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ARTICLES





Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion

Dominic J. Campisi, Evan D. Winet** and Jake Calvert****

“And the devil hath power t’assume a pleasing shape. Yea, and perhaps out of my weakness and my melancholy, as he is very potent with such spirits, abuses me to damn me.”¹

Financial elder abuse encompasses a broad set of situations and misconduct involving the vulnerability of disabled and aged individuals to predation by relatives, employees, strangers and professionals. Financial elder abuse is an offshoot of long-standing principles and remedies for undue influence and fraud in estate planning and gifts, as well as disputes over enforcement of contracts and unjust enrichment.

English Courts, as any viewer of Masterpiece Theatre, or reader of Dickens or Trollope knows, have long dealt with undue influence. Francis Bacon, ruling in the High Court of Chancery in 1617, found undue influence where the 80 year old George Lydiatt, “being weak of body and understanding and having a great estate of goods and lands” was influenced by Anne, who

did so work upon his simplicity and weakness and by her dalliance and pretence [sic] of love unto him and of intention after the death of her then husband to marry him, and by sundry adulterous courses with him and sorcery and by kindred, telling him sometimes that they would poison him and sometimes that they would rob him,

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¹ WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 2, sc. 2.

whereby she obtained his personal estate by transfers and execution of a will disinheriting his kindred.²

I. UNDUE INFLUENCE STANDARDS IN FOUR RESTATEMENTS OF THE LAW

The civil law has provided remedies where a contract has been executed by actions which result in an unfair advantage being obtained over another. For example, the rule related to invalidity of contracts was described by the court in *Gerimonte v. Case*, citing Restatement (Second) of Contracts § 177 (1981), focusing on the domination of another and the use of unfair persuasion.³ The Restatement (Third) of Property provides a common law description of misconduct which can invalidate testamentary, trust or purported gifts because of improper conduct.⁴ The common law of trusts deals with the invalidity of trusts created by fraud or undue influence. Restatement (Third) of Trusts provides,

A transfer in trust or declaration of trust can be set aside, or the terms of a trust can be reformed, upon the same grounds as those upon which a transfer of property not in trust can be set aside or reformed.⁵

The common law of restitution has been updated to include undue influence and the remedies of rescission and restitution, including unjust enrichment.⁶

California has adopted tests of capacity that reflect twentieth century psychological testing criteria. The Due Process in Competence Determinations Act⁷ modified its Elder Abuse statute to add “donative transfers” and “testamentary bequests” to the transactions subject to the statutory protections and remedies.⁸

A transaction such as a purchase of objects or services or transfer of authority to a third party requires the victim to assess both the providence of the transfer for his or her current and future personal financial needs and to assess the reliability and competence of the person who will now control necessities of his or her life. Such decisions require a

² *Joy v. Bannister* (Chanc. 1617), reprinted in JOHN RITCHIE, M.A., REPORTS OF CASES DECIDED BY FRANCIS BACON 34 (1932).

³ 712 P.2d 876, 877 (Wash. Ct. App. 1986); see also CAL. CIV. CODE § 1575 (West 2018).

⁴ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (AM. LAW INST. 2003).

⁵ RESTATEMENT (THIRD) OF TRUSTS § 12 (AM. LAW INST. 2003).

⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 15 (AM. LAW INST. 2011).

⁷ CAL. PROB. CODE §§ 810–813 (West 2018).

⁸ CAL. WELF. & INST. CODE § 15610.30 (West 2018).

high level of capacity. Historically, transactions that only affected events after death, such as wills or trusts, were held to involve a lower level of capacity since they did not impact the necessities required for the well-being and comfort of the testator, settlor or donor. Indeed, some courts hold that the standard for testamentary transfers is lower than any other benchmark save the decision to marry.⁹

Developments in the last decade call into question many of the premises of lay and legal analyses of how “rational” or “free will” decisions are made. For example, the role of our unconscious mind in making decisions has been highlighted by detailed investigations of how various decisions are actually made, both in the processes involved and in the areas of our brains utilized.¹⁰ While most people assume that most decisions are consciously made on rational grounds, in point of fact humans have developed heuristics and mental tools to deal with complex issues which are largely supported by unconscious modes of processing.¹¹

[A]n unconscious gesture or a casual word for which a strong association has previously been formed –“priming” to a social psychologist—can change a person’s behavior Subliminal motivations make use of the same mental processes—working memory and executive function—as used in conscious acts of self-control and that people often misunderstand the actual underlying reasons for their behavior when influenced by unconscious impulses.¹²

The process of making decisions in seconds, rather than pondering factors at length, has been illuminated over the past several decades and summarized by Daniel Kahneman in his 2011 book, *Thinking, Fast and Slow*.¹³

The National Academy of Sciences published *Cognitive Aging: Progress in Understanding and Opportunities for Action* (“*Cognitive Aging*”), a comprehensive study of the decline of mental ability as a part of aging.¹⁴ *Cognitive Aging* builds on recent studies of the neurobiology of

⁹ *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 642 (2013).

¹⁰ John A. Bargh, *Our Unconscious Mind*, SCI. AM., Jan. 2014, at 34.

¹¹ *Id.* “This and many other studies suggest that an unconsciously perceived stimulus may suffice to cause someone to actually pursue a goal without any awareness of how it originated—no conscious deliberation or free will required.” *Id.* at 37.

¹² *Id.* at 34.

¹³ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20-21 (Farrar et al. eds., 2013).

¹⁴ See COMM. ON PUB. HEALTH DIMENSIONS OF COGNITIVE AGING, INST. OF MED. OF THE NAT’L ACADS., *COGNITIVE AGING: PROGRESS IN UNDERSTANDING AND OPPORTUNITIES FOR ACTION* (Dan G. Blazer et al. eds., 2015). See also MARY JOY QUINN ET AL., *DEVELOPING AN UNDUE INFLUENCE SCREENING TOOL FOR ADULT PROTECTIVE SERVICES* (2016).

decision-making in responding to recent studies of the explosion of financial elder abuse.¹⁵

Plato, in his dialogue “Phaedrus,” analogized the problem of controlling the wild and emotional side of human nature by its rational function which he characterized as a charioteer with two horses, one which is obedient and sees the perfect form of beauty and rationality and the other which is wild and unruly:

And when they are near [the form of reason and beauty] he stoops his head and puts up his tail, and takes the bit in his teeth and pulls shamelessly. Then the charioteer is worse off than ever; he falls back like a racer at the barrier, and with a still more violent wrench drags the bit out of the teeth of the wild steed and covers his abusive tongue and jaws with blood, and forces his legs and haunches to the ground and punishes him sorely. And when this has happened several times and the villain has ceased from his wanton way, he is tamed and humbled, and follows the will of the charioteer. . . .¹⁶

Aristotle looked into the biology of sensing and the workings of the mind in his essay, “On the Soul.” “Soul” is an English translation of his Greek term “psyche,” which should more properly be translated as a principle of life or principle of animation. By the time of Aristotle, Greeks had observed that injuries to the head and age-related changes impaired the ability of the mind to operate properly.¹⁷ These historic analyses focused on the split between rationality and animal desires. This emphasis on the struggle between body and spirit dominated legal analysis until medical and scientific investigative tools illuminated the actual brain structure and processes involved in making decisions.¹⁸

In 1996, the California legislature passed the Due Process in Competence Determinations ACT (“DPCDA”) in order to provide a more rigorous set of standards for evaluating the competence of persons to perform various acts. This neuropsychological paradigm for evaluating capacity focused on alertness, attention, information processing, thought processes, and the ability to modulate mood and effect. It specified that a deficit in the mental functions listed in the Act may be considered only

¹⁵ COMM. ON PUB. HEALTH DIMENSIONS OF COGNITIVE AGING, *supra* note 14, at 17-18.

