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# The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence

TRENT J. THORNLEY\*

## INTRODUCTION

Consider this. Pedro and Sean, two gay men, have been alienated by their families for the ten years of their relationship. As a result of their estrangement, Pedro and Sean rely heavily on each other for support and affection. They are more than just lovers; they are best friends. Pedro and Sean made a public commitment to one another by exchanging rings in the presence of mutual friends. Like any married couple, they now share such things as a home, furniture, a bank account, and a variety of personal interests. Each has a deep emotional commitment invested in their relationship, and they rely on one another in times of need. In short, Pedro and Sean care for each other.

Pedro, HIV-infected since before meeting Sean, becomes sick with AIDS. His immune system is crippled, and he phases in and out of clear consciousness.<sup>1</sup> He struggles to maintain control of his bodily functions, but he fights to little avail. He becomes helpless, meek, and utterly dependent.<sup>2</sup>

Sean takes on increasing amounts of responsibility for Pedro, from monitoring when Pedro is capable of receiving visitors and phone calls to selecting Pedro's favorite foods from the hospital's menu. He frequently consults with Pedro's doctors and helps to administer the plethora of painkillers. He handles medical bills and hospital bureaucracy; mortgage payments and insurance claims. Their relationship has taken on a new dimension: total dependency.

Like many young persons, Pedro is intestate.<sup>3</sup> Under his state's law of intestate succession, at Pedro's death, his parents would take his property, including the home which is in his name alone.<sup>4</sup> Pedro is aware of his parents' disdain for Sean; they blame

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1. Carol Angel, *Legal Challenges to AIDS Patients' Wills Seen on Rise*, L. A. DAILY J., Aug. 16, 1988, at 1, 26 ("Some [AIDS] patients are in and out of competence over long periods of time.").

2. One AIDS patient described his condition this way:

"Life keeps shrinking," he says. "I'm always so tired and I fight to get up and get out and—oh, somebody dies and it's not even the grief so much as the shrinking. Something else you've fought for, and it's gone.

Always closing in, to a bed you can't get out of. Then you're gone, too."

Laurence Tate, *The Epidemic: A San Francisco Diary*, in PERSONAL DISPATCHES: WRITERS CONFRONT AIDS 53, 67 (John Preston ed., 1988).

3. In one 1977 telephone survey, 87.7% of persons between the ages of 17 to 30 did not have a will. Lawrence W. Waggoner, *Tribute to William F. Fratcher: Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29 n.17 (1994) (citing Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336-39).

4. The general rule is that the law of the testator's domicile determines who is an "heir at law." *Harrison v. Nixon*, 34 U.S. 483 (1835); see also R.D. Hursh, Annotation, *What Law Governs in Determining Who Are "Heirs," "Heirs at Law," "Issue," "Next of Kin," or the Like, Who Will Take Legacy or Bequest Under Terms of Will*, 52 A.L.R.2d 490 (1957).

Sean for Pedro's "deviant" lifestyle and his contracting AIDS.<sup>5</sup> Several months ago, Pedro told Sean that he wanted to keep his family out of his will for this reason.

Realizing that intestate succession is not what Pedro wants, Sean explains the situation to a lawyer and asks her to meet with Pedro to draft his will. Sean arranges, and is present, at the execution of the will. A doctor declares Pedro competent, and two nurses witness as the lawyer reads the will to Pedro and Pedro signs it. The will devises everything to Sean.

Inevitably, AIDS overtakes Pedro and he passes away. While in probate, Pedro's parents contest his will on the ground that Sean had exerted undue influence over him. They are upset at the prospect of Sean taking Pedro's house and relentlessly challenge his claim to Pedro's property.<sup>6</sup> As evidence of undue influence, Pedro's parents point to Pedro's dependency on Sean, to Sean's massive control over Pedro's life, and to the fact that Sean had such a prominent role in the making of Pedro's will. They argue that it is unnatural for Pedro to give such preference to a mere "roommate" over his own flesh and blood. Unfortunately for Pedro and Sean, Pedro's parents would probably win under the current law of undue influence.<sup>7</sup>

As the number of AIDS cases increases, variations on this scenario will become more commonplace.<sup>8</sup> In fact, many health care and legal professionals who work daily with AIDS patients have reported that will contests are on the rise.<sup>9</sup> Many of these cases are very similar to the one here posed: a caring partner, who is estranged from his lover's family, finds himself in court fighting to uphold his deceased lover's will.<sup>10</sup>

Yet, as in so many other facets of law and society, AIDS cases are only a subset of a larger issue.<sup>11</sup> The AIDS scenario unmask an alarming problem in the current law of undue influence: it does not adequately account for acts of care, such as Sean's. Instead,

5. Angel, *supra* note 1, at 1. Attorney Clint Hockenberry of the San Francisco AIDS Legal Referral Panel was quoted as saying, "[Family members] blame the lover for giving the son AIDS and bringing him out [of the closet]. So there's a lot of anger there . . ." *Id.*

6. This sort of vindictive behavior by relatives is, unfortunately, all too common. *See id.* ("Even if the assets are minimal, the emotional energy generated by somebody's death from AIDS—particularly where the family was estranged because of the decedent's sexual orientation—is intense."); *see also In re Will of Kohn*, No. 1024-K, 1993 Del. Ch. LEXIS 88, at \*2 (Del. Ch. May 19, 1993) ("Experience shows that disposition of property at death sometimes provides the sad occasion for fault lines in family relationships . . . and for the litigation process to be employed as a means of punishment . . ."); *AIDS Deaths Cause Tug-of-War for Insurance Funds*, LEGAL INTELLIGENCER, Mar. 3, 1994, at 7 [hereinafter *AIDS Deaths Cause Tug-of-War*].

7. *See infra* parts I.A-B. In some states, the combination of a confidential relationship (a relationship in which one party is dominant) and participation in the will-making process is enough to raise a presumption of undue influence. *See infra* part I.B.

8. HIV and AIDS continue to rise among minority populations in particular. *See AIDS Among Racial/Ethnic Minorities—U.S. 1993; From the Centers for Disease Control and Prevention*, 272 JAMA 1162, 1163 (1994). In conjunction with the fact that most young persons do not have a will, *see supra* note 3, the rising incidence of AIDS is a harbinger of increased problems in the area of probate law, among others.

9. Angel, *supra* note 1.

10. *Id.* at 1. One such partner said:

[A]ll of a sudden, his family tried to blame me for his death. . . . First they tried to get money out of me. They said they'd just put me through two years of hell if I didn't settle. Then when I was about to give them a cash settlement, they upped it. . . . At first everyone was so *for* me. At one time, I was God to them, because I took care of him so well. But now that he's gone I'm just nothing.

*Id.* (emphasis in original).

11. *See* Dorothy Nelkin et al., *Introduction: A Disease of Society*, in *A DISEASE OF SOCIETY: CULTURAL AND INSTITUTIONAL RESPONSES TO AIDS* 1, 1 (Dorothy Nelkin et al. eds., 1991) ("[T]he effects of the [AIDS] epidemic extend far beyond medical and economic costs to shape the very ways we organize our individual and collective lives.").

challengers<sup>12</sup> use caring acts as evidence that the beneficiary of a will controlled the testator. Simply put, acts of care become evidence of undue influence.<sup>13</sup>

The current law of undue influence attempts to guard against a problem which is certainly a concern: society should not reward a person who manipulates another in order to garnish a share of her estate. To illustrate, consider another scenario.

David and Corey are an unmarried couple who have recently begun dating despite a large age difference. While Corey is convinced that they are in love with each other, David primarily continues the relationship because he enjoys power over Corey. He entices Corey's affections to the exclusion of her loved ones; he systematically lures her into a state of dependency by destroying her self-esteem and then bargains his continued endearment for a host of selfish ends: financial support, service, and self-aggrandizement. He continuously rebukes her in public and in private.

Corey becomes seriously ill and must be hospitalized. Realizing that her death is imminent, David coaxes Corey into changing her will. He ridicules her family and friends, calling them "callous and unconcerned," and admonishes her against rewarding their "leeching." David repeatedly chides that his faithful devotion should be reciprocated; he implies that his future loyalty depends upon her generosity. David contacts an attorney for Corey, and she eventually writes a will leaving David as her primary beneficiary.

In both of the scenarios presented, the testator is not fully free from control—both Pedro and Corey are influenced by the beneficiaries of their wills. Yet, despite their similarities, many people intuitively would want to uphold Pedro's will and overturn Corey's in the face of a challenge by relatives. In order to justify different outcomes, it is not enough to explain that in the second case the control exerted constituted undue influence.

*Black's Law Dictionary* defines "undue influence" as influence that "so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party."<sup>14</sup> Yet, both Pedro and Corey acted under the influences of a dominating party; both were dependent upon another and both acted under a state of diminished judgment. Neither's actions were completely voluntary.<sup>15</sup> Thus, the focus on individual autonomy is not sufficient grounds for upholding Pedro's will and not Corey's.

This Note proposes that the undue influence standard fails to adequately account for the role of caring. The difference between the two scenarios is that Sean cares about Pedro in a way that David does not care about Corey. The law fails society by inquiring primarily into the autonomous nature of the relationships while ignoring the caring

12. The challengers are usually people who would take property under intestate succession or under a previous will. *E.g.*, *In re Estate of Sarabia*, 270 Cal. Rptr. 560 (1990) (disinherited brother); *In re Estate of Sutura*, 199 Ill. App. 3d 531 (1990) (heirs at law); *Knutsen v. Krippendorf*, 862 P.2d 509 (Or. Ct. App. 1993) (disinherited mother).

13. *E.g.*, *Bolan v. Bolan*, 611 So. 2d 1051 (Ala. 1993); *Thompson v. Gammon (In re Estate of Beal)*, 769 P.2d 150 (Okla. 1989).

14. BLACK'S LAW DICTIONARY 1528 (6th ed. 1990). Although the law of undue influence varies from state to state, this is a fair statement of the standard's conceptual basis.

15. In one sense, both Pedro and Corey "willed" their wills. Neither was forced to write a will under direct threat, such as at gunpoint. Most people, however, probably would not conclude that their actions were wholly voluntary. In both cases Pedro and Corey felt subtle pressures to conform their wills to the expectations of the dominating party.

nature.<sup>16</sup> Further, courts frequently translate acts of care into evidence that the one-caring unduly influenced the cared-for,<sup>17</sup> or, worse yet, courts use caring acts to support a presumption of undue influence.<sup>18</sup>

The standard of undue influence would more closely conform with human intuition and experience if it were grounded in part on an alternative theoretical framework to that of autonomy, namely, the ethic of care. Together, the theories of autonomy and care provide a more intuitive and complete picture of human relationships.

A two-pronged standard of undue influence rises from joint reliance on the theories of autonomy and care. In addition to determining whether the testator's autonomy has been compromised, courts should also probe the nature of the relationship between the testator and the influencer to determine if it was a caring one. Evidence of a caring relationship ought to counterbalance evidence that a testator's autonomy was diminished.

Part I of this Note outlines the current law of undue influence: the general standard, the use of a presumption of undue influence, and the law's application to the scenarios posed here. Part II demonstrates how the standard of undue influence is grounded primarily in autonomy theory and discusses the resulting inadequacies of near-exclusive reliance on autonomy theory. Part III introduces care theory, and contrasts the theories of autonomy and care. Finally, Part IV proposes a care-sensitive addition to the undue influence standard, and discusses how courts could apply a two-pronged test.

## I. CURRENT LAW OF UNDUE INFLUENCE

The freedom of testamentary disposition is a basic principle of property law. Though not a constitutional right,<sup>19</sup> many states recognize freedom of testation as a deeply ingrained tradition in our society.<sup>20</sup> As a result, most courts will dispose of property according to the perceived wishes of the testator.<sup>21</sup>

There are, however, certain limits on a testator's freedom to devise her property.<sup>22</sup> Some of the substantive grounds upon which a court may decide to set aside a will

16. To make matters worse, undue influence law usually grants a great deal of discretion to the trial judge. Biased judges have exacerbated the problem for unpopular populations: couples of mixed races, homosexuals, adulterers, unmarried heterosexual couples, etc. For a further discussion, see generally Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1982).

17. See, e.g., *Bolan*, 611 So. 2d 1051; *Knowles v. Binford*, 298 A.2d 862 (Md. 1973); *Thompson*, 769 P.2d 150; *Knutsen v. Krippendorf*, 862 P.2d 509 (Or. Ct. App. 1993).

18. E.g., *In re Estate of Churik*, 397 A.2d 677, 681 (N.J. Super. Ct. App. Div. 1978) (Halpern, J., dissenting) ("The 'care and attention' [defendant] gave to testatrix is more consistent with the view that [the defendant] stood in a confidential relationship to her which, in turn, brings into play the presumption of undue influence."), *aff'd*, 397 A.2d 655 (N.J. 1979); see *infra* part II.B.

19. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."). *But cf. Hodel v. Irving*, 481 U.S. 704, 717 (1987) ("In holding that complete abolition of a particular class of property may be a taking, we reaffirm the continuing validity of the long line of cases recognizing the States' . . . broad authority to adjust the rules governing the descent and devise of property.").

20. E.g., *In re Fritschi's Estate*, 384 P.2d 656, 659 (Cal. 1963) ("[T]he right to testamentary disposition of one's property is a fundamental one . . ."); *Churik*, 397 A.2d at 680 ("[The testator] is free to leave the estate to anyone she pleases so long as it is accomplished in accordance with law and without coercion or undue influence . . ."); *Knutsen*, 862 P.2d at 517 ("[A] testator has a legal right to dispose of her property as she sees fit.").

21. Cf. *Neill v. Brackett*, 126 N.E. 93 (Mass. 1920) (upholding grantor's will for lack of evidence indicating fraud or undue influence); *Whitworth v. Kines*, 604 So. 2d 225 (Miss. 1992) (upholding deed based on grantor's mental capacity and lack of confidential relationship with grantee).

22. Courts may use various rules of construction, such as the rule against perpetuities, to frustrate a testator's intent. See, e.g., J.H.C. MORRIS & W. BARTON LEACH, *THE RULE AGAINST PERPETUITIES* (2d ed. 1962).

include lack of testamentary capacity, fraud, and undue influence.<sup>23</sup> These judicial tools are intended to “ensure that the wishes and choices of the testator are truly his own and not those of some other person.”<sup>24</sup>

Through the undue influence standard, the law attempts to ensure that the testator was free from the controlling influence of another. Such a controlling influence, in effect, destroys the testator’s freedom of choice and substitutes the influencer’s own will for that of the testator. The influence is similar to fraud, in that the will does not entirely reflect the wishes of the testator alone but is instead a product of manipulation or deception.<sup>25</sup> It is difficult, however, to ferret out just what portion of the testator’s will resulted from her free choice and what portion did not.<sup>26</sup> Hence, proof of undue influence tends to be circumstantial and indirect.<sup>27</sup>

This Part first discusses the general undue influence standard, followed by a discussion of the use of a presumption of undue influence. It concludes by applying the standard to the scenarios posed in the Introduction.

### A. General Undue Influence Standard

Generally, courts presume that the testator was competent and free from influence.<sup>28</sup> Thus, a challenger must prove by a preponderance of the evidence that undue influence has occurred in order to set aside the will.<sup>29</sup>

As a general inquiry into the question of undue influence, courts employ what might be called the “will substitution test”: Was the testator’s mind so controlled by another person that his will is actually the will of the other person?<sup>30</sup> There need not be any direct evidence of coercion, physical force, or explicit threats in order to successfully prove

23. Some courts may also set aside a will based on what are essentially moral grounds after finding evidence of a meretricious relationship. See Joseph W. deFuria, Jr., *Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200 (1989). For a further discussion of meretricious relationships, see *infra* notes 51-53, 127, 205-06 and accompanying text.

24. deFuria, *supra* note 23, at 201.

25. See *In re Porter's Estate*, 235 P.2d 894, 897 (Or. 1951) (“This court has repeatedly stated that ‘undue influence is a species of fraud’ . . .”).

26. After a court finds that undue influence has occurred, it will usually invalidate only those parts of the will which were the product of the undue influence—although this is often the entire will. *E.g.*, *In re Estate of Auen*, 35 Cal. Rptr. 2d 557 (Ct. App. 1994); see also Alan R. Gilbert, Annotation, *Partial Invalidity of Will: May Parts of Will Be Upheld Notwithstanding Failure of Other Parts for Lack of Testamentary Mental Capacity or Undue Influence*, 64 A.L.R.3d 261 (1975).

