** Cults define reality as being black and white, or good and evil. Members are encouraged to internalize the group's truth. Language is used in ways that discourage thought and reduce complexity. This includes the use of clichés, platitudes, and "buzz words." Critical thinking, analysis, and constructive criticism about the leader, doctrine, or policy are discouraged. The use of denial, rationalization, justification, and wishful thinking is pervasive. Chanting, meditating, praying, speaking in "tongues," and singing or humming is encouraged to interfere with thought and communication.
- **Emotional Control** relates to the manipulation of members' feelings. Members are led to believe that others' problems are their fault and made to feel guilty for who they are, their families, their past, their affiliations, and their thoughts, feelings, and actions. Fears about the "outside" world, of enemies, of losing one's "salvation," of leaving or being shunned by the group, and of disapproval are promoted. Emotional control is achieved by producing extreme emotional highs and lows. Other tactics include ritual and public confession of "sins," the indoctrination of phobias, and the programming of irrational fears about what will happen if they leave the group or questions the leader's authority.

Allegations of unfair persuasion by cults were made in several highly publicized events including the Jonestown mass suicide/murder of 1978 in Guyana and the 1993 siege of a compound of Branch Davidians, a religious group originating from the Seventh Adventist church. The Jonestown event claimed the lives of almost 1,000 followers of cult leader Jim Jones, and the 51-day siege between the Branch Davidians and federal authorities in Waco, Texas in 1993 ended with a fire that killed the group's leader, David Koresh and 81 of his followers (Washington Post, 1997).

Controversies Surrounding Cults

Applying psychological theories and principles to cults raised a storm of controversy with cult followers and critics, civil libertarians, religious groups, and academics engaging in highly publicized disputes. During the 1980s, Margaret Singer was among those mental health professionals who became controversial figures due to their involvement as expert witnesses in court cases against new religious movements.

In 1983, the American Psychological Association's Board of Social and Ethical Responsibility for Psychology asked Singer to chair a task force to (Introvigne, 1998):

1. Describe the deceptive and indirect techniques of persuasion and control that may limit freedom and adversely affect individuals, families, and society
2. Review the data base in the field
3. Define the implications of deceptive and indirect techniques of persuasion and control for consumers of psychological services
4. Examine the ethical, educational, and social implications of this problem

The task force's report, released a few years later, affirmed that cults' use of deceptive and indirect techniques of persuasion and control can compromise individual freedom and result in serious harm. The report further called for more research on the topic. The APA, however, rejected the committee's findings, claiming that the report "lacks the scientific rigor and evenhanded critical approach necessary for APA imprimatur," and declined to take a position on the issue. Individual critics were more disapproving, with one advisor to the APA claiming that the report "resorts to sensationalism in the style of certain tabloids" and that "the term 'brainwashing' was more suitable to 'cultists' and revival preachers" (Introvigne, 1998).

The incident did not, however, put the issue to rest (Introvigne, 1998; Bromley & Hadden, 1993). In 1990, the APA's Division of Psychologists Interested in Religious Issues approved a resolution stating that it "supports the conclusion that, at this time, there is no consensus that sufficient psychological research exists to scientifically equate undue non-physical persuasion (otherwise known as "coercive persuasion", "mind control", or "brainwashing") with techniques of influence as typically practiced by one or more religious groups. Further, the Executive Committee invites those with research on this topic to submit proposals to present their work at Divisional programs."

The American Civil Liberties Union (ACLU) also addressed cults' use of persuasion. In the 1970s, the Union considered whether cults were using mind control techniques to exploit the vulnerability of youths and whether there was legal justification for parents' kidnappings and deprogramming of their children (Donohue, 1985). The Union concluded that for those who had reached the age of majority, there was no justification for mental incompetence proceedings, conservatorships, or temporary guardianships unless physical coercion or its threat had been used. In the absence of these factors, the ACLU concluded, adult inductees had the right to exercise their prerogative, and it was essentially criminal for "deprogrammings" to kidnap cult members and "unbrainwash" them.

Stockholm Syndrome or Traumatic Bonding

The term *Stockholm syndrome* was coined by criminologist and psychiatrist Nils Bejerot, who assisted police during a 1973 robbery of a bank, the Kreditbanken, in Stockholm, Sweden (Bejerot, 1974). During the event, the robbers took four bank employees hostage and held them for six days. After their release, the hostages refused to cooperate with law enforcement or to testify against their captors. They saw law enforcement as the villains, and one hostage later married one of the captors.

Although there is little published academic research on the Stockholm syndrome and the diagnosis is not described in any international classification systems (Namnyak et al., 2007), the syndrome is acknowledged by prominent law enforcement organizations, including the FBI, which defines it as a psychological response in which positive bonds develop between hostages and captors. According to the FBI's Hostage Barricade Database System, which contains data on over 4,700 reported federal, state, and local hostage/barricade incidents, 27% of captives show some evidence of Stockholm syndrome (deFabrique, N.; Romano, S.J.; Vecchi, G.M.; & Van Hasselt, V.B., 1999).

An FBI directive states that the following conditions are generally believed to be necessary for the syndrome to occur (deFabrique et al, 1999):

- A person held in captivity cannot escape and depends on the hostage taker for life.
- Captors control their captives' basic needs and their lives.

- The hostages are isolated from others and have only their captors' perspectives available. The captors keep information about the outside world's response to their actions from captives.
- Hostage takers threaten to kill victims and give the impression they will do so. The captives judge it safer to align with the perpetrators, endure the hardships of captivity, and comply with their captors than to resist and face murder.
- Captives see the perpetrators as showing some degree of kindness. Although kindness is viewed as the cornerstone of the syndrome, some have noted that captives often misinterpret a lack of abuse as kindness or benevolence.

The Stockholm syndrome was originally seen as a barrier to the negotiation process. More recently, however, hostage negotiators and FBI officials have concluded that encouraging the process may in fact reduce victims' risk. This conclusion is based on the assumption that if victims develop a bond with their captors, it may result in the hostage takers feeling compassion toward their victims (deFabrique et al, 1999).

The Patty Hearst Case

The 1974 kidnapping of 19-year-old publishing heiress Patty Hearst by members of the Symbionese Liberation Army (SLO) became a landmark in the debate about mind control. The SLO, a leftist terrorist organization, kidnapped Hearst and held her in captivity for almost two months, during which she appeared to align herself with her captors and join their ranks. Hearst participated in a San Francisco bank robbery with her abductors for which she was arrested. Her defense attorney, F. Lee Bailey, was the first to introduce psychiatric testimony in an American courtroom that a defendant had been influenced by pressures that some people considered "brainwashing." Margaret Singer was among those who served as expert witnesses.

According to the defense, Hearst was:

- Isolated and made to feel that no one was going to rescue her
- Physically and sexually abused by members of the group
- Told that she might die
- Told how the establishment was oppressing her captors

- Forced to record messages that disparaged those she loved

The “brainwashing” defense proved unsuccessful, and Hearst was convicted. She served nearly two years in prison before her sentence was commuted by President Jimmy Carter. She was later pardoned by President Bill Clinton.

The Battered Woman Syndrome

From the time that domestic violence theory was first articulated in the 1970s, advocates, psychologists, victimologists, and others have tried to understand why battered women often refuse to leave violent relationships, press charges against their abusers, refuse help, or even become aggressive to those who try to help them. In doing so, analysts have noted similarities between the tactics used by batterers and those used by captors against prisoners of war (Romero, 1985). Others have suggested that battered women may experience the Stockholm syndrome (McCue, 2008).

The “Battered Women’s syndrome” was advanced by Psychologist Lenore Walker (2000, 2009). An underlying assumption is that batterers (mostly male) are intrinsically more powerful than their intimate partners (mostly female) as a result of historical gender-based injustices. Batterers use violence and the threat of violence to maintain control and assert their power and privilege.

Walker further described the syndrome as a process that develops over time, acknowledging that violence does not occur randomly, but rather, in distinct and predictable phases. The first is the tension-building phase, followed by the explosion or acute battering incident, which culminates in a calm, loving respite that is often referred to as the honeymoon phase. According to Walker, women must experience at least two complete battering cycles before they can be labeled "battered women."

Walker explained that victims stay in abusive relationships for many reasons, including the positive reinforcement they receive for their compliance during the honeymoon phase. Other factors include the cultural expectation that women are responsible for making their marriages work. Strong impediments to leaving relationships also exist, include adverse economic consequences, the fact that research has shown that it is more dangerous to leave than to stay, threats by batterers to kill themselves or kill or take their children, lost self-esteem; and a lack of psychological energy.

