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# A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems

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# A TALE OF TWO COUNTRIES: COMPARING THE LAW OF INHERITANCE IN TWO SEEMINGLY OPPOSITE SYSTEMS

RAY D. MADOFF\*

**Abstract:** Although at first glance French and U.S. inheritance laws appear to be diametrically opposed, this paper provides a deeper analysis. In doing so, it explains that nuances within both systems have made the laws more similar than they initially appear. U.S. inheritance laws, explicitly characterized by freedom of testation, include numerous substantive limits on how a testator may dispose of her property at death. Courts often use doctrines such as mental capacity, undue influence, and fraud to void wills that do not provide for the decedent's children. Also, because over one half of all Americans die intestate, or without a will, children are provided for in this way as well. French inheritance laws, which on their face appear to require everyone to leave at least half of their property to their children, similarly allow for significant deviation from this rule. Some techniques, such as life insurance, tontines, and usufruct interests have been around for a while. Since 2006, however, the law has given French parents even greater ability to control the distribution of their estates. This paper examines French and U.S. inheritance law, with an eye towards these initial differences, and deeper similarities.

*I am surprised that ancient and modern jurists have not attributed to [the law of descent] a greater influence on human affairs. It is true that these laws belong to civil affairs; but they ought nevertheless to be placed at the head of all political institutions; for, whilst political laws are only the symbol of a nation's condition, they exercise an incredible influence upon its social state. They have, moreover, a sure and uniform manner of operating upon society, affecting, as it were, generations yet unborn.*

—Alexis de Tocqueville  
*Democracy in America* (1835)

## INTRODUCTION

The United States and France stand at polar extremes when it comes to inheritance law. The United States takes as its starting point the autonomy

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of the individual and is characterized by the doctrine of freedom of testation.<sup>1</sup> Freedom of testation gives people the ability to distribute their property at death as they wish—even to the exclusion of their family members and even if the decedent's children become wards of the state as a result of the disinheritance.<sup>2</sup>

In contrast to the United States, French inheritance law takes as its starting point the obligation towards family, and imposes strict limitations on individuals' freedom of testation.<sup>3</sup> French law is characterized by the heirs' rights to the *réserve héréditaire*.<sup>4</sup> Under this law, children are entitled to receive between one-half and three-quarters of their parents' property.<sup>5</sup> Individuals can only control the remaining portion of their estates, which can be as little as one-quarter.<sup>6</sup> Moreover, the *réserve héréditaire* cannot be avoided by making lifetime gifts, as the rights to the *réserve héréditaire* extend to property transferred by the decedent during life.<sup>7</sup>

At first glance, nothing could be more different than the inheritance law of France and the United States. But, nothing is as simple as it first appears. Closer inspection of laws and practices in the United States shows that testators are subject to restraints that result in far greater protections for family members than the rhetoric of freedom of testation would suggest. In addition, French law—particularly after 2006—leaves heirs far more vulnerable to the wishes of testators than the rhetoric surrounding the *réserve héréditaire* would suggest. Nonetheless, despite this seeming convergence, significant differences remain between the two systems. This essay explores these differences and similarities.

This essay will examine the following topics: (1) freedom of testation under U.S. inheritance law; (2) protection for heirs under French inheritance law; (3) unexpected protection for heirs under U.S. inheritance law; (4) expanded freedom of testation under French inheritance law; and (5) concluding thoughts on convergence and continued differences.

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<sup>1</sup> RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 57–58 (2010) [hereinafter IMMORTALITY AND THE LAW].

<sup>2</sup> *Id.*

<sup>3</sup> See Joelle Godard, *Reform of the Law of Succession in France*, in INTERNATIONAL FAMILY LAW 50, 53 (2007).

<sup>4</sup> CODE CIVIL [C. CIV.] art. 913 (Fr.).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Godard, *supra* note 3, at 51.

<sup>7</sup> C. CIV. arts. 920–924 (Fr.).