27. *E.g.*, *In re Estate of Davidson*, 839 S.W.2d 214, 217 (Ark. 1992) (“Undue influence is generally difficult of proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator . . .” (quoting *Hyatt v. Wroten*, 43 S.W.2d 726, 728 (Ark. 1931)); *Porter*, 235 P.2d at 897 (“Those who undertake to substitute their will for that of a testator do not ordinarily shout their plans . . . from the rooftops. . . [Thus, undue influence] is established by proof of circumstances . . .”); see also *Estate of Ramsey v. Waudby*, 105 N.W.2d 657, 659 (Iowa 1960); *Holland v. Traylor*, 227 So. 2d 829, 833 (Miss. 1969); *Thompson v. Gammon (In re Beal's Estate)*, 769 P.2d 150, 154 (Okla. 1989).

28. *E.g.*, *Leimbach v. Allen*, 976 F.2d 912 (4th Cir. 1992); *Smith v. Vice*, 641 So. 2d 785 (Ala. 1994); *Knowles v. Binford*, 298 A.2d 862 (Md. 1973).

29. *E.g.*, *In re Estate of Gelonese*, 36 Cal. App. 3d 854 (1974); *Peterson v. Peterson*, 432 N.W.2d 231 (Neb. 1988); *In re Fechter's Estate*, 277 N.W.2d 143 (Wis. 1979); *Waters v. Holkan*, 679 P.2d 470 (Wyo. 1981).

30. *E.g.*, *Thompson*, 769 P.2d at 153-54 (“[I]t is a well settled rule that undue influence such as to invalidate a will must destroy the free agency of the maker and in effect substitute the will of another for that of the testator.” (citations omitted)); see also *In re Estate of Sarabia*, 270 Cal. Rptr. 560 (1990); *In re Estate of Larendon*, 30 Cal. Rptr. 697 (Ct. App. 1963); *In re Will of Kohn*, No. 1024-K, 1993 Del. Ch. LEXIS 88 (Del. Ch. May 19, 1993); *Beatty v. Strickland*, 186 So. 542 (Fla. 1939); *In re Estate of Sutura*, 199 Ill. App. 3d 531 (1990); *Succession of Dowling*, 633 So. 2d 846 (La. Ct. App. 1994); *Knowles*, 298 A.2d 862.

undue influence.<sup>31</sup> Instead, proof of undue influence can include evidence of subtle pressures, such as manipulation or persuasion.<sup>32</sup> Since more subtle forms of influence often occur “behind the scenes,” courts and juries are forced to rely upon circumstantial evidence.<sup>33</sup> Accordingly, courts have developed a variety of factors plaintiffs may use in order to carry the burden of proving undue influence, including: opportunity, motive, naturalness, and susceptibility.<sup>34</sup>

The first factor, opportunity, encompasses a broad set of circumstances involving the influencer’s access to the testator. These circumstances include the testator’s dependency on the influencer,<sup>35</sup> the testator-influencer living arrangements,<sup>36</sup> the influencer’s access to the testator, and the mere existence of a close, personal relationship between the influencer and the testator.<sup>37</sup> As a result, plaintiffs can establish opportunity relatively easily. Most likely, everyone named as a beneficiary will have had the opportunity to influence the testator. Further, if the influencer stands in a confidential relationship<sup>38</sup> with the testator, opportunity to influence is more easily proven.<sup>39</sup>

Motive, or the disposition to influence, is the second factor courts use. In most undue influence challenges, the defendant will also be the alleged influencer. As a future beneficiary of the will, the defendant presumably had something to gain as a result of his influence.<sup>40</sup> In some cases, plaintiffs allege that the influencer manipulated the testator

31. *E.g.*, *Thompson*, 769 P.2d at 154 (“To establish undue influence it is not necessary that there be direct testimony that threats were made or even persistent entreaty or persuasion was brought to bear upon the mind of the testatrix.” (quoting *McCarty v. Weatherly*, 204 P. 632, 638 (Okla. 1922))); *see also* *Neill v. Brackett*, 126 N.E. 93, 94 (Mass. 1920) (“Any species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence.”).

32. *E.g.*, *Knutsen v. Krippendorf*, 862 P.2d 509, 515 (Or. Ct. App. 1993) (“Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence.”).

33. *See supra* note 27; *see also* *Holland v. Traylor*, 227 So. 2d 829, 834 (Miss. 1969) (“From its very nature, evidence to show undue influence must be largely circumstantial. Undue influence is an intangible thing, which only rarely is susceptible of direct or positive proof.”).

34. *Leimbach v. Allen*, 976 F.2d 912 (4th Cir. 1992); *Larendon*, 216 Cal. App. 2d 14; *Neill*, 126 N.E. 93; *Thompson*, 769 P.2d 150. Because freedom of testation is the object of state law, the undue influence standard differs from one jurisdiction to another. The names and contents of the factors vary as a result.

Other factors include the existence of a confidential relationship (*e.g.*, *Thompson*, 769 P.2d at 154) and participation in the will-making process (*e.g.*, *In re Estate of Loomis*, 810 P.2d 126, 129 (Wyo. 1991)). Many courts, however, hold that these elements do more than provide general evidence for a claim of undue influence—they raise a *presumption* of undue influence which, in turn, shifts the burden of proof to the defendant. *See infra* part II.B.

35. *E.g.*, *In re Will of Kohn*, No. 1024-K, 1993 Del. Ch. LEXIS 88, at \*18 (Del. Ch. May 19, 1993).

36. *E.g.*, *Larsen v. Olinger*, 96 N.W.2d 489, 492 (Wis. 1959) (stating that opportunity arose when testator and influencer were living together).

37. *E.g.*, *Burkland v. Hill*, 504 P.2d 1143, 1147 (Wash. Ct. App. 1972) (stating that defendant had opportunity to influence because testator and defendant were “constantly together”).

An ongoing sexual relationship would certainly provide an opportunity for undue influence. *E.g.*, *In re Kelly’s Estate*, 46 P.2d 84 (Or. 1935). Intimate relations outside the context of marriage may be even more suspect. *Id.* at 92 (“But, since the relationship which arises out of illegal amours may provide favorable opportunities for the exertion of undue influence, proof of the relationship is admissible when undue influence is charged.” (emphasis added)).

38. *See infra* part I.B.

39. *E.g.*, *In re Estate of Loomis*, 810 P.2d 126, 129 (Wyo. 1991). A “confidential relationship” is one in which one party is dependent upon another superior party. *See infra* note 60 and accompanying text.

40. The fact that the influencer is wealthy does not preclude a finding of motive. *E.g.*, *Knowles v. Binford*, 298 A.2d 862, 866 (Md. 1973) (“The fact that [the defendants] were well-to-do did not necessarily extinguish the spark of cupidity.”). *But see* *Fetcher v. East Wise. Trustee Co.*, 277 N.W.2d 143, 151 (Wis. 1979) (“A disposition to unduly influence a testatrix is more than a mere desire to obtain a share of the estate. It implies a willingness to do something wrong or unfair.” (citing *In re Estate of Phillips*, 112 N.W.2d 591, 595 (Wis. 1961))).

on behalf of a third party beneficiary.<sup>41</sup> In these cases, it is potentially more difficult to establish that the influencer had a motive for her actions.<sup>42</sup>

The third factor, naturalness, centers on the question of whether the beneficiary of the will is the natural object of the testator's affections and beneficence. Generally, in accordance with societal expectations about what is reasonable, courts find that a parent, child, or sibling is more naturally the object of a testator's affection than a stranger or a casual acquaintance.<sup>43</sup> Sometimes courts inquire into whom the testator might have considered as the natural objects of his affections.<sup>44</sup>

The fourth factor, susceptibility, is related to competence. If the testator was of weak mind, courts infer that he was more susceptible to the preying influences of another.<sup>45</sup> Susceptibility includes the idea that an influencer had a position of advantage over the testator: the influencer was the testator's lawyer or doctor, someone with significant control over the testator, or even someone merely in a confidential relationship with the testator.<sup>46</sup>

Beyond these four factors, some courts admit evidence of the influencer's bad character or his use of "improper devices."<sup>47</sup> For instance, the minister of a cult-like religious organization who entices unsophisticated persons to devise their property to him in exchange for "saving their souls" might be employing improper devices.<sup>48</sup> Other examples include stirring up resentment against the testator's heirs<sup>49</sup> and threatening to abandon the testator.<sup>50</sup> Though related to the naturalness and susceptibility factors,

41. *E.g.*, *In re Estate of Sutera*, 199 Ill. App. 3d 531, 536 (1990).

42. *E.g.*, *In re Estate of Davidson*, 839 S.W.2d 214, 218 (Ark. 1992) ("Without some assets flowing to particular parties sought to be benefited by the supposed culprit, an undue influence claim is hard to sustain."). Yet, there may be instances in which a niece, nephew, friend, etc. is the third party, in turn, providing an adequate motive for undue influence. *See, e.g.*, *Burkland v. Hill*, 504 P.2d 1143, 1147 (Wash. Ct. App. 1972) ("The contingent beneficiary of one-half of a substantial estate was [the defendant's] sister . . . [which is] consistent with [the defendant's] desire as expressed in her own will . . .").

43. *E.g.*, *Davidson*, 839 S.W.2d at 218 ("The expression 'unjust and unnatural will' is usually applied when a testator leaves his estate, or a large portion of it, to strangers, to the exclusion of natural objects of his bounty without any apparent reason." (quoting *Abel v. Dickinson*, 467 S.W.2d 154, 156 (Ark. 1971))); *State v. Beaudry*, 191 N.W.2d 842, 845 (Wis.) (defining "natural object" as one which reasonable people would believe were natural), *cert. denied*, 407 U.S. 912 (1972); *see also* *Neill v. Brackett*, 126 N.E. 93, 94 (Mass. 1920); *In re Estate of Churik*, 397 A.2d 677, 679-80 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 397 A.2d 655 (N.J. 1979); *In re Will of Kaufman*, 20 A.D.2d 464, 484-85 (N.Y. App. Div. 1964).

44. *E.g.*, *In re Estate of McCauley*, 415 P.2d 431, 439 (Ariz. 1966) ("[A] will is unnatural only when it is contrary to what the testator would have been expected to make . . . however much it may differ from the ordinary actions of people in similar circumstance."); *Llewellyn's Estate v. Cheesewright*, 189 P.2d 822, 841 (Cal. Dist. Ct. App. 1948).

45. *E.g.*, *In re Estate of Larendon*, 30 Cal. Rptr. 697, 700 (Ct. App. 1963); *In re Will of Kohn*, No. 1024-K, 1993 Del. Ch. LEXIS 88, at \*19-21 (Del. Ch. May 19, 1993); *Neill*, 126 N.E. 93; *Holland v. Traylor*, 227 So. 2d 829, 835 (Miss. 1969); *Knutsen v. Krippendorf*, 862 P.2d 509, 517 (Or. Ct. App. 1993); *In re Estate of Shabley*, 189 N.W.2d 460, 462 (S.D. 1971).

46. *E.g.*, *Estate of Elmer v. Elmer*, 210 N.W.2d 815, 819 (N.D. 1973) (finding inference of susceptibility from domination or confidential relationship); *Fechter v. East Wisc. Trustee Co.*, 277 N.W.2d 143, 151 (Wis. 1979) (influencer was testator's lawyer); *Glass v. Birkeland*, 270 N.W.2d 386, 393 (Wis. 1978) (stating that susceptibility is found when the testator's "natural defenses are lowered leaving [the testator] unable to resist the suggestions of a stronger, more determined individual"). *But see In re Estate of Madsen*, 535 N.W.2d 888, 893 (S.D. 1995) (holding that confidential relationship alone is not sufficient proof of susceptibility).

47. *E.g.*, *In re Estate of Swenson*, 617 P.2d 305 (Or. 1980); *In re Reddaway's Estate*, 329 P.2d 886 (Or. 1958).

48. *See generally In re Estate of Baker*, 131 Cal. App. 3d 471 (1982) (finding that an influencer's convincing the testator that the influencer can supernaturally contact dead relatives was evidence of undue influence).

49. *Knowles v. Binford*, 298 A.2d 862, 864 (Md. 1973). In *Knowles*, beneficiary told testator that none of her family "cared about her and that her people were no good" and prevented contact with her relatives. *Id.*; *see also* *Byran v. Norton*, 265 S.E.2d 282 (Ga. 1980); *In re Estate of Brown*, 640 P.2d 1250, 1255 (Kan. 1982).

50. *Cook v. Loftus*, 414 N.E.2d 581, 586 (Ind. Ct. App. 1981) (finding beneficiary used undue influence when threatening to place testator in nursing home); *cf. In re Estate of Sutera*, 199 Ill. App. 3d 531 (1990) (finding undue influence when decedent was threatened with exposure of his homosexuality).



evidence of bad character shifts the emphasis of the inquiry from the state of the testator to the character of the influencer.

Finally, some courts allow evidence that the testator and the benefactor were in a meretricious relationship when deciding whether undue influence existed.<sup>51</sup> A meretricious relationship is “a sustained sexual relationship between two persons which is not sanctified by lawful marriage.”<sup>52</sup> This legal device stems from a moral interest in the promulgation of the institution of marriage.<sup>53</sup>

A defendant can counter evidence of undue influence based on these factors by introducing evidence to the contrary. For instance, a defendant might demonstrate that the testator was mentally alert or of strong will in order to counter a claim of susceptibility.<sup>54</sup> Alternatively, she could attempt to persuade the jury that her influence was not undue, but instead constituted something akin to reasonable persuasion.<sup>55</sup>

Unfortunately, this defensive evidence is often insufficient protection for a benefactor who engaged in the sort of caring activity described in the Introduction.<sup>56</sup> In many cases, the defendant must do more than raise doubt about the plaintiff’s case because many courts employ a presumption of undue influence upon finding one or two factors. The presumption shifts the burden of proof to the defendant to prove that she did not unduly influence the decedent.

### B. Presumption of Undue Influence

The presumption of undue influence is a judicial tool courts use to counter the fact that undue influence is difficult to prove directly.<sup>57</sup> A presumption of undue influence arises when characteristics of relationships that the law does not want to reward are present in the testator-beneficiary relationship. If these hallmark characteristics exist, then courts presume the existence of undue influence and shift the burden of proof from the plaintiff to the defendant.<sup>58</sup> The proof needed to establish a presumption of undue influence, indeed whether the presumption is available at all, varies from state to state. Courts which allow the presumption generally presume undue influence if a confidential relationship existed between the testator and the influencer and “suspicious circumstances” existed around the preparation of the will, such as the influencer’s direct or indirect participation.<sup>59</sup>

51. See *Locke v. Sparks*, 81 So. 2d 670 (Ala. 1955); *Thompson v. Gammon (In re Estate of Beal)*, 769 P.2d 150 (Okla. 1989). In many of the courts which still allow this evidence, the existence of a meretricious relationship is not sufficient to give rise to a presumption of undue influence. *E.g., id.* at 673.

52. deFuria, *supra* note 23, at 201 n.8.

53. *Id.* at 200-01.

54. *Taylor v. Welch*, 609 So. 2d 1225 (Miss. 1992); *Whitworth v. Kines*, 604 So. 2d 225 (Miss. 1992); *In re Estate of Churik*, 397 A.2d 677 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 397 A.2d 695 (N.J. 1979).

55. *E.g., In re Will of Liebl*, 617 A.2d 266, 270 (N.J. Super. Ct. App. Div. 1992), *cert. denied*, 627 A.2d 1138 (N.J. 1993); *Nease v. Clark*, 488 P.2d 1396, 1401 (Or. Ct. App. 1971) (holding that influence which arose from “gratitude and affection” and was the product of “mutual devotion” was not undue).

Despite the appearance that defendants could use the reasonable persuasion defense to introduce evidence of caring, this tactic is not adequate in light of the nature of caring and the presumption of undue influence. See *infra* text accompanying note 220.

56. For a further discussion, see *infra* text accompanying note 219-20.

57. See *supra* note 27 and accompanying text.

58. *E.g., In re Porter's Estate*, 235 P.2d 894, 897, 910 (Or. 1951).