¹⁶ 2 THE DIALOGUES OF PLATO 131-32 (B. Jowett trans., Clarendon Press 2d ed. 1875).

¹⁷ 2 THE BASIC WORKS OF ARISTOTLE 548 (J.A. Smith trans., Richard McKeon ed., 1941).

¹⁸ Makoto Ito & Kenji Doya, *Distinct Neural Representation in the Dorsolateral, Dorsomedial, and Ventral Parts of the Striatum During Fixed- and Free-Choice Tasks*, J. NEUROSCI. 3499, 3499 (2015).

“if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.”¹⁹ This detailed statute allows practitioners to focus on specific issues of short term memory, working memory, and problems with comprehension and attention, in order to assist in determining capacity or susceptibility to undue influence and fraud.

The American Bar Association and American Psychological Association have developed handbooks for lawyers, psychologists and court professionals, as resources for those who must assess and report cognitive problems and potential elder abuse.²⁰

While psychological testing of donors and testators is not prevalent, there are also many circumstances in which the testatrix has had an audio recording or video made explaining her intentions or recording the actual signing ceremony, which recordings have been used by judges and juries and by expert witnesses.²¹

The capacity to do an act varies with the complexity of the issue in question.²² However, capacity tests may not resolve the question whether “free will” was overcome. People with general capacity to do business or deal with complex situations are taken advantage of with great frequency.²³

Most instances of financial elder abuse involve *inter vivos* impact on the victims which does not require much analysis, either because of the obvious lack of capacity of the victim or the fraudulent or inequitable conduct of the predator.²⁴

In other cases, the issue of the intent and desires of the transferor are much more opaque. Many people have conflicting views about how

¹⁹ Due Process in Competency Determinations Act of 1995, ch. 842, § 812(a)(4)(b) (1995).

²⁰ See generally Am. Bar Ass’n & Am. Psychol. Ass’n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>; Am. Bar Ass’n & Am. Psychol. Ass’n, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*, <https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>.

²¹ *In re Will of Stotlar*, 542 A.2d 358 (Del. 1988); *In re Estate of Seegers*, 733 P.2d 418, 421 (Okla. Civ. App. 1986); *Hall v. Hall*, 190 So. 3d 683, 684 (Fla. Dist. Ct. App. 2016).

²² See *Andersen v. Hunt*, 196 Cal. App. 4th 722, 731 (2011); *In re Ivey’s Estate*, 271 P. 559, 562 (Cal. Dist. Ct. App. 1928); RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. subsec. (2), at 161 (AM. LAW. INST. 2003).

²³ See, e.g., GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* 1 (2015).

²⁴ For examples of the tactics of abuse, see Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911, 921 (2001).

children or other relatives should be treated in general terms, alternately privileging equal treatment of heirs, treating those who helped you in your declining years at the expense of indifferent or absent members of the class, favoring the less successful or impaired members, letting them all fight after a lifetime of feigned love and affection, or giving it to the Church to ease your way into the afterlife. Charles Dickens, a former clerk of the Chancery Court, understood many of these foibles.²⁵

II. STUDIES OF DECISION-MAKING AND INFLUENCE, PERNICIOUS AND “NORMAL”

The seminal psychological study on the subject is that of Robert Cialdini, *Influence: The Psychology of Persuasion*.²⁶ Cialdini investigated how persuasion was exercised by “compliance professionals—sales operators, fund-raisers, recruiters, advertisers, and others.”²⁷ He reviewed sales manuals, signed up to be trained to sell encyclopedias and vacuum-cleaners, and to become a portrait photographer, dance instructor, and to work in advertising agencies, public-relations, and fund raising agencies—all fertile sources to determine the techniques which got their customers/victims to “Yes.” Cialdini derived six basic principles used in persuasion: consistency, reciprocation, social proof, authority, liking and scarcity.²⁸ We will discuss Cialdini’s principles below after explaining the neurobiology of decision-making and the psychological nature of influence and persuasion.

Other experts in recent decades examined the biological and psychological bases of decision-making, focusing on roles played by the various structures of the brain. Daniel Kahneman and Amos Tversky teamed up to apply scientific testing to the psychological analysis of decision-making.²⁹ They applied their studies of behavior to all types of decisions, including investment decisions. Kahneman received the Nobel prize in economics in 2002.³⁰

Such studies raised the question of how humans make decisions involving uncertain information. Kahneman used the analyses developed by L. Savage in *Foundations of Statistics* (1954) and by psychologists

²⁵ CHARLES DICKENS, *AMERICAN NOTES* 27 (Fromm Int’l 1985) (1842) (describing a ship’s movements while at sea and its resulting effects on its passengers).

²⁶ ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (2007).

²⁷ *Id.* at vii.

²⁸ *Id.*

²⁹ See Amos Tversky & Daniel Kahneman, *A Judgment under Uncertainty: Heuristics and Biases*, *SCI.*, Sept. 27, 1974, at 1124.

³⁰ Press Release, Kungl Vetenskapsakademien: The Royal Swedish Academy of Sciences, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002 (Oct. 9, 2002), https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/press.html.

Keith Stanovice and Richard West to describe the process by which we make decisions, identifying two distinct methods of making decisions: “*System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control. *System 2* allocates attention to the effortful mental activities that demand it, including complex computations. The operations of *System 2* are often associated with the subjective experience of agency, choice, and concentration.”³¹ *System 1* is automatic, where you decide to run out of the burning building, or remember the pleasure of buying that car with the hemi-head V-8 and roaring exhaust (ignoring the fact that the pleasurable experience was in a time when gasoline cost 25 cents per gallon and you did not care about five star crash ratings, repair records, or global warming). Alternately, assessing these past experiences and information flows can employ *System 2*, which involves deliberation, as when you recall making an election in a prior tax return which either worked or resulted in an audit.

