

Presumed Abuse:
Restoring Elder Justice in the 21st Century by
Enacting a Presumption of Abuse and Disinheriting Abusers

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Sometimes the smallest changes leave in their wake the most impressive results. A small change in the way that courts process the abuse of elders and their estates is now needed to bring elder justice into the 21st Century, because probate reform has demonstrably failed to keep pace with recent, major developments. The evolving structure and role of the family in modern American society,¹ the lengthier and increasingly isolated lives of elderly Americans,² and the oncoming retirement of about 80 million “baby boomer” Americans have led to a widespread and increasing rate of abuse directed at elders and their estates.³ In the next three decades, the baby boomers that constitute over a fourth of the American population will double the amount of Americans living in retirement.⁴ These trends have sparked a trend in elder abuse. Well over five million Americans aged 60 and over endured physical or financial abuse in 2010 alone,⁵ indicating that physical and financial elder abuse has skyrocketed by 50% since 1980.⁶

Actor Mickey Rooney has appeared in over 300 films, which marks one of the longest careers of any actor from the silent film era. At 90 years of age, Mr. Rooney recently testified before Congress about his experience with abuse at the hands of his stepson.⁷ Tears reached Mr. Rooney’s eyes as he vividly recalled how his stepson withheld food and medication, censored mail, and controlled million of dollars’ worth of Mr. Rooney’s income.⁸ Several million elderly Americans have shared in the emotional and physical harassment, threats, and intimidation that

Mr. Rooney underwent, merely because he happened to be the only obstacle standing between his estate and his abuser.

Recognizing that elder abuse is often intrinsically linked with a desire to take from the victim's estate, this Essay argues that state legislatures can deter predators from harming several million more of the most vulnerable Americans by enacting a legal presumption that, subject to certain enumerated affirmative defenses, allows (but does not compel) factfinders to presume that abuse has occurred. Specifically, the statutes will permit factfinders to presume elderly abuse if a prosecutor establishes beyond a reasonable doubt that a person aged 60 or over has sustained unusually serious wounds or has made an inter vivos transfer of at least \$2,000 – or at least .5% of his or her net worth, if \$2,000 is less than .5% of his or her net worth – to a person without reciprocation. The statute will then state that individuals convicted of elder abuse will be disinherited from their victim's estate.

Research indicates that the prosecution of elder abuse is primarily held back by the inherent difficulty of proving whether a bruise resulted from assault or accident, and the inherent difficulty of proving that a financial transfer resulted from abuse instead of free will.⁹ As in *res ipsa loquiter* personal injury cases, the circumstances in the proposed statute speak for themselves to indicate abuse. By shifting to the accused person the burden of proving the elderly victim's consent or lack thereof, this presumption will help prosecutors convict individuals who lie, cheat, and steal their way into the estates of the most defenseless Americans. The conviction for abuse will then result in what an elder abuser would likely consider the ultimate sacrifice – disinheritance.

Part One of this Essay explores the landscape of elder abuse, namely what constitutes “elder abuse” and why the crosshairs of abuse have increasingly fallen onto America's seniors,

of all people. In Part Two, this Essay then analyzes the three most common scholarly proposals to curbing the rise in elder abuse and finds that, imperfect as it may be, the combination of a presumption of abuse and an abuse-related disinheritance bar to succession does not suffer from the conspicuous flaws apparent in these mainstream proposals. This Essay investigates in Part III the landmark U.S. Supreme Court case *County Court of Ulster County, New York v. Allen* to look into the legal and practical viability of enacting a statutory presumption of abuse and an abuse-related bar to succession.¹⁰

I. The Landscape of Physical and Financial Elder Abuse, and Why Such Abuse Happens

A. Physical Elder Abuse

As conspicuous as the signs of physical abuse can be, the explanations that abusers offer are difficult to refute when the victim is unavailable for reasons of incapacity, death, or refusal to cooperate. “She refused to eat,” “he’s a *klutz* and bruises easily,” and “I did it in self-defense” are all strong explanations for why an elderly person appears bruised, famished, or in some way physically abused.¹¹ Nursing homes may seem like a safe zone, but in reality they offer no safety guarantees from physical abuse. Indeed, nursing homes “are responsible for *much* of the elder abuses occurring in the United States.”¹² The largest and seemingly safest nursing home chains are cited 65% more often for deficiencies in quality of care than their smaller for-profit counterparts.¹³ Elder care institutions small and large are chronically understaffed, and their staffers are undertrained, overstressed, and overworked.¹⁴

Mandatory reporting laws apply in most states to incentivize self-reports of abuse, but these laws generally show little effect in the low rate of reporting physical abuse in nursing homes across the nation.¹⁵ To some extent, the rate of abuse in nursing homes and low rate of abuse reporting result from the fact that abuses in nursing homes are among the most difficult to explain, let alone discover. Even where the nursing home's administration and culture is genuinely concerned with providing only the finest standard of care for residents, after all, nursing home staffers are independent enough that their abuse of an elderly person can take too long to uncover, can be difficult to trace if uncovered, and can be all too easy to cover up to prevent discovery.¹⁶

Even once the report and subsequent evidence of elder abuse has caught a prosecutor's attention, prosecutors have mountains to move before they can convict someone of elder abuse. The elderly victim's unreliable and fading memory; the loss, destruction, or fabrication of fragile evidence;¹⁷ and high burdens of proof all combine to make prosecutors view the prosecution of elder abuse as an "onerous" affair, as one elder abuse prosecutor described it.¹⁸ A trial for physical elder abuse is also much more expensive than most trials, with costs climbing into six-figure digits because the prosecution must engage in extensive discovery and call for the testimony of medical experts, standard of medical care experts, and experts on issues of damages.¹⁹ The prosecution of physical elder abuse is so difficult that "some" or "few, if any" reports of elder abuse ever see any prosecution.²⁰ Litigation on elder abuse offers just as many challenging hurdles to plaintiffs as it does to prosecutors, because plaintiffs' attorneys have had to sue dozens of companies at once, only to collect a mere \$25,000 on an otherwise \$400,000 verdict.²¹

The understandable refusal or inability to prosecute elder abusers in criminal and civil courts has had a domino effect on the willingness of elders, families, and nursing homes to bother with reporting the offense in the first place. Up to *thirteen* out of fourteen incidents of physical elder abuse go unreported.²² Without a conviction, the elder abusers are free to continue their parasitic reign of terror on their victims' estates, and at times even inherit from those estates when their victim passes away. Both the civil and criminal sides of elder abuse prosecution are tied down by the same complication, namely the struggle with proving the elderly person's state of mind. Lack of consent often makes all the difference between a random bruise and a serious assault. Factfinders in elder abuse litigation under the current system cannot presume that abuse has occurred until the prosecutor or plaintiff has proven abusive intent, and that is going to continue paralyzing elder abuse litigation until state legislatures step in enact a presumption of abuse.