59. *E.g., Bolan v. Bolan*, 611 So. 2d 1051 (Ala. 1993); *In re Estate of Sarabia*, 270 Cal. Rptr. 560 (1990); *In re Estate of Auen*, 35 Cal. Rptr. 2d 557 (Ct. App. 1994); *Estate of Ramsey v. Waudby*, 105 N.W.2d 657 (Iowa 1960); *Neill v. Brackett*, 126 N.E. 93 (Mass. 1920); *Madden v. Rhodes*, 626 So. 2d 608 (Miss. 1993); *In re Estate of Novak*, 458 N.W.2d 221 (Neb. 1990); *In re Estate of Churik*, 397 A.2d 677 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 397 A.2d 655 (1979);

A confidential relationship is one in which one party is in a position of superiority over the other.<sup>60</sup> Paradigmatic examples include the doctor-patient,<sup>61</sup> lawyer-client,<sup>62</sup> trustee-beneficiary,<sup>63</sup> religious advisor-layperson,<sup>64</sup> and conservator-ward<sup>65</sup> relationships. In the undue influence context, however, courts do not limit confidential relationships to these well-defined categories. Instead, confidential relationships can include *any* relationship wherein the influencer is in a superior position and the testator is significantly dependent.<sup>66</sup>

There is one stark exception to this expansive definition of a confidential relationship: courts rarely find that spousal relationships are confidential,<sup>67</sup> despite the fact that equal levels of dependency may exist in marital and nonmarital relationships.<sup>68</sup> In this context, the law discriminates in favor of marital status, presenting a particularly problematic obstacle to gay and lesbian couples, whose relationships the law has yet to recognize.<sup>69</sup>

Suspicious circumstances encompass a wide range of situations involving a benefactor's opportunity to unduly influence the testator.<sup>70</sup> Courts frequently focus on the benefactor's role in the will-making process.<sup>71</sup> As a result, showing suspicious circumstances is usually an easy evidentiary burden: the benefactor contacted the

Thompson v. Gammon (*In re Estate of Beal*), 769 P.2d 150 (Okla. 1989); Knutsen v. Krippendorf, 862 P.2d 509 (Or. Ct. App. 1993); Porter, 235 P.2d 894.

60. *E.g.*, Madden, 626 So. 2d at 617 (stating that a confidential relationship exists "[w]henver there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former" (citing Hendricks v. James, 421 So. 2d 1031, 1041 (Miss. 1982))).

61. *E.g.*, *id.* at 618; *see also* Whitworth v. Kines, 604 So. 2d 225, 231 (Miss. 1992) (Hawkins, J., dissenting).

62. *E.g.*, Madden, 626 So. 2d at 618; Thompson, 769 P.2d at 155.

63. *See generally* Whitworth, 604 So. 2d at 231 (Hawkins, J., dissenting).

64. *See* Estate of Ramsey v. Waudby, 105 N.W.2d 657, 659 (Iowa 1960) (citing Graham v. Courtright, 161 N.W. 774, 778 (Iowa 1917)).

65. *E.g.*, Thompson, 769 P.2d at 155; *see also* Whitworth, 604 So. 2d at 231 (Hawkins, J., dissenting).

66. *E.g.*, Burns v. Lucich, 638 S.W.2d 263, 270 (Ark. Ct. App. 1982) ("[Confidential relationships] are not limited to legal control but are supposed to arise 'whenever there is a relation of dependence or confidence.'" (quoting Gillespie v. Holland, 40 Ark. 28 (1982))); Madden, 626 So. 2d at 617; Thompson, 769 P.2d at 155 ("'Confidential relation' is not confined to any specific association of parties." (quoting *In re Null's Estate*, 153 A. 137 (Pa. 1930))).

67. One court held that a confidential relationship is one beyond that which "naturally exists by virtue of the usual husband-wife status . . . . [T]he facts and circumstances required to . . . raise a presumption where a husband-wife relationship exists may often be greater and perhaps of a different nature than where another relationship exists, such as a doctor-patient . . . ." Snell v. Seek, 250 S.W.2d 336, 342 (Mo. 1952); *see also* Butler v. Butler, 347 A.2d 477, 480-81 (Pa. 1975) (holding that a marital relationship does not create a confidential relationship *per se*); *cf.* Lamborn v. Kirkpatrick, 50 P.2d 542, 544 (Colo. 1935) (holding that relationship between testator and beneficiary of will, where there was no relation of blood or marriage, raises a presumption of undue influence that can be rebutted by beneficiary); Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920) (holding that mere opportunity of wife is insufficient to submit undue influence claim to jury); McKee v. Stoddard, 780 P.2d 736, 739-40 (Or. Ct. App. 1989) (holding that husband and wife relationship alone is insufficient to be confidential).

68. Burns, 638 S.W.2d at 270; Madden, 626 So. 2d at 617 (finding that a confidential relationship existed despite the defendant's argument that she and the testator were "merely friends").

69. One attorney for a gay AIDS patient conceded a large settlement to the testator's parents in lieu of the testator's partner. The parents claimed a presumption of undue influence arose because the defendant-lover was in a confidential relationship with their son. *AIDS Deaths Cause Tug-of-War*, *supra* note 6. He commented, "This case really made me think . . . . Maybe none of these problems would have arisen if these two [gay men] had been legally married." *Id.* at 7.

70. Some courts include many factors under the heading of "suspicious circumstances." *E.g.*, Knutsen v. Krippendorf, 862 P.2d 509, 516-17 (Or. Ct. App. 1993) (stating that "suspicious circumstances" includes procurement, advice, secrecy, change in attitude of testator, planning, unnaturalness of disposition, and susceptibility); *see also supra* note 59 and accompanying text.

71. *E.g.* Bolan v. Bolan, 611 So. 2d 1051 (Ala. 1993); Estate of Sarabia, 270 Cal. Rptr. 560 (1990); Neill, 126 N.E. 93; Madden, 626 So. 2d 608; *In re Estate of Novak*, 458 N.W.2d 221 (Neb. 1990).

attorney, was present at the attorney-client meetings, or was an active participant in the execution of the will.<sup>72</sup>

After the plaintiff presents evidence of a confidential relationship and suspicious circumstances, there arises a presumption that undue influence has occurred, thus shifting the burden of proof to the defendant.<sup>73</sup> Courts have varied on the standard of proof necessary to rebut a presumption of undue influence. Some courts allow the defendant to rebut the presumption with a preponderance of evidence; many require clear and convincing evidence; and some courts go so far as to insist that the defendant rebut the presumption beyond reasonable doubt.<sup>74</sup> Even if rebutted, some courts hold that the presumption does not disappear, but remains as an inference of undue influence for the jury to consider.<sup>75</sup> Thus, in states where the presumption of undue influence is available, plaintiffs may employ a powerful legal tool in order to set aside the testator's will.

### C. Application of the Current Standard

Under the current law of undue influence, plaintiffs plainly can use acts of care against a defendant. Consider the two hypothetical scenarios posed in the Introduction.

Notwithstanding the presumption of undue influence, challengers against Sean and David would probably succeed using the general factors of undue influence. By virtue of their confidential relationships, both Sean and David had the opportunity to influence. Since both Sean and David were the primary beneficiaries of the testators' will, both men had the motive to unduly influence. Sean would likely fail the naturalness factor because Pedro's parents are more apt to be the natural objects of Pedro's affection than his roommate.<sup>76</sup> Likewise, David would have difficulty passing the naturalness factor because many people would think it unnatural for a testator to leave her entire estate to a person whom she had only recently met, in lieu of relatives or longstanding friends. Finally, since illness weakened both Pedro's and Corey's minds, both may have been susceptible to undue influence. In short, a strong case for undue influence exists against Sean and David based on the four factors.<sup>77</sup>

Challengers to either Pedro's or Corey's will would in all likelihood succeed using a presumption of undue influence. As a consequence of illness, Sean and David were in superior positions with respect to Pedro and Corey, which resulted in excessive

72. See, e.g., *Estate of Ramsey v. Waudby*, 105 N.W.2d 657, 659 (Iowa 1960) ("[W]here the dominant party, in [a confidential relationship] initiates the preparation of the will, or gives directions as to its contents to the scrivener or writes it himself, in other words, is active either in its preparation or execution, and is made a beneficiary thereunder, a suspicion arises . . ." (citing *Graham v. Courtwright*, 161 N.W. 774, 778 (Iowa 1917))); *Estate of Padilla Gonzales v. Cantu*, 775 P.2d 1300, 1302-03 (N.M. Ct. App. 1988) (finding no undue influence or suspicious circumstances even though beneficiary was present at execution of will and participated in procurement of will). *But cf.* *Estate of Mann v. Smith*, 229 Cal. Rptr. 225 (Ct. App. 1986) (stating that a presumption of undue influence is not shown by "the mere fact of the beneficiary procuring an attorney . . . or mere presence at the execution of the will").

73. E.g., *In re Estate of Auen*, 35 Cal. Rptr. 2d 557 (Ct. App. 1994); *Neill*, 126 N.E. 93; *Whitworth v. Kines*, 604 So. 2d 225, 230 (Miss. 1992); *Burns v. Kabboul*, 595 A.2d 1153 (Pa. Super. Ct. 1991).

74. E.g., *Smith v. Welch*, 587 S.W.2d 593, 595 (Ark. 1980) (beyond reasonable doubt); *Sarabia*, 270 Cal. Rptr. 560 (preponderance); *Neill*, 126 N.E. 93 (clearest proof); *Whitworth*, 604 So. 2d at 230 (clear and convincing); *Burns*, 595 A.2d at 1165 (clear and convincing).

75. See, e.g., *Nemeth v. Banhalmi*, 466 N.E.2d 977 (Ill. App. Ct. 1984).

76. See *supra* notes 43-44 and accompanying text. This factor is compounded by prejudices against gay relationships. See *Sherman*, *supra* note 16.

77. If the courts adjudicating these cases permitted undue influence to be inferred from the existence of a meretricious relationship, further evidence would exist against Pedro and David. Both relationships described in this Note's Introduction were outside of the sanctity of marriage. See *supra* notes 51-53 and accompanying text.

dependence by the latter on the former and the emergence of two confidential relationships. Furthermore, suspicious circumstances surrounded the will since both Sean and David, the primary benefactors, participated in the will-making process.<sup>78</sup> Thus, a presumption of undue influence could be raised against Sean and David which would be difficult for either to overcome.

Either the general inquiry into factors of undue influence or the use of the presumption would probably lead a court to overturn both Pedro's and Corey's wills on the ground of undue influence. In light of the caring nature of Sean's acts towards Pedro, this result is counterintuitive and unjust. This Note proposes that the inadequacies of the undue influence standard result from the courts' sole reliance on the analytical framework—autonomy—which underlies the greater part of the current law.

## II. AUTONOMY AS A THEORETICAL FRAMEWORK OF UNDUE INFLUENCE

The current doctrine of undue influence rests primarily on values associated with the theory of autonomy. Indeed, autonomy theory serves as a foundation for a large portion of Anglo-American law, well beyond the scope of property rights.<sup>79</sup> Yet, overreliance on autonomy theory has serious disadvantages.

This Part first discusses the basic concepts of autonomy theory. Second, it demonstrates how the law of undue influence flows from those concepts. Finally, it highlights the limitations of the law of undue influence and their relation to the use of autonomy theory as its primary foundation.

### A. *The Theory of Autonomy*

The term "autonomy" is derived from Greek: *autos* ("self") and *nomos* ("rule").<sup>80</sup> The term originally referred to political autonomy, specifically, the self-ruling Greek city-states, in which citizens made the law instead of having it imposed upon them.<sup>81</sup>

Personal autonomy is an extension of political autonomy. It describes a notion of self-ruling individuals. Much like a self-ruling government, an autonomous individual "acts in accordance with a freely self-chosen and informed plan."<sup>82</sup> Similarly, a person with diminished autonomy "is in at least some respect controlled by others or incapable of deliberating or acting on the basis of his or her plans."<sup>83</sup>

Today, autonomy refers to "a set of diverse notions including self-governance, liberty rights, privacy, individual choice, liberty to follow one's will, causing one's own behavior, and being one's own person."<sup>84</sup> This Note, however, will focus on three primary concepts in the theory of autonomy: competence, freedom, and respect.<sup>85</sup> Taken together, these concepts form the basis of the undue influence standard.

78. Both Sean and David contacted a lawyer and set up a meeting between the lawyer and the testator. These facts alone are probably sufficient to constitute suspicious circumstances. See *supra* notes 59, 70-72 and accompanying text.

79. See generally David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991) (arguing that courts unwarrantedly confine constitutional religious liberty to a volitionalist interpretation).

80. TOM BEAUCHAMP & JAMES CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 67 (3d ed. 1989).

81. *Id.*

82. *Id.* at 68.

83. *Id.*

84. *Id.* at 67-68.

85. This Note will focus on the deontological derivation of autonomy theory most fully developed by Immanuel Kant.

Autonomy involves the competence, or ability, to rule one's self. Because ruling one's self is deciding how one ought to live, it is closely linked with an individual's capacity to reason.<sup>86</sup> It is through the use of rational thought that a person is able to make the decisions necessary to carry out a life-plan. The notion of a life-plan means acting on one's values and beliefs about the world.<sup>87</sup> Some beings are competent to make these decisions; others are not.<sup>88</sup>

Though necessary, competence alone is not sufficient for an individual to be deemed autonomous. In addition to having the ability to formulate a life-plan, an individual must also have the freedom to carry out that plan.<sup>89</sup> In other words, an autonomous individual is "free from both controlling interferences by others and personal limitations . . . that prevent meaningful choice."<sup>90</sup>

Some philosophers have termed the ability to act free from the controlling influence of others "voluntariness."<sup>91</sup> Yet, influence is a matter of degree: an individual can be

86. In the Kantian tradition, "autonomy" hinges upon the ability to reason. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 60-62, 96-98 (H.J. Paton trans., 1967) (1785) [hereinafter KANT, *GROUNDWORK*]; see also JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 78-86 (rev. ed. 1990).

For Kant, a "good" person is one who acts in accordance with universal law. KANT, *GROUNDWORK*, *supra*, at 59-86, 106. Universal law is derived by formulating maxims for possible action and testing those maxims against what he called the "categorical imperative." *Id.* at 86, 96 (discussed *infra* note 104). The only way an individual is competent to test maxims is through the use of reason. Thus, reason is necessary for moral action. *Id.* at 86.

The ability to reason is what distinguishes humankind from other animals. Because animals act only on instinct and not reason, they can never be autonomous. *Id.* at 60-63.

87. BEAUCHAMP & CHILDRESS, *supra* note 80, at 71.

88. For example, courts traditionally consider children not to be autonomous because they lack the fully developed capacity to reason. *E.g.*, Parham v. J.R., 442 U.S. 584, 603 (1988) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.").

89. Kant asserted that in order for a person to discern universal law to govern her individual action, her will must be free to employ reason. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 33-39 (Lewis White Beck trans., 1956) [hereinafter KANT, *CRITIQUE OF PRACTICAL REASON*]; KANT, *GROUNDWORK*, *supra* note 86, at 101. Thus, freedom of will is necessary for an individual to act morally since moral actions are those which are done in accordance with universal law. KANT, *CRITIQUE OF PRACTICAL REASON*, *supra*, at 34. Any other influencing force, beyond the motive of duty to adhere to universal law, resulted in what he called the "heteronomy of the will." *Id.* Such influencing forces include inclinations and impulses—the desire for happiness, sympathy, for instance. *Id.*; see also FREDERICK COPLESTON, S.J., *VOLUME VI: WOLFF TO KANT* 329 (1960).

Indeed, for Kant, if an individual acts *in accordance with duty*, but not *from the motive of duty*, his act, though reaching the same result in either case, is without moral worth. For example, if a person does not commit suicide because she is afraid of death, and not because it is her duty not to take her own life, she is acting only in accordance with duty and not from the motive of duty. For Kant, her refraining from suicide is not moral. KANT, *GROUNDWORK*, *supra* note 86, at 63-65.

Further, if a person were "cold in temperament and indifferent to the sufferings of others," or without sympathy, Kant would claim that her philanthropic acts contain higher moral worth because she acted solely from the motive of duty, and not from the inclination of feeling or sympathy. *Id.* at 66. This idea is in sharp contrast to the ethic of care, described *infra* part III, which allows the motive of empathy as a foundation for moral action.