Some of the factors utilized in formulating such *Systems* were the experiences of many expert professionals who made split second decisions based on what appeared to be intuition, and which were labeled as “tacit knowledge” by Gary Klein.³² Klein spent his career evaluating and assisting firefighters, pilots, military officers and others to make appropriate decisions under great pressure and time constraints: planes running low on fuel, deploying firefighters in burning buildings, combat situations in the fog of war. He distinguishes Explicit Knowledge from Tacit Knowledge, evoking the same types of systems described by Kahneman.³³ Explicit knowledge includes Declarative Information and Routines and Procedures, while tacit knowledge involves Perceptual Skills, Workarounds, Pattern Matching, Judging Typicality and Mental Modes.³⁴

Klein described a situation in which a fire captain took his crew into the ground floor of a burning building. Kahneman reported that once the firefighters got into the house,

the commander heard himself shout, “let’s get out of here!” without realizing why. The floor collapsed almost immediately after the firefighters escaped. Only after the fact did the commander realize that the fire had been unusually quiet and that his ears had been unusually hot. Together, these impressions prompted what he called a sixth sense of danger. He had no idea what was wrong, but he knew something was wrong. It

³¹ KAHNEMAN, *supra* note 13, at 20-21.

³² GARY A. KLEIN, STREETLIGHTS AND SHADOWS: SEARCHING FOR THE KEYS TO ADAPTIVE DECISION MAKING 34-35 (2009).

³³ *Id.* at 71, 93-94.

³⁴ *See id.* at 35 fig.3.

turned out that the heart of the fire had not been in the kitchen but in the basement beneath where the men had stood.³⁵

The fire captain did not mentally review a list of factors. He had only his experience in other fire situations and the sense that something was very wrong. Klein concluded,

Intuition includes tacit knowledge that we can't describe. It includes our ability to recognize patterns stored in memory. We have been building these patterns up for decades, and we can rapidly match a situation to a pattern or notice that something is off—that some sort of anomaly is warning us to be careful.³⁶

Humans evolved to survive in a world where they lacked the claws, fangs, horns, or size to fight off predators. They had to recognize the signs that a predator was in their area, so that they could turn to flight rather than fight. Those who survived registered the signs observed in their memories, and then used a portion of their brain known as the anterior cingulate cortex (ACC) to match the sensory data arising from the current situation to patterns experienced in the past.³⁷

The flight decision had to be triggered by strong emotional signals to initiation action, or the observer would end up being lunch. The fire chief only sensed that the circumstances he and his men faced were somehow wrong. What people commonly call a sixth sense is in fact a highly developed structure comparing current sensory information with patterns seen before—the ACC triggers a decision to take action.³⁸ The ACC provides a heuristic system for making decisions involving complex or uncertain variables, rules, or ambiguous sensory input. The surrender to animal instincts triggers the mechanisms of System 1, which processes information that is uncertain in nature and probable consequences that are hard to predict or quantify. System 1 uses memory to retrieve not specific granular facts, but rather patterns of sensory input that led to past successful or unsuccessful decisions.

Increased study of the role of the ACC has altered our understanding of human decision-making. In the past, most studies in decision-making assumed the dichotomy used by Plato and Aristotle, that the rational side of the mind controls our behavior. The fundamental prob-

³⁵ KAHNEMAN, *supra* note 13, at 11. Klein also stated that he has had “several expert decision makers explain to [him] that they felt they had made specific life-and-death decisions on the basis of extrasensory perception.” KLEIN, *supra* note 32, at 45.

³⁶ KLEIN, *supra* note 32, at 71.

³⁷ See Matthew Botvinick et al., *Conflict Monitoring Versus Selection-for-Action in Anterior Cingulate Cortex*, NATURE, Nov. 11, 1999, at 179.

³⁸ See *id.*; see also Sameer A. Sheth et al., *Human Dorsal Anterior Cingulate Cortex Neurons Mediate Ongoing Behavioral Adaptation*, NATURE, Aug. 9, 2012, at 218.

lem is that the rational side of the mind deals of certainties—if you follow the directions of the income tax forms, and correctly add up the items of income and expenses, you can slowly but surely reach a correct solution. This is your prefrontal cortex carefully using known rules and known data to complete your Form 1040. It takes time and conscious use of memory to prepare a defensible 1040. It also takes a great deal of energy, since the brain uses glucose to keep those neurons humming.³⁹

The effort to maintain attention and consciously deal with tasks involving the prefrontal cortex uses up the available glucose, sometimes leading to “ego depletion,”⁴⁰ Once you have labored on conscious reasoning, your supply of glucose may be so depleted that you likely will start making less than rational choices—dictated by your limbic system rather than reasoning produced in your depleted prefrontal cortex.⁴¹ The ego-depleted person will start making poor decisions based on System 1, seeking gratification rather than maximization of his utility.

In the estate planning process, after the clients attempt to understand the perfect wording of inclusion ratio provisions or other masterful, lengthy, dense and unintelligible paragraphs, they surrender to exhaustion and say “yes” to multiple other issues which are much more significant personally to them—who gets what and why. Where the predator is attempting to influence the elderly person, focusing first on enormously complex issues leaves the elder succumbing to ego depletion and acceding to the crucial suggestions of the predator.⁴²

The elderly person is also more vulnerable than the capable adult to the creation of false memories, which are induced by repetitive efforts of the predator to reframe the elder’s relationship with family members or favored institutions. Kahneman points out that people have internal “stories” about themselves, which define who they are and what their relationships and values are.⁴³ False memories change those “stories” to the benefit of the predator.

³⁹ See KAHNEMAN, *supra* note 13, at 42-43.

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² The NAS study, *Cognitive Aging*, concluded, “Older adults may rely more on strategies that use biases or heuristics to help them make decisions than do younger adults. . . . This poses obvious risks for financial decisions in which analysis of large amount of complicated information may be needed. . . . However, others have concluded that there is little evidence that additional disclosure and consumer education by themselves are sufficient to improve financial choices in the context of cognitive aging. . . . As a result, older adults are more likely than middle-aged adults to make less-than-advantageous decisions across a range of scenarios involving financial decisions” COMM. ON PUB. HEALTH DIMENSIONS OF COGNITIVE AGING, *supra* note 14, at 234.

⁴³ See KAHNEMAN, *supra* note 13, at 386-90.

Kahneman investigated painful or pleasurable experiences and found that such experiences are categorized in our memories based on the intensity as well as the resolution of the experience at the end. “But our memory, a function of System 1, has evolved to represent the most intense moment of an episode of pain or pleasure (the peak) and the feelings when the episode was at its end.”⁴⁴

“[H]uman memory does not function like a video recorder that can be rewound and replayed; rather, our memories are malleable.”⁴⁵ Predators can induce false memories by repetition of false statements about past experiences or attitudes, seeking to change the person’s perception and evaluation of people they had dealt with. The predator may ask leading questions to elicit agreement with propositions that may not be true. This tactic also includes the assertion of familial information and false narratives, where the victim is plied with incorrect information supposedly provided by trusted relatives or deceased family members. A variety of studies show that repetition of new information regarding settled experiences or attitudes can create new memories, which the person has difficulty in placing in time sequence, with the most recent statements becoming more vivid than actual memories.⁴⁶

With the advent of the use of functional magnetic resonance imaging (fMRI) technology, researchers no longer had to rely on philosophic speculation to explain how people make decisions. Instead, researchers can image the brains of college volunteers or patients as they engage, or attempt to engage, in mental processes. Since the brain and spinal cord require nutrients in order to function, the fMRI can measure changes associated with blood flow to the areas actively involved in the mental processes utilized.