## INHERITANCE LAW IN THE UNITED STATES: FREEDOM OF TESTATION

Inheritance law in the United States is characterized by the principle of freedom of testation: the unlimited right of a person to dispose of her property however she chooses.<sup>8</sup> This right to control the disposition of property at death is central to the American psyche. While people are often vague in their understanding about many aspects of the law, one thing that is often clear in their minds is the right to write a will that controls who will—and who will not—get their property after they die.<sup>9</sup>

The effect of this ability to control property after death, and the power it conveys to the property owner, is a theme that has been frequently explored in the American arts. Whether it is Tennessee Williams' "Cat on a Hot Tin Roof" or Rodney Dangerfield's "Easy Money," Americans easily recognize the image of would-be heirs currying favor with the future dead in order to secure an inheritance. In this way, property owners can control much more than just their property. Through their right to control the disposition of property at death, they can control the behavior of others during their lives. After all, is there any doubt that many May-December unions—marriages between young women and much older husbands—would likely not occur if "December" did not have the power to transmit wealth to "May" at the end of the day?

Freedom of testation has produced another trope as well, namely the surprise ending in which the protagonist ends up disappointing his (often unappealing) family by writing a will very different from the one they expected. The movie "Gran Torino" provides one recent example of this "Passed Over Inheritance" trope, when Clint Eastwood surprises everyone by disinheriting his family in favor of the Hmong family next door.<sup>10</sup> These tropes would not be possible but for freedom of testation.

This ability to control property at death is instantiated in the rules governing inheritance in a variety of ways. First, the U.S. Supreme Court ruled as a constitutional matter that the right to transmit property at death is an essential right in the "bundle of sticks" we call property rights.<sup>11</sup>

Second, courts have regularly ruled that children do not have a right to inherit property. As one court described it:

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<sup>8</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 58. The ideas in this section were explored by the author in greater detail in IMMORTALITY AND THE LAW, *supra* note 1.

<sup>9</sup> *Id.* at 59.

<sup>10</sup> See *Gran Torino* (Village Roadshow Pictures 2008); *Passed Over Inheritances*, TVTROPES.ORG, <http://tvtropes.org/pmwiki/pmwiki.php/Main/PassedOverInheritance> (last visited Mar. 2, 2014) (providing other examples of this trope).

<sup>11</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

Basically, the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the United States constitution. It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children.<sup>12</sup>

Ohio is not alone in this view. There are no state or federal laws protecting adult children against disinheritance.<sup>13</sup> Moreover, in forty-nine of the fifty states (the exception being Louisiana), testators have broad latitude to disinherit their minor and dependent children, even if the effect of this disinheritance is that the children become wards of the state.<sup>14</sup>

This focus on freedom of testation can partially be explained by the fact that the United States (with the exception of Louisiana) is largely a common law country. The common law has as its starting point that property is owned by individuals (traditionally men) and that families have very little claim to the husband/father's property.<sup>15</sup> Common law countries differ from civil law countries (like France) because civil law countries view property as something that is owned by a family unit—as opposed to an individual.<sup>16</sup> As a result, individuals are limited in their ability to convey property away from the family unit.

Nonetheless, the fact that the United States is a common law country does not tell the whole story, since most of the common law countries other than the United States have modified their laws to provide greater protections for families by enacting family maintenance statutes.<sup>17</sup> These statutes permit family members and other dependents to petition the court to receive more than was provided for them under the testator's will.<sup>18</sup>

Thus, in civil and common law countries throughout the world, children are protected against disinheritance by their parent, either by being provided a fixed share of the parent's estate (through forced succession

<sup>12</sup> *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 828 (Ohio Misc. 1974) (citations omitted).

<sup>13</sup> See IMMORTALITY AND THE LAW, *supra* note 1, at 58.

<sup>14</sup> See *id.* at 167 & n.12.

<sup>15</sup> *Id.* at 59.

<sup>16</sup> THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 192–218 (1999).

<sup>17</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 59.

<sup>18</sup> Family maintenance statutes were first enacted in New Zealand in 1900. Testator's Family Maintenance Act of 1900 (N.Z.). This served as the basis for the current testate succession laws in Australia, several of the Canadian provinces, and England. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 121 n.25 (1994). England adopted their first family maintenance statute in 1938. Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, c. 45 (Eng.). For a detailed discussion of the law of England, see ALEXANDRA MASON & MARIAN CONROY, SPENCER MAURICE'S FAMILY PROVISION ON DEATH (7th ed. 1994).

statutes) or by being given the right to make an equitable claim against the decedent's estate (through family maintenance statutes). In the United States, however, a disinherited child is largely left without recourse.