Walker identified four general characteristics of the syndrome:

- The woman believes that the violence was her fault
- The woman is unable to place the responsibility for the violence elsewhere
- The woman fears for her life and/or her children's lives
- The woman has an irrational belief that the abuser is omnipresent and omniscient

She and others have identified other symptoms experienced by victims, including the “fight or flight” response, cognitive changes, and “learned helplessness.”

The “fight *battering* or flight” response refers to the fact that the body and mind prepare to deal with danger by becoming hyper vigilant to cues of potential violence, resulting in an exaggerated startle response. The automatic nervous system becomes operational and the individual becomes more focused on the single task of self-defense. This impairs concentration and causes physiological responses usually associated with high anxiety. In serious cases, fearfulness and panic disorders are present and phobic disorders may result. Irritability and crying are typical symptoms of this response. The “flight” response, which often alternates with the fight pattern, is the natural inclination to run away from danger. When physical escape is actually or perceived as impossible, mental escape may be triggered. This is the avoidance or emotional numbing stage where denial, minimization, rationalization, and disassociation are used to psychologically escape from the threat or presence of violence.

Some victims of domestic violence experience changes in their cognitive abilities and memory. Victims may begin to have intrusive memories, including flashbacks of abuse, or they may not remember the events or important details. They may have trouble following their thoughts in a logical way or become distracted. Some “disassociate” themselves when faced with painful events, memories, reoccurring nightmares.

The principle of “learned helplessness” is premised on research conducted by Martin Seligman (1991) during the 1960s in which dogs were placed in cages with a divider and subjected to electrical shocks. Initially, when one side of the cages were charged with electricity, the dogs jumped to the other side. Subsequently, shocks were administered on both sides so that it did not matter where the dogs went. After a short period, the dogs stopped trying to avoid the pain; they had learned that they were helpless. The battered women’s syndrome assumes that the process is similar in battering

relationships. At first, victims believe they can control the violence by doing what abusers want or refraining from conduct that precipitates the violence. When they discover over time that this doesn't work, they become passive and lose the ability to perceive alternatives.

Social psychologists who have studied domestic violence have observed that unequal power relationships can become increasingly unbalanced over time. As the power imbalance magnifies, victims feel more negative in their self-appraisal, more incapable of fending for themselves, and more dependent on their abusers. This cycle of dependency and lowered self-esteem repeats itself over and over and eventually creates a strong effective (emotional) bond to abusers. At the same time, abusers develop an exaggerated sense of their own power, which masks the extent to which they are dependent on their victims to maintain their self-image. If the roles that maintain this sense of power are disturbed, the masked dependency of the abuser on the victim is suddenly made obvious. One example of this sudden reversal of power is the desperate control attempts made by the abandoned battering husband to bring his wife back into the relationship through threats and/or intimidation.

In comparing battered women's experiences to those of prisoners of war, Romero (1985) suggests that both groups experience coercion and threats, intimidation, emotional abuse, and isolation. In comparing battered women's syndrome to the Stockholm syndrome, McCue (2008) observed that members of both groups are likely to experience displaced rage (focusing rage on themselves or others instead of their abusers), see abusers as either all good or all bad, lose their sense of self, which results in a belief that they deserved the abuse, and are caught up in a push-pull dynamic, in which their impulse is to push the men away and pull them toward them at the same time. Some advocates for battered women have objected to the association of abuse with Stockholm syndrome, stating that there is a distinct difference between hostages and battered women, including the fact that hostages are usually male, their captivity is not lifelong, there is no intimate relationship between hostages and their captors, and hostages know that someone is advocating for their release (McCue, 2008).

Battered women's syndrome has been identified as a subcategory of posttraumatic stress disorder (PTSD) in the DSM-IV-TR (APA 1994). Six groups of criteria have been

identified as part of the syndrome: intrusive recollections of the trauma event(s), hyperarousal and high levels of anxiety, avoidance behavior and emotional numbing, disrupted interpersonal relationships, body image distortion and/or somatic and/or physical complaints, and sexual intimacy issues.

Although battered women's syndrome is not a legal defense in itself, courts in the U.S. and other countries have accepted evidence of it to explain the conduct of women in battering relationships who fight back and kill their abusers. Specifically, it may constitute self-defense, provocation, and diminished responsibility. The "battered woman's defense" argues that a battered woman is a normal, reasonable person caught in irrational circumstances, responding as any reasonable person would. For a lawyer handling a woman's self defense case, it provides the tools to argue that what happened to the woman would happen to anybody under similar circumstances and that reasonable persons would use force in self-defense.

This use of the battered women's defense syndrome has been controversial. Legal and feminist scholars have criticized it on the grounds that it focuses on women's passivity and its portrayal of a singular profile (Jones, 1994). In addition, as men's groups and others have challenged the emphasis on gender in explaining domestic violence, the syndrome's focus on women has also been challenged. In 1994, as part of the Violence against Women Act, the United States Congress ordered an investigation into the role of Battered Woman Syndrome expert testimony in the courts to determine its validity and usefulness. Investigators concluded that an extensive body of scientific and clinical knowledge strongly supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence (National Institute of Justice, 1996). It therefore affirmed the utility within the trial process, and at various stages of the criminal justice process, of evidence concerning the effects of battering. However, it also concluded that the term 'battered woman syndrome' is too narrow, has some negative implications, and is no longer useful or appropriate. The term has been replaced with "battering and its effects."

Influence of Caretakers on their Charges

A few studies have explored how caregivers exert power over those they care for. In studying dementia caregivers, Dunham & Cannon (2006) concluded that to be successful,

family caregivers must establish relationships of power over those they care for and substitute their judgment over them. Paradoxically, the researchers observe that in achieving power, caregivers experience a sense of powerlessness.

Mandeville and Hanson (2000) describe how caregivers of persons with developmental disabilities exercise power and control at both the individual and systems levels. At the individual level, caregivers and family members may use isolation and abusive tactics to maintain power and control. At the system's level, caregiving agencies depend on hierarchical and authoritative styles that grant powerful roles to caregivers in their relationships with consumers. The service models employed by agencies can also add to the isolation of both caregiver and consumer. Caregivers who must meet agency expectations to manage the lives of consumers and contain their behavior, without full consideration for their equality and interdependence, can act out their authoritative role in an abusive manner.

Persuasion in the Consumer Context

The use of both normal and unfair persuasion has also been explored in the consumer context. In the mid 1950s advertisers began incorporating the insights of psychology into their work. "Motivation research" investigated the psychological reasons why individuals buy specific types of merchandise and why they respond to specific advertising appeals. It was further used to influence their choices about goods and services. It viewed consumers as governed by irrationality and insecurity and moved by eroticism (Richards, MacRury, & Botterill, 2000).

The more sinister aspects of marketing were revealed to the public in Vance Packard's popular book *The Hidden Persuaders* (Packard, 1957), which explored how advertisers use psychological methods to tap into unconscious desires in order to persuade consumers to buy their products. Packard exposed how motivation research was used not only to probe people's minds, but to control their actions, providing examples of how ad campaigns were tailored to exploit vulnerability and how subliminal messages were embedded into advertisement to produce desired responses. Among the studies he cited was one by James Vicary, who claimed to have provoked a rush to concession

stands at a New Jersey movie theater by flashing orders to buy food on the movie screen at speeds faster than the eye could perceive.

Subsequent studies failed to support Packard's theory or demonstrate that efforts to manipulate the unconscious did in fact lead to behavioral changes favorable to specific marketers and Vicary later retracted some of his claims. Despite these conflicting findings, more than three quarters of the U.S. population currently believe that marketers use subliminal messages to sell products or services (Rothenberg, 1997).

Robert Cialdini brought widespread public attention to how consumers' purchasing behavior is influenced. His 1984 bestseller *Influence: The Psychology of Persuasion* is based on three years of working "undercover" —applying for jobs and training at used car dealerships, fund-raising organizations, and telemarketing firms—to observe real-life situations of persuasion. *The Psychology of Persuasion*, also published as a text under the title *Influence: Science and Practice*, reviews theories and experiments in social psychology and has been updated several times.

Cialdini identifies rules or principles that govern behavior in everyday life. Although they are instilled by culture, these rules can be exploited to gain control over others. They include:

- **The Rule of Reciprocity.** According to sociologists and anthropologists, culture instills in people a natural inclination to repay others for gifts, favors, or considerations. This sense of obligation or indebtedness can be manipulated to induce compliance and prompt people to reciprocate with substantially larger favors or gifts. There are several variations on the theme. The exchange may involve concessions, as is the case when manipulators make extreme requests, which they know their subjects will reject. When the requests are rejected, as expected, the requesters make smaller requests, which are the ones that were desired all along. The desired requests are therefore accepted because they appear to be concessions.
- **Commitment and Consistency.** People want to appear consistent in their words, beliefs, attitudes, and deeds. This desire is exploited when manipulators lead people to take initial positions that are consistent with the behaviors they want to induce. Then, when the manipulator requests the desired behavior, the victim feels inclined to comply.