A striking set of studies demonstrates that elders tend to be more trusting than younger adults.⁴⁷ The study examines psychological tests and fMRI scans and other studies of the activation of brain elements in making decisions dealing with the trustworthiness of strangers.⁴⁸ The anterior insula, which is closely linked with the ACC, is the area which deals with evaluating the trustworthiness of people.⁴⁹ In older adults,

⁴⁴ *Id.* at 385.

⁴⁵ Cara Laney & Elizabeth F. Loftus, *Recent Advances in False Memory Research*, 43(2) S. AFR. J. OF PSYCHOL. 137, 138 (2013).

⁴⁶ See Joseph E. Dunsmoor et al., *Emotional Learning Selectively and Retroactively Strengthens Memories for Related Events*, NATURE, Apr. 16, 2015, at 345; Sarah Du Brow & Lila Davachi, *Temporal Memory is Shaped by Encoding Stability and Intervening Item Reactivation*, J. NEUROSCI. 13998, 14003-05 (2014).

⁴⁷ Elizabeth Castle et al., *Neural and Behavioral Bases of Age Differences in Perceptions of Trust*, 109 PNAS 20848, 20851 (2012).

⁴⁸ *Id.* at 20848.

⁴⁹ See *id.* at 20849.

the signals from the anterior insula are either degraded by neurological losses or are viewed as less significant by elderly persons.⁵⁰ In either case, the elderly victim should be expected to be more trusting of people presenting either financial or personal decisions including medical or caregiving issues:

Across a variety of experiences and perceptions, older adults show a positivity bias. . . . They report being happy and satisfied with life . . . they experience negative emotions after unpleasant interpersonal events less strongly than younger adults . . . they remember positive information better than negative information . . . and they recover faster from negative emotions. . . . This general pattern of findings is consistent with socioemotional selectivity theory . . . which posits a general pruning by older adults of negative experiences and people in way that may foster well-being. . . . Thus, a visceral early warning system that may alert younger adults to be cautious in the presence of cues regarding trust/distrust may not be present in the same degree in older adults.⁵¹

The disclosure of adverse information about conflicts of interest involved in financial advice or actual specific information raising questions of trustworthiness with respect to a person may perversely lead the victim to disregard the warning and defend the predator.⁵² The RAND Report prepared for the Department of Labor concluded that “disclosures may in fact have the opposite effect: Consumers may feel a ‘burden of disclosure’ to follow the advice, and advisers may respond to the disclosure by providing even more biased advice, resulting in decreased welfare for consumers.”⁵³

One can understand this effect by looking at other areas of psychological pathology, where people may be co-dependent on an abusive spouse or child because they lack self-esteem, feel guilty for their current impaired status, or are more fearful of the devil they know not. An established relationship, however painful, may pose less risk than the challenges of finding a new supporting person or entity. The elderly patient needs to rely on the expertise of their nurse or doctor since they lack the energy or skill to assess the medical decisions themselves. Warned of misconduct or conflicts of interest, they choose to defend the conflicted or predatory caregiver rather than leap into the void.

⁵⁰ See *id.* at 20851.

⁵¹ *Id.*

⁵² Daylian M. Cain, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. OF LEGAL STUD. 1, 5-6 (2005).

⁵³ ANGELA HUNG ET AL., EFFECTIVE DISCLOSURES IN FINANCIAL DECISION-MAKING 24 (RAND Corp. 2015).

These types of choices by the elderly or disabled person are among those dealt with by System 1, which can automatically prompt a response to ambiguous information and possible outcomes despite badges or clues to untrustworthiness or undue influence that a younger person would deal with in a more critical manner. Recent studies support the conclusions of the NAS study of Cognitive Aging that “Older adults may rely more on strategies that use biases or heuristics to help make decisions than do younger adults.”⁵⁴

The classical model of rational thought was refined in the publication in 1954 of *Foundations of Statistics* by Leonard Savage.⁵⁵ Savage developed the concept of normative decision theory to answer the question how a rational agent *ought* to make decisions.⁵⁶

Drechler points out that for such normative decision-making to function, the agent must eliminate uncertainty in the variables, which is impossible in most complex decisions.⁵⁷ Hence, it appears that the rational decision posited by Plato, who could observe the perfect form, could be utilized only when the actor can limit the options to a fair certainty. When uncertainty prevails in some or all of the alternatives, the process must deal with “Large World” methods, in order to assess and weigh alternatives.⁵⁸ Enter the ACC and patterns of experience which are necessary to deal with decisions involving uncertainty in the acts involved, the states of the world, and the possible consequences.

The rational decision-maker is described in Bayesian decision theory, which is a primary paradigm of economics and probability theory.⁵⁹ Current neuroscientific research, using not only psychological tests of decision-makers in process, but also neuroimaging of their brains of they decide, refutes the Bayesian or Expected Utility (EU) models as a description of how people make most decisions: those which are fraught with uncertainties.⁶⁰

⁵⁴ COMM. ON PUB. HEALTH DIMENSIONS OF COGNITIVE AGING, *supra* note 14, at 233-34.

⁵⁵ See generally LEONARD J. SAVAGE, *FOUNDATION OF STATISTICS* (2d ed. 1972) (taking into account objective events as well as interpersonal differences).

⁵⁶ Mareile Drechler, *Rationality, Decisions and Large Worlds* 12 (Oct. 2012) (unpublished PhD thesis, London School of Economics and Political Science) (on file with the Department of Philosophy, Logic and Scientific Method, London School of Economics and Political Science).

⁵⁷ *Id.* at 12-13.

⁵⁸ *Id.*

⁵⁹ See *id.* at 20.

⁶⁰ See Kristen G. Volz & Gerd Gigerenzer, *The Brain is not “as-if” – Taking Stock of the Neuroscientific Approach on Decision Making*, in *ADVANCED BRAIN NEUROIMAGING TOPICS IN HEALTH AND DISEASE – METHODS AND APPLICATIONS* 573, 585-86, 589 (T. Dorina Papageorgiou et al. eds., 2014).

III. PERSUASION: TACTICS THAT EXPLOIT PSYCHOLOGICAL VULNERABILITIES—UNDULY OR OTHERWISE

Cialdini's *Influence: The Psychology of Persuasion* listed categories of tactics resulting in the targets accepting the influence of "compliance professionals" who induced or triggered responses to their attempts at influencing customers, whether elderly, healthy, cognitively impaired or not.⁶¹ In all of these circumstances, "free will" may be an irrelevant concept, since such decisions may in many cases have nothing to do with rational thought/System 2. Hence the susceptibility of the general population to influence may require a shift in analysis to determine whether a bright line between normal entreaty and undue influence can be elucidated. It may be necessary to utilize a flexible standard of legal analysis, finding undue influence where the defense mechanisms of the victim are compromised by general aging or specific insults to attention, short-term and working memory, or where the tactics or consequences are more extreme and inequitable. The predator should not be absolved merely because most of the population do not make good financial decisions.