The ability to disinherit minor children is particularly surprising in light of the fact that virtually every state imposes an obligation on parents to support their minor children during life.<sup>19</sup> It is also ironic that although parents can disinherit their minor and dependent children, these children cannot generally disinherit their parents due to the fact that they do not have the capacity to make a will.<sup>20</sup> Moreover, in a majority of American jurisdictions, a parent who fails to support his child during life can nonetheless inherit from the child in the event of the child's death.<sup>21</sup>

Although disinheritance of minor children is usually not a problem for the child who lives with both parents, it can be a significant problem for children with a non-custodial parent. This is particularly likely to be a problem when the non-custodial parent has remarried and formed a new family.

Children of divorce are not the only ones who are likely to be disinherited—non-marital children are also susceptible to this fate. Non-marital children have reached epidemic proportions as over 40 percent of all children born in the United States are born out of wedlock.<sup>22</sup> When a paternity action is brought against the putative father of a nonmarital child, he will often dispute the claim. If the claim is proven and support is ordered, the father may view the child merely as an unwanted source of debt. Unlike other creditors, who cannot be written off or “disinherited” by a will, the disinheritance of his child is perfectly permissible.<sup>23</sup>

Louisiana is the only state in the United States that provides statutory protection for children in the form of “forced heirship.”<sup>24</sup> The Louisiana

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<sup>19</sup> See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?* 57 LA. L. REV. 1, 6 & n.23 (1996) (providing an extensive list of state statutes that require able parents to support minor children during life).

<sup>20</sup> See IMMORTALITY AND THE LAW, *supra* note 1, at 60.

<sup>21</sup> Paula A. Monopoli, *Deadbeat Dads: Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259–60 (1994). There are generally two situations in which parents can inherit significant assets from their children. The first is when a child has no assets during life, but on death his estate has value as a result of a wrongful death claim. The second situation is when a child accumulates substantial earnings or receives a large personal injury or wrongful death award during the child's lifetime (typically for a parent's death). *Id.* at 265.

<sup>22</sup> *Unmarried Childbearing*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/unmarry.htm> (last visited Mar. 2, 2014).

<sup>23</sup> Brashier, *supra* note 19, at 11.

<sup>24</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 61. Texas is the only other state that has ever tried forced heirship, a remnant of the state's Spanish law history. After Texas entered the Union in 1846, the common law influence in this area became stronger and more expansive. Texas abolished forced heirship altogether in 1856. See Joseph Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 LA. L. REV. 42, 56–57 (1941).

forced heirship statute protects children against disinheritance by securing for them a minimum share (ranging between one-quarter and one-half) of the decedent's estate.<sup>25</sup> The statutory system of forced heirship protects the children of a testator from disinheritance unless they do something to "deserve" disinheritance.<sup>26</sup>

Even in Louisiana, the trend has been moving away from family protection and towards individual rights to control one's own property after death. Prior to 1989, the Louisiana forced heirship statute applied to all children, regardless of their age.<sup>27</sup> In 1989, the Louisiana legislature changed the forced heirship provisions by limiting the class of children who can make a claim as forced heirs.<sup>28</sup> The legislature limited the class of forced heirs to only children under the age of twenty-three, or children who were unable to care for themselves because of mental incapacity or physical infirmity.<sup>29</sup> These changes were widely perceived as effectively ending forced heirship in Louisiana.<sup>30</sup> Since then, Louisiana has further limited its protections for minor and disabled children, and no other state has enacted provisions for the protection of children.<sup>31</sup>

Many scholars have criticized the American rule allowing disinheritance of children. They have also suggested different ways to reform the American system. Some have suggested that states adopt forced heirship statutes, similar to the rules that exist in France and other civil law countries. Others have suggested that states adopt family maintenance statutes, similar to those adopted in England and other common law countries. Finally, some have suggested extending the support obligation for minor children

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<sup>25</sup> See LA. CIV. CODE ANN. arts. 1493–1494 (1987); Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1570–73 (1984).

<sup>26</sup> See LA. CIV. CODE ANN. art. 1494 (1987) (providing that donor may disinherit heirs for just cause).

<sup>27</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 62.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See generally Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409 (1990) (exploring the changes to forced heirship in Louisiana).