B. Financial Elder Abuse

Where elder physical abuse is typically self-explanatory and painfully visible to the eye, elder financial abuse requires some definition because, “[a]s one insensitive criminal investigator told an elder fraud complainant, it is not a crime for someone to give their money away.”²³ Elder financial abuse is often defined as “the illegal or improper use of an elder’s funds, property or assets.”²⁴ The Elder Justice Act provides an even more precise definition where it states that elder financial abuse is “the fraudulent or otherwise illegal, unauthorized, or improper act or process of . . . us[ing] the resources of an older individual for monetary or personal benefit, profit,

or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.”²⁵

Where physical elder abuse is difficult to quantify, financial elder abuse is estimated to have cost nearly three billion dollars in 2011, marking a 12% increase from just 2008.²⁶ Just over half of the three-billion-dollar price tag went to total strangers.²⁷ Also unlike physical elder abuse, financial elder abuse leaves behind no bruises or marks. While large transfers of wealth certainly leave behind a footprint for prosecutors to put into evidence, prosecutors find themselves hindered by their inability to establish that the transfer resulted from abuse.²⁸ Without evidence of consent or lack thereof, prosecutors often cannot establish that a large financial transfer resulted from the fruits of exploitation, misrepresentation, undue influence, or deceit instead of voluntary gifts or loans.²⁹

C. The Fundamental Problem of Consent in Both Physical and Financial Abuse

With allegations of abuse being unlikely to succeed in court if the abused person is unavailable, consent is clearly the central problem that prosecutors and plaintiffs’ attorneys face.³⁰ Naturally, consent is especially difficult to prove when the victim has passed away by the time pre-litigation matters are resolved and the trial has begun. But the Supreme Court in *Crawford v. Washington* ruled that if the elderly victim has passed away by the time trial has begun, then introducing the victim’s statement into evidence would violate the defendant’s right to confront hostile witnesses.³¹ Establishing consent can still be problematic even when the victim remains alive if the victim suffers from the kinds of cognitive impairments that affect many elderly persons, or if when the victim refuses to cooperate in the prosecution of an abuser.

After all, family members are the physical or financial abusers in about a third of elder abuse cases.³²

This relationship between the abuser and the abused helps prevent a great deal of reporting, in the likely event that the family refuses to believe that abuse has occurred or chooses to keep it private as a dark family secret, or in the likely event that the abused victim is too ashamed to besmirch the family name or is fearful of being retaliated against by other family members or ostracized from the family altogether.³³ Lack of reporting the abuse is especially prevalent in family abuse situations, because elderly victims may understandably feel a misplaced sense of loyalty to their kin.³⁴ Many elderly persons would simply prefer to suffer in silence while living around familiar faces and surroundings instead of living well in a nursing home.³⁵ And as mentioned in earlier, elderly persons do not necessarily fare any better in nursing homes.

Even in ideal circumstances where the elderly victim is alive and well, like Mr. Rooney in his testimony before Congress, the fact remains that the bruises or financial transfers in question typically occur through stealth and in secret. This is why even Mr. Rooney struggled to prove his claims about his stepson when his stepson of course denied everything.³⁶ Another major cause behind the staggering lack of reporting of elder abuse lies in the fact that elderly victims are concerned that no one will believe their story.³⁷ These concerns are actually rather substantiated, because law enforcement personnel generally show a bias against the perceived reliability of elderly persons,³⁸ and have come to treat elder abuse as “licensing or administrative matters and not as crimes.”³⁹ These consent-related complications to litigation and police work help explain the practical, sociological, and financial reasons that draw people to abuse the elderly in the first place.

D. The Practical, Sociological, and Financial Causes Behind Elder Abuse

Practically, elderly persons are targeted because abusing them is a high-profit, low-risk enterprise with a rapidly growing pool of potential elderly victims. In sworn testimony before a U.S. Senate committee that was investigating the rise elder financial abuse, an elder abuser observed that elders make for worthwhile targets because they “save their money more than younger people.”⁴⁰ Persons aged 65 and over also hold 70% of total household net worth on average in modern American society, which accounts for an aggregation of \$15 trillion in assets.⁴¹ At the same time, people often feel more depressed and feel a greater need for affection as they age, and these inclinations are only reinforced by the Internet Age’s tendency to reduce people’s social availability.⁴²

Sociologically, elders are living increasingly isolated lives as they outlive their partners and friends,⁴³ and as their children and siblings take up jobs in far-away cities.⁴⁴ One scholar observed that it “is not at all uncommon...to find that elder parents have not seen one or more of their adult children for many years...he or she is basically no longer a part of the parent’s life.”⁴⁵ With solitude comes loneliness, and this is a fact that is not lost on con-artists who manipulate their elderly victim’s isolation, loneliness, and natural longing for affection to gain their victim’s misplaced trust. Recent developments in American society allow these abusers to hone their destructive skills on more and more victims, with increasingly less and less outside scrutiny.

Psychologically, aging typically comes hand in hand with cognitive impairments. This is why many abusers do not randomly target elderly persons, but instead look for signs of impairment – for instance, looks of confusion and disorientation or forgetfulness – on elderly

people at banks, grocery stores, and churches.⁴⁶ To complicate matters, elderly people's decision-making abilities can function competently in most respects while functioning with subtle but serious impairments in other respects.⁴⁷ Mental exams are an imperfect solution for competency evaluations, because undue influence is strictly a legal concept.⁴⁸ And even for elderly people who are fully competent in every respect, the fact remains that advanced age often brings with it an inclination to be more trusting of others.⁴⁹ Some speculate that today's elders grew up in an era when people were more trustworthy.⁵⁰ Studies suggest that elders are merely less able to pick up on cues of untrustworthiness and misleading information due to their weakened anterior insula and prefrontal cortex.⁵¹