Cialdini organizes his book around "six basic categories" of persuasion tactics, each of which "is governed by a fundamental psychological principle that directs human behavior and, in so doing, gives the tactics their power,"⁶² and an "ability to produce a distinct kind of automatic, mindless compliance from people, that is, a willingness to say yes without thinking first."⁶³

A. Reciprocation

This rule "enforces uninvited debts" by telling us that "we should try to repay, in kind, what another person has provided us."⁶⁴ People commonly feel obliged to participate in a "web of indebtedness" or "network of obligation."⁶⁵ Persuaders exploit this principle of "reciprocity" in a variety of ways.

Dennis Regan, at Cornell University, conducted an experiment that demonstrated how reciprocity can be exploited by an influencer. Subjects were asked to participate in an experiment rating artworks in pairs. However, one was actually Regan's assistant, posing as a subject. Regan's assistant would leave the room at some point, and do one of two things: either he would come back with two bottles of Coke, and offer one, unsolicited, to the actual subject, or he would just come back

⁶¹ CIALDINI, *supra* note 26, at xiii.

⁶² *Id.*

⁶³ *Id.* at xii-iv.

⁶⁴ *Id.* at 13, 30.

⁶⁵ *See id.* at 18.

empty-handed. Later, the assistant would ask the actual subject to buy some raffle tickets for 25 cents each. Twice as many of the subjects who had been given a Coke agreed to buy raffle tickets as subjects who had been given nothing. Regan also asked the subjects whether or not they liked Joe. However, it turned out that “[f]or those who owed him a favor, it made no difference whether they liked him or not; they felt a sense of obligation to repay him, and they did.”⁶⁶

One significant variation on reciprocity is the “benefactor-before-beggar” strategy, employed clearly by Hare Krishnas, who give a gift in order to solicit a donation.⁶⁷ After concluding that their fund-raising had stalled because of negative public feelings towards the sect, Hare Krishnas turned to a tactic that didn’t depend on “liking” the salesman. The Hare Krishna solicitors, typically standing in places of high pedestrian traffic, would offer the target a “gift,” (typically either a copy of the *Bhagavad Gita*, the Society magazine, or even just a flower). The solicitors refuse to allow the target to return the gift, and only ask for donations after the target has relented and accepted the unsolicited (and generally undesired) gift. “The benefactor-before-beggar strategy has been wildly successful for the Hare Krishna Society, producing large-scale economic gains and funding the ownership of temples, businesses, houses, and property in 321 centers in the United States and overseas.”⁶⁸

Similar strategies are commonly employed by politicians who trade favors and food purveyors that offer “free samples.”

The reciprocity principle is often evident in testamentary situations where the testator eschews simple parity to bestow greater benefits on a child or other person perceived as having created a debt of gratitude. A conniving heir will frequently position herself as an elderly parent’s indispensable helper, giving generously of her time and efforts when such “generosity” is in fact a long-term strategy to make mom both dependent and indebted. Courts have acknowledged that influence can take such outwardly benign forms. For example, the Court in *Kelley v. First State Bank of Princeton* notes that “[i]f kindness and affection result in overcoming the testator’s free agency and leave the will that of the beneficiary rather than the testator, then such constitutes undue influence.”⁶⁹ Nevertheless, as the United States Supreme Court stated in *Mackall v. Mackall*, courts are typically reticent to find coercive reciprocity within family dynamics:

Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the

⁶⁶ *Id.* at 21.

⁶⁷ *Id.* at 23-24.

⁶⁸ *Id.* at 24.

⁶⁹ 81 Ill. App. 3d 402, 414 (Ill. App. Ct. 1980).

others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained.⁷⁰

B. Commitment and Consistency

We have a nearly obsessive desire to be (and to appear) consistent with what we have already done. Once we have made a choice or taken a stand, we will encounter personal and interpersonal pressures to behave consistently with that commitment. Those pressures will cause us to respond in ways that justify our earlier decision.⁷¹ Persuaders exploit the rule by making the initial commitment easy and attractive. “Once a stand is taken, there is a natural tendency to behave in ways that are stubbornly consistent with the stand.”⁷²

Cialdini observed the principle exploited by influencers in the context of a transcendental meditation program. At the introductory meeting of the program, a pair of earnest young men sought to recruit new members by promising the participants benefits “ranging from simple inner peace to the more spectacular abilities to fly and pass through walls at the program’s advanced (and more expensive) stages.”⁷³ A friend, attending with Cialdini, spoke up and effectively pointed out all the logical flaws in the presenter’s reasoning. However, afterwards, a rush of attendees paid the enrollment fee and signed up anyway. Afterwards, Cialdini spoke to one who said he understood and agreed with the friend’s critique of the program. However, he had come to the program to find answers to problems in his life, and a challenge to that intention, rather than undermining his resolve, actually drove him to sign up quickly, before he lost his nerve. “Something must be done at once before logic takes its toll and leaves them without hope again. Quickly, quickly, walls against reason are needed; and it doesn’t matter that the fortress to be erected is a foolish one.”⁷⁴

The “commitment and consistency” principle is important in the context of Undue Influence as a challenge to the pervasive assumption that a “stubborn” or “strong-willed” testator by definition will be less susceptible to Undue Influence. Courts frequently place weight on evidence of such “toughness” on the part of testators in finding that they

⁷⁰ 135 U.S. 167, 172-73 (1890).

⁷¹ CIALDINI, *supra* note 26, at 57.

⁷² *Id.* at 67.

⁷³ *Id.* at 61.

⁷⁴ *Id.* at 63.

could not possibly have been coerced.⁷⁵ In point of fact, a clever influencer may take advantage of this precise characteristic in his victim, the victim's "stubbornness," to induce the victim to "buy in" to irrational beliefs. Once the influencer has successfully planted a notion in the testator's mind, e.g. that the other siblings are somehow undeserving of their inheritance, then the "commitment and consistency" principle will operate to make the testator stubbornly convinced of this "fact," irrespective of evidence to the contrary.