90. BEAUCHAMP & CHILDRESS, *supra* note 80, at 68.

91. *Id.* at 106-07.

persuaded,<sup>92</sup> manipulated,<sup>93</sup> or coerced.<sup>94</sup> An individual's autonomy is increasingly diminished along this continuum of influence. Certainly, some types of influence, like persuasion, are not sufficient to fully compromise autonomy.<sup>95</sup> Others, like coercion, clearly compromise a person's autonomy.<sup>96</sup> Considerable debate arises in instances of manipulation.<sup>97</sup> Autonomy theorists suggest that the less an individual is influenced, the more free she is to rule herself.<sup>98</sup>

In addition to freedom from the control of others, autonomy theory concerns internal freedom. A person lacks autonomy if she allows intrinsic forces, such as passion, to subjugate her ability to reason. To be fully self-ruling, an autonomous individual must live in accordance with the dictates of reason alone.<sup>99</sup> Thus, a free individual is one who is free from both extrinsic forces, such as deception, and intrinsic forces, such as fear.

In order for a particular individual's autonomy to flourish, other individuals and society as a whole must respect that autonomy. Respect for autonomy demands that individuals "treat[] agents so as to allow or to enable them to act autonomously."<sup>100</sup> In other words, the respecter must regard competent individuals as such, and allow them to act freely.

The principle of respect for persons first involves respecting a person's capacity to reason. A person respects another's autonomy by treating that person as an end unto herself, and never simply as a means to an end.<sup>101</sup> Take, for example, a waiter at a restaurant. A patron is seated and the waiter takes her order. In this instance, the patron is using the waiter as a means to an end: she is using him to bring her food. She is also, presumably, treating him as an end in himself: she respects his capacity to reason.<sup>102</sup> He is not *just* a tool used for getting food, he is also a self-ruling person in his own right, and

92. At least two thinkers define persuasion as a "weak" form of influence wherein a person "must be convinced to believe in something through the merit of reasons advanced by another person." *Id.* at 108.

Note the reliance on a person's ability to reason in this definition. The definition implies that the appeal to other facilities, such as emotion, is somehow improper. By tapping into an individual's feelings, a person is doing something more spurious than attempting to persuade—he is manipulating, or worse.

93. "Manipulation" is difficult to define. Manipulation can occur when a person plays on another's inclinations or feelings in order to achieve his own ends. At other times, manipulation can be closely linked with the idea of deception. When a person manipulates facts or circumstances, he is deceiving the other into relying on a false assessment of the world. In a way, the manipulated person is still self-ruling—she is still making decisions about how she ought to live. We cannot conclude, however, that she is fully autonomous. Her decisions are based, in part, on a false view of the world. She is controlled by the manipulator to the extent that he has shaped this false view. *See id.* This idea is closely related to the discussion of respect for autonomy. *See infra* text accompanying notes 100-05.

94. For the purpose of undue influence, some courts suggest that coercion involves the physical or mental domination of another. *E.g., In re Will of Liebl*, 617 A.2d 266, 270 (N.J. Super. Ct. App. Div. 1992) (stating that "coercion . . . may be moral, physical, or mental, or all three"). The definition of "coercion," however, is the subject of some debate. While some argue that coercion includes both direct and indirect pressures, *see, e.g., Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (stating that "[peer pressure], though subtle and indirect, can be as real as any overt compulsion"), others confine coercion to direct threats. *See, e.g., id.* at 2684 ("I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . .") (Scalia, J., dissenting); *see also* Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440 (Sidney Morgenbesser et al. eds., 1969).

95. *See supra* note 92. Under this definition of persuasion, the individual is merely presented with alternative courses of action from which she is free to select. She remains self-ruling because she is freely deciding how she ought to live.

96. BEAUCHAMP & CHILDRESS, *supra* note 80, at 108.

97. This is the central question in the law of undue influence: When does influence become undue? The law attempts to take account of benign influences, such as reasonable persuasion. *See supra* note 55. *But see infra* text accompanying note 219. For a further discussion of the application of autonomy theory to the law of undue influence, *see infra* part II.B.

98. BEAUCHAMP & CHILDRESS, *supra* note 80, at 67-74.

99. *See supra* note 86.

100. BEAUCHAMP & CHILDRESS, *supra* note 80, at 71.

101. *See infra* note 104.

102. As noted, for Kant, it is only one's capacity for reason which gives rise to an obligation of respect. *See supra* notes 86, 89; *infra* note 104.

thus deserves respect. She recognizes that he too has the capacity and freedom to reason and thus create his own life-plan.

Respect for persons also means allowing other autonomous individuals to act freely. If the customer in the previous example had enslaved the employee, she would be failing to respect his autonomy, because she would be restricting his extrinsic freedom. Instead, the waiter and the patron are engaged in a contractual relationship: he serves her the food in exchange for compensation. Assuming that both were free to enter into this relationship, each respects the other as a person.

Respect for autonomy gives rise to a picture of society as a collection of autonomous individuals. Each individual is allowed to pursue her own life-plan, at least and to the extent that this pursuit does not dramatically interfere with the plans of other individuals.<sup>103</sup> Autonomous individuals adhere to the rule of universalizability.<sup>104</sup> In short, this rule dictates that each individual act such as every other individual ought to act in like circumstances.<sup>105</sup>

Also included in an autonomy-based conception of society is a strong focus on individual rights.<sup>106</sup> An autonomous individual recognizes inherent value in the capacity to reason in other individuals which limits the acceptability of her actions towards those individuals. An individual's inherent value, the capacity to reason, erects barriers around that person which others may not cross without justification. These barriers are better known as rights, and they require that others take responsibility to limit their actions accordingly.<sup>107</sup>

Autonomy theory conceives of society as the amalgamation of little pockets of individual self-rulers who are connected to one another only by means which do not

103. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 47 (W. Hastie, B.D. trans., 1974) [hereinafter KANT, *THE PHILOSOPHY OF LAW*] ("[I]f a certain exercise of Freedom is itself a hindrance of the Freedom that is according to universal Laws, it is wrong; and the compulsion or constraint which is opposed to it is right, as being a *hindering of a hindrance of Freedom* . . ." (emphasis in original)).

104. Kant termed the rule of universalizability the "categorical imperative." KANT, *GROUNDWORK*, *supra* note 86, at 86 ("Act only on that maxim through which you can at the same time will that it should become a universal law.").

Kant asserted that the only unqualified good is a good will; it is good in itself, or without regard to anything else. *Id.* at 61. An individual produces a good will by choosing to act solely from the motive of duty and in accordance with universal law. *Id.* at 64-69. The function of reason is to divine universal law by formulating maxims and testing them against the categorical imperative. *Id.* at 80. Thus, "every human will is a will which by all its maxims enacts universal law." *Id.* at 98. As a result, every rational individual is "an end in itself." *Id.* From these premises, Kant concludes that an individual should never treat herself or any other rational individual as a means only, but always as an end in herself. *Id.* at 101.

105. *Id.* The rule of universalizability is a variation on the "golden rule": do unto others as you would have done unto you. See *Luke* 6:31.

The common law has assimilated this moral command in the form of the "reasonable person" standard. However, the command only applies when there is a *legal duty* to act. Caring, in this context, indeed the "standard of care," depends on a quasi-contractual relationship. A person owes a duty of care to another when she is in a special relationship with him. See, e.g., *FOWLER V. HARPER ET AL.*, *THE LAW OF TORTS* 389-90 (2d ed. 1986); see also *Canterbury v. Spence*, 464 F.2d 772, 785-87 (D.C. Cir. 1972).

106. Kant claimed that each person is owed a duty of respect by virtue of the fact that his capacity to reason enables him to divine the dictates of universal law: each person is an end unto himself. KANT, *GROUNDWORK*, *supra* note 86, at 100-06.

People relate to one another by respecting each other's right to live freely in accordance with universal law. KANT, *THE PHILOSOPHY OF LAW*, *supra* note 103, at 43-58. "*Freedom* is Independence of the compulsory Will of another; and in so far as it can co-exist with the Freedom of all according to a universal Law, it is the one sole original, inborn Right belonging to every man in virtue of his Humanity." *Id.* at 56 (emphasis in original).

107. *Id.* at 43-47. "The universal Law of Right may then be expressed, thus: 'Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others . . .'" *Id.* at 46.

compromise their self-ruling capacity, by contract for example.<sup>108</sup> One can draw an analogy to a honeycomb. Just as a honeycomb is the sum total of a myriad of individual beeswax cells, an autonomy perspective views society as the sum total of many self-ruling individuals. Like the honey inside each cell, each individual person is carefully secluded in her own little compartment, never to be inadvertently interfered with by others who are themselves in adjoining compartments. Each is separate and independent. Just as beeswax constitutes the walls around individual combs, so also do rights form the barriers around individual persons.

Autonomy theory can thus be summarized as follows. An individual is autonomous if she is competent to make decisions about how she ought to live her life and if she is free to do so. An autonomous individual is respected if others both treat her always as an end unto herself and also refrain from controlling her. Autonomy theory conceives of society as a collection of autonomous individuals who follow generalizable rules and respect each other's rights.

Most American law and policy is built upon this picture of the way in which individuals interact in society. The standard of undue influence is but one example of how law flows from the theory of autonomy.

### *B. Autonomy and Undue Influence*

The law seeks to protect autonomy by ensuring that a person's will is the product of his freely self-chosen and informed plan. If the decedent was in a state of diminished autonomy—if he was “in at least some respect controlled by others or incapable of deliberating or acting on the basis of his [own life] plans”<sup>109</sup>—then his will is invalidated by the law of undue influence. Certainly, a deceased person's autonomy cannot be respected *per se*, but perhaps it can be respected to the extent that society can respect her last wishes. Moreover, the undue influence rule discourages would-be benefactors from unduly influencing others, and thus, protects the autonomy of testators generally.

The general will-substitution test is the foundation of undue influence, and it is derived from a conception of society as a collection of self-ruling individuals.<sup>110</sup> The idea that a person should be able to substitute his will for another person's is wholly inconsistent with the idea that the decisionmaker is self-ruling because the decisionmaker is not being treated with respect: the influencer is not recognizing and respecting the decedent's capacity to reason out such decisions for herself. By exerting this control over the

108. One thinker described autonomy theory as

[a picture] of the person as atomistic . . . and asocial—only accidentally and externally related to others. If we are lucky, our independent interests may coincide or happily divide in a symbiotic relationship . . . [O]ur interaction is normally a trade relationship . . . . A contract, implicit or explicit, may thus be necessary to lay down guidelines that will protect [each party's] interests . . . .

John Hardwig, *Should Women Think in Terms of Rights?*, in *FEMINISM & POLITICAL THEORY* 53, 58 (Cass R. Sunstein ed., 1990).

109. BEAUCHAMP & CHILDRESS, *supra* note 80, at 68.

110. *E.g.*, *In re Will of Liebl*, 617 A.2d 266, 270 (N.J. Super. Ct. App. Div. 1992) (connecting undue influence to the destruction of free agency and concluding that no undue influence occurred where the testator was self-reliant); *Cline v. Larson*, 383 P.2d 74, 89 (Or. 1963) (finding no undue influence where testator's “will was a natural, reasonable one . . . [and] its execution was her *free and voluntary act*” (emphasis added)); *DeJamal v. Merta*, 289 N.W.2d 813, 822 (Wis. 1980) (affirming trial court's finding of no undue influence where the testator “was in *total control* of her own life” (emphasis added)).



decendent, the influencer is unjustifiably<sup>111</sup> and unlawfully stepping over the barrier of rights which emanates from the testator by virtue of her autonomy.

The factors<sup>112</sup> into which courts inquire in order to find undue influence are also based upon autonomy principles.<sup>113</sup> The opportunity and confidential relationship inquiries address dependency. Dependency is antithetical to the notion that the testator is self-ruling. This concern is derived, in part, from the autonomy principle of competence—the dependent person is less able to reason. Freedom is also implicated: the dependent person may not be free from the control of the influencer because of his dependency. Finally, these inquiries are concerned with respect. Dependency indicates that the barrier of rights between the testator and influencer is weak because the testator is unable to assert his rights.

The susceptibility inquiry is concerned with competence. The less an individual is able to reason, the less autonomous he is, and the more susceptible he is to undue influence.<sup>114</sup> Confidential relationships, by virtue of their dependency dynamic, aggravate this problem; the “vulnerable” party is more susceptible to the influence of the “dominant” party. Susceptibility is also concerned with freedom from passions and inclinations which undermine the individual’s ability to reason. Finally, the susceptibility factor is the law’s attempt at protecting the testator’s autonomy and subsequent rights when he is unable to do so.

Naturalness is also derived, in part, from autonomy concerns. Some courts assume that people would not ordinarily devise property to acquaintances instead of family members because that is unreasonable in light of what is “natural.” Such a bequest is evidence of a controlling influence over the testator, indicating diminished competence. Other courts look to what the testator would have naturally wanted but for the influence of another. Such an inquiry into the testator’s wishes is an attempt to reassert the testator’s autonomy.

The use of improper devices also involves the protection of autonomy values. Threats are a coercive tactic which implicate the individual’s freedom. Similarly, appeals to a person’s passions, for example his lust for sexual pleasure or his fear of eternal damnation, further implicate the decisionmaker’s freedom. These manipulative tactics encourage the subjugation of reason to inclinations. To the extent that the meretricious relationship factor is related to undue influence, it is also based, in part, on the autonomy principle of freedom.<sup>115</sup> The influencer uses his sexual prowess to manipulate the testator’s feelings. These improper devices are “improper” because they manipulate the

111. There are times when the compromise of an individual’s rights is justified, as in the case of children. *See supra* note 88. This may also happen when two persons’ rights are in conflict. For example, it may be justifiable for society to limit a person’s freedom of speech in order to protect another’s right not to be misled by false advertising. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

112. *See supra* part I.A.

113. Not all of the factors are based entirely on concerns about the testator’s autonomy. For instance, motive might also be concerned with the influencer’s intent. Meretricious relationships and naturalness may have moral elements. And the presumption of undue influence may be concerned with the difficulty of proof.

114. *E.g., In re Estate of Larendon*, 30 Cal. Rptr. 697, 700 (Ct. App. 1963) (“[One indicator of undue influence is]: the decedent’s mental and physical condition was such as to permit a subversion of his freedom of will . . .”).

115. The concern with meretricious relationships seems primarily to be a moral one. *See supra* notes 51-53. Nonetheless, meretricious relationships may tangentially implicate autonomy values as well. The notion that the testator was led away from his wife and family by the seduction of a meretricious relationship is an affront to his freedom because his reason has been subverted by his passions. *See, e.g., Beatty v. Strickland*, 186 So. 542, 544 (Fla. 1939) (“[I]n common parlance [the adulteress] can ‘twist him about her finger at will’ . . . [and] her mind instead of his controls his conduct . . .”). *But see infra* note 126.

testator into acting on the basis of something other than reason, an important concern of autonomy.

The presumption of undue influence is simply a short-hand device intended to enforce the same autonomy values discussed above. The focus on confidential relationships is a concern with one person's dependency on another. When combined with suspicious circumstances, such as participation in a will-making process, the confidential relationship gives rise to a presumption that the testator was not acting autonomously. The influencer had the opportunity to exploit his superior position in the relationship at the expense of the testator's autonomy.<sup>116</sup>

*C. Problems with the Current Standard of  
Undue Influence: Limitations of the  
Autonomy Foundation*

Despite its wide acceptance as a foundation of law and policy, autonomy theory has its limitations. Most importantly, its picture of society as merely a collection of free-thinking, rational beings is not a complete account of how people interrelate. Thus, when lawmakers rely exclusively on autonomy theory to generate policy, the result is a set of rules which are in disharmony with intuition and experience.

This disharmony between law and experience is most apparent when lawmakers construct rules to govern intimate personal relationships. Herein lies the primary problem with the law of undue influence: It does not adequately account for acts of care. In fact, acts of care can be, and are, used against defendants during will contests.<sup>117</sup> There are at least three ways in which this problem manifests itself.