- **Social Proof.** When prompted to behave in ways that are new or unfamiliar, people are likely to follow the lead of others. Compliance can therefore be induced by informing people that others, particularly role models, have performed the desired behavior. A shortcut is to solicit the behavior in groups where the other group members serve as models. The technique is most effective when the role models are similar to the people being influenced.
- **Liking.** People are more likely to comply with people they like. Enhancing influencers' likeability can therefore, increase their effectiveness. Research shows that physical attractiveness has a "halo" effect that leads people to believe that attractive people are also talented, kind, and intelligent. People also tend to like people they perceive as similar to themselves and who praise and compliment them. Repeated contact and positive associations (the person is associated with favorable people, places, or activities) also contribute to likeability.
- **Authority.** Socialization instills in people the belief that obedience is "correct" and that people who have achieved authority have done so because they are knowledgeable, wise, and powerful. Compliance can therefore be achieved when requests are made by figures of authority. Authority can be demonstrated symbolically by symbols like titles, dress, and possessions.
- **Scarcity.** People assign greater value to opportunities and objects that are less available. This belief is exploited when salespersons claim that there are only a limited number of products available or there is a deadline for purchases. The scarcity principle further applies to the way that information is evaluated. Research indicates that the act of limiting access to a message may cause individuals to want it more and to perceive it as more persuasive.

Personal Fraud

Fraud refers to crimes that involve issues of trustworthiness and honesty. The term "personal fraud victims" distinguishes individual victims from governments, corporations, or other institutions that are also likely to suffer losses from fraud. The types of fraud that individuals commonly fall victim to include scams, telemarketing, fraudulent financial advice, or fraudulently gaining access to victims' property or assets.

Jonathan J. Rusch (1998, 1999), a litigator with the U.S. Department of Justice and an expert in telemarketing, cites social influence theories and motivation research to explain the “sustained psychological warfare” used in telemarketing fraud. Drawing from Cialdini’s principles of social influence, Rusch describes how those experienced at deceiving others gradually gain the compliance of people who have little experience or skill in recognizing and protecting themselves against manipulation. This is accomplished through sustained, intensive personal contact and a three-stage process that includes:

- 1) Excitement. Criminals make prospective victims more susceptible by making statements at the outset of their interactions that trigger excitement. They may, for example, offer substantial prizes. The resulting surge of excitement may distract the victim from thinking rationally.
- 2) Authority. Social psychology experiments have shown that people are less likely to scrutinize persuasive messages closely when they perceive the source to have authority and to be honest.
- 3) encouraging victims to treat their relationships with scammers as family relationships.

Criminologists have also developed models to explain why certain people appear to be predisposed to personal fraud victimization. In particular, they have focused on individuals who are victimized repeatedly. The key, according to experts, seems to rest in the fact that these crimes involve varying levels of victim cooperation. Titus, Heinzelmann, & Boyle (1995) describe a continuum of cooperation and provide examples:

- No cooperation: A woman discovers in her monthly credit card statement that she has been the victim of an identity fraud, having done nothing to facilitate the crime.
- Some cooperation: A man responds to a "cold" phone call and contributes to a charity without investigating and learning that it was phony.
- Considerable cooperation: Over a period of years, a woman loses many thousands of dollars in a series of scams but continues to participate. The authors point out that this apparent cooperation with abusers has led observers to blame victims, a tendency that they equate to that which is frequently observed in relation to domestic violence.

Abuse of Professional Role

Certain professional/client relationships are believed to have intrinsic power differentials and imbalances. Doctors, psychotherapists, psychiatrists, social workers, pastors, lawyers, teachers, and workplace mentors are among those who are assumed to wield a high degree of power over their patients or clients. In the case of psychiatrists, psychotherapists, and clergy, they may hold in trust the intimate, wounded, vulnerable, or undeveloped parts of those they serve. Clients suffering from psychological or spiritual injuries are considered to be particularly vulnerable. Under these circumstances, patients and clients may develop emotional and psychological dependencies on professionals. The nature of these relationships creates power disparities in which the professionals hold high levels of power over those they serve. Recognition of these power disparities have led to strong ethical, moral, and legal strictures against accepting gifts or become sexually involved with clients or patients.

Attention to abuses of power by professionals have tended to focus on sexual contact and, in particular, abuse by male professionals toward female clients. Because professionals have the greater power in these settings, sexual behavior is always prohibited regardless of who initiates it or how willing clients appear to be. Because the dynamics of these situations are believed to render victims unable to *withhold* consent, professionals have the responsibility to maintain the boundaries (Rutter, 1991).

Summary of the Psychology of Undue Influence and Its Implications for Elder Abuse

The psychological studies described in this section provide rich insights into seemingly paradoxical behavior. They have further identified factors that heighten vulnerability to unfair persuasion and specific techniques or technologies used by controllers. They further suggest why certain methods are successful with some subjects and not others, and suggest ways to prevent manipulation. As new patterns of unfair persuasion are identified, researchers and practitioners have attempted to determine if and when past explanations apply.

Although the settings and circumstance in which unfair persuasion has been identified are far ranging, the tactics associated with them share many common elements. Tactics used to break down victims' resistance to persuasion that have been identified in multiple settings include isolation, degradation, and the deprivation of food and information. Further, researchers have attempted to pinpoint techniques, circumstances, or conditions that *must* be present to achieve control in various settings. For example, in attempting to explain why some prisoners of war switched loyalties or turned on fellow prisoners while others did not, researchers have attempted to determine if it was the length of confinement, the infliction of pain, or other specific strategies that were applied that ensured the desired results. Similarly, because the majority of hostages do not exhibit Stockholm syndrome, law enforcement professionals have attempted to identify what features are key. They too have considered the duration of the victims' confinement as well as the intensity of the situations, whether the hostage takers used violence, and whether the captors demonstrated kindness toward the hostages (Bejerot, 1974; de Fabrique et al, 1999; & Namnyak et al, 2007).

In attempting to understand why some victims are more vulnerable than others to persuasion, researchers have looked at such victim characteristics as the psychological strength or resiliency of those being persuaded.

Apparent commonalities in how persuasion is exercised in multiple settings have led researchers and practitioners to explore parallels among diverse areas of inquiry. Those who have studied cults have turned to the literature on prisoners of war for explanations, while those in the field of domestic violence have looked to the research on the Stockholm syndrome to explain the bonds that battered women develop with their batterers. Similarly, those who have attempted to understand scams have turned to the literature on marketing.

Although applying theories and insights derived from one set of circumstances to other settings appears to have been fruitful in some instances, there are dangers to these shortcut approaches. Often at stake is the integrity of the theory or explanation itself. When established theories are applied to new circumstances, they are often not an exact "fit," resulting in the theories themselves becoming over-generalized and imprecise. Because much of the research on the psychology of persuasion has been controversial

and widely debated, there is further danger of “infecting” new areas of exploration with the sensationalism or polarization generated by others.

Applying Psychological Theories of Undue Influence to Elder Abuse

Increasingly, practitioners in elder abuse prevention have turned to the theories described earlier to understand why seemingly competent elders surrender assets to predators or are repeatedly taken advantage of by swindlers and con artists. The work of Singer and Cialdini in particular are increasingly appearing in the literature on elder abuse (Nerenberg, 1996; Pratkanis & Aronson, 1992; Pratkanis & Shadel, 2005; Quinn, 1998, 2000, 2001, 2002; Rusch, 1998, 1999; Turkat, 2003; YWCA of Omaha, 2006).

Undeniably, the most direct link between these past efforts and the field of elder abuse prevention is through Margaret Singer, who drew from her work with POWs and cults to formulate a model of undue influence in elder abuse, which has become the basis for subsequent analyses. Singer identified the following six tactics used by perpetrators of elder financial abuse (Nerenberg, 1996).

- Isolation. Perpetrators may isolate their victims from family members, friends, trusted advisors, and professionals. Other factors that may contribute to isolation include decreased mobility, communication problems, illness, sensory deficits, and lack of transportation. Perpetrators may contribute to isolation by preventing seniors from accessing assistive devices (hearing aides, walkers) or services that could overcome these natural barriers. Elder may also become isolated as a result of grief and depression.
- Creation of a “siege mentality.” Perpetrators may convince their victims that they are the only ones that can be trusted and that others in fact pose a danger to them.
- Dependency. Perpetrators foster dependency by failing to provide assistive devices like glasses, canes, walkers, and hearing aides to elders. They may further fail to provide adequate food, water, or medication, leading to decline and increased dependency on abusers for sustenance, help, emotional support, information, and companionship.
- Creation of powerlessness. As the other tactics take their toll, victims begin to feel powerless.