II. Mainstream Proposals for Sustaining Elder Justice

Have Untenable Shortcomings

Given the sheer number of proposals to tackling the elder abuse problem and the lack of action taken on these ideas, one might mistake elder justice as a place where good ideas go to die. States have enacted “no drop” statutes in domestic violence cases so that domestic abuse is prosecuted even when the battered victim is a “willing participant” who refuses to cooperate with the prosecutor, and states have enacted mandatory reporting laws for child abuse. If there are already domestic violence and child abuse statutes in existence, some scholars wonder, then why not simply expand them to cover elder abuse? The answer is that elder abuse is unique, in that elders live very differently than children and spouses. Unlike children and spouses, elderly people are retired and therefore do not frequent schools and workplaces where their abuse might be seen, and where they have an opportunity to talk about their abuse with non-judgmental

colleagues.⁵² Unlike children and younger adults, elderly people do not attend yearly doctor's appointments, and the doctors they eventually visit can mistake signs of abuse for signs of poor balance, since balance declines rapidly with old age.⁵³

Three arguments, however, have emerged with some staying power. Scholars largely look to one of three areas for answers to the growing elder abuse problem: new filial responsibility laws from local legislatures, new financial incentives from the federal government, or the creation of an elder abuse court system. Each of these proposals holds out its own unique kind of promise to the cause of restoring elder justice, but each of these proposals is also marred by serious shortcomings. The ideal solution would seize the advantages of these proposals without being held back by their disadvantages, and that is why this Essay will go on to outline its proposal for a statute that enacts the presumption of elder abuse and disinherits those convicted of elder abuse.

A. Filial Responsibility

Filial responsibility laws create a duty on adult children to provide support for their parents when their parents cannot provide for themselves.⁵⁴ Scholars who advocate stronger filial responsibility laws argue that many families can and should help absorb the ballooning costs of Medicare and Medicaid,⁵⁵ and these scholars can point to a long legal tradition of enforcing filial responsibility that stretches back centuries, to the colonial American era, Greek philosophers, and even to the beginnings of Judeo-Christian morality.⁵⁶ Helpfully enough, over half of all states have already enacted filial responsibility laws, with about 90% of states treating it as a

civil or probate matter.⁵⁷ On a related note, some scholars argue that Congress should expand the Family and Medical Leave Act to cover caregivers of the elderly.⁵⁸

But even if we ignore the tens of thousands of elderly individuals whose children are unavailable for reasons of being impoverished, disabled, incarcerated, deceased, hospitalized, drug addicted and in rehabilitation, or domiciled out-of-state or out-of-country, a number of serious problems arise with the filial responsibility laws. The two most pressing problems relate to the laws' vagueness and perverse incentives.

First, many statutes require "support" for "indigent" elderly people from their "children," but those statute fail to adequately define what actually constitutes "support," "indigence," or "children."⁵⁹ Does "children" refer solely to biological children, or does it include stepchildren, abandoned children, abused children, children born out of wedlock, adopted children, and so on? Many statutes fail to indicate who has standing to bring an enforcement action,⁶⁰ and provide no direction regarding how the responsibility for caregiving must be apportioned among multiple children.⁶¹ Many of these laws are simply unenforced, perhaps because they are so vague as to be unenforceable or not worth enforcing.⁶² Already, over 60 million elderly Americans receive 450 billion dollars' worth of assistance from family members, free of charge.⁶³ Filial responsibility laws do not and likely cannot take into account and credit informal caregiving of this nature when the caregiving responsibility is imposed on several children, but it is unfair to impose additional familial responsibilities on these caregivers.

Second, and most importantly, forcing a caregiving relationship onto people can create perverse incentives that run contrary to the overall goal of caregiving and reducing elder abuse. Unwilling caregivers can find a temptation to misappropriate the elder's finances and, out of spite, provide the bare minimum of necessary support. Such an unhappy relationship is not likely

to increase the amount of elder abuse reports. Even in the absence of outright physical or financial abuse, there is an undeniable conflict of interests at play between the size of the elder's estate and the cost of the elder's care. Elders themselves, meanwhile, often look askance at being a burden to their family, and feeling like an anchor on those who they love dearest.⁶⁴ It would be tragic and absurd to encourage children to distance themselves from their parents in an effort to escape the perceived heavy-handed obligations of filial responsibility laws.

B. Financial Incentives

Another prominent proposal lies in the creation of financial incentives. Proponents of the tax solutions maintain that charitable-related tax deductions should recognize individuals who help the elderly, that tax credits should be given to individuals who install elderly-friendly home improvements for elderly people, or that the government should subsidize people who provide support for the elderly or enable their employees to become caregivers for the elderly.⁶⁵ While such monetary incentives would not result in vague laws that compel people into a forced and unwilling relationship, the complexity of tax law is likely to create more confusion than opportunity.

Further, the tax credits and subsidies would award and encourage temporary assistance to the elderly when a long-term solution is needed to serve the increasingly long-living demographic of elderly people. Elderly people who are very outgoing and social would likely attract the most amount of help from their friends and acquaintances under these new laws, anyway, while the isolated elderly persons who need the help most will remain unknown to individuals eager to take advantage of the tax breaks. As with the familial responsibility laws, tax

breaks can create perverse incentives in the sense that some people will force themselves into the lives of the elderly to improve their living conditions, whether or not those elderly people want or need a constant parade of uncaring strangers coming into their residence to make unnecessary and noisy improvements. Ultimately, the help brought about by these tax incentives does nothing to increase elder abuse reports or deter elder abusers. If anything, the tax incentives provide abusers with a plausible cover story and more opportunities for their abusive schemes.