First, the current law of undue influence overemphasizes the role of reason as a proper basis for decisionmaking, to the exclusion of other human faculties like emotion.<sup>118</sup> Within the autonomy framework, an individual's competence, or ability to reason, is crucial to her self-ruling capacity.<sup>119</sup> Thus, the law eyes with suspicion any nonrational influence. The naturalness factor, for instance, is one tool used to ferret out undue influence. It requires some courts to inquire into whether the testator acted rationally, that is, how most people in the community would act in her place.<sup>120</sup> Some courts link an "unnatural will" with unreasonableness if it does not comport with social expectations

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116. *See supra* part I.B.

117. *See supra* notes 17-18 and accompanying text.

118. There is a great deal of scholarship on how rights-based frameworks deemphasize the legitimacy of other human faculties, such as imagination and emotion, in lieu of reason. *See, e.g.*, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Robin West, *Love, Rage and Legal Theory*, 1 YALE J.L. & FEMINISM 101 (1989).

119. Indeed, under autonomy theory, reason is a person's self-ruling capacity. *See supra* notes 86-102 and accompanying text.

120. *See supra* notes 43-44 and accompanying text.

of what is “reasonable.”<sup>121</sup> Other courts focus on what the testator naturally would have wanted had he been acting reasonably.<sup>122</sup>

Certainly, in David’s case, the emotional influence was manipulative and undesirable. It does not follow, however, that every appeal to a testator’s emotions is unsavory. On the contrary, many people rely on emotion or intuition to settle major life decisions; “gut feeling” can be a valuable tool in such times.<sup>123</sup>

Second, the current standard of undue influence improperly conceptualizes dependency. Since dependency is antithetical to the notion of self-rule, autonomy theory requires an almost radical independence of the individual. Likewise, the law discourages dependency by allowing evidence of such to support a claim of undue influence. For example, the presumption of undue influence may arise when evidence of dependency exists in the testator-beneficiary relationship. Because caring involves an element of dependency, the law has the effect of discouraging caring activity.

Moreover, it is impermissible for a sick and totally dependent person, like Pedro, to rely on his primary beneficiary to help him set up his will. Yet, this is counterintuitive because, at times, dependency can be beneficial. Dependency and vulnerability can give texture to a relationship: trust, unity, depth.<sup>124</sup> The primary beneficiary of a person’s will usually has that status *because* he is faithfully relied upon in times of need—because he cares. Who better to serve the needs of the testator, in preparing a will, than the people who care for him the most? It is not surprising that those individuals are named in the will as a result.

Third, the law of undue influence, based upon autonomy principles, suggests that a rights-based conception is the only adequate way in which to view relationships. The law endorses autonomy by protecting a person’s “right” to be free from interference in testation. This quasi-contractual view of relationships manifests itself in the law of undue influence in the factors of opportunity, motive, confidential relationship, and participation in the will-making process. These factors lead courts to inquire into whether an influencer has interfered with the testator’s right to testamentary disposition.<sup>125</sup>

Further, the marital exception implied in the law of undue influence is an arbitrary and inequitable exception to the rights-based emphasis. The link between meretricious relationships and the will-substitution test is tenuous since the former concerns social

121. *E.g.*, *Drum v. Capps*, 88 N.E. 1020, 1026 (Ill. 1909) (“Can it be said . . . that no rational person, situated as was testatrix, would desire [to dispose of property in this way]? It seem[s] . . . it was a most natural and reasonable thing for testatrix to decide to do.”); *In re Bliss’ Estate*, 225 N.W. 576, 577 (Mich. 1929) (Porter, J., dissenting) (“Human conduct and actions are found to be natural or unnatural . . . in accordance with prevailing standards.”). A typical example of the connection between reasonableness and naturalness is the following test which assumes the need for reasoned justification when the testator produces an “unnatural will”: “[The expression ‘unnatural will’] is usually applied in a case where a testator leaves his estate or a large portion thereof to strangers to the exclusion of the natural objects of his bounty *without apparent reason* therefor.” *In re Shay’s Estate*, 237 P. 1079, 1083 (Cal. 1925) (emphasis added).

122. *E.g.*, *Abbott v. Noel*, 148 N.E.2d 377, 380 (Mass. 1958) (“It cannot be said that the contestant was the natural object of [the testator’s] bounty or one to whom [the testator] might reasonably be expected to leave her property.”).

123. *See supra* note 118.

124. This is not to suggest that dependent relationships are per se a good thing; Corey’s dependence upon David is not beneficial. Nevertheless, dependency is a building block of such virtues as trust and confidence. Ideally, persons in a relationship are interdependent. *See infra* text accompanying note 195.

125. *E.g.*, *In re Fritschi’s Estate*, 384 P.2d 656, 659 (Cal. 1963) (stating that exceptions to the right of free testation “have served to sharpen the court’s vigilance in protecting the testator’s right to be free of interference . . . .”); *Collins v. Collins*, 275 P. 571, 576 (Wash. 1929) (“[T]he right to make testamentary disposition of one’s property is a valuable right and should not be interfered with . . . .”).

morality and the latter concerns individual freedom of will.<sup>126</sup> Indeed, one commentator has suggested that evidence of a meretricious relationship should be evidence *against* undue influence.<sup>127</sup> Nevertheless, one can read the marital exception as consistent with autonomy values. Since husband and wife have entered into a legal contract allowing (even arguably encouraging) dependence, the law is less concerned when one spouse is not respecting the other's autonomy because the dependent spouse has formally consented to the arrangement.<sup>128</sup>

Yet, intimate relationships, both inside and outside marital bonds, are not based entirely, or even primarily, on rights.<sup>129</sup> The law may not always need to protect rights in the context of *some* intimate relationships because, by their nature, those relationships are based upon a caring concern and affection which is beyond the rigid, formulaic adherence to rights. When a person influences the testator to prepare a will, for example, it may be imprecise to speak solely in terms of whether that person has respected the testator's rights. In such cases, the law is gratuitous at best, detrimental at worst. What is needed to ameliorate the autonomy-based problems of the law of undue influence is the addition of a new theoretical perspective: care theory.

### III. SHIFTING THEORETICAL PERSPECTIVES: AUTONOMY TO CARE

The theory of care is an alternative theoretical framework to that of autonomy. Care theory more closely resonates with the dynamic of close, interpersonal relationships and, as a result, is a good supplement to the law of undue influence. This Note does not suggest that care theory completely supplant autonomy—only that it supplement it. Taken together, the theories of autonomy and care provide a more just and fitting basis for developing the law of undue influence than does the autonomy theory alone.

This Part introduces basic concepts of care theory and analyzes the differences between autonomy and care. This Part concludes with a discussion of the strengths and weaknesses of both theories and how they might be made to work together.

126. *But see supra* note 113. One court attempted to justify the link between meretricious relationships and autonomy theory by comparing such relationships to drug addiction and asserting that unlawful relationships almost always give rise to one party controlling the other. *Beatty v. Strickland*, 186 So. 542, 544 (Fla. 1939). In *Beatty*, the court wrote:

[W]hen a married man, past middle age, becomes enamored of a young woman to such extent that he is willing to abandon his family that he may take up and pursue more intimate relations with the woman . . . it becomes almost universally true that the wish of the mistress becomes the law of the lover.

*Id.*

However, this reasoning fails to cover all relationships outside of marriage, such as relationships between homosexuals. Moreover, one can easily apply the same logic to relationships within the sanctity of marriage: many *spouses* employ passion to influence their mates. Thus, it appears that the use of the undue influence standard in these cases has more to do with moral condemnation than concern for autonomy.

127. *deFuria, supra* note 23, at 202. *deFuria* argues that meretricious relationships are merely intimate relationships which are not sanctified by law. These relationships better serve as evidence of natural beneficence, rather than undue influence. It is perfectly natural that a person would devise property to someone with whom she has had an intimate relationship. *Id.* *deFuria* attempts to collapse meretricious relationships into the current standard via the factor of naturalness. This Note instead argues that defendants might use meretricious relationships as evidence of caring. *See infra* note 205 and accompanying text.

128. *See KANT, THE PHILOSOPHY OF LAW, supra* note 103, at 109-11.

129. *See Jeremy Waldron, When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 626 (1988) ("There is a world of difference . . . between the Kantian 'contract for reciprocal use' and the 'love, trust, and common sharing of their existence as individuals' which is what married partners commit themselves to."). Waldron argues that when one partner in a loving relationship complains "to the other about a denial or withdrawal of conjugal rights, we know that something has already gone wrong with the interplay of desire and affection between the partners." *Id.* at 627 (emphasis in original).

### A. A Theory of Care

In the early 1980's, psychologist Carol Gilligan first published what was to become a watershed work, both in developmental psychology and in a number of other fields. In her book *In a Different Voice: Psychological Theory and Women's Development*,<sup>130</sup> Gilligan theorized that during the process of moral decisionmaking, women speak in a "different voice" than men do.<sup>131</sup>

Gilligan attacked the dominant ideas of the day, most notably, Lawrence Kohlberg's theory of moral development. Kohlberg postulated hierarchical stages of moral development through which persons develop.<sup>132</sup> Among his highest stages of moral decisionmaking is reasoning in terms of abstract principles, such as justice and rights.<sup>133</sup> Gilligan argued that Kohlberg's exaltation of abstract moral reasoning was, de facto, a male-oriented, normative judgment about what constitutes good moral decisionmaking.<sup>134</sup> She proposed that many women do not think in terms of justice and rights, but instead, think in terms of responsibility and care.<sup>135</sup> Care-thinkers assess moral dilemmas not by balancing *abstract individual rights* against each other, but instead, by probing the impact decisions will have on *particular relationships*. The preservation of caring relationships is the caring individual's central moral concern.<sup>136</sup>

Various care-theorists have described the process of caring differently. However, from these thinkers have emerged four phases in the process of caring: identification (engrossment with another), disposition (taking an attitude of responsibility), care-giving (the activity of caring), and care-receiving (response of the object of care-giving).<sup>137</sup> When these four elements are present, a caring relationship has been established.

130. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

131. *Id.* at 1-2.

132. See Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Development Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347, 352 (David A. Goslin ed., 1969); Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Development Approach*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* 31, 32-33 (Thomas Lickona ed., 1976).

133. GILLIGAN, *supra* note 130, at 19; see generally sources cited *supra* note 132.

134. GILLIGAN, *supra* note 130, at 1-4.

135. Gilligan's empirical claim that women think in terms of care more often than men has been attacked as inexact. E.g. LAWRENCE KOHLBERG ET AL., *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* 17-29, 121-50 (1983).

136. Gilligan's research provides an excellent example of the contrast. GILLIGAN, *supra* note 130, at 24-63. Gilligan presented subjects with the classic Heinz dilemma: Heinz' wife has a fatal disease and he cannot afford the drug that will cure her. Gilligan then asked whether Heinz should steal the drug. Then she analyzed the differences between the responses of men and women. *Id.*

One male subject, Jake, viewed the dilemma as a conflict of property and life rights and justified his answer that Heinz should steal the drug after engaging in a logical calculus which balanced the two rights. *Id.* at 26-27.

In contrast, Amy:

consider[ed] neither property nor law but rather the effect that theft could have on the relationship between Heinz and his wife:

If he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way . . .

*Id.* at 28. Amy saw "the dilemma not [as] a math problem with humans[,] but [as] a narrative of relationships that extends over time . . . [S]he tie[d] the wife's survival to the *preservation of relationships* . . ." *Id.* (emphasis added). "Amy's judgments contain the insights central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach." *Id.* at 30.

For a further discussion of the differences in moral reasoning, see *infra* note 182.

137. Care theorists attach different labels to these phases, but their meanings are essentially the same. See, e.g., NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* 30-78 (1984); JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 106-08 (1993).

Identification is the first step towards caring. This phase occurs when one assumes the position of another and becomes attentive to her needs.<sup>138</sup> The one-caring becomes engrossed with the cared-for.<sup>139</sup> Contemporary feminist thinker Nel Noddings describes identification this way:

Caring involves stepping out of one's own personal frame of reference into the other's. When we care, we consider the other's point of view, his objective needs, and what he expects of us. Our attention, our mental engrossment is on the cared-for, not on ourselves. Our reasons for acting, then, have to do both with the other's wants and desires and with the objective elements of his problematic situation.<sup>140</sup>

Identification is similar to empathy.<sup>141</sup> As Noddings points out, however, the traditional understanding of empathy may not capture the meaning of identification in its entirety.<sup>142</sup> Empathy does not wholly describe the process of identification if what is meant by empathy is "the power of projecting one's personality into, and so fully understanding, the object of contemplation."<sup>143</sup> Identification involves more than contemplation by the care giver; identification is the process by which the very identities of the one-caring and the cared-for are blended.<sup>144</sup> The one-caring takes on a "dual perspective" with regard to the other: he simultaneously sees his own needs and her needs as *one set of needs*.<sup>145</sup> He "set[s] aside [his] temptation to analyze and to plan" and he receives the other as a part of himself.<sup>146</sup> Clearly, this conception of empathy as duality is broader than the idea that empathy only involves the contemplation of how the other might feel in given circumstances. The one-caring is not merely *thinking about* how the cared-for is feeling; he is *feeling with* the cared-for.<sup>147</sup>

Perhaps the most common occurrence of this experience in our society is the relationship between mother and child.<sup>148</sup> "Mothers quite naturally feel with their

138. Tronto refers to this as "caring about" or "attentiveness." TRONTO, *supra* note 137, at 106, 127-31.

139. NODDINGS, *supra* note 137, at 17, 24. "One-caring" and "cared-for" are terms borrowed from Nel Noddings. *Id.* at 30-78.

140. *Id.* at 24.

141. *Id.* at 30.

142. *Id.* For a further discussion on the problematic use of "empathy" in feminist-legal scholarship, see Henderson, *supra* note 118, at 1578 ("Empathy has become a favorite word in critical and feminist scholarship. . . . [I]t is never defined or described—it is seemingly tossed in as a 'nice' word in opposition to something bad or undesirable.")

143. NODDINGS, *supra* note 137, at 30 (citing the definition of empathy in the Oxford Universal Dictionary).

144. The idea that identities are "blended" may seem rather mystical. While there may in fact be mystical traditions which embrace this idea, for example certain Buddhist sects, the concept does not necessarily rely on any transcendent experience. On the contrary, Nel Noddings argues, and this Author agrees, that the receptive state of being required for the blending of identities is a natural and frequent, if not necessary, human experience. *Id.* at 30, 33-35.

145. *Id.* at 63.

146. *Id.* at 30.

147. Nel Noddings describes a mode of consciousness with which the process of identification is associated: the "relational mode." *Id.* at 33-35. This state of consciousness is neither fully rational nor fully emotional. *Id.* at 33. It is "qualitatively different from the analytic-objective mode in which we impose structure on the world. It is a precreative mode characterized by outer quietude and inner voices and images, by absorption and sensory concentration. The one so engrossed is listening, looking, feeling." *Id.* at 34.

She also writes:

[This mode] allows us to receive the [cared-for's identity], to put ourselves quietly into its presence. We enter a feeling mode, but it is not necessarily an emotional mode. In such a mode, we receive what-is-there as nearly as possible without evaluation or assessment. We are in the world of relation.

*Id.* Finally, she posits that the "relational mode seems to be essential to living fully as a person . . ." *Id.* at 35.

148. Philosopher Sarah Ruddick is perhaps the best-known advocate for the maternal focus in care theory. See SARAH RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989).