- Fear and deception. The victim is fearful and afraid of everything that is different from what the manipulator wants. The world is a dangerous place for the victim. Only the suspect can make him or her feel safer.
- Victim is kept unaware. Perpetrators in essence create false worlds where they control the information available to victims. They can shape victims' world to make them more dependent and compliant.

Others in the field of elder abuse prevention have offered additional insights into undue influence against elders. Some have focused on victims' characteristics or vulnerabilities (Quinn, 2005). For example, Pennant (1999) used the case of Anne Morrow Lindbergh to suggest how unresolved grief can be exploited by unscrupulous service providers to achieve compliance for financial gain. Others have focused on specific vulnerabilities, such as the role of subtle, undetected deficits that appear to heighten vulnerability.

Several experts have proposed broader models or constellations of contributing factors including victim vulnerabilities, abuser characteristics, tactics used, and outcomes. Psychiatrist Bennett Blum has developed the "IDEAL" model of undue influence assessments, which identifies isolation, dependence, emotional manipulation and exploitation of vulnerability, acquiescence, and loss as significant factors in undue influence.

Turkat, an attorney, drew from social influence theories to describe characteristics of the influencers, victims, and the forms of control he has observed in elder abuse cases. In particular, he focused on power imbalances between abusers and victims that are derived from character traits, intelligence, strength, social class, and education. He further suggests that these power imbalances can be magnified by "vulnerability enhancements," which include:

- Increasing victims' dependency by giving them extra medications or depriving them of nutrients
- Self promotion
- Relationship poisoning
- Restricting access

- Deceptive manipulations used to deliberately foster attitudes, beliefs, and feelings.
- Reinterpreting events.
- Inactive relatives
- “Timing the strike,” which is taking advantage of normal fluctuations in mental states to take advantage of elders when they are most amenable to influence.
- Increasing the vulnerable person’s discomfort
- Applying pressure
- Puppeteering, which refers to the fact that as a result of the trust, dependency, or submissiveness that has been established, victims mindlessly follow whatever demands or requests the exploiters make

Turkat also identifies three categories of influencers:

- Con artists
- Psychologically damaged persons who seek self-gratification by manipulating others. These individuals need to feel power over others, and enjoy their suffering
- Individuals who did not originally set out to exploit the vulnerable person, but who over time found the temptation too great to resist

Susan Bernatz, a neuro-psychologist, drew upon Robert Cialdini’s principles of influence, as well as the work of Singer and Blum, in developing SCAM, “a conceptual framework for understanding the psychological, neuropsychological, medical, social, financial, legal, and environmental factors that pose a threat to informed consent in legal transactions” (American Bar Association & American Psychological Association, 2008). Also an acronym, SCAM stands for susceptibility, confidential, active procurement, and monetary loss. Susceptibility factors include declines in victims’ physical, psychological, or neuro-psychological health, dependence, and isolation. “Confidential” refers to the nature of the relationship between victims and abusers, and the “active procurement” of finances and financial instruments assumes that suspects actively sought and obtained changes in victims’ preexisting financial matters. Monetary loss is the end result or outcome of the undue influence. The SCAM model reflects a blending of legal and psychological conceptualizations of undue influence as evidenced by the inclusion of

“confidential relationships” and "active procurement," which are legal concepts. This merging of the legal and psychological conceptualizations is also evidenced in the work of Nieivod (1992), whose work is described in “The Legal Context of Undue Influence” section of this report along with additional legal terminology.

Undue Influence and Elder Fraud

Although studies have shown that older people are not actually at greater risk of fraud victimization than younger people (Titus et al., 1995), advocates and law enforcement officials are increasingly encountering elderly victims of scams and fraud (AARP, 2003), and some criminals admit to targeting elders (Rusch, 1998, 1999). Particularly common are offers of "free" prizes that may not actually exist or that result in costs to victims; scams promising unnecessary or useless goods or services; the unauthorized use of victims' bank or credit card numbers; scams involving bogus charities; predatory lending; and identity theft.

Several studies of elder fraud have focused on elderly victims' vulnerability to persuasion and the tactics used against them. An AARP-sponsored study focused on achieving a clearer understanding of how telemarketers target their victims, the tactics they use, and who is at greatest risk. Working with law enforcement agencies, researchers Anthony Pratkanis and Doug Shadel obtained 645 audiotapes of con artists and swindlers making pitches to people they thought were potential victims but who were in fact undercover law enforcement officers. Pratkanis and Shadel then reviewed the transcripts, identifying in each case social influence tactics defined by Robert Cialdini. In their book *Weapons of Fraud: A Source Book for Fraud Fighters (2005)*, which draws from the study, the authors provide examples of how the telemarketers used the principles of friendship, authority, scarcity, reciprocity, and social consensus to defraud their victims. California courts are beginning to award conservatorships in situations where proposed conservatees are found to be unable to resist the influence of telemarketers (Quinn & Nerenberg, 2005).

The Building Blocks of Undue Influence

Although the psychology of undue influence is not yet well understood, a framework for understanding it seems to be emerging, which highlights the following features:

- 1) Factors affecting susceptibility or vulnerability
- 2) Roles and relationships between victims and abusers
- 3) Psychological manipulations and techniques
- 4) Outcomes

1. Victims' Vulnerability

The literatures on undue persuasion and mind control contain numerous examples of “normal” people being induced or persuaded into doing things they would not have done otherwise. There is no evidence to suggest for example that prisoners of war who renounced their governments or turned on comrades were different from those who did not in terms of their cognitive functioning. Similarly, there is no reason to believe that hostages, victims of domestic violence, or cult inductees, fall outside the boundaries of normalcy. Some experts in fact have posited that “virtually anybody can be unduly influenced if the influencers or techniques used against them are powerful enough” (Singer, 1992). However, certain conditions are believed to render certain people more vulnerable or susceptible. These include both permanent or temporary impairments that result from illness, accidents, or decline; or they may be induced (e.g by withholding food, water, medications, or care). Some conditions, such as debilitating grief reactions, are related to situations or circumstances.

Perhaps the most commonly cited vulnerability associated with undue influence is diminished mental capacity. In fact, some analysts believe that there must be some level of cognitive impairment for undue influence to occur. Others concede that while diminished capacity is not a requirement for undue influence, it is easier to unduly influence those who have impairments.

Courts, in evaluating undue influence, have tended to focus on victims' cognitive capacity and lawyers have noted that it is easier to prove undue influence in cases where victims have cognitive impairments (American Bar Association and American Psychological Association, 2008). Naimark (2001) suggests that court's reliance on cognitive capacity assessments stems from the fact that capacity is measureable, whereas

such factors as emotional vulnerability and dependency, power differences between victims and influencers, and the pressure that perpetrators bring to bear on their victims are more difficult to calibrate.

In general, that which can be measured is given great weight and that which cannot be measured is given less weight. In the case of undue influence, this approach may lead to missing an important aspect of the analysis.

The emerging literature on fraud suggests that extremely subtle cognitive impairments increase vulnerability to certain types of fraud. For example, a recent study Jacoby, Bishara, Hessels, & Toth (2005) suggests a link between memory deficits and vulnerability to scams.

Shulman et al (2007) suggest that the relationship between cognitive capacity and susceptibility to undue influence is directly proportional. That is, the lower an individual's cognitive status, the less pressure that's needed to undermine their will (the less pressure that is required). Conversely, a highly functional individual requires a higher level of pressure or persuasion.

Other cognitive impairments that are believed to heighten vulnerability to undue influence stem from developmental disabilities and mental illness. Spar, Hankin, & Stodden (1995) suggest that mania, which impairs judgment and impulse control, heightens susceptibility. Other mental health problems that are believed to increase susceptibility to undue influence include depression, anxiety, and substance abuse.

Some have suggested that "characterologic weaknesses" or personality disorders may also contribute to vulnerability. Dependent personality, in particular, has been frequently cited (Hall, Hall, Myers, & Chapman, 2009; Turkat, 2003).

The Diagnostic and Statistical Manual DSM-IV defines persons with dependent personality disorder as emotionally dependent on other people who spend great effort trying to please others (American Psychiatric Association, 1994). Individuals diagnosed with the disorder tend to display needy, passive, and clinging behavior, and have a fear of separation. Other common characteristics associated with dependent personality disorder include:

- Inability to make decisions without the advice and reassurance of others
- Avoidance of personal responsibility, including the avoidance of jobs that require independent functioning and positions of responsibility
- Intense fear of abandonment and a sense of devastation or helplessness when relationships end; persons with the disorder often move right into another relationship when one ends
- Over-sensitivity to criticism
- Pessimism and lack of self-confidence, including a belief that they are unable to care for themselves
- Avoidance of disagreeing with others for fear of losing support or approval
- Inability to start projects
- Difficulty being alone
- Willingness to tolerate mistreatment and abuse from others
- Placing the needs of their caregivers above their own
- Tendency to be naïve and to live in fantasy

Courts may also consider multifaceted medical, social, and environmental histories that analyze the processes, interactions, conditions, and circumstances of the person alleged to be have been unduly influenced or susceptible.