C. The Elder Abuse Court

Creating an elder abuse court is no simple matter. Under the current legal system, elder abuse is typically a state law issue with a patchwork of definitions, presumptions, and burdens of proof that differ from state to state.⁶⁶ Congress could still create an Article I elder abuse court, so long as an Article III federal court retains the power to make *de novo* reviews over its decisions.⁶⁷ By definition, then, the Article I elder abuse court would be unable to make binding decisions.⁶⁸ The elder abuse judge would perform all the functions of a federal judge, but merely submit findings of fact for a federal judge's review and decision.⁶⁹ Alternatively, Congress could create an Article III elder abuse court and provide it with jurisdiction over an elder abuse cause of action, with a uniform series of rights, presumptions, and burdens of proof to replace the national patchwork.⁷⁰

This second alternative, and indeed the concept in general of an elder abuse court, is as creative and novel as it is impractical. Such a sweeping change would be inordinately expensive to follow through nationwide, at a time when the government as a whole is tightening its operating budget. The cost of implementing a new court system would also promise to find a

major roadblock in Congress, where fiscal conservatives would certainly prefer a more cost-effective solution to what they would perceive as rapid and massive government expansion. Further, the trials of an elder court would be no quicker or less expensive than regular elder abuse trials, and the elder victims who are key witnesses would remain just as unreliable and unlikely to report their abuser in the first place. Lastly, the uniformity of a national system is inappropriate to an area of law that is as state-specific as elder estate law, considering how differently Florida's elderly demographic is to, say, North Dakota's elderly demographic.⁷¹

By contrast, a statute from each state that creates a presumption of abuse and disinheritance can seize the advantages of these aforementioned proposals, without being held down by their critical shortcomings. Through *Allen*, the Supreme Court has already weighed in on and ruled in favor of this Essay's proposal for a presumption.

III. Using the *Allen* Precedent to Implement the Presumption of Abuse

A. The Case Law in *Allen*

In *County Court of Ulster County, New York v. Allen*, the Supreme Court analyzed the legality of a New York statutory presumption that, subject to certain enumerated exceptions, every person in a vehicle jointly possesses a firearm found in the vehicle.⁷² In *Allen*, three adults and a minor were arrested after a traffic stop revealed two handguns in the minor's open handbag.⁷³ All four of the defendants were convicted, but the appellate court found that the presumption was invalid for being arbitrary and prone to unfair applications.⁷⁴ The appellate

court reasoned that if a hitchhiker had been a defendant in the vehicle, then the presumption would arbitrarily and rather absurdly apply to that hitchhiker.⁷⁵

The Supreme Court disagreed with that analysis. Rejecting the hitchhiker hypothetical as “implausible,” the Court ruled that it is improper analysis to imagine an extreme hypothetical to which a presumption would be wrongly applied.⁷⁶ Indeed, a prosecutor would most likely not prosecute the hitchhiker because applying the presumption to him would run so contrary to common sense. Even if the prosecutor were to prosecute, the jury could see the absurdity of applying the presumption, so long as the jury instructions made it clear that the presumption was purely permissive, not mandatory. In defense of presumptions, the Supreme Court observed that “presumptions are a staple of our adversary system factfinding.”⁷⁷ Indeed, there are “hundreds of recognized presumptions” in the American legal system.⁷⁸ The Court outlined a two-prong test for the analysis of presumptions under the Due Process Clause: first, the facts must bear some rational connection to the presumed facts, so as not to be arbitrary; and second, the presumption must not seriously interfere with fact-finding.⁷⁹

The Court reasoned that permissive presumptions do not burden defendants because, as devices that merely permit factfinders to presume certain facts, permissive presumptions do not relieve the State from its duty to produce evidence and persuade a factfinder beyond a reasonable doubt.⁸⁰ By contrast, mandatory presumptions struck the Court as “far more troublesome” because they can excuse the State from its burden of persuasion beyond a reasonable doubt.⁸¹ Later case law has come to the conclusion that mandatory presumptions violate the Constitution when they relieve the State of its burden of persuasion, but do not violate the Constitution where they merely shifted the burden of production to the defendant.⁸²

B. Policy Concerns Addressed in a Presumption of Abuse

While the presumption of abuse could be mandatory, a permissible presumption of abuse is sufficient to stem the tide of elder abuse. This is because even a merely permissible presumption will help prosecutors withstand directed verdicts of acquittal in the all-too-likely event that the elder victim's unavailability for reasons of incapacity, death, or refusal to cooperate has damaged the prosecutor's case-in-chief.⁸³ By allowing a trial judge to overlook the victim's unavailability and still find that a reasonable jury could be convinced beyond a reasonable doubt of the defendant's guilt, the presumption of abuse bolsters prosecutors without adding any additional burdens onto defendants.⁸⁴ The presumption merely makes it easier for the court system and its factfinders to process a crime with a state of mind that is difficult or impossible to prove.

State legislatures should enact legislation allowing factfinders to presume that an elderly person has not consented to receiving an unusually serious bruise or has not consented to "donating" especially large financial transfers to others. Since the conceptual framework behind such legislation should be flexible enough to meet each state's unique demographic needs, the language proposed here will provide only a model statute that outlines the facts most states will likely rely on in allowing factfinders to presume the victim's lack of consent. "Abuse," for instance, is used throughout this Essay as a placeholder that each state can replace with its unique legislative language, be it "undue influence" or some other legal term of art. To minimize the possibility of coincidence and to comply with the Court's insistence that presumptive facts bear some rational relationship to the actual facts of a case, the statute below will list a number of elements for the prosecution to prove beyond a reasonable doubt.

C. The Presumption Statute's Model Language

A model statute that gives rise to the presumption of abuse would contain language as follows: “The rebuttable presumption of elder financial abuse is triggered when the prosecution shows by clear and convincing evidence that a person aged 60 or over has sustained unusually serious wounds or has made an inter vivos transfer of at least \$2,000 – or at least .5% of his or her net worth, if \$2,000 is less than .5% of his or her net worth – to a person without receiving any reciprocal material benefit. The presumption of physical abuse is rebutted if the suspected abuser shows by clear and convincing evidence that the wounds resulted from self-harm, accident, or harm from a third party. The presumption of financial abuse is rebutted if the suspected abuser shows by clear and convincing evidence that the transfer resulted from a valid charitable contribution or loan. The criminal conviction of physical and/or financial elder abuse will bar succession of the victim’s estate, resulting in the abuser’s disinheritance.”⁸⁵

This presumption of abuse allows a factfinder to infer the victim’s state of mind as lacking free will, which is critical to the success of physical and financial abuse cases. This presumption is comparable to the *res ipsa loquiter* doctrine, which states that when the circumstances that give rise to personal injuries speak for themselves, it is the injuring party’s burden to establish intent.⁸⁶ Still, the model presumption of abuse here stops short of imposing strict liability onto the accused party because it provides room for the accused party to explain if any misunderstandings are at work.

D. Analysis of the Presumption of Abuse

1. *A person aged 60 or over*

Age is a touchy subject, in social conventions as much as in statutory language. This Essay singles out 60 years of age because that mirrors the language found in many elder abuse statutes.⁸⁷ The factors here are not meant to impose any ageist burdens on generous elderly people, or deprive them of any right because of their age. Instead, the age element is only triggered once all of the other elements indicate that abuse can be presumed. Ultimately, states may prefer to use the term “vulnerable person” instead of specifying an age.