However, some have argued that the mother-child paradigm for understanding caring relationships has its limitations. E.g., TRONTO, *supra* note 137, at 103. First, this paradigm tends to romanticize mother-child relationships. *Id.* But see RUDDICK, *supra*, at 28-39 ("I know full well the malign effects on mothers and children of sentimentalizing motherhood . . ."). Second, the paradigm is exclusive of other care-givers (nonmothers) and other caring activities (broadly speaking,

infants."<sup>149</sup> When an infant cries, the mother does not merely stop to contemplate how the child might be feeling.<sup>150</sup> Instead, the mother's receptivity to the infant's pain leads her to identify with him—she feels *with* her child.<sup>151</sup>

Identification, though essential, is not sufficient to constitute "caring." Indeed, at a very broad level, all people can identify with other people by virtue of their shared humanity.<sup>152</sup> A person can identify with another, and yet, stop short of caring. Consider the following example: a man meets a stranger on his train commute home from work. A friendly discussion ensues wherein the stranger describes how she decided to become a doctor after her mother died many years earlier. The man takes a sudden interest since he lost his own mother just the previous week. The more that the stranger begins to describe the feelings she felt about her mother's death, the more that the man shares her feelings. The train stops at his station and he departs never to see her again. At a very basic level, he has identified with her. But he has not fully cared for her—something is missing. He is not disposed to take any responsibility for her.<sup>153</sup>

Thus, the second element in the process of caring is one of disposition. The one-caring must become disposed to care for the cared-for. In other words, the one-caring must not only identify with the cared-for, but also take responsibility for her.<sup>154</sup> Taking responsibility is essentially an attitude; it is a "motivational shift."<sup>155</sup> The one-caring feels the needs of the cared-for as if they were his own, which in turn, motivates him to act on behalf of those needs.<sup>156</sup>

"maintaining, continuing, or repairing the world"). TRONTO, *supra* note 137, at 62-97, 103-04. *But see* RUDDICK, *supra*, at 40-47 ("maternal work can, in principle, be performed by any responsible adult, . . . [though] women [have] . . . disproportionately cared . . ."). Third, this paradigm focuses on a dyadic understanding of care, thus restricting caring to a private activity. TRONTO, *supra* note 137, at 10, 103. Tronto argues, and this Author agrees, that caring can and should be a public activity as well as a private one. *Id.* at 10-11, 96-97. Finally, the paradigm may not be culturally sensitive: many societies regard childrearing as a tribal or communal activity. *Id.* at 103.

The maternal paradigm is a useful and illustrative model. However, we should not mistake the model for the total reality of caring. Indeed, Ruddick herself concedes, "the maternal is not the whole of care and cannot be made to stand for it." RUDDICK, *supra*, at 47.

149. NODDINGS, *supra* note 137, at 31.

150. *Id.* Mothers may learn to interpret the infant's crying: discomfort, hunger, restlessness, etc. *Id.* However, this does not detract from the point that mothers are doing more than simply analyzing how it might feel to be the infant in pain. Mothers are feeling pain along with the infant; they are sharing the feeling. *Id.*

151. *Id.*

152. There are some who might claim an even broader level of identification: feeling with animals, the environment, indeed, the earth as a whole. *See generally* JAMES E. LOVELOCK, *GAIA* 14-50 (3d ed. 1995). Lovelock, among many others, contends that the earth itself is a living system, of which humanity constitutes a connected part. *Id.* at vii-xviii. Applying the care theory to Lovelock's ideas, one could say that at some level, the individual "identifies" with the earth.

153. Nel Noddings writes about a similar example. NODDINGS, *supra* note 137, at 30-31. She was having lunch with a group of colleagues. One, for whom she had little respect or regard, began to talk about an experience which changed his life and impelled him to become a teacher. She writes, "I am touched. . . . It is as though his eyes and mine have combined to look at the scene he describes. . . . I shall never again be completely without regard for him. . . . I am now prepared to care whereas previously I was not." *Id.* at 31. Note that, in contrast to the example in the text, Noddings has more than identified with her colleague. She has also taken on a limited attitude of responsibility for him. She is "prepared to care." *Id.*

154. TRONTO, *supra* note 137, at 106, 131-33. Tronto refers to this as "taking care of." "It involves assuming some responsibility for the identified need and determining how to respond to it." *Id.* at 106. She cites the person who might feel that it is too bad that there is rampant hunger in developing countries, but does not take any attitude of responsibility for solving the problem. *Id.*

155. NODDINGS, *supra* note 137, at 33.

156. This is in sharp contrast to Kant's conception of each individual as an end unto herself. For Kant, the taking on of another's ends as one's own is to act from something other than pure duty-inclination. For Kant, moral action flows only from the duty to conform with universal law. *See supra* notes 89, 104.

Feminist thinker, John Hardwig, takes issue with Kant's notion of individuated ends. He writes, [When I care], I do not respect you (in the Kantian sense) as an independent being with independent ends that have as much right to fulfillment as my ends. Rather, I want you, and I want your well-being, and your ends are my ends too. To have you as one of my ends is thus to see you and the realization of your

Together, identification and disposition form the basis for the blending of identities—the duality of perspective. The process is neither fully rational, nor fully emotional, but a convergence of the two.<sup>157</sup>

The first two elements in the process of caring describe a special link between the one-caring and the cared-for. Caring requires this link, but the process of caring is fundamentally a practice.<sup>158</sup> “Intending to provide care, even accepting responsibility for it, but then failing to provide good care, means that in the end the need for care is not met.”<sup>159</sup>

Thus, the third element in the process of caring is the activity of care-giving: activity of the one-caring which meets the needs of the cared-for.<sup>160</sup> It is action which tends to promote the well-being of the other; it “either brings about a favorable outcome for the cared-for or seems reasonably likely to do so . . . .”<sup>161</sup>

What activity constitutes caring activity depends entirely upon circumstances.<sup>162</sup> The specific needs of the cared-for, the ability of the one-caring to meet those needs,<sup>163</sup> and the resources available to the one-caring all shape the judgment that a specific activity is caring in a particular circumstance.

There are some general categories of activity, such as protection,<sup>164</sup> the sustaining of relationships,<sup>165</sup> and the promotion of individual growth,<sup>166</sup> which are potentially caring activities. These activities, however, remain general categories and not judgments about caring in particular circumstances because they are complicated by the possibility that the actor is self-serving. For instance, he may be providing a form of protection which reinforces itself, as in the case of mobster racketeering.<sup>167</sup> Or, to take the second example in the Introduction, David might be sustaining the relationship merely because he enjoys feeling powerful and not because he has any regard for Corey’s needs. Thus, in order for an activity to be one of caring, it must aim at the well-being of the other person.

Care-giving, however, is not the end of the process. Caring is a two-way process in which the reception of care plays a key part. If the one-caring does not receive any

goals as part of me and the realization of my goals.

Hardwig, *supra* note 108, at 57 (citation omitted).

157. See *infra* notes 190-95 and accompanying text.

There is some debate about the role of reason in the process of caring. Noddings refers to the “consciousness of caring” as “fundamentally nonrational.” NODDINGS, *supra* note 137, at 61. In contrast, other writers on the subject refer to the practice of caring as a form of “practical reason.” See RUDDICK, *supra* note 148, at 8-12; TRONTO, *supra* note 137, at 108-09 n.18.

This Author is not convinced that the positions are incompatible. “Consciousness of caring” might refer to the first and second elements of caring: identification and disposition (*i.e.*, the blending of identities). It seems that this process is not fully rational—it is founded on inclinations and regard for the other combined with self-reflection. “Practical reason” might refer to the third element of caring: the actual activity of the one-caring. Activities such as judgment, clear communication, and attentive listening are activities of practical reason which have a role in the caring process. See RUDDICK, *supra* note 148, at 8. Under this conception of reason’s role, it is easy to see differences with the Kantian notion that reason alone should form the basis of action. See *supra* note 104 and accompanying text.

158. TRONTO, *supra* note 137, at 108 (“Caring is perhaps best thought of as a practice.”).

159. *Id.* at 133.

160. *Id.* at 107.

161. NODDINGS, *supra* note 137, at 25.

162. Noddings suggests the “one-caring displays a characteristic variability in her actions—she acts in a nonrule-bound fashion in behalf of the cared-for.” *Id.*

163. The competence of the one-caring simply means the ability to provide “good care”—care which adequately meets the needs of the cared-for. TRONTO, *supra* note 137, at 133-34.

164. *Id.* at 104-05; see also RUDDICK, *supra* note 148, at 17. Ruddick emphasizes maternal acts of caring. *Id.* She includes “works of preservative love, nurturance, and training.” *Id.*

165. GILLIGAN, *supra* note 130, at 28.

166. RUDDICK, *supra* note 148, at 17.

167. See, e.g., TRONTO, *supra* note 137, at 105.



response to his caring, he will be unable to gauge his success at meeting the needs of the cared-for.<sup>168</sup>

Thus, the fourth and final phase of caring is care-receiving. It occurs when the cared-for directly and spontaneously responds to the acts of the one-caring.<sup>169</sup> An adequate response of the cared-for is not necessarily reciprocal; nor is it compensatory. Reciprocity and compensation imply an equal exchange—a *quid pro quo*—which may be characteristic of a relationship in which the participants essentially share equally in the responsibilities and benefits.<sup>170</sup> Nevertheless, equality is not necessary for caring. Often the caring relationship is one in which the one-caring is in a position of superiority. Examples include: teacher and student, parent and child, and healthy and sick. The cared-for may not have the competence, the mental capacity, or even the physical strength to take on the role of the one-caring and return the care given to her.<sup>171</sup>

Instead, what constitutes a response by the cared-for varies with the circumstances.<sup>172</sup> A key feature of this response is spontaneity; it occurs despite the expectations of the one-caring.<sup>173</sup> If the cared-for is merely responding in accordance with the perceived wishes of the one-caring, the response has no value to the one-caring because it does not serve as accurate feedback to the activity of care. While a spontaneous response from the cared-for may in fact meet the expectations of the one-caring, it is important that the response does not arise out of the expectations of the one-caring.<sup>174</sup>

To illustrate, consider a math teacher and a struggling student.<sup>175</sup> The teacher acts with a deep concern for her student's performance. She understands his frustrations and his motivations and, after identifying with his circumstances, she presents the material in a way she feels is best suited for his comprehension. Nevertheless, the student is distracted. Instead of becoming self-proficient with the material, he searches for cues from his teacher so that he can tailor his response to please her. Since his response is not spontaneous, he is not receiving the teacher's care. If the teacher fails to recognize the situation and adjust her actions accordingly, she has not established a caring relationship with her student.<sup>176</sup>

Thus, part of the responsibility of the one-caring, especially in unequal relationships, is to encourage the freely given response of the cared-for. This is not to say that autonomy is a prerequisite to caring, but that encouraging the cared-for's autonomy, when possible, may be an important responsibility of the one-caring.<sup>177</sup> If the cared-for

168. TRONTO, *supra* note 137, at 107-08. Tronto uses the example of a person with diminished mobility. *Id.* at 108. She may want to feed herself, but it is more efficient for a volunteer worker to feed her. The volunteer may think his help is an act of care, but in actuality, his help erodes the meal recipient's sense of dignity, instead of nurturing it. Since she has not received his act of supposed care, it is fair to say that caring has not occurred. *Id.*

Note that the problem here originated at the identification level. See *supra* notes 138-51 and accompanying text. Perhaps this volunteer does not know his recipient well enough to fully identify with how she feels and what she wants. It is irrelevant that *he* might want to be fed had the roles been reversed. This, of course, is not to say that identification is hopeless; he could start by asking.

169. NODDINGS, *supra* note 137, at 69-74.

170. *Id.* at 69-71.

171. See *id.* at 69-74.

172. *Id.* at 65-69.

173. *Id.* at 72, 75.

174. *Id.* at 69-75.

175. Noddings describes this situation. *Id.* at 70-71.

176. *Id.*

177. When care theorists use the term "autonomy," it may not parallel the meaning that autonomy theorists ascribe to the word. Indeed, care theorists may assert that a person is never truly autonomous in the sense that autonomy theorists use the word. Instead, for some care theorists, autonomy might refer to self-actualization: the process of helping the cared-for feel like a whole person, valued for her uniqueness, and not reducible to a type. See NODDINGS, *supra* note 137, at 72-

is wholly unautonomous, it may be impossible for the one-caring to receive any response. In these circumstances, however, the one-caring has not failed in his responsibility to perceive the response of the cared-for. In short, he still cares. In contrast, if the one-caring is manipulating the cared-for into a constant state of dependency, one may fairly judge him uncaring.

Some care-theorists have analogized the care theory's picture of society to a web.<sup>178</sup> For example, Joan Tronto and Berenice Fisher defined caring as:

*a species activity that includes everything that we do to maintain, continue, and repair our 'world' so that we can live in it as well as possible. That world includes our bodies, our selves, and our environment, all of which we seek to interweave in a complex, life-sustaining web.*<sup>179</sup>

In this picture, persons are like the points at which the silky threads intersect. Each point on the web is connected to every other point by means of these threads.<sup>180</sup> Indeed, it is the very threads, or interpersonal bonds, themselves which constitute the points of intersection, or persons. Without the silky threads, or bonds, one is left with no points, or people. Thus, each point is in a state of interdependency—each relies on the other for sustenance. A person, or point, is never considered only in terms of independent properties or capacities, but always with reference to his interpersonal relationships.<sup>181</sup>

One can imagine himself as the center point of this web. Concentric circles of points orbit him at various distances. Though he is connected to all the points on the web, some points are closer in proximity than others. These represent circles of relationships: family, partners, and friends; acquaintances; ethnic, religious, and cultural communities; strangers and the rest of humanity; nonhuman animals; the environment—all are interconnected; the closer the point, the stronger the tie to the center. Caring is the process of strengthening these relationships. By identifying with and caring for other persons, the one-caring reinforces the relational bonds which sustain his own life.

This theoretical framework is markedly different than the autonomy-based conception of society currently endorsed by the law of undue influence. Whereas under autonomy theory, responsibility denotes *refraining from action* which compromises the moral status of another, care theory conceives of responsibility as the one-caring's *affirmative obligation to act* to meet the needs of the cared-for.<sup>182</sup> In a deeply caring relationship, one

73, 75-76.

178. TRONTO, *supra* note 137, at 103.

179. *Id.* (emphasis in original) (citation omitted).

180. Care theory paints a picture of society which resembles communitarianism. See Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in *FEMINISM & POLITICAL THEORY*, *supra* note 108, at 143-44 ("The communitarian self . . . [is] not a social atom but is instead a being constituted and defined by its attachments . . .").

Note, however, that the link between care theory and communitarianism is the source of heated debate. For example, Tronto has argued against relating care theory to communitarianism because of her fear that the latter's deemphasis of individual rights potentially "stifle[s] diversity and otherness." TRONTO, *supra* note 137, at 161.

181. There may be some scientific support for this theoretical perspective. See FRITJOF CAPRA, *THE TAO OF PHYSICS* 309-21 (3d ed. 1991). "[T]he constituents of matter and the basic phenomena involving them are all interconnected; . . . they cannot be understood as isolated entities but only as integral parts of a unified whole." *Id.* at 309.

182. Gilligan's research using the Heinz dilemma, discussed *supra* note 136, provides an example of this contrast. Gilligan describes Jake's approach to the dilemma as essentially an autonomy-based one:

Beginning with [Jake's] responsibility to himself, a responsibility that he takes for granted, he then considers the extent to which he is responsible to others as well. Proceeding from a premise of separation but recognizing that "you have to live with other people," he seeks rules to limit interference and thus to minimize hurt. Responsibility in his construction pertains to a *limitation of action* . . . guided by the recognition that his actions can have effects on others, just as theirs can interfere with him. . . . [He] protect[s] autonomy through reciprocity . . . .

GILLIGAN, *supra* note 130, at 37-38 (emphasis added). In contrast, Amy answers the dilemma with a care-based approach:

in the closest concentric circle of relationships (friendship, for example), rights have little, if any, useful meaning.<sup>183</sup> At the very least, this is true for intimate personal relationships.<sup>184</sup> One feminist thinker captures this idea well when he writes:

If you are my friend, I expect you to do more for me than respect my rights, but there are also many ways in which you do not need to respect my rights. You can invade my privacy, interrupt what I am doing, fail to respect my private property, verbally abuse or perhaps even physically assault me, and it is all right so long as I know that you are my friend. . . . Precisely because you are my friend and I know that you care for me and will keep my interests in mind, you don't have to obey the rules that govern more impersonal relationships.

. . . .  
 . . . In a close personal relationship, I don't want you to respect my separate interests; I want to mean enough to you that you will have an interest in those interests. And if I care for you, I will want your well-being, and thus *your well-being will be essential to mine* too. . . . Thinking in terms of rights thus always violates the relationship, even as it strives to protect the persons involved from violation.<sup>185</sup>

In light of these differing accounts of how interpersonal relationships work, the question of continuity between them arises. This Note proposes that autonomy and care theory can work together to form a better legal response to interpersonal dynamics than does the exclusive reliance on autonomy seen in the law today.