C. Social Proof

"We view a behavior as more correct in a given situation to the degree that we see others performing it."⁷⁶ Persuaders exploit this rule by using indicators of wider social approbation to trigger our belief that the substance must be good or acceptable.⁷⁷

Millennial cults provide an example of "social proof" in action. Such cults operate by risking ridicule by taking to the streets and asserting that some important factual event is going to occur, typically the apocalyptic end of days. Contrary to what one would expect, when the prophesied day comes and goes without the factual event occurring, the cults typically experience a strengthening of member convictions.⁷⁸

A group of scientists from University of Minnesota observed this phenomenon first-hand by infiltrating a doomsday cult based in modern-day Chicago. The cult adhered to the belief that a flood would soon engulf the world, sparing only the cultists, who would be rescued in spaceships by spiritual beings.⁷⁹ In the weeks leading up to the anticipated eschaton, the scientists observed the behavior of the cultists. Their level of commitment to the cult remained very high, evidenced by taking draconian and irreversible steps to tie up their affairs on Earth. They quit their jobs, severed relationships and abandoned worldly possessions.⁸⁰ However, they typically took surprisingly little action to recruit

⁷⁵ See *In re Estate of Anderson*, 198 P. 407, 410 (Cal. 1921) ("The evidence which would justify the conclusion that [undue influence] had occurred in any particular case of [a strong-willed] character would have to be strong indeed."); see *Pittman v. Pittman*, No. M2006-01256-COA-R3-CV, 2007 WL 1217270, at *6 (Tenn. Ct. App. Apr. 24, 2007) (affirming that where a testator was repeatedly described as a "strong willed individual . . . it was pretty clear . . . that there was no undue influence, that they clearly understood what they were doing . . .").

⁷⁶ CIALDINI, *supra* note 26, at 116.

⁷⁷ *Id.* at 116-17.

⁷⁸ *Id.* at 121.

⁷⁹ *Id.*

⁸⁰ *Id.* at 122.

(and thereby, presumably, to save) others. They turned inward as a community, and isolated themselves from the world.⁸¹

When the cataclysmic moment came and went without actual cataclysm, the cultists at first responded with despair and confusion.⁸² Then, the leader received a message from the spiritual aliens explaining that the desired apocalypse could not take place because not enough recruits had been gathered.⁸³

Moments after being confronted with a factual non-occurrence that should have destroyed their beliefs, the cultists, with renewed strength, renewed their commitments with greater evangelical fervor than before. Where previously, they had been reticent to speak to reporters and other outsiders, now, at the apparent moment of greatest vulnerability to their belief system, they set out to convert the world. Cialdini explains the seemingly paradoxical psychology at work:

It was necessary to risk the scorn and derision of the nonbelievers because publicity and recruitment efforts provided the only remaining hope. If they could spread the Word, if they could inform the uninformed, if they could persuade the skeptics, and if, by so doing, they could win new converts, their threatened but treasured beliefs would become *true*. The principle of social proof says so: The greater the number of people who find any idea correct, the more the idea will be correct. The group's assignment was clear; since the physical evidence could not be changed, the social evidence had to be. Convince and ye shall be convinced!⁸⁴

Thus influencers may take advantage of the principle of social proof to motivate their targets to accept social evidence that is deliberately faked precisely when external reason would appear to make that evidence least believable.

D. Liking

"[W]e most prefer to say yes to the requests of someone we know and like."⁸⁵ Persuaders exploit this rule by creating situation in which the pressure is coming from a friend, relative or neighbor, or simply make use of their own attractive characteristics to influence their targets to comply with their requests.

⁸¹ *Id.* at 123.

⁸² *Id.*

⁸³ *Id.* at 124.

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 167.

Cialdini describes Tupperware parties as “the quintessential American compliance setting.”⁸⁶ Tupperware parties influence their targets to purchase Tupperware by deputizing neighbors and friends as proxy salespeople and then using the other persuasion tactics to complete the sale. First, there’s reciprocity: games are played in which each and every partygoer ends up with a gift. Then there’s commitment (each participant is urged to testify as to the uses and benefits of her own Tupperware) and social proof (once the buying begins, each purchase reinforces a feeling of community and encourages more buying). However, the overarching tactic is “liking.” The actual Tupperware salesperson does her best to remain in the background and empower the party hostess, who has invited her friends to the party, and who, as the friends all know, will make a commission on each sale. “In this way, the attraction, the warmth, the security, and the obligation of friendship are brought to bear on the sales setting.”⁸⁷

People particularly like those they see as similar to themselves. Several studies have shown that people are more likely to help others who dress similarly to themselves (e.g., an experiment in the early 1970s where experimenters donned “hippie” or “straight” clothes and succeeded in attracting students dressed similarly).⁸⁸ Influencers also induce targets to like them by espousing similar backgrounds and interests. Car salesmen are trained to look for evidence of customers’ interests and use these to promote trust.⁸⁹ For example, the salesman may notice golf balls in the customer’s back seat and then remark on his own plans to play golf. Though apparently, trivial, research has shown that exploitation of such small similarities can result in increased success at making sales.⁹⁰

People also like people who they think like them. Every month, Joe Girard, “the world’s ‘greatest car salesman,’” would send each of his thirteen thousand former customers a holiday greeting card.⁹¹ The holidays would of course change, but printed on the face of each card was always the phrase “I like you.”⁹² No doubt, most recipients would recognize such an obvious ploy, and yet “we tend, as a rule, to believe praise and to like those who provide it, oftentimes when it is clearly false.”⁹³

In the testamentary context, an influencer may encourage the testator to view him as more attractive or more similar to the testator than

⁸⁶ *Id.*

⁸⁷ *Id.* at 168.

⁸⁸ *Id.* at 174.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 175.

⁹² *Id.* at 174.

⁹³ *Id.* at 175.

his siblings. If the testator has conservative social values, the influencer will dress well and comport himself accordingly while planting rumors that the other siblings are hippie wastrels who would merely squander their inheritance. If the testator views himself as a successful businessman, then the influencer will paint a rosy picture of his own acumen in comparison to the lesser gifts of his kin.

E. Authority

We have “a deep-seated sense of duty to authority within all of us,” an “extreme willingness of adults to go to almost any lengths on the command of an authority,” a disinclination or even inability to defy the wishes of someone in charge.⁹⁴ Persuaders exploit this rule when they “drape themselves with the titles, clothes and trappings of authority.”⁹⁵

Impressive titles are generally difficult to earn, but may be easy to feign. In one experiment,⁹⁶ a researcher made a phone call to 22 separate nurses’ stations. In each call, he identified himself as a hospital physician and directed the nurse to administer a high dose of a dangerous and unauthorized drug to a patient. Despite the fact that there were many aspects of the order that should have sounded suspicious along with the fact that the order came from a man the nurses had never seen, the mere assertion of status as a hospital physician influenced 95 percent of the nurses to unhesitatingly comply (at which point, another researcher would prevent the dangerous act from actually being carried out).⁹⁷

Influencers may also dress in a manner that conveys authority. In one experiment,⁹⁸ a man would ask passersby on the street to comply with some odd request, such as picking up a discarded paper bag or relocating to the other side of a sign. The man did not overtly assert any authority or rationale for the requests. In one version, he dressed in ordinary street clothes. In another, he dressed as a security guard. Nearly all the targets complied with the request of the “security guard,” whereas fewer than half listened to the “ordinary citizen.”⁹⁹ Other researchers have observed similar effects in response to influencers who dress in well-tailored business suits.¹⁰⁰

⁹⁴ *Id.* at 213, 215.