States differ in their understanding of vulnerability, with Florida defining a “vulnerable person” as someone who suffers impairments of the ability to perform everyday activities because of a “mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging,”⁸⁸ and Alaska defining the vulnerable person as “a person 18 years of age or older who, because of incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance, is unable to meet the person’s own needs or to seek help without assistance.”⁸⁹ However the state defines vulnerability, a factfinder engaged in the vulnerable person analysis would likely consider “aggravating” and “mitigating” factors. Aggravating factors would include a person who lives in solitude and/or suffers from depression or some other cognitive or physical impairment, while mitigating factors would include a person living in the company of others and/or a person who lives in good mental and physical health.

The open-ended wording of “vulnerable person” may catch more individuals under its umbrella than a strict age limit, but a strict age limit is easier to prove beyond a reasonable doubt.

Further, a state's statutory understanding of "vulnerability" would exclude elderly people who are merely gullible or exceptionally trusting due to their age, and may exclude vulnerable elderly people whose unique vulnerabilities are not yet statutorily recognized. Incapacity in general is a sliding scale when it comes to the cognitive impairments of old age, and studies indicate that many elders can appear fully mentally capable but still be vulnerable to exploitation.⁹⁰ This Essay merely seeks to point out the possibilities of how the statute can be worded, so that each state legislature can determine what kind of language best suits its locality.

2. *Unusually serious wounds*

It is certainly overzealous to bring a caregiver or potential abuser into court each time an elderly person has a small bruise or a scrap. But the same is not true of unusually serious wounds, a term that can be further defined by each state according to the kinds of physical abuse prevalent in those states, or perhaps be left open-ended so that each factfinder can determine what a reasonable person should take as an unusually serious wound. A major impediment in the prosecution of physical elder abusers lies in the fact that the current legal framework requires factfinders to expect the prosecutor to establish what was going on in the minds of the parties when the injuries occurred. This presumption will allow factfinders to presume what was going on in the parties' minds when the wound is unusually serious, and thus leave it up to the accused to explain the injuries and the circumstances surrounding those injuries.

Already, then, this presumption goes further to protect elder estates and advance the cause of elder justice than several disinheritance statutes and the doctrine of undue influence in probate law, because they apply only to elder financial abuse.⁹¹ The wording of this statute will inspire caregivers and other people to be especially patient with and diligent around the elderly,

especially when the elderly person is clumsy or shows tendencies of self-harm. At the very least, a rule of this nature will encourage people to have witnesses, cameras, recordings, or some other kind of evidence with them when they interact with difficult elderly persons, which will benefit both parties immensely in the event that an otherwise suspicious-looking injury occurs.

3. Inter Vivos Transfer

Inter vivos transfers occur when a person gives money within his or her lifetime. The proposed statute focuses on inter vivos trusts because bequests given through wills and trusts already go through the probate process, which only begins once the elderly person has passed away. This delay brings with it two key implications. First, elder abusers prefer to actually take hold of money or property from their victim's estate as soon as possible instead of waiting very patiently for their victim to pass away and hoping that their victim has written a bequest for them in a valid will or trust. The second implication is that the probate process is already designed to determine the validity of large transfers without the assistance of the decedent, so the consent-related benefit of a presumption would have little effect in the probate process.

The probate process also comes with two built-in advantages over inter vivos transfers. First, inter vivos transfers often occur entirely on the elderly person's volition, but attorneys are generally involved in the drafting of a valid will or trust bequest. When attorneys are involved to assist, they can act as a second pair of eyes to scrutinize suspicious activity before exploitation occurs. Second, an extensive body of probate law already addresses this Essay's concerns about elder abuse through a presumption analogous to the presumption of exploitation. The Undue Influence Doctrine in probate law states that financial transfers large and small are presumptively

an act of undue influence if they were given to an individual who had a trusting, confident relationship with the decedent.⁹²

4. *\$2,000 or .5% of net worth*

The “\$2,000” figure is admittedly arbitrary, but it helps establish a framework for balancing the fine line between unusual transfers of large funds and commonplace transfers to friends and family. Since the measurement between “unusual” and “commonplace” depends on each state’s average per capita income, tax rates, and other financial statistics, the exact number that triggers the presumption should vary from state to state. Even a seemingly high five-digit minimum requirement would suffice to stop much of the abuse. For example, 93-year-old Donald McClurg was approached by a 38-year-old who struck up an innocent conversation with him, met him several more times for coffee, then told him that she had developed cancer and would need \$15,000 for surgery.⁹³ The lies continue until, over the course of several weeks, McClurg hands over \$60,000 to the woman before a police detective caught onto her scheme.⁹⁴ A \$2,000 or even \$20,000 cut-off would have triggered the presumption of exploitation very early on in this all-too-common common scheme. Without triggering a presumption, unfortunately, individuals like Mr. McClurg have to rely on the luck of having “an aggressive detective and determined prosecutor.”⁹⁵

Another concern that is present when specific values are provided is that very wealthy elderly people might contribute large sums of money with such regularity that enacting this statute would effectively send individuals like Bill Gates on weekly trips to their local probate courthouse. To avoid the inordinate burden that wealthy elderly people would face, the statute adds that the minimum sum of donated money must constitute a certain percentage of the

donor's overall wealth. If \$2,000 or some other minimum number is less than .5% of the donor's net worth, then it would be overzealous to even put a permissive presumption of exploitation before a jury, let alone overzealous to prosecute at all. If, however, a \$600 transfer is *over* .5% of the donor's net worth, then the presumption of exploitation should be triggered because that is a suspiciously large amount of money to transfers.

If the transfer's percentage of net worth is the main factor, one might wonder, then what sense is there in putting a specific minimum number before it? The statute should still use a number so that it acts as a clear message to potential abusers. These abusers will not and likely cannot calculate their victim's net worth before attempting to cheat the person out of a sum of money. But an exact number is important to put into the statutory language, because exact numbers that are easy to understand and remember will help deter at least some potential elder abusers. While the pathological abusers will continue abusing with headlong abandon even if the punishment were a mandatory death penalty, a segment of risk-averse abusers who dare not trigger the presumption of exploitation will decide that the costs of finding an elderly person and establishing a relationship is not worth \$2,000, or whatever the state enacts as its minimum requirement.