### B. Autonomy and Care

Autonomy theory alone is an inadequate description of interpersonal relationships, or at the very least, close personal relationships.<sup>186</sup> Yet, legal standards based entirely on care theory may be undesirable, unpalatable, or untenable due to the deeply ingrained value society places on individual autonomy.<sup>187</sup> Nevertheless, it is possible to salvage the best from both.<sup>188</sup> This Note suggests that one can use autonomy and care theories together to support a better legal framework within which to deal with interpersonal relationships than that which currently exists. There are at least three points of convergence on which one can build a dual approach which would account for both autonomy and care and which would address the problems of sole reliance on autonomy theory described in Part II.C.

"[Amy] [p]roceed[s] from a premise of connection . . . . To her, responsibility signifies response, an *extension rather than a limitation of action*. Thus, it connotes an act of care rather than a restraint of aggression." *Id.* at 38 (emphasis added).

183. See Waldron, *supra* note 129, at 637 (arguing that in the context of private relationships, especially intimate relationships such as marriage, rights might better be conceived as a "fall-back" position).

184. Hardwig, *supra* note 108, at 54. Such relationships are "characterized by intimacy, genuine care, love, and emotional involvement . . . [including] friendship, love, marriage, and family relationships, when they are healthy . . . ." *Id.*

185. *Id.* at 56-57, 60-61 (emphasis added) (citation omitted).

186. See *supra* notes 126, 185 and accompanying text.

187. Gilligan captured this point well when she wrote:

Within the context of U.S. society, the values of separation, independence, and autonomy are so historically grounded, so reinforced by waves of immigration, and so deeply rooted in the natural rights tradition that they are often taken as facts: that people are by nature separate, independent from one another, and self-governing. To call these "facts" into question is seemingly to question the value of freedom.

GILLIGAN, *supra* note 130, at xiv.

188. To some extent, the two theories are dependent upon one another. Gilligan writes, "[t]hese disparate visions, [autonomy and care,] in their tension reflect the paradoxical truths of human experience—that we know ourselves as separate only insofar as we live in connection with others, and that we experience relationship only insofar as we differentiate other from self." *Id.* at 63.

The first point of convergence between autonomy and care is the requirement that the cared-for's response be spontaneous, or without regard to the expectations of the one-caring. In many circumstances, it is the responsibility of the one-caring to encourage the "autonomy" of the cared-for.<sup>189</sup> "The one-caring is motivated in the direction of the cared-for and she must, therefore, respect his freedom. She meets him as [a] subject—not as an object to be manipulated nor as a data source."<sup>190</sup> If the one-caring is intentionally encouraging the dependency of the cared-for, he may be treating her as an "object to be manipulated," and in that case, is not truly caring for her as a result. This point of convergence addresses, in part, the problem with the overemphasis of reason in the autonomy-based conception of undue influence. The fact that two people are in a caring relationship, as described above, does not preclude the possibility of autonomous decisionmaking. Appeals to the cared-for's emotions need not be inconsistent with her autonomy, so long as the one-caring takes his responsibility to encourage her autonomy seriously.

A second point of convergence between the two theories is the concept of interdependency. Even the staunchest autonomy theorist would recognize that every person is dependent on another sometime during her lifetime. Care theory challenges the assumption that individuals are ever fully autonomous at any given time. The point of departure is the notion of dependency. Autonomy theorists "emphasize dependence as the character-destroying condition."<sup>191</sup> The state of dependency is antithetical to the very foundation of autonomy: self-rule. Joan Tronto goes on to explain this point about dependency:

For [autonomy theorists], to be dependent is to be without autonomy. To become dependent is to learn how to act on behalf of others, not on behalf of the self. Dependent people lose the ability to make judgments for themselves; and end up at the mercy of others on whom they are dependent.<sup>192</sup>

Yet, since every person is a child at one time in her life, every person is born into a "condition of dependency."<sup>193</sup> Furthermore, a person's dependency does not end with adulthood. In many regards, people remain dependent on others throughout their entire lives. People continually seek the support and nurturance of family, partners, and friends. When confronted with an important decision in her life, it is not unusual for a person to actively seek out the advice of those in her "first circle" of relationships.<sup>194</sup> These advisors do not merely counsel her with detached, objective, and rational alternatives; they have taken her interest as their own, and by doing so, suggest action which they feel is the best action *for her*. These are the people who know her best: what her needs, hopes, and desires are; what her life-plan is and what skills she has to achieve it. They remind her of her talents and inherent worth; they encourage her when she doubts herself; they nurture her when the course of events does not turn her way. In short, they care.

But care theory is not limited to a one-way interaction. Just as the person described above is in the position of the cared-for at that time, so also might she be the one-caring

189. See *supra* note 177 and accompanying text.

190. NODDINGS, *supra* note 137, at 72.

191. TRONTO, *supra* note 137, at 163.

192. *Id.*

193. *Id.*

194. "First circle" refers to the web analogy—that initial concentric circle of people to whom the person at the center is connected. It represents those who are closest to the cared-for and in the best position to take on the role of the one-caring. See *supra* text accompanying notes 178-83.

in a host of other circumstances. She might also seek to follow her own decisions, without regard to the web of relationships which encompasses her. Autonomy can be re-read to describe a phase of decisionmaking which most people enjoy at least some of the time. "Since people are sometimes autonomous, sometimes dependent, sometimes providing care for those who are dependent, humans are best described as interdependent."<sup>195</sup> Thus, this second point of convergence addresses the current standard's improper punishment of dependency since care theory recognizes, and to some extent celebrates, healthy dependency.

The third point of convergence is the distinction between private and public life. Simply put, care theory might better guide closer, more private relationships, and leave autonomy theory to guide more impersonal relationships.<sup>196</sup> While some care-theorists take issue with this distinction,<sup>197</sup> it may be a pragmatic one for legal purposes. Further, there is some theoretical basis for this distinction. Caring occurs most deeply and meaningfully within a person's "first circle" of relationships because it is fertile ground for the blending of identities. A person is best able to undergo the process of identification and disposition with another when she has had close contact with that person. As a result of identification, focus on autonomy is not always useful or relevant.<sup>198</sup> This point of convergence allows for the autonomy, rights-based conception to remain legally forceful in relationships, while giving credence to the affective nature of more personal relationships.

These points of convergence are starting points for the use of both autonomy and care theories in the pragmatic construction of legal standards. Specifically, the law of undue influence can and should inquire into both autonomy and care concerns. What emerges is a new standard of undue influence.

#### IV. A CARE-SENSITIVE APPROACH TO UNDUE INFLUENCE

The law should account for our constant state of interdependency. The near-exclusive reliance on autonomy theory in the shaping of the law of undue influence is evidence that our society continues to value autonomy highly. Yet, caring activity is also valued, engaged in, and arguably should be encouraged. Together, courts can use the theories of autonomy and care to justify a two-part analysis in the law of undue influence.

Part IV.A proposes how courts can use autonomy and care together to shape a general legal standard of undue influence which more closely comports with the interdependent nature of interpersonal relationships. Part IV.B describes ways in which attorneys and judges might use the caring standard—what might constitute evidence of "caring." Part IV.C demonstrates how courts might apply the care-sensitive standard by revisiting the scenarios posed in the Introduction. Finally, Part IV.D answers some potential objections to the care-sensitive standard of undue influence.

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195. TRONTO, *supra* note 137, at 162.

196. This is not to suggest that caring cannot be a political phenomenon. See TRONTO, *supra* note 137. Indeed, the theory of care may impose some *moral* responsibility on persons or institutions to act in the political or public realm. However, the public-private distinction is one which can guide the *legal* construction of interpersonal relationships. It makes caring a relevant factor—one to be acknowledged and protected—in the law governing private relationships. By doing so, courts are free to make caring a legally relevant criterion, whereas currently the law only recognizes the autonomous nature of relationships.

197. For an example of such disagreement, see TRONTO, *supra* note 137, at 3.

198. See *supra* note 185 and accompanying text.

### A. Proposed Undue Influence Standard

The undue influence standard should first address autonomy concerns, and then issues of care. Under this new standard, a finding of undue influence would be subject to a two-prong test. First, was the testator autonomous? Second, if the testator was not fully autonomous, was the relationship between the testator and the influencer a caring one? Only when a court or jury finds a negative answer to *both* of these inquiries should it issue a judgment of undue influence.

The standard of undue influence should read as follows: Undue influence has occurred when, in the context of an uncaring relationship, the testator's autonomy has been diminished by another such that the will in question is not the will of the testator, but instead, the will of the other person. The court should first hear evidence that the testator's autonomy had been diminished, and then hear evidence that the relationship between the testator and the influencer was an uncaring one.

When determining the autonomy of the testator, courts should continue to employ the current law of undue influence, with some minor modifications. The will-substitution test and the various factors are an adequate beginning. Note, however, that the same evidence that plaintiffs present in an attempt to prove opportunity and naturalness might also be used by the defense to argue that the relationship was a caring one.<sup>199</sup>

Courts should either alter or eliminate the use of a presumption of undue influence. Presently, the presumption of undue influence is a dull knife: it cuts out *all* dependent relationships—caring and uncaring—in which the beneficiary participated in the will-making process.<sup>200</sup> This is the problem which this Note seeks to address. Thus, if courts decide to continue the use of the presumption, they should require plaintiffs to prove that the existing confidential relationship<sup>201</sup> was an uncaring one, and that the influencer's self-interest, instead of the well-being of the testator, gave rise to the "suspicious circumstances" surrounding the will.<sup>202</sup> This new standard for the use of the presumption continues to probe for diminished autonomy while accounting for caring relationships in which autonomy is not a central concern. In essence, it extends what appears to be an exemption for marital relationships from the presumption of undue influence to all caring relationships.<sup>203</sup>

Courts should eliminate any inference of undue influence from the existence of a meretricious relationship. Not only is the use of this inference essentially unrelated to autonomy concerns,<sup>204</sup> but also, such relationships are evidence of care. Indeed, the very nature of intimate sexual relationships, legally recognized or not, might support evidence

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199. For example, opposing parties should be able to use the fact that the influencer was the testator's close friend as evidence of both opportunity and interdependency. *See supra* part I; *infra* part IV.B; *see also* Estate of Burkland v. Hill, 504 P.2d 1143, 1147 (Wash. Ct. App. 1993) (finding that daily association between decedent and "friend" suggested opportunities for exertion of undue influence).

200. *See supra* part I.B.

201. The existence of a confidential relationship may be evidence supporting the *general* finding of undue influence. Indeed, the confidential relationship is evidence of diminished autonomy. *See supra* text accompanying note 115. In the context of the presumption, however, proof of a confidential relationship should include proof that the relationship was uncaring. If it does not, the presumption would allow a plaintiff to bypass the care inquiry altogether and shift the burden of proof to the defendant. *See supra* part II.B.

202. Evidence of "uncaring" is discussed *infra* part IV.B.

203. *See supra* notes 67-69 and accompanying text.

204. It appears to be a tool for the imposition of moral standards instead of any real inquiry into autonomy. *See supra* note 126.

of caring.<sup>205</sup> Thus, it is better that both plaintiffs and defendants be free to use such evidence either for or against undue influence. Eliminating the use of evidence of meretricious relationships merely precludes the court or the jury from inferring undue influence from nonsanctified sexual relations.<sup>206</sup>

Courts should continue to respect individual autonomy by preserving the general tradition of free testation in our society. If a court or jury finds that a testator was fully autonomous, her property should be distributed in accordance with her wishes, even if that disposition is to an uncaring person.<sup>207</sup> In this event, there is no need for any further inquiry—no need for the court to step in and rework the testator's will or impose state intestacy laws. This is essentially the current state of the law.<sup>208</sup>

Additionally, most people probably would agree that the law should prohibit a person from selfishly manipulating another who is in a diminished state of autonomy. In fact, this is the concern which the law of undue influence attempts to address. In such a case, the courts may fairly characterize the relationship as an uncaring one—the manipulator is not acting for the well-being of the other.<sup>209</sup> The influence assuages neither the concern about autonomous decisionmaking nor the concern about uncaring manipulation; it is undue.

The more difficult, and perhaps controversial, case is the one in which a testator who is in a diminished state of autonomy is engaged in a caring relationship with another individual. While the testator is significantly dependent, the caring nature of the relationship leads one to protest when a court sets aside the testator's will. A court should uphold the cared-for's will in this case, despite the fact that the one-caring may have had a hand in the preparation of the will and despite the fact that the cared-for is dependent upon the one-caring. When found in the context of a caring relationship, these acts of influence are not *undue*; they are acts of *care*. Indeed, it is exactly the point at which one is in a diminished state of autonomy that one needs the most care. Simply put, the law should encourage acts of care—not punish them. Thus, the distinction between caring and uncaring relationships becomes crucial to the determination of undue influence under the proposed standard.

205. See deFuria, *supra* note 23, at 202. Note that deFuria collapses meretricious relationships into the autonomy framework of undue influence. He argues that such relationships should be proof of natural beneficence, thus falling under the naturalness factor of undue influence discussed *supra* note 127 and accompanying text. deFuria, *supra* note 23, at 202. This is an attempt at using naturalness as a foothold for evidence of care. For problems with this approach, see discussion *infra* note 206 and accompanying text.

206. The inference distinguishes between the use of sexual intimacy in the context of marriage and its use outside of marriage. See *supra* notes 51-53 and accompanying text. This distinction, however, is no longer useful (assuming it ever was useful) in the context of our more liberalized society. See deFuria, *supra* note 23. The institution of marriage is not a bright line for determining whether sex is being used to unduly influence another person. Indeed, the sanctity of marriage is wholly irrelevant: spouses, as well as any other partner, can use sex in an effort to influence another person. Thus, courts should no longer use any inference regarding the sexual intimacy of a relationship, and instead should allow for a level playing field when it comes to such evidence in the persuasion of the jury: both plaintiffs and defendants might use it to support their cases.

207. See WILLIAM H. PAGE, 1 PAGE ON WILLS § 187 (3d ed. 1941) ("No matter how evil or sinister may be the purposes of the person who attempts to exercise the influence, it does not become undue influence unless it causes the testator to execute a will which did not represent his own wishes."); accord *In re Welch's Estate*, 272 P.2d 512, 512 (Cal. 1954); *In re Will of Liebl*, 617 A.2d 266, 271 (N.J. Super. Ct. App. Div. 1992).

208. See *supra* parts I-II. It is "essentially" the current law because courts should slightly modify the autonomy-based prong.

209. See *supra* part III.A. Note that care theory is concerned with more than selfish manipulation; however, such self-oriented action is counter to the blending of identities, and thus, caring generally. See *supra* notes 141-46 and accompanying text.

*B. How the Care Standard Would Work:  
Evidence of Caring*

The law presumes that the testator was autonomous.<sup>210</sup> Likewise, the law should presume that the devisees in the testator's will were in a caring relationship with the testator. It is fair to assume that persons named in the will are people who were engaged in a meaningful relationship with the testator. Thus, the burden of proving that the relationship was uncaring should remain with the plaintiff. This also supports the policy of encouraging caring activities. In order to prevail in an undue influence claim, the plaintiff should prove by a preponderance of the evidence that the testator was not autonomous and that the influencer was uncaring.

Similar to autonomy theory's will-substitution test, care theory should also take the form of an evidentiary test: the "caring-context" test. The caring-context test should probe the nature and context of the relationship between the testator and the influencer in order to determine whether one could characterize the relationship as uncaring. The test would ask the following: Was the nature and context of the relationship between the testator and the influencer uncaring? If so, a court can appropriately overturn the testator's will on the ground of undue influence.

Just as the principles of autonomy (competence, freedom, respect) supply factors which indicate a lack of autonomy (opportunity, motive, naturalness, susceptibility, confidential relationship), so also can the phases of caring (identification, responsibility, care-giving, care-receiving) form factors which indicate a lack of caring (disassociation, lack of responsibility, an absence of care-giving, disingenuousness).<sup>211</sup> Plaintiffs should use these factors in order to prove that the testator-influencer relationship failed the caring-context test. A plaintiff need not prove that *all* of these characteristics of caring were absent; instead, the caring-context factors are intended to parallel factors which courts currently use to probe the will-substitution test. Most importantly, courts ought to consider the totality of the testator-defendant relationship instead of relying on a formulaic consideration of these factors.<sup>212</sup>

### 1. Identification/Dissociation

Certainly, the interconnections between persons which enable them to identify with one another are probably incapable of direct proof in a court of law. Thus, just as with the autonomy factors, parties may have to rely heavily on circumstantial evidence.<sup>213</sup> There

210. See cases cited *supra* note 28 and accompanying text.

211. The caring-context factors are intended to work functionally, not rigidly. The New York Court of Appeals' application of factors for determining whether a person is a member of another's "family" is a good example of how courts should apply the caring-context factors. *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989). *Braschi* also provides a good example of the kinds of evidence into which courts might inquire in order to determine the caring nature of the testator-influencer relationship. *Id.*

212. The court in *Braschi* wrote:

These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring, and self-sacrifice of the parties which should, in the final analysis, control.