Situational events and circumstances, such as the loss of a loved one, may also play a role. Several researchers and practitioners have noted that elders who are recently widowed are particularly susceptible to the advances of persons who seek to exploit. The vulnerability associated with life events or circumstances may be permanent or temporary (Pennant, 1999; Quinn, 2005).

Victims who are not impaired to begin with may be rendered so by those who seek to influence them. This can be done through such means as depriving them of nourishment or over or under medicating them (Turkat, 2003).

2. Power Differentials

Undue influence involves powerful individuals getting those who are less powerful to do things they would not have done otherwise. Influencers draw their power from a variety of sources.

- Persons in positions of trust or confidence are believed to hold power over those who trust or confide in them.
- Personality traits. Some perpetrators are naturally charismatic or persuasive.
- Granted power. Some influencers are placed in positions of power by others as was the case with those charged to guard prisoners of war. These individuals were granted authority to control, confine, reward, punish, and even terrorize their charges. Similarly, caregivers may be granted have high levels of control over those they are charged to serve.
- Professional authority. Social influence theories describe how the power to persuade may be derived from the natural authority attached to jobs, professions, or social class. Caregivers in particular have high levels of control as victims may depend on them for food, water, medications, and other necessities.
- Privilege. Domestic violence theory holds that batterers derive their power from social, historical, and economic forces. Power that is derived from gender, class, race other socioeconomic forces is reinforced by institutions like the criminal justice system.

3. Tactics of Undue Influence

Specific actions that perpetrators use depend on the outcomes being sought. When the motive is financial, the persuasion may focus on getting someone to surrender assets or property, whereas in the case of domestic violence, the motive is domination, power, or control. The tactics that perpetrators use may also reflect their assessments of victims' specific vulnerabilities. It has frequently been noted that perpetrators assess the psychological makeup of their victims and "customize" their approaches (Pratkanis & Shadel, 2005). . Specific tactics that appear in the literature include:

- Isolating victims
- Controlling the flow of information to keep victims unaware

- Emotionally manipulating the victim by inducing fear, anxiety, agitation, paranoia and suspiciousness (includes “creating a siege mentality”)
- Relationship poisoning (implanting the idea that the victim’s relatives and friends are only there because they want to exploit the elder)
- Encouraging dependency
- Actively procuring finances and financial instruments
- Presenting themselves as healers, advocates, and protectors
- Randomly bestowing rewards and punishments, thereby promoting “learned helplessness”

4. Outcomes

Most characterizations of undue influence in elder abuse have focused on the use of undue influence for financial gain. Some state elder and dependent adult abuse laws, however, address undue influence in relation to sexual abuse, suggesting that undue influence may be a tactic in achieving compliance in sexual acts (Stiegel & Klem, 2007). This association has not, however, been systematically explored in the elder abuse literature. Brandl, Stiegel, & Heisler (YWCA of Omaha, 2006) explore the relationship between undue influence and late life domestic violence, suggesting that control and domination are, in themselves, goals.

The Legal Context of Undue Influence

The law assumes that unimpaired people are fully capable of making decisions and are thus responsible for their own actions. However, the legal system also recognizes that capable persons may be unfairly persuaded to do things they would not have done otherwise. Undue influence has therefore been characterized in law as an activity that destroys “free agency” and “substitutes another person's will” in legal transactions. Findings of undue influence “negate contractual consent” and are reason to rescind or nullify agreements. Courts also consider undue influence in determining the need for protective interventions like guardianship (Quinn, 2005).

The legal system has recognized undue influence for centuries. The term is believed to have been coined and popularized by Henry Bolingbroke in 1735 in an essay about improper electoral practices being used to influence voters (Slapper, 2007, para, 2). The concept, however, goes back even further. Abraham Nievod (1992) describes a 1617 case in which Chancellor Francis Bacon found that a woman, known as Mrs. Death, had used undue influence to obtain a deed and will from “an old man about the age of eighty years and being weak of body and understanding and having a great estate of goods and land.”

In determining if undue influence has occurred, courts, lawyers, and legal professionals look at many of the same factors described in the psychological literature. These include vulnerability that results from infirmity or diminished capacity, power differentials between the parties involved, the specific actions taken by influencers, and the harm that is produced. Perhaps the greatest difference between legal and psychological analyses and conceptualizations of undue influence is the legal systems’ emphasis on evaluating specific transactions or decisions. Whereas the psychological literature focuses on patterns of conduct (e.g. relationships that are considered to be exploitative or artificially induced loyalties), legal discussions of undue influence typically focus on specific legal actions such as the signing of contracts, giving consent, or granting authority, and those actions or events leading up to the event in question. Courts look at subjects’ state of mind at the time documents were executed or decisions were made. The following sections describe how these factors have been addressed in the legal system.

Imbalances in Power

Just as psychologists recognize that certain individuals, by virtue of their knowledge, training, or relationships, wield power over others, the legal system recognizes that persons in “positions of trust and confidence” have an unfair advantage over those whose trust and confidence they hold. It also imposes on them a duty to act in the others’ best interest. When undue influence is alleged, courts typically begin by establishing whether a relationship of trust and confidence exists, and hence, the duty.

Positions of trust and confidence may be established by law or informally. The Restatement third of property (2003) § 8.3 divides confidential relationships into three categories: fiduciary, reliant, and dominant-subservient (Welden-Smith, 2009). A fiduciary relationship is one in which the powerful person has a legal duty toward the other. The powerful person is called a fiduciary and the person to whom they owe the duty is called the “principal.” Professionals (and others) who are likely to have a fiduciary duty are trustees, conservators, guardians, real estate agents or brokers, lawyers, estate executors or administrators, and stockbrokers. Non-professionals may also have a fiduciary responsibility. Relatives or friends, for example, may serve as guardians, conservators, or trustees.

“Reliant relationships” are ones in which the weaker parties rely on others for judgment or advice. An example is the doctor/patient relationship. In “dominant-subservient relationships” the weaker person is subservient to the dominant person. Persons likely to be in subservient relationships include those who are mentally or physically impaired. These categories are not mutually exclusive and there is potential for overlap among them.

Family members and friends may also have an informal duty of trust and confidence toward weaker members. When undue influence has been alleged in contracts involving family and friends, courts have looked at whether the weaker parties were very old, mentally incapacitated, suffering from debilitating sicknesses, or otherwise physically or psychologically impaired. In general, family relationships between husbands and wives, and parents and children are considered confidential relationships (Nievod, 1992).

In situations involving parties where there is no confidential or fiduciary relationship, courts may still determine that an individual has taken advantage of another's weakness through the use of his or her own disproportionate strength. The courts have found that "disproportionate strength" may be based upon knowledge, experience, training, or relationship. Factors that contribute to the weaker parties' weakness include diminished mental capacity, failing health, isolation, and/or distress. In these cases, courts also consider what benefits the powerful parties provided to the weaker (Frolik, 2001).

Undue Influence in the Execution of Contracts and Wills

Undue influence is among the most commonly asserted grounds for invalidating contracts, including wills, deeds, or trust instruments. It is addressed under a branch of law called "constructive fraud," which covers situations in which someone is manipulated into doing something with legal consequences through the actions of others who have an unfair advantage.

In these situations, courts may decide that the person is not exercising free and independent judgment and that the action should be treated as fraud even if all of the technical elements of fraud have not been proven. If undue influence is proved to have been exercised in the signing of contracts, the contracts are voidable by the innocent party, and the remedy is rescission.

In contract law, if a contract is obtained by undue influence, the document is invalid and no contract has been formed (Nievod, 1992). In determining whether contracts are the products of undue influence, courts consider:

- Imbalances in power between signers and beneficiaries
- The circumstances in which the contracts were negotiated
- Specific actions taken
- The inherent fairness or "naturalness" of transactions

Imbalances in powers result from the nature of the relationship (is it a relationship of trust or confidence). Weaker parties may also be at a disadvantage as result of diminished capacity. Therefore courts consider whether weaker persons were of full

capacity at the time they signed documents, if they understood the facts and their rights, if they had time to reflect, and if they had independent advice (Nievod, 1992). In evaluating the results or products of the exchanges or transactions in question, courts attempt to determine if the transactions give an obvious advantage to the stronger parties. They may consider, for example, whether properties are sold at fair value, if employees are compensated at reasonable rates, and whether gifts are commensurate with the length and quality of relationships. They may also look at whether exchanges are “natural,” or what one would ordinarily expect. For example, courts may scrutinize wills that leave inheritances to new friends as opposed to family members.