⁹⁵ *Id.* at 221.

⁹⁶ *Id.* at 224.

⁹⁷ *Id.* at 224-25.

⁹⁸ *Id.* at 226.

⁹⁹ *Id.* at 226-27.

¹⁰⁰ *Id.* at 227.

Con men have combined the “security guard” and “business suit” ploys in a fraud called the bank-examiner scheme.¹⁰¹ A man in a well-tailored suit goes to the door of the victim, typically an elderly person living alone. He explains to the victim, who he selected by secretly following her home from the bank, that he is in fact, a professional bank examiner who has discovered evidence of foul play in her financial records. He asks the target for her cooperation in exposing the culprit, another bank officer, by withdrawing her savings so the criminal can be caught tampering with the transaction. The victim complies without question. She goes to the bank, withdraws her savings and returns home with them. She is then contacted by another con man posing as a uniformed bank guard who informs her that it turns out her account is safe, and he graciously comes to her home to take her money back to the bank. Of course, the money never makes it back to the bank. The “bank-examiner scheme” depends on the principle that people trust those with the outer appearance of authority, and will be so stultified by a well-dressed bank official followed by a uniformed guard, that they will think little of emptying their bank accounts to these fine fellows.¹⁰²

In a testamentary context, an influencer may inflate his own authority or instrumentalize the apparent authority of others. An influencer will often take steps to place himself in control of the testator’s finances or estate plan and then represent to the testator that he must sign off on modifications or transactions because they are necessary, e.g. for tax purposes. The influencer may enlist the support of attorneys or accountants to buttress his own authority. As the influencer tightens his grip, the testator will loosen his oversight of such decisions. The authority principle will operate to relieve the testator of his own critical faculties and place total trust in the influencer to make correct decisions.

F. Scarcity

“Scarcity” is the principle that “opportunities seem more valuable to us when their availability is limited.”¹⁰³ Something that, on its own merits, might hold little appeal becomes “decidedly more attractive merely because it would soon become unavailable.”¹⁰⁴ Persuaders exploit this rule by conveying some kind of limited availability, e.g. the “deadline” tactic (some official time limit placed on opportunity to get the product).¹⁰⁵ The effectiveness of scarcity as a persuader relates to Jack Brehm’s “reactance theory,” which explains how “whenever free

¹⁰¹ *Id.* at 170-71.

¹⁰² *Id.* at 226-28.

¹⁰³ *Id.* at 238.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 242.

choice is limited or threatened, the need to retain our freedoms makes us desire them . . . significantly more than previously.”¹⁰⁶

One of the most straightforward applications of “scarcity” is the “limited-number” tactic, where a customer is informed that a certain product is in short supply that cannot be guaranteed to last. For example, a salesperson might say that a particular car is going to become unavailable soon because the model or some of the parts are being discontinued.¹⁰⁷ Or he might warn the customers about limited production or some kind of bottleneck in the manufacturing of a product that make it very hard to get and potentially unavailable in the near future. “Sometimes the limited-number information was true, sometimes it was wholly false. But in each instance, the intent was to convince customers of an item’s scarcity and thereby increase its immediate value in their eyes.”¹⁰⁸ The prospect of impending unavailability creates a sense of increased value.

A related application is the “deadline” tactic, in which some kind of time constraint, rational or otherwise, is placed on the opportunity for a customer to make a purchase. “[P]eople frequently find themselves doing what they wouldn’t particularly care to do simply because the time to do so is shrinking.”¹⁰⁹ Salespeople regularly make use of such manufactured urgency to generate interest where none previously existed, and induce purchases of goods that otherwise the customer was not interested in buying.

In a variant on the “deadline” tactic, high-pressure, face-to-face salesmen will inform customers that unless they decide *right now* to make a purchase, then later the item will either be more expensive or completely unavailable. For example, a door-to-door salesman might say that he is only in the neighborhood for a day and after that the customer won’t be able to reach him. Cialdini describes a home vacuum-cleaner operation that trained its salespeople to tell customers that they were so busy with other customers that they couldn’t possibly come back, so it’s now or never. “As the company sales manager impressed on his trainees, the true purpose of the can’t-come-back claim has nothing to do with reducing overburdened sales schedules. It is to ‘keep the prospects from taking the time to think the deal over by scaring them into believing they can’t have it later, which makes them want it now.’”¹¹⁰

¹⁰⁶ *Id.* at 245.

¹⁰⁷ *See id.* at 239.

¹⁰⁸ *Id.* at 241.

¹⁰⁹ *Id.* at 242.

¹¹⁰ *Id.* at 244.

The scarcity factor finds ample support in observations about the use of time pressure to induce a decision. The FTC has issued rules imposing a cooling-off period for all door-to-door sales, including the provision of a written statement to the buyer that she has the right to rescind any purchase within three business days of the transaction.¹¹¹ As the FTC explained,

The Cooling-Off Rule was not intended to be a federal "satisfaction guarantee" requirement or "buyers; remorse insurance program" The Rule instead has the limited purpose of correcting the specific problem of sales being obtained through high pressure and deceptive sales tactics used on consumers at times and places in which consumers typically may not expect to be solicited for sales and find it difficult to extricate themselves from the situation.¹¹²

This is a common vulnerability of individuals young and old, and highlights the common law focus on personal confrontation and pressure on the donor or testator to obtain a transfer. The older adult, physically and mentally less able to deal with personal entreaties, is much more likely to agree to demands to end the presence and pressure of someone in their home or hospital room seeking their signature on documents. Evidence of imposed time pressures, or directions to act quickly by potential beneficiaries or advisors should be treated as indicia of undue influence. Unfortunately, estate planners may lose patience with elderly clients and push them into decisions, failing to recognize that their slow consideration or reluctance to sign on the dotted line may be evidence that the client is wavering because of conflicting signals of risk when the advisors shifts into pressuring the client to make the proposed changes.

G. Fixed-Action Patterns, Trigger Features, and the Contrast Principle

Any of the six tactics described above can cause compliant behavior in the victim by triggering "fixed action patterns" of compliant behavior, such as making a purchase or doing something else the persuader wants.¹¹³ Supporting these categories are other psychological factors which assist the compliance practitioner.

¹¹¹ FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (1995).

¹¹² FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 60 Fed. Reg. 54,184 (Oct. 20, 1995) (to be codified at 16 C.F.R. pt. 429).

¹¹³ CIALDINI, *supra* note 26, at 3.