<sup>31</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 62. There were some bumps on the road in the elimination of forced heirship because after it was repealed by legislature, the Louisiana Supreme Court declared the repeal to be unconstitutional under their state constitution in 1993. The court's holding of unconstitutionality was announced in the companion cases of *Succession of Lauga*, 624 So. 2d 1156, 1157 (La. 1993) and *Succession of Terry*, 624 So. 2d 1201, 1202 (La. 1993). Louisiana subsequently amended its constitution to allow for the limitation of forced heirship and the statutory provision was re-enacted in 1996. LA. CONST. art. XII, § 5; LA. CIV. CODE ANN. arts. 1493, 1495, 1496 (1996).

to include the obligation to support children at death.<sup>32</sup> Yet, these suggestions have largely fallen on deaf ears. To date, no new jurisdiction has added statutory protections against disinheritance for children, and the one state that provides such protections, Louisiana, has recently cut back on the protections provided for its children by limiting its protections to minor and disabled children.<sup>33</sup>

The availability of the common law trust affords American testators an additional level of testamentary control. A trust is a device for holding property that allows the creator to establish continuing conditions on the distribution of property. This enables individuals to posthumously control the behavior of others through the use of conditional trusts. Courts have consistently enforced these trusts on the theory that since the beneficiaries could have been disinherited entirely, they cannot complain about having conditions imposed on their bequests. As one court described it:

It must be borne in mind in all such instances that the legacies and devises were acts of bounty merely. The testator was free to withhold them altogether, or to subject them to conditions, whether sensible or futile. The gift is to be taken as made or not at all.<sup>34</sup>

The only limitations that courts put on these conditions is that they cannot be “illegal” or “against public policy.”<sup>35</sup>

The restriction against illegal conditions means that, presumably, a court would not enforce a provision that said that the beneficiary was obligated to kill the testator’s former boss in order to receive his inheritance. While the rule against illegal conditions is often cited by courts and is a favorite of law professors, it is rarely applied, as there are no actual cases on record involving illegal conditions.<sup>36</sup>

Thus, the only relevant restriction on conditional bequests is that a court will not enforce a condition that is “against public policy.” Theoretically, this public policy exception could severely restrict conditional bequests, as the term is extremely malleable. In practice, this has not proven to

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<sup>32</sup> See generally Brashier, *supra* note 19 (exploring the lack of protection from disinheritance for minor children throughout the United States); Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1 (arguing that the lack of protection from disinheritance for minor children is bad for the family and bad for society).

<sup>33</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 62.

<sup>34</sup> *In re Folsom’s Will*, 155 N.Y.S. 2d 140, 146–47 (Sur. Ct. 1956) (quoting *In re Lesser’s Estate*, 287 N.Y.S. 209, 215 (Sur. Ct. 1936)).

<sup>35</sup> See *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 828–29 (Ohio Misc. 1974).

<sup>36</sup> Jeffrey G. Sherman, *Posthumous Meddling: An Instrumental Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1280 & n.34 (1999).



be much of a limitation, as American courts have generally been loath to use their authority to restrict these conditions, seeing it as outside their bailiwick. As one court described it:

[A] testator has the right to grant bequests subject to any lawful conditions he or she may select. Beneficiaries of a testamentary instrument have no right to testamentary bequests except subject to the testator's conditions, and it is generally not the role of the court to rearrange those bequests or conditions in keeping with the court's sense of justice.<sup>37</sup>

One area in which people often seek to impose conditions is marriage. Although the right to marry is constitutionally protected, courts have consistently upheld bequests conditioned on either forbidding the beneficiary from marrying or requiring the beneficiary to marry someone of a particular group, on the theory that these provisions do not restrict the beneficiary's right to marriage, they only restrict the beneficiary's right to inherit.<sup>38</sup>

Courts have been particularly understanding of husbands conditioning their wives' inheritance on remaining unmarried after their husband's death. As one court saw it:

It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it to hatch a brood of strangers to his blood.<sup>39</sup>

When it comes to children, testators have been more interested in requiring them to marry someone of a particular religion or background, and courts have generally been supportive of these controls as well. Thus, in one case, in order to inherit his share of his father's estate, the son was required to marry "a Jewish girl whose both parents were Jewish" within seven years of his father's death.<sup>40</sup> In another case, the testator's daughter was required to marry a "man of true Greek blood and descent and of Orthodox religion" before receiving her inheritance.<sup>41</sup>