Approximately 3% of wills are challenged and 1% are found to be invalid (Mohr, 1997). A survey of will contestations showed that wills are likely to be contested when decedents have no biological children (this is true in 52% of will contests) and when the will was written less than one year prior to the testator's death (this accounts for 48% of contests) (Hall, Hall, Myers, & Chapman, 2009). There are two primary reasons that wills are contested. The first is dramatic or “radical” changes from previous wills or inconsistently expressed wishes of the testator. This factor accounts for 72% of contested wills.

Specific circumstances in which wills are likely to be challenged are when testators have psychiatric conditions, including dementia (accounting for 40%), alcohol abuse (28%), and other neurological/psychiatric conditions (28%). In these situations, courts must determine whether “testators,” those executing wills, had “testamentary capacity.” The criteria for testamentary capacity were defined by Lord Cockburn in 1870. Known as Lord Cockburn's Rule, they remain the basis for most American and English commonwealth inheritance laws.

- 1) The testator understands the nature of the act he or she is engaging in. The individual must know that he or she is writing a will and what a will is.
- 2) The testator has to appreciate the effect of the act (the distribution of wealth).
- 3) The testator must know the extent of his or her bounty (property) in order to appreciate the significance of the decision.

- 4) The testator comprehends and appreciates the claims to which he ought to give effect (those who should be included and excluded, or, as it is commonly phrased in current language, “know their natural heirs”).
- 5) The final component is that no insane delusion shall influence his will.

In the Mohr study, allegations of undue influence were made in 56% of contestations, and most challenges to wills based on undue influence were successful (Mohr, 1997). Although definitions of undue influence with respect to wills vary by state, most laws contain the notion of a power imbalance or dependency between the parties that is used to influence (through coercion, compulsion, deception) the weaker party to secure changes in how assets are distributed to the stronger individual. Courts require a showing that the will of the testator is subjugated to the will of another. It must also be shown that testators’ disposal of property is different from that which would have occurred otherwise (Nievod, 1992).

The Presumption of Undue Influence

Ordinarily, those who seek to show that certain acts or transactions were the product of undue influence, have the responsibility for proving that undue influence has occurred. However, in certain situations, in which the likelihood of wrongdoing is high, it may trigger a “presumption” of undue influence. When a presumption exists, the onus shifts from the accuser to the accused to show that there was no wrongdoing. The presumption of undue influence, in one form or another, exists in all states (Meyers, 2005).

The presumption of undue influence typically arises when confidential relationships exist between the parties and the weaker or dependent persons make substantial gifts to, or execute contracts with the dominant parties. For example, when lawyers and other fiduciaries profit or gain from contracts with their clients, the contracts are “presumptively invalid.”

“Badges” that trigger the presumption of undue influence in will contests include:

- The person executing the will (the testator) is physically weak and or mentally impaired
- The will is “unnatural” in its provisions

- The relationship between the testator and beneficiary has developed recently and is of comparatively short duration
- The beneficiary actively participated in the preparation of the will
- The beneficiary has the will in his or her possession
- The beneficiary has made efforts to restrict the person's contacts with the "natural objects of his or her bounty"
- Absolute control of testator business affairs by a beneficiary

A presumption of undue influence can be rebutted or dissolved by contrary evidence that shows that transactions were in fact the result of free deliberation and that the person entering into the contract had full capacity, knowledge of all the facts of the contract, time to reflect on the contract; and the opportunity to consult with outside fiduciaries or experts. To trigger the presumption of undue influence in cases alleging undue influence in will cases, persons contesting transfers must show that:

1. The person executing the will (the testator) was susceptible to the influence of others
2. The testator and alleged influencer had some type of confidential relationship.
3. That the alleged influencer used the confidential relationship in order to secure a change in the testator's post death distribution of property.
4. The testator actually did change his or her post death distribution plan as a result of the influencer's actions.
5. That the change was unconscionable.

Proponents of wills can defend them by presenting rebuttal evidence, which disproves any of the five elements.

Blinder (2003) identified the following elements that have proven to be the most persuasive to the judiciary in demonstrating undue influence in cases involving wills:

- The provisions of the will are "unnatural" (different from what might be expected)
- The dispositions in the will appear to be at war with the wishes of the decedent, expressed both before and after the execution of the will;
- The physical and mental condition of the decedent was such to permit a subversion of the decedent's free will; and
- The primary beneficiaries under the will were active in procuring the execution of the will.

Ross & Reed (1999) identified five types of relationships that courts consider subject to undue influence when someone executes a change of a post death plan by the victim in favor of the influencer:

1. A “David and Bathsheba” relationship is one in which a second spouse obtains the disinheritance of children of an earlier marriage.
2. An “Esau and Jacob” relationship is one in which a child attempts to obtain the disinheritance of one or more children.
3. A “Judge Jeffrey Pycheon” relationship is one that resembles # 2, but a brother, sister, niece, nephew, or cousin obtains the lion’s share of the estate at the expense of other kin
4. A “Uriah Heep” relationship is one in which a helping professional obtains all or part of the victim’s estate instead of the victim’s heirs
5. A “Mary Worth” relationship is one in which a neighbor or acquaintance obtains the victim’s estate at the expense of the victim’s heirs

The authors note that courts tend to be more hostile to the latter three relationships than to the first two.

Undue Influence and Guardianship

Undue influence is included in some states’ guardianship statutes as a criterion to justify the need for probate guardianship (called conservatorship in California) (Grant & Quinn, 1996). If a court finds that a person is unable to resist undue influence, it can lead to an appointment of a guardian of the person’s estate. As Turkat (2003), however, points out, courts are unlikely to deprive people of basic rights unless they have cognitive impairments. The extent to which this assertion is true remains unclear since most guardianship filings involve individuals with some level of cognitive impairment (Quinn & Nerenberg, 2005). Some have noted limitations in the effectiveness of guardianships in preventing or remediating undue influence. Coffey and Cummings (2000), for example, point out that guardianships can protect those assets that belong to wards at the time the court acts, but that they are not a particularly effective remedy for already lost assets.

Whether guardianships can be established to protect persons who are vulnerable to undue influence (but who have not yet been victimized) also remains to be seen.

Other Legal Proceedings in Which Courts Consider Undue Influence

In the 1966 case of *Odorizzi v Bloomfield School District*, an elementary schoolteacher, Odorizzi, alleged that the school board had used undue influence (among other forms of coercion) to resign his position. Odorizzi had been arrested and jailed for homosexual activity. During the process of the arrest, police questioning, booking, and release, Odorizzi went 40 hours without sleep. Shortly after his release, the principal and superintendent of his school came to his apartment and told him that if he didn't resign immediately, the District would dismiss him and publicize what had happened. The charges against Odorizzi were later dismissed and he tried to get his job back. When the school district refused to reinstate him, he filed a lawsuit against the district asserting that his resignation was invalid because it was obtained through duress, fraud, mistake, and undue influence and given at a time when he lacked capacity to make a valid contract.

Reversing a trial court's earlier decision in the case, the California Court of Appeal held that while the facts of the complaint were insufficient to state a cause of action for duress, menace, fraud, or mistake; they set out sufficient elements to justify rescission of consent because of undue influence. The court explained "the essence of undue influence is the use of excessive pressure by a dominant person over a servient person resulting in the will of the servient person being overborne." It further described undue influence as "a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, or overpersuasion." It identified factors that generally accompany overpersuasion, which, in combination, may be characterized as excessive:

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

Statements that there is no time to consult financial advisers or attorneys

Legal Issues in Undue Influence Cases Involving Cults

Courts have addressed undue influence in several circumstances involving cults. These include cases in which parents of cult inductees have attempted to have their children placed under guardianship, and tort cases brought by ex-members alleging that the cults had used unlawful and unethical recruitment practices (Lewis, 1998). Lawsuits involving undue influence by cults have also focused on whether or not donations of money, property, or time were given willingly and with deliberate judgment. Gifts to cults have been challenged on the basis that they were the result of persons exercising power through confidential or quasi-confidential relationships, rather than on donors' use of deliberate discretion. The fundamental issue in these cases is when does the relationship between the advisor in a cult and the recipient of the advice rise to the presumption of confidentiality that would require the advisor to defend an undue influence charge (Hominik, 1995).

Nievod (1992) cites *Molko v. Holy Spirit Association*, a case in which former Association member Molko alleged that the church had used coercive persuasion to unduly influence him to extract a monetary gift. The California Supreme Court held that Molko could bring a claim that the church had used its dominant psychological position and its confidential relationship with Molko for the purpose of obtaining unfair advantage.