5. A person

This Essay has carefully chosen to apply its model statute to any recipient with personhood, whether or not that recipient is related to the donor by blood or is even human at all. Elderly persons make frequent gifts to their relatives without any need or desire for reciprocation. Given the low probability that a court will find exploitation in its inspection of gifts to close relatives, opponents of this statute could argue that including relatives in the statute

would unnecessarily burden the courts, at best – and at worst, these inspections would violate due process for being arbitrary, because the presumed facts bear no relationship to common experience.⁹⁶

Nevertheless, exploitation is worth considering when unusually large sums of money are transferred. Relatives commit a substantial percentage of elder financial fraud, after all, and it is less improbable that exploitation may be afoot when a transfer involves large sums of money, and meets this statute's other elements. The reasonable suspicion that large transfers of money would trigger, especially if such large transfers are unusual for the donor, would pass the test for arbitrariness because common experience *does* in fact indicate that exploitative individuals seek to manipulate large transfers out of their victim's estate. And while corporate persons are not a major source of elder financial abuse, it could certainly happen that a corporation might target a wealthy potential donor and exert enough undue influence, misrepresentation, or other form of exploitative persuasion to secure a large transfer of money from that victim's estate.

6. Receiving assets or services in return

Not every large transfer of money that involves nothing in return is a clear sign of elder financial exploitation, but most acts of elder financial exploitation result in large transfers of money that involve nothing in return. Indeed, large transfer of money that involve nothing in return is a clear sign of fraudulent conduct in general.⁹⁷ While many innocent transfers of money also involve no reciprocal benefits because they are gifts or loans, the statute's other elements and its exceptions for gifts and loans will help prevent wrongly accused individuals from being wrongly convicted and disinherited.⁹⁸ This language will also help reduce the amount of

unnecessary and frivolous litigation, because it ensures that any transfer of money involving reciprocation will not trigger the presumption of abuse.

7. Charitable contribution defense

Elder financial abusers often cloak their illegal gains as the result of a legitimate charitable gift, in the hopes that the prosecution cannot establish the donor's manipulated state of mind beyond a reasonable doubt.⁹⁹ While many transfers of money are in fact gifts, the accused abuser should have to establish that the donor intended with free will to offer the transfer of money or property as a gift. Ideally, the accused abuser would provide this evidence through the elder's own writings or statements, be they verbal or electronic. The accused abuser would raise the charitable contribution defense as an affirmative defense, one that he or she must persuade the factfinder of beyond a reasonable doubt.

8. Loan defense

Another manipulative trick that elder financial abusers use is the promise of paying back the generous transfer of money.¹⁰⁰ The loan defense works in courts as well, if the accused abuser can raise enough doubt in the factfinder's mind that the transfer was intended to be paid back in full. These kinds of defenses muddy the very kinds of consent-related issues already holding back the prosecution of elder abuse. By requiring written evidence that demonstrates definite repayment dates for the supposed loan, the statute can help ensure that the loan defense is more than merely another intent-related ruse.¹⁰¹ Like the charitable gift defense, this would be an affirmative defense for the defendant to establish beyond a reasonable doubt. If the apparent

repayment date has expired but the payment is still due, an accused abuser will have a very difficult time explaining how the transfer was not based on some form of exploitation.

8. Disinheritance

As mainstream scholarship already agrees, disinheritance should be an integral part of any deterrent solution to restoring elder justice in the 21st Century.¹⁰² Further, six out of eight states with a disinheritance statute have enacted their statute to work in tandem with criminal law, in that they require a criminal conviction before the abuse acts as a bar to succession.¹⁰³ The Constitution grants no right of inheritance, so there are no legitimate double-jeopardy concerns about punishing an abuser with a criminal conviction, then using that conviction to bring on the civil consequence of disinheritance.¹⁰⁴ Indeed, states have such legal discretion over probate matters that they could “even abolish the power of testamentary disposition over property within its jurisdiction,” which would effectively and without need for due process of law invalidate every will in the state’s jurisdiction.¹⁰⁵ Many if not the majority of states use the convictions of murder or abandonment, for instance, as grounds for disinheritance, so that “disinheritance through abuse” merely adds another serious harm to the list of bars to succession.¹⁰⁶

It is reasonable to assume that strengthening the bar to succession may strengthen the deterrent effect of disinheritance statutes.¹⁰⁷ Part I of this Essay delved into depth just how rational of a crime elder abuse – at least, elder financial abuse – has become. Further, some studies indicate that disinheritance statutes on murderers have some effect on deterring the murder of elderly persons for inheritance reasons, despite the passions of murder. Even putting the rational/emotional concerns aside, a bar to succession will likely deter elder abuse because the very incentive to abuse stems from the possibility of gaining from the estate. Succession is

tied into the very nature of elder abuse. Abusers who are not aware of the law once it is passed will become aware of it as it is enforced against other elder abusers. Concerns about overbroad language are a simple matter that careful legislative drafting can avoid.

E. Jury Instructions

If the case law is any indication, accurate jury instructions can be critical in criminal cases that turn on presumptions. So, the statute here should also add a model set of jury instructions. In an area as sensitive as this one, it is critical that the courts use some very precise language in their jury instructions. *Francis v. Franklin* ruled, for instance, that courts violate due process when they even inadvertently lead a jury to believe that a permissive presumption is a mandatory presumption that shifts the burden of persuasion about the victim's intent to the defendant.¹⁰⁸

The jury instructions must also avoid creating a risk that jurors could construe the presumption as conclusively establishing intent, instead of offering them the ability to infer intent.¹⁰⁹ The *Allen* Court in fact ruled that the trial judge's jury instruction saved the conviction by making it clear that the presumption was a mere part of the State's case-in-chief, that it gave rise to a permissive inference only in certain cases, and that jurors were free to ignore it.¹¹⁰ As such, the model jury instructions should be clear that if the jurors find that the State has convinced them beyond a reasonable doubt of all elements in the statute, then the jurors may *but are not required to* presume that the transfer(s) resulted from "exploitation," or whatever legal term the local jurisdiction prefers to put in place of "exploitation."