These are sometimes intricate sequences of behavior, such as entire courtship or mating rituals, that occur in virtually the same fashion and in the same order every time, “as if the patterns were recorded on tapes.”¹¹⁴

What triggers the fixed-action pattern is some specific feature, one tiny aspect of the totality of a significant person, event or situation.¹¹⁵ Trigger features are “shortcuts” or “stereotypes” or “rules of thumb to classify things according to a few key features and then to respond mindlessly when one or another of these trigger features is present.”¹¹⁶ Such “automatic behavior patterns” protect us from “brain strain,” but also “make us terribly vulnerable to anyone who does know how they work.”¹¹⁷

In his opening chapter, Cialdini describes the “contrast principle” in order to demonstrate the workings of triggers and fixed-action patterns. When two things are presented, one after another, and the second is fairly different from the first, we will tend to see it as more different than it actually is. (e.g., a heavier person will seem enormous; a less attractive woman will seem ugly).¹¹⁸ Influencers use this by selling the costlier item first, so the less expensive alternative feels like a bargain.¹¹⁹ Or a real-estate broker may show undesirable “setup” houses first to create more enthusiasm for the decent ones.¹²⁰

Nobelists George Akerlof (whose wife is Janet Yellen) and Robert Shiller cite Cialdini’s writings in developing their book, *Phishing for Phools*, noting their intention to offer “a new, more general view (beyond Cialdini’s list and beyond current behavioral economics) regarding what makes people manipulable. People largely think by situating themselves within a story.”¹²¹

A leading strategy of manipulation is to lead phools to graft new stories (advantageous to the phishermen) onto the old ones. (We add, parenthetically that a major role of psychologists—literally from Freud to Kahneman—has been to elicit those stories that people are telling about themselves. The psychologists have technical terms for them: such as “mental frames” or “scripts.”)¹²²

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 5.

¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 12.

¹¹⁹ *Id.* at 13.

¹²⁰ *Id.* at 14.

¹²¹ AKERLOF & SHILLER, *supra* note 23, at 10.

¹²² *Id.* at 10.

Phools are people in the general population who do not make rational decisions to choose what is good for them, but instead choose immediate pleasure—to their detriment:

We can think about our economy as if we all have monkeys on our shoulder when we go shopping or when we make economic decisions. These monkeys on our shoulders are in the form of the weaknesses that have been exploited by marketers for ages.

Because of those weaknesses, many of our choices differ from what we “really want,” or, alternatively stated, they differ from what is good for us. We are not generally aware of that monkey on our shoulder. So, in the absence of some curbs on markets, we reach an economic equilibrium where the monkeys on the shoulder are substantially calling the shots.¹²³

Here we are back with Plato trying to control, not raging horses, but monkeys on our shoulders. This is a powerful image, derived from the Fifth Voyage of Sinbad in the Arabian Nights. In the Sir Richard Francis Burton translation, Sinbad has been shipwrecked and swims to an island where he finds an old man who gestures for Sinbad to put him on Sinbad’s shoulders and help him:

So I took him on my back and carrying him to the place whereat he pointed, said to him, “Dismount at thy leisure.” But he would not get off my back and wound his legs about my neck. I looked at them and seeing that they were like a buffalo’s hide for blackness and roughness, was affrighted and would have cast him off; but he clung to me and gripped my neck with his legs, till I was well-nigh choked, the world grew black in my sight and I fell senseless to the ground like one dead. But he still kept his seat and raising his legs drummed with his heels and beat harder than palm-rods my back and shoulders, till he forced me to rise for excess of pain. Then he signed to me with his hand to carry him hither and thither among the trees which bore the best fruits; and if ever I refused to do his bidding or loitered or took my leisure he beat me with his feet more grievously than if I had been beaten with whips. He ceased not to signal with his hand wherever he was minded to go; so I carried him about the island, like a captive slave . . .¹²⁴

¹²³ *Id.* at 5.

¹²⁴ VI RICHARD F. BURTON, *THE BOOK OF THE THOUSAND AND ONE NIGHTS*, at 51 (Richard F. Burton ed. & trans., 1888).

Phishing is an insightful discussion of how the monkeys destabilize the market and impose unnecessary costs on us poor Phools, who are poorer for the experience. Clearly we should be buying cars based on Consumer Report analyses, instead of aping our neighbors in conspicuous consumption or satisfying our animal urges by buying big, noisy V-8 cars instead of cheap reliable and efficient ones. But it is an excellent study in economic terms of the exploitation of the vulnerabilities of our financial decision making process.

IV. CONCLUSION

In evaluating the susceptibility of people to undue influence and elder abuse tactics, it is important to focus on the actual cognitive processes by which most people make decisions involving less than perfect information and uncertainty. These are not Bayesian decisions that can be made with complete rationality, but rather decisions that involve retrieving one's experiences to find patterns that seem to match the current situation and then acting in accord with the emotional signals triggered by System 1.

If most of us are "Phools," then many decisions might be construed as products of undue persuasion. However, most people derive legitimate benefits from decisions that gratify their emotional needs despite being at odds with Consumer Reports' objective goals of utility. In the context of undue influence in donative or testamentary decisions, however, the patterns evoked by requests for gifts or bequests are much more complex. In *inter vivos* transactions, the injury to the elder or disabled person is much easier to evaluate—why would somebody pay more than market price or get less than promised? Given limited resources needed to sustain an elder in reasonable comfort for a long life expectancy, why would large transactions be reasonable, when such transactions could only put the elder at risk of serious later financial distress?

Where the issue is a pay-on-death account, joint tenancy, or trust or will whose impact will not be suffered currently by the donor or testator, value judgments need to be made on what the elder would have wanted. Care must be given here since these valuations are not fixed, rational, Bayesian values, but rather the subjective values and goals of a person whose needs may change with age and experience or the recent conduct or needs of their donees or beneficiaries.

In analyzing the available facts and witnesses on the issues of reduced capacity, vulnerability to undue influence or fraud, and other indicia of undue persuasion, it is important to understand the actual mechanisms involved in such donative or testamentary decisions.



Drafting a will or trust involves expert knowledge incomprehensible to most lay people, and to many professionals. The donor or testator or settlor must, of necessity, rely on the expert advice of a skilled estate planner. Taking the client through inclusion ratios for GST purposes or other impenetrable clauses often exhausts the client—ego depletion occurs. At that point, like the person trapped into a sale pitch in their home, there is a strong impulse to do anything to escape, even if it means signing documents which they do not understand. With normal cognitive aging, the senior is likely to solve the problem by accepting all the proposed terms, seeking to trust the scrivener rather than venture out to obtain a second opinion. As noted above, as aging progresses, older people often refuse to deal with suggestions of conflicts or incompetence on the part of the planner, since it would require them to start the whole process over again, only to be flummoxed by the same tax jargon and resulting fatigue.

It is important in the planning process to spend more time on the distributive provisions and not the intellectually intriguing tax mechanisms, so that the client is not so ego depleted that they reflexively agree to dispositions which vary from the heart of their intentions.

Dealing with medical witnesses and experts is much more complicated now than at the times when these experts were trained—be sure you are able to elicit for these professionals the details suggested in California's Due Process in Competence Determinations Act and the respective Handbooks promulgated by the American Bar and American Psychological Associations¹²⁵ in order to assure that such witnesses have the data necessary to reach defensible positions on competence and susceptibility to undue persuasion.

¹²⁵ See *supra* note 19 and accompanying text.