Undue Influence in Elder Abuse Laws

Many states have added undue influence to definitions of elder abuse in their adult protective service (APS) laws. A review of state APS laws conducted by the American Bar Association for the National Center on Elder Abuse revealed the context in which undue influence is addressed (Stiegel & Klem, 2007):

- Part of a broader definition of financial exploitation or of sexual or physical abuse/exploitation
- Included as a distinct definition that makes clear that the context relates to one or more types of abuse
- Part of a general definition that does not clearly reference financial exploitation or physical or sexual abuse/exploitation

Some states have created presumptions of undue influence in cases involving elder abuse. Maine's Improvident Transfer of Title Act is among the most comprehensive (Maine Revised Statutes Annotated §1022). It applies in situations in which "there is a transfer of real estate or a major transfer of personal property for less than full consideration by an elderly person to someone who has a confidential or fiduciary relationship with that person." Transfers that are covered under the statute are presumed to be the result of undue influence unless the elderly dependent person was represented in the transfer or execution by independent counsel.

1) Confidential or fiduciary relationships that are covered include:

- A. A family relationship between the elderly dependent person and the transferee...including relationships by marriage and adoption
- B. A fiduciary relationship between the elderly dependent person and the transferee...such as with a guardian, conservator, trustee, accountant, broker or financial advisor
- C. A relationship between an elderly dependent person and a physician, nurse, or other medical or health care provider
- D. A relationship between the elderly dependent person and a psychologist, social worker or counselor
- E. A relationship between the elderly dependent person and an attorney
- F. A relationship between the elderly dependent person and a priest, minister, rabbi or spiritual advisor
- G. A relationship between the elderly dependent person and a person who provides care or services to that person whether or not care or services are paid for by the elderly person
- H. A relationship between an elderly dependent person and a friend or neighbor
- I. A relationship between an elderly dependent person and a person sharing the same living quarters

Hall et al (2009) drew from civil law and the literature on financial elder abuse to proposed "red flags" or warning signs of undue influence.

1. An elderly person's actions are inconsistent with past longstanding values/beliefs
2. An elderly person makes sudden changes in financial management that enrich one individual
3. An elderly person suddenly changes his/her will or disposition of assets, belongings, or property and directs assets toward one individual, who is not a natural "object of their bounty"
4. A caretaker dismisses previous professionals and directs an older person to new ones (eg, bankers, stockbrokers, attorneys, physicians, realtors)
5. An elderly person is isolated from family, friends, community, and other stable relationships
6. A non-family caretaker moves into the home or takes control of an elderly person's daily schedule
7. An elderly person directs his or her income flow (eg, Social Security benefits, pensions, trust distributions) to a caretaker
8. An elder's will, living will, or trust is altered with a new caretaker or friend as beneficiary/executor
9. An elderly person develops mistrust of family members, particularly about financial affairs, with this view supported by a new friend, acquaintance, or caretaker
10. An older person finds a new caretaker who guarantees lifelong care in exchange for the elder's assets.
11. An elderly person in a relationship characterized by a power imbalance between the parties, with the caretaker assuming restrictive control and dominance
12. A caretaker or friend accompanies an elderly person to most important transactions, not leaving him/her alone to speak for himself/herself
13. An elderly person writes checks for cash, in round numbers or large amounts, or gives cash gifts to the caretaker or the caretaker's family
14. An older person becomes increasingly helpless, frightened, or despondent, feeling that only the caretaker can prevent his/her further decline
15. An elderly person sees an acquaintance or caretaker as exalted, with unusual powers or influence

California Codes Pertaining to Undue Influence

Like most states, California addresses undue influence in its contract and conveyance laws. California Civil Code Section 1575 describes undue influence as:

- 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;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.⁹

In 2002, the California Supreme Court defined undue influence as “pressure brought to bear directly on the testamentary act, sufficient to overcome the testator’s free will, amounting in effect to coercion destroying testator’s free agency” (Rice v. Clark (2002) 28 Cal. 4th 89).

Civil Code §1575 also describes a presumption of undue influence when fiduciary or confidential relationships exist and when perpetrators participate in obtaining an undue profit or unfair advantage over the elders. A long line of California cases have held that a presumption of undue influence is created when there is a confidential relationship between the testator and the influencer, a transfer for no consideration, an opportunity to exert undue influence, a particular susceptibility to undue influence on the part of the transfer, and an undue benefit to the party who participated in the transfer. Ross v Conway (1892)? 92 Cal.632, 635. Confidential relationships can be established by the close proximity of the perpetrator to the elderly victim, and may include caregivers, nurses, friends or relatives.

California’s “prohibited transfers statute” (Probate Code §21350) creates a presumption of undue influence that prevents certain professionals from inheriting assets from clients unless they can demonstrate that they didn’t use fraud, menace, duress, or undue influence to get them. The presumption also covers “care custodians,” and specifies that those who receive last-minute bequests from dependent adults are presumed to have exercised undue influence, even if they were close friends of the deceased. There are several exceptions, including gifts to family members and gifts that have been

reviewed by independent attorneys who certify that the gifts were not the product of menace, duress, fraud, or undue influence.

The prohibited transfers statute was originally enacted in response to a high-profile case involving an estate-planning attorney who named himself and members of his family as fiduciaries for, and beneficiaries of, clients' estates. Hence, law firms, lawyers, and employees of law firms associated with them are included in the list of people who cannot inherit unless they can prove that transfers weren't the product of fraud, menace, duress, or undue influence.

The presumption also applies to "care custodians," which has prompted debate and controversy about what constitutes a care custodian. *Bernard v. Foley* involved 97-year-old Carmel Bosco, who left her half million-dollar estate to two friends who cared for her during the last months of her life. While under their care, Bosco amended her living trust several times, giving more each time to the caregivers until, a few days before her death, she made them the beneficiaries of her entire estate. Bosco's family, the original beneficiaries, sued, claiming that the caregivers had exerted undue influence over Bosco while she was gravely ill and heavily sedated. The case focused on whether the friends were in fact "care custodians," and therefore, covered under the prohibited transfers law. The caregivers claimed that they were just "performing acts of kindness on a purely volunteer basis as good friends often do for others."

The court found in the caregivers' favor but the family appealed, and the appeals court reversed the decision, stating that "a caregiver may be a personal friend, and in fact, personal friends are uniquely positioned to unduly influence the elderly for whom they care." It affirmed that the caregivers were covered under Probate Code §21350 and had failed to satisfactorily rebut the statutory presumption of undue influence. The chief justice in the case agreed but suggested that the law be amended to differentiate between long-term caregivers and those who provide care for short periods of time.

In response, the California Assembly passed AB 2034, sponsored by the State Bar Trusts & Estates Section, which directs the California law Revision Commission to study Section 21350. The Commission was asked to review "the proper scope of the statutory presumption of fraud and undue influence that applies when a "dependent adult" makes a gift to that person's "care custodian." Specifically, it was asked to consider:

- How should caregivers or caretakers be defined? Should the law differentiate between long and short-term caregivers and between those who are paid and unpaid?
- Who needs protection and how should “dependent adult” be defined?
- Will the law inhibit old friends or acquaintances from assisting elders for fear of losing any transfers that the elder may make?
- Should the law exempt families, the most common offenders in financial abuse cases?

The Commission concluded that the care custodian presumption is broader than it needs to be, protecting people who are not necessarily subject to any heightened risk of undue influence (adults with physical disabilities) and gifts to care custodians that do not seem to be “unnatural” (i.e., gifts to friends and other volunteer caregivers). The Commission is further proposing to narrow the definition of “care custodian” to only include caregivers who provide services for remuneration (i.e., volunteers would not be included).

Undue influence is also addressed in the state’s Probate code. Probate Code §850 allows a personal representative to bring a case on behalf of a decedent holding a claim to real or personal property that is possessed or held in title of another. By utilizing §850, a personal representative may make a claim of undue influence on behalf of a decedent under Civil Code §1575.

Although in most will contests, contestants allege both lack of mental capacity and undue influence, California courts have ruled that mental incapacity is not required to show undue influence. In the California case of *Estate of Baker*, 131 Cal.App.3d 471, the Court upheld the jury's determination that although a decedent was “of sound mind in making certain gifts and dispositions by will,” the transfer was obtained by undue influence.

The case involved Dorothy Mae Baker, who was convinced by an acquaintance named Potter that she was a psychic who could communicate with Baker's deceased relatives. Potter told Ms. Baker that the deceased relatives wanted Baker to turn over money, stocks, and a condominium to Potter, and to name her as the primary beneficiary under Baker's will. The Court noted "the record demonstrates that Potter's control over Baker's mind and her influence so pervaded Baker's thought processes that they completely subverted her will to the wishes and domination of Potter, and this imposition continued from the moment Baker was convinced Potter was a true psychic and medium to

immediately before her death." *Baker, supra*, at 482. The transfers to Potter were set aside, and probate was denied as to the provisions of the will that benefited Potter. The Court cited *Estate of Olson*, 19 Cal.App.379, 386 (1912), as follows:

"Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that minds of strong men and women have been overcome, and they have been by a master mind persuaded to consent to what in their sober and normal moments, and free from undue influence, they would not have done."