IV. CONCLUSION

Without probate reform, the legal system today and its “legal and social welfare systems are unequipped to adequately protect elders from predators.”¹¹¹ With adults leading increasingly transient lives away from their elderly parents, with elderly parents living increasingly lengthier and isolated lives, and with 80 million Americans about to enter the elderly demographic, American society is adopting to the modern world in a manner that makes financial and physical elder abuse easier and more tempting to the men and women who make a living by preying on the graying. Elder and estate law has failed to keep pace with this troubling development, and scholars have brought forward a number of proposals that will not do enough to curb this troubling development.

This Essay therefore proposes that state legislatures enact a presumption of abuse when elderly people sustain unusually serious wounds or make suspiciously large transfers of money to people for no reciprocal benefit. If the recipient cannot demonstrate through the enumerated affirmative defenses that the prosecutor’s suspicions are unfounded, then the recipient of the large transfer will be found guilty of elder abuse and be disinherited from the victim’s estate, if disinheritance applies. Enacting this presumption into law brings with it few costs, and implementing this presumption would in fact save money by easing the otherwise expensive and tedious process of prosecuting elder abusers. The presumption of disinheritance and the abuse bar to succession hold out great promise for deterring elder abusers, because they are both simple legal concepts for potential abusers to comprehend. The presumption and bar also lower the notorious burdens of reporting the “under-reported, under-recognized, and under-prosecuted”

crime of elder abuse by addressing the very root of a victim's concerns about not being believed.¹¹²

With small changes in the prosecution of elder abusers, we can restore elder justice in the 21st Century without the kinds of massive overhauls entailed in burdensome filial responsibility laws, confusing tax reforms, and expensive elder abuse courts. Indeed, sometimes the smallest changes are precisely the kinds of changes that leave in their wake the most impressive results.¹¹³

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- ¹ See Donna Harkness, *What Are Families For? Re-Evaluating Return To Filial Responsibility Laws*, 21 ELDER L.J. 305, 310 (2014).
- ² See Travis Hunt, *Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 And Using It As A Model*, 2014 B.Y.U. L. REV. 445, 452 (2014).
- ³ See Harkness, *supra* note 1, at 306.
- ⁴ *Id.* at 39.
- ⁵ See Priscilla Vargas Wrosch, *What More Can Congress Do About The Elder Abuse Epidemic? A Proposal For National Movement*, 23 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2013).
- ⁶ See Hunt, *supra* note 2, at 448.
- ⁷ See Daniel L. Madow, *Why Many Meritorious Elder Abuse Cases in California Are Not Litigated*, 47 U.S.F. L. REV. 619, 645 (2013).
- ⁸ *Id.*
- ⁹ Andrew Jay McClurg, *Preying On The Graying: A Statutory Presumption To Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1104 (2014).
- ¹⁰ 442 U.S. 140 (1979).
- ¹¹ See Wrosch, *supra* note 5, at 10.
- ¹² *Id.* at 39 (emphasis added).
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.* at 4-5.
- ¹⁶ *Id.* at 7 (“Residents are bathed. Linens are washed or thrown away before physical forensic evidence is collected.”).
- ¹⁷ *Id.* at 6 (“Nursing home employees intentionally frustrate legal vindication by tampering and destroying records that could serve as evidence of abuse.”).
- ¹⁸ Page Ulrey, Senior Deputy Prosecuting Attorney, King County Prosecutor’s Office, Panel Discussion at Nat’l Inst. of Justice: Prosecuting Cases of Elder Abuse (June 2010) (transcript available at <http://nij.ncjrs.gov/multimedia/audio-nijconf2010-elder-prosecuting.htm#ulrey>).
- ¹⁹ See Wrosch, *supra* note 5, at 15.
- ²⁰ *Id.* at 13.
- ²¹ *Id.* at 14.
- ²² See Hunt, *supra* note 2, at 449-50.
- ²³ See McClurg, *supra* note 9, at 1118.
- ²⁴ WASH. REV. CODE ANN. § 74.34.020 (West 2015).
- ²⁵ 42 U.S.C. § 1397(j)(8) (2010).
- ²⁶ See McClurg, *supra* note 9, at 1106-07.
- ²⁷ *Id.*
- ²⁸ *Id.* at 1105.
- ²⁹ *Id.*
- ³⁰ See Wrosch, *supra* note , at 6.
- ³¹ 541 U.S. 36, 68-69 (2004).
- ³² See McClurg, *supra* note 9, at 1107.
- ³³ See Wrosch, *supra* note 5, at 3; see also Hunt, *supra* note 2, at 449.
- ³⁴ See Wrosch, *supra* note 5, at 4.

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- ³⁵ *Id.*
- ³⁶ *Id.* at 2.
- ³⁷ *Id.* at 3.
- ³⁸ *Id.* at 7.
- ³⁹ *Id.* at 6.
- ⁴⁰ See McClurg, *supra* note 9, at 1108.
- ⁴¹ *Id.*
- ⁴² See McClurg, *supra* note 9, at 1115.
- ⁴³ See Harkness, *supra* note 1, at 339.
- ⁴⁴ *Id.* at 314.
- ⁴⁵ *Id.* at 316-17.
- ⁴⁶ *Id.* at 1111.
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*
- ⁴⁹ *Id.* at 1112.
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 1112-13.
- ⁵² Cf. Hunt, *supra* note 2, at 452.
- ⁵³ *Id.*
- ⁵⁴ See, e.g., ALA. STAT. ANN. §25.20.030 (West 2014); DEL. CODE ANN. TIT. 13, §503 (West 2015); GA. CODE ANN. §36-12-3 (West 2014); IOWA CODE ANN. §252.2 (West 2015); KY. REV. STAT. ANN. §530.050 (West 2015); MD. CODE ANN. FAMILY LAW, §13-303 (West 2014); MISS. CODE ANN. §43-31-25 (West 2015); MONT. CODE ANN. §40-6-214 (West 2014); N.H. REV. STAT. §167:2-b (West 2014); N.D. CENT. CODE ANN. §14-09-10 (West 2015); OR. REV. STAT. ANN. §109.010 (West 2015); and UTAH CODE ANN. §17-14-2 (West 2015).
- ⁵⁵ See Windsor C. Schmidt, *Medicalization of Aging: The Upside and The Downside*, 13 MARQ. ELDER'S ADVISOR 55, 64 (2011) (estimating that Medicaid and Medicare expenses amounted to 35% of all U.S. spending on health care in 2009, which approximates 875 billion dollars).
- ⁵⁶ See Harkness, *supra* note 1, at 310-11.
- ⁵⁷ See, e.g., CAL. PENAL CODE §270(c) (West 2015); CONN. GEN. STAT. ANN. §53-304 (West 2014); IND. CODE ANN. §35-46-1-7 (West 2015); KY. REV. STAT. ANN. §530.050 (West 2015); MD. CODE ANN. FAM. LAW §§13-101, 13-102, 13-103 (West 2015); MASS. GEN. LAWS ANN. CH. 273 §20 (West 2014); MONT. CODE ANN. §§40-6-301, 40-6-302 (West 2015); N.C. GEN. STAT. ANN. §14-326.1 (West 2014); OHIO REV. CODE ANN. §2919.21 (West 2015); R.I. GEN. LAWS ANN. §§15-1 1 to 15-10-7; R.I. GEN. LAWS ANN. §§40-5-13 to 40-5-18 (Westlaw 2015); VT. STAT. ANN. TIT. 15 §§202, 203 (West 2015); VA. CODE ANN. §20-88 (Westlaw 2015).
- ⁵⁸ See Harkness, *supra* note 1, at 340.
- ⁵⁹ See, e.g., IND. CODE ANN. §31-16-17-1 (West 2015); R.I. GEN. LAWS ANN. §§40-5-13 to 40-5-18 (Westlaw 2015); VT. STAT. ANN. TIT. 15 §§202, 203 (West 2015).
- ⁶⁰ See, e.g., CONN. GEN. STAT. ANN. §53-304 (West 2014); DEL. CODE ANN. TIT. 13, §503 (West 2015); MISS. CODE ANN. §43-31-25 (West 2015); UTAH CODE ANN. §17-14-2 (West 2015); VT. STAT. ANN. TIT. 15, §204 (West 2015).
- ⁶¹ See, e.g., KY. REV. STAT. ANN. §530.050 (West 2012); MD. CODE ANN. FAM. LAW §§13-101, 13-102, 13-103 (West 2015); MASS. GEN. LAWS ANN. CH. 273 §20 (West 2014).
- ⁶² See Harkness, *supra* note 1, at 321.