*Id.* at 55.

213. See cases cited *supra* note 27 and accompanying text.



are circumstances, however, which make the process of identification more likely; circumstances, which, when present, become fertile ground for identification.

The longevity and frequency of the relationship are two examples of circumstances which may establish the existence of identification. People who have just met are probably less able to fully identify with each other than people who have known each other for ten years, thus creating a higher potential for identification. Similarly, identification arises from contact. Evidence that the testator and influencer had frequent contact—they often spent time together, called each other, wrote each other, etc.—supports the claim that they identified with one another. A plaintiff who demonstrates that the testator knew the influencer for only a short time or that they did not spend quality time together casts doubt on the presumption that the relationship was a caring one because the process of identification is brought into question.

## 2. Responsibility/Lack of Responsibility

A caring influencer not only identifies with the cared-for, but also commits to being responsible for the cared-for. Evidence of responsibility includes actions indicating this commitment. One guide to the inquiry is self-referential: how did the testator and influencer hold themselves out to society? Perhaps the most obvious example is marriage. Other acts of self-referential commitment might include referring to the other as “boyfriend,” “girlfriend,” “partner,” or even “best friend.”

Another guide to determining a person’s commitment of responsibility to another is that person’s outward manifestations of an internal commitment. For example, the fact that one person devotes significant hours at the bedside of another who is sick might be an indication of an internal disposition toward responsibility.

## 3. Care-Giving/Absence of Care-Giving

Another object of inquiry is into the actual acts of the influencer: was she acting to meet the needs of the cared-for? How did the influencer and testator conduct their everyday lives? The activity of care-giving varies with the circumstances of the cared-for. Thus, courts will have to determine care-giving on a case-by-case basis. Care-giving might include cooking and cleaning, running errands, setting up appointments, or simply being by the side of the cared-for. For these purposes, care-giving is more than professional care; it is activity which occurs within a broader context of a caring relationship.<sup>214</sup>

Further, courts and juries should be sensitive to the fact that the testator’s needs, and thus the influencer’s actions, may not comport with the trier of fact’s personal judgments about what should have happened in the circumstances. Instead, the question is whether,

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214. There are several important differences between a caring relationship described in this Note and a relationship with a professional care-provider, such as a doctor or a nurse. This is not to say that professional care-providers cannot engage in a caring relationship which would pass the proposed standard. A relationship with a professional care-provider, however, does not per se constitute caring because the professional has a *duty* to care for her patient. This duty relies on a contractual, reason-based, rights-based perspective. One need only look at autonomy-based rules, such as informed consent, to see how the doctor-patient relationship is conceived apart from a perspective which would include the blending of identities. See BEAUCHAMP & CHILDRESS, *supra* note 80, at 74-79, 307-57.

Further, professionals are paid, and thus do not necessarily adapt the patient’s interest as *their own*; the relationship may never have been one of interdependence—deep and long-term financial and emotional commitments.

in the context of the testator's circumstances, it is reasonable to say that the acts were caring. A plaintiff could present evidence of abuse, neglect, or insensitivity, as long as she is able to persuade a court or jury that these actions were uncaring in the context of the relationship.

Courts should also hear evidence pertaining to interdependency: did the testator and influencer rely on each other? Emotional and financial interdependency are two forms that interdependency can take. Parties may use evidence that the testator and influencer relied upon one another for support and nurturance to establish emotional interdependency. For example, when faced with a crisis or a life-shaping decision, did the testator call upon the beneficiary for emotional support and guidance? If so, evidence of interdependency exists.

Joint bank accounts and budgets, as well as shared basic needs—food and shelter, for instance—are examples of financial interdependence. Many people in caring relationships are unconcerned with reciprocity: money and emotional support flow freely between them without regard to scorekeeping and equal division. Thus, plaintiffs could present evidence that the influencer lorded over the testator by reminding him of past debts or unfulfilled obligations in order to cast doubt on interdependency.

#### 4. Care-Receiving/Disingenuousness

To further counter the presumption of caring, plaintiffs can demonstrate that the influencer acted disingenuously towards the relationship. Perhaps he told a third party that he did not really love the testator, or that he was using her for her money. Another possibility is that the influencer clearly neglected the feelings and desires of the testator.

To further a claim of disingenuousness, plaintiffs can introduce evidence that the defendant was actively encouraging the testator's dependence. By its nature, caring includes an element of dependency; however, the one-caring ought to be encouraging the spontaneous, "autonomous" response of the cared-for. Dependency as an *unintended* by-product of the relationship might be permissible, as in cases where the testator is ill. In contrast, a defendant who knowingly encourages the dependency of the cared-for, especially for selfish ends, is not acting in a caring manner.<sup>215</sup>

All of these factors will ultimately be for the courts or juries to consider. The plaintiff should attempt to prove that the relationship resulted from something short of sincere concern for the other that arose from the blending of identities. Likewise, defendants should be able to counter the plaintiff's caring-context claims with evidence that the relationship was in fact a caring one.

#### C. Application of the Proposed Standard

Under the proposed standard of undue influence, the outcome of the scenarios posed in the Introduction might be different. Sean would probably prevail against a claim of undue influence whereas David probably would not.

The threshold question is one of autonomy. If a court or jury is convinced that either Pedro or Corey acted autonomously, the inquiry into undue influence is concluded. However, given the circumstances in each of the cases in light of the theoretical

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215. See *supra* notes 189-90 for a further discussion.

underpinnings of autonomy, it is doubtful that a jury could reasonably conclude that either Pedro or Corey was autonomous.<sup>216</sup>

Assuming that a jury would find that both Pedro and Corey were in a diminished state of autonomy, the second inquiry under the proposed standard is one into the caring nature of the relationships. Under the care-sensitive prong of the proposed standard, there is a strong argument that courts would uphold Pedro's will despite a finding of lack of autonomy.

Under the proposed standard, courts would presume that Pedro and Sean's relationship was caring. Sean could rely on several arguments using the factors of the caring-context test to rebut any claim to the contrary. First, Sean could argue that identification had occurred. Sean's and Pedro's relationship lasted ten years, during which time they were in frequent contact as a result of living together. Second, Sean could introduce evidence that he had taken on an attitude of responsibility for Pedro in the form of external acts of commitment. Sean and Pedro publicly committed themselves to one another by exchanging rings and holding themselves out to society as best friends and lovers. Moreover, Sean dedicated significant time at Pedro's bedside when he became sick. Third, Sean could introduce evidence of financial and emotional interdependency: the joint bank account, the shared home, and the reliance upon one another in times of need. Fourth, Sean could convincingly argue that his actions, such as monitoring phone calls, consulting with doctors, and arranging the attorney meeting, constituted caring activity because they met Pedro's specific needs as the cared-for. As the cared-for, Pedro's response would ordinarily be important to the determination of caring. In the case of Pedro's illness, however, it is sufficient to conclude that Sean did not intentionally undermine Pedro's autonomy. In light of these arguments, it is unlikely that Pedro's parents would successfully cast doubt on the presumption of a caring relationship by a preponderance of the evidence.

In sharp contrast, David's actions would probably continue to constitute undue influence under the caring-context test. In order to counter the presumption of a caring relationship, plaintiffs could point to the lack of longevity or frequency of contact in Corey's and David's relationship resulting from the short timespan of their relationship. Plaintiffs could also introduce evidence that David verbally abused Corey in public, indicating a lack of an attitude of responsibility and David's disingenuous approach to their relationship. Plaintiffs could convince the jury that David and Corey were not emotionally and financially interdependent—that David was encouraging Corey's dependence instead of her autonomy. Finally, plaintiffs could introduce any evidence that David had told another that he did not really love Corey or that he was using her for money or the feeling of power.

In sum, plaintiffs and defendants could successfully use the care-sensitive prong of the undue influence standard to distinguish between caring and uncaring relationships. The results of the two-pronged, care-sensitive approach better comport with an intuitively just outcome.

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216. See *supra* part I.C.

#### D. Answering Potential Objections

The inclusion of a care theory perspective within the law of undue influence will no doubt raise objections. Because our legal framework relies so heavily on autonomy theory, it is a challenge to incorporate an entirely new viewpoint, such as care theory, into our law. While care theory offers a more intuitive, if not more pragmatic, conception of interpersonal relationships, critics may insist that the autonomy framework is sufficient. This Section will examine four potential objections to the proposed standard.<sup>217</sup>

The first objection to a care-sensitive approach is that the current autonomy-based standard adequately distinguishes between caring and noncaring defendants. Yet, there are many cases in which the influencer has undertaken caring activity only to be the object of an undue influence finding.<sup>218</sup> Notwithstanding these cases, critics may argue that caring influencers already have several footholds in the current law in which to counter undue influence.

One potential foothold is the defendant's ability to counter a claim of undue influence with evidence that the influencer employed "reasonable persuasion."<sup>219</sup> However, this is problematic in light of the picture of interpersonal relationships which care theory paints. This defense implies that *proper* persuasion must be "reasonable." Indeed, the definition of persuasion is based on reason: providing rational, alternative courses of action.<sup>220</sup> Yet, caring relationships are often not based on reason alone: caring persons are inclined toward one another; they *feel* with one another. Under the current standard, courts could easily determine that the defendant's appeals to the emotions of the testator were outside the parameters of appropriate persuasion because the appeals were nonrational. Thus, while the defendant may employ the reasonable persuasion defense to describe her caring acts, it is clear that in many instances it will not constitute sufficient protection.

Another potential foothold for acts of care within the existing autonomy framework is the naturalness factor. The naturalness factor is used to show that the testator did not make an autonomous decision because his will devised property to a person whom the community deems to be outside the natural object of a reasonable person's affections. Yet, caring relationships may exist well outside the scope of what the community considers to be "natural," possibly presenting a serious problem for unpopular groups of people.<sup>221</sup> The naturalness factor is insufficient protection for these relationships.<sup>222</sup>

Even if either of the two potential footholds suggested provides adequate ground for evidence of care within the autonomy-based standard, they both rely on the general factors of undue influence; neither attacks what may be the most egregious problem of all—the presumption of undue influence. Presently, plaintiffs can too easily use the presumption to shift the burden of proof to the defendant. Overcoming the presumption

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217. One potential objection which is not fully addressed in this section is that the care-sensitive approach does not eliminate the abuse of judge and jury discretion. The care-sensitive standard, however, ensures that biased judges or juries will face greater difficulty justifying decisions of undue influence. In any event, society must address problems such as discrimination by fundamentally altering values and attitudes—a project well beyond the scope of this Note.

218. See *supra* note 17.

219. See *supra* note 55 and accompanying text.

220. See *supra* note 92 and accompanying text.

221. See generally Sherman, *supra* note 16.

222. One lawyer attempted to make the naturalness argument against the likely presumption of undue influence, but conceded that the plaintiff would probably win the "lion's share" of the funds in settlement because "it would have been a difficult case to win." See *AIDS Death Causes Tug-of-War*, *supra* note 6.

is a formidable task, especially in instances where the defendant must meet a higher burden of proof.<sup>223</sup>

As a second potential objection, critics may argue that there are ample opportunities for persons in a caring relationship to avoid accusations of undue influence. The testator could contact the attorney herself. Attorneys could sequester the testator in a room with paper and pen and have her write down all her wishes at once. Attorneys could avoid discussions with any partner who potentially could be considered an undue influencer or videotape the testator stating how she wants her property devised. However, there are several problems with these tactics.

First, these techniques may not be possible as a practical matter, such as in a situation where the testator is in the late stages of a debilitating disease. These testators are not in a position to contact an attorney or arrange meetings. They may not even be able to write. In the case of a testator stricken by a disease such as AIDS, videotaping may not be a practical alternative because of the danger that the plaintiff will use the tape to demonstrate weakened mental capacities, increased susceptibility to undue influence, or lack of testamentary capacity.<sup>224</sup>

Second, these tactics misunderstand the nature of influence under the autonomy framework. The fact that a testator is physically separated from the influencer does not mean that the control of the influencer ceases to exist. Simply put, control can be, and often times is, more psychological than physical.

Third, these techniques misunderstand the nature of caring relationships. It is unclear why a person in a caring relationship outside of marriage should have to disassociate herself from her friends and lovers when making the kinds of decisions that go into a will. Indeed, people naturally rely upon one another when making important life decisions. It is not uncommon for spouses to make their wills together.<sup>225</sup> Why should *any* caring relationship preclude people from seeking out the advice of those who care for them when these decisions are exactly what caring is all about?

The third potential objection to the proposed standard is that the care-sensitive approach is too difficult to administer. Yet, the care-sensitive standard is no more difficult to administer than the current autonomy-based standard, or indeed, many kinds of jury questions. Interdependency is no harder to prove than motive or naturalness.

A final potential objection is that the care-sensitive standard is overinclusive—that, if adopted, the caring standard would encourage rampant deception on the part of influencers. Manipulative people would disguise their actions by appearing caring, making undue influence nearly impossible to prove.

To the contrary, juries are extremely sympathetic to will challenges.<sup>226</sup> It is unconvincing that juries will not continue to serve as a potential deterrent for those who would unduly influence the testator.

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223. See *supra* note 74 and accompanying text.

224. See Angel, *supra* note 1, at 26. (“[Videotaping is problematic because] of the way a person looks in the advanced stages of [AIDS]—when they’ve lost a lot of weight, look very gaunt and so forth.” (quoting attorney Denise McWilliams)).

225. Cf. *McKee v. Stoddard*, 780 P.2d 736, 743 (Or. Ct. App. 1989) (“It is ludicrous to contend that it is suspicious for one spouse to be present while both spouses sign their wills or fail to insist that the other spouse have independent representation.” (Rossman, J., dissenting)).

226. One, albeit dated, study concluded that approximately 75% of all will contests are successful. See Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953); see also Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (suggesting that the average jury is tempted to rewrite a contested will to its own sense of fairness, rather than heed the court’s instructions regarding a will’s actual validity).

Even assuming that the proposed standard is overinclusive, it remains a more attractive alternative than the current standard because the latter rejects caring relationships along with uncaring relationships. It throws out the proverbial baby with the bath water. In the worst scenario, an uncaring influencer's manifest acts were consistent with a conclusion of caring, and the testator died believing that the influencer loved and cared for him deeply. The care-sensitive rule will encourage manifest acts of caring. Yet, one does not have to adopt a utilitarian perspective to agree that it is better to allow for some error on the side of uncaring relationships than to accept that caring relationships be subject to the strict judicial scrutiny of the current standard—it may simply be more intuitively just.

#### CONCLUSION

One byproduct of the AIDS epidemic is the exposure of the inequity of a variety of modern legal standards. These inequities are difficult to remedy because changing the rules alone is inadequate. Standards, such as the law of undue influence, are embedded in a theoretical framework supported by a deeply ingrained tradition. As a result, the rules must be transcended; change must occur at the level of theoretical perspective. By shifting perspectives, new legal tools can be created and employed to ameliorate existing deficiencies in the law's capacity to reflect changing attitudes and values.

This Note has proposed an example of the fruitfulness of such a theoretical shift, not only for AIDS patients, but for all persons who, by virtue of their caring acts, are in danger of a determination of undue influence. The caring-context inquiry arises naturally after one embraces care theory's perspective of interpersonal relationships. Together with the present autonomy-based standard, the care-sensitive approach adds new texture to the law of undue influence—one which more accurately accounts for our intuitive sense of interpersonal relationships.

Nevertheless, there are obstacles which complicate the kind of paradigm shift this Note proposes—obstacles which accompany all challenges to an existing order: the adherence to tradition, the convenience of custom, and the inertia against change. Autonomy values have the endorsement of the existing legal order and will be difficult to supplement as a result.

Yet, as scenarios like Pedro's and Sean's become an unwelcome familiarity, the reliance on alternative theoretical and legal conceptions, such as care theory, becomes imperative to justice. For the sake of those like Pedro and Sean, it could not come soon enough.