Undue influence may be also alleged in civil lawsuits under California's Elder Abuse and Dependent Adult Civil Protection Code (EADACPC). The code provides for a civil action requesting that defendants be liable for attorney fees, costs, and punitive damages, as well as all special and general damages. A 2008 California law (Senate Bill 1140) added undue influence to the definition of financial abuse in EADACPC. By including undue influence as a basis for elder financial abuse, the new law allows for the recovery of damages, attorneys' fees, and court costs, making it more feasible for victims to initiate lawsuits.

The number of civil lawsuits alleging undue influence is increasing dramatically in California. In 2006, more than 760 civil lawsuits claiming elder abuse, mostly financial abuse, were filed, a 98% increase from five years earlier (Duhigg, 2007 para.12), a trend that is likely to continue.

Susceptibility to Undue Influence as a Criterion for Conservatorship in California

In California, a conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Under California Probate Code §1801,

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5.

Little is known about the extent to which conservatorship is sought as a protection against or remedy for undue influence in the state. In a study of conservatorships established in San Francisco in 2000, court investigators noted that 44 out of 125 people with diminished capacity were at risk for undue influence. Of that number, the investigators reflected a suspicion that financial abuse had already taken place in 25 of the cases (Quinn & Nerenberg, 2005).

Undue influence as a crime

In 2007, the California District Attorney's Association sponsored legislation that would have added undue influence to the definition of elder financial abuse contained in the state's elder abuse criminal code, Penal Code §368. SB 1259, which did not pass, defined "criminal undue influence" as:

The exploitation by a person of a known physical or mental infirmity or other physical, mental, or emotional dysfunction in a vulnerable elder or dependent adult for financial gain by one of the following methods:

- 1. Using a position of trust or confidence or using any real or apparent authority over the vulnerable elder or dependent adult for the purpose of obtaining an unfair advantage over the vulnerable elder or dependent adult.*
- 2. Knowingly taking an oppressive and unfair advantage of a vulnerable elder or dependent adult's weakness of mind, necessities, or distress.*

How do Courts Evaluate Undue Influence?

Courts consider various forms of evidence in determining whether undue influence has occurred in the signing of document or other transactions and in determining the need for conservatorship. Foremost among these are neuropsychological examinations, which assess for impaired judgment, cognition, and impulse control.

Despite assertions about the limited value of cognitive testing in assessing susceptibility to undue influence, courts have tended to focus on them when assessing claims of undue influence.

A multi-state survey of probate judges suggests the importance of expert witnesses in conservatorship rulings (Spar, Hankin, & Stodden, 1995). The majority of

experts testifying on both competence and undue influences were physicians, of which about half were psychiatrists. Non-physicians accounted for 30%. The responding judges found expert testimony to be “extremely influential 51% of the time regarding incompetence and 37% of the time regarding susceptibility to undue influence.

A few models or constellations of contributing factors have been proposed to help courts and others evaluate undue influence. The "SODR factors" model was designed to help courts determine whether to deny probate of a will based upon the theory of undue influence. "SODR" factors are: (1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result. Some have adopted the factors with modifications. For example, Wisconsin uses the SODR factors as one of two tests for undue influence in will contests. Contesters must prove the four elements by clear, satisfactory, and convincing evidence. However, once three of the elements are proven, there need only be a slight showing of the fourth (*Welden-Smith and Miller v. Vorel*, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981).

Psychiatrist Bennett Blum developed the “IDEAL” model to assist professionals conduct undue influence assessments, help law enforcement conduct investigations, and help attorneys organize cases for court (personal communication, July 24, 2009). The model further suggests ways that undue influence can be prevented. “IDEAL” is an acronym for isolation, dependence, emotional manipulation and exploitation of vulnerability, acquiescence, and loss.

Discussion

Although significant progress has made in understanding the role of undue influence in elder abuse, and addressing it through the legal system, much remains to be done. As is the case with other forms of conduct that negates free will, undue influence has been controversial.

Experts have noted the difficulties involved in translating an essentially “psychological” process into legal terms. Others have added that courts are generally distrustful of psychological explanations for conduct.

More specifically, there remains widespread disagreement with respect to what undue influence is and what it is not. Some legal experts have, as a starting point,

attempted to define what it is not. XXX for example, states that “in all probability, there can be no undue influence” if an alleged victim:

- Knows his or her own mind
- Can readily distinguish his or her interests from those of others
- Can distinguish a neutral, disinterested assertion from an active, persuasive one,

Spar, Hankin, & Stodder (1995) observed disagreement among probate judges as to whether those who unduly influence must be doing so intentionally. They found that a majority of probate judges did not believe that undue influence had to be intentional.

Courts have at times gone against traditional conceptualizations of undue influence. For example, in *Odorizzi v Bloomfield School District* (1966), the court discounted the common assertion that a confidential relationship must exist between the parties to constitute undue influence. It determined that “while most reported cases of undue influence involve persons who bear a confidential relationship to one another, a confidential or authoritative relationship between the parties need not be present when the undue influence involves unfair advantage taken of another's weakness or distress.”

Some have attempted to distinguish “normal” influence from that which is “undue” (Blinder, 2003; Quinn, 2001). Blinder (2003) contends, for example, that while convincing frail or disabled people to take actions they might otherwise not take may be influence, it only becomes “undue” when the action is in the service of the influencer’s own interests and the other elements are present. Coffey & Cummings (2000) observe that even when influence is exercised in the execution of a will, even when it coercive, is not “undue” if it does not change the preexisting disposition of the testator. That, is, if the bequest or gift would have been made anyway, absent the influence, then no undue influence has occurred. Making this determination obviously, requires knowledge of the testator’s long-term wishes and intentions.

Disagreement also surrounds the factors that render people susceptible to undue influence, or what makes “weaker” parties weak. Perhaps the most controversial factor is cognitive impairment. Although most experts list cognitive impairment, including dementia, as a significant factor, most also contend that it is not required and that anybody can be unduly influenced under the right circumstances. As described earlier,

however, many have observed reluctance by courts to determine that someone with capacity, has been unduly influenced (Naimark, 2001; Turkat, 2003).

Distinguishing undue influence from other factors affecting free will is difficult because multiple factors are often present in cases. For example, in will contests, contestants frequently allege both lack of mental capacity and undue influence (Blinder, 2003). Similarly, guardianship petitions frequently cite lack of mental capacity as well as undue influence among the reasons for the filing. Duress, which is "any unlawful threat or coercion used...to induce another to act [or not act] in a manner [they] otherwise would not [or would] (Black's Law Dictionary, 1990) is another threat to free will that is likely to be alleged along with undue influence. Duress is often used interchangeably with menace.

The extent to which other specific impairments play a role has also been the subject of disagreement. Spar, Hankin, & Stodder (1995) note that there is disagreement among expert witnesses with respect to the importance of mania in affecting judgment as it relates to undue influence.

Beyond determining what factors *must* be present to constitute undue influence, some suggest that certain factors are more important than others in specific circumstances and that the strength of certain factors renders others less important. Shulman et al (2007), for example, observed that elders whose physical and mental health is severely compromised may require lower levels of manipulation to gain their compliance than those who are less impaired. Similarly, when applying the "SODR factors" to evaluate undue influence in will contests, contestants in Wisconsin must prove the four elements by clear, satisfactory, and convincing evidence. However, once three of the elements are proven, there need only be a slight showing of the fourth (Welden-Smith and *Miller v. Vorel*, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981). The extent to which these variables interact inversely or proportionately has not been systematically addressed but may suggest promising areas for further inquiry.

Predicting the risk of undue influence in the future is also problematic. Clearly, there are situations in which a person who has not been unduly influenced is at risk. In determining the need for guardianship, for example, courts hope to prevent losses or harm before it occurs, as opposed to other legal interventions involving undue influence that

attempt to correct past losses or harm. However, there are no instruments or precedents with which to assess imminent risk posed by undue influence. Risk assessment theory suggests that past victimization raises the risk of future victimization, suggesting that those who have been unduly influenced in the past are more likely to be unduly influenced in the future. There is, however, a need for prospective, as opposed to retrospective remedies, if undue influence is to be prevented.

Tools to measure undue influence are clearly needed to provide guidance to legal professionals, courts, and practitioners. This includes evidence based that measure such factors as the strength of relationships, the efficacy of specific tactics that employed and their relative strength, and psychological manipulations. IDEAL, the only existing tool that has been developed to date to assess undue influence in elder abuse, has not been validated (personal communication, July 24, 2009).

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