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- ⁶³ See LYNN FEINBERG ET AL., VALUING THE INVALUABLE: 2011 UPDATE THE GROWING CONTRIBUTIONS AND COSTS OF FAMILY CAREGIVING, AARP PUB. POL. INST. 1 (2011), available at <http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf>.
- ⁶⁴ *Id.* at 331.
- ⁶⁵ See Harkness, *supra* note 1, at 339-40.
- ⁶⁶ See Wrosch, *supra* note 5, at 25-26.
- ⁶⁷ *Id.* at 22-24.
- ⁶⁸ *Id.*
- ⁶⁹ *Id.* at 24.
- ⁷⁰ *Id.* at 25-26
- ⁷¹ See FLORIDA HEALTH CARE ASSOCIATION, 60 YEARS OF CARING 5 (2014), available at <http://eldercareflorida.com/wp-content/uploads/2014/07/FHCAs-60-Years-Report.pdf> (estimating that by 2030, a quarter of Florida's population will be made up of elderly adults).
- ⁷² 442 U.S. 140 (1979).
- ⁷³ *Id.* at 143-44.
- ⁷⁴ *Id.* at 145-46.
- ⁷⁵ *Id.* at 163.
- ⁷⁶ *Id.* at F.N. 14.
- ⁷⁷ *Id.* at 156.
- ⁷⁸ See 2 MCCORMICK ON EVIDENCE § 343 (Kenneth S. Broun ed., 7th ed. 2013).
- ⁷⁹ See 442 U.S. at 142.
- ⁸⁰ *Id.* at 157.
- ⁸¹ *Id.* at 158.
- ⁸² See generally, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).
- ⁸³ See McClurg, *supra* note 9, at 1128.
- ⁸⁴ *Id.*
- ⁸⁵ *Cf. id.* at 1131.
- ⁸⁶ See generally Kyle Graham, *Strict Products Liability At 50: Four Histories*, 98 MARQ. L. REV. 555 (2014).
- ⁸⁷ See, e.g., IOWA CODE ANN. §252.2 (West 2015); KY. REV. STAT. ANN. §530.050 (West 2015); MD. CODE ANN. FAMILY LAW, §13-303 (West 2014); MISS. CODE ANN. §43-31-25 (West 2015); Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 300 (2003).
- ⁸⁸ FLA. STAT. § 415.102(27) (2014).
- ⁸⁹ ALASKA STAT. ANN. § 47.24.900(21).
- ⁹⁰ See Natalie L. Denburg & Lyndsay Harshman, *Why So Many Seniors Get Swindled: Brain Anomalies and Poor Decision-Making in Older Adults*, in CEREBRUM 2010: EMERGING IDEAS IN BRAIN SCIENCE 123-31 (2010).
- ⁹¹ See Hunt, *supra* note 2, at 461.
- ⁹² See J. William Gray Jr. & Katherine E. Ramsey, *Wills, Trusts, And Estates*, 49 U. RICH. L. REV. 211, 225.
- ⁹³ See McClurg, *supra* note 9, at 1100.
- ⁹⁴ *Id.* at 1101.
- ⁹⁵ *Id.*

⁹⁶ *Tot v. United States*, 319 U.S. 463, 464-66 (1943). (“A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.”).

⁹⁷ See McClurg, *supra* note 9, at 1137.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1139.

¹⁰⁰ *Id.* at 1137.

¹⁰¹ *Id.*

¹⁰² See Hunt, *supra* note 2, at 446.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 457.

¹⁰⁵ *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

¹⁰⁶ Hunt, *supra* note 2, at 445.

¹⁰⁷ See Karen J. Sneddon, *Should Cain’s Children Inherit Abel’s Property?: Wading into the Extended Slayer Rule Quagmire*, 76 U.M.K.C. L. REV. 101, 103 (2007).

¹⁰⁸ See 471 U.S. at 325.

¹⁰⁹ See McClurg, *supra* note 9, at 1125-26.

¹¹⁰ See 442 U.S. at 160-61.

¹¹¹ See McClurg, *supra* note 9, at 1103.

¹¹² METLIFE MATURE MKT. INST., *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA’S ELDERS* 4 (2011).

¹¹³ Cf. Elaine R. Jonesa, *Social Justice And The Law*, 42 U. RICH. L. REV. 69, 77 (2007) (“The anthropologist Margaret Mead tells us, “Never doubt that a small group of thoughtful, committed citizens can change the world; indeed it is the only thing that ever has.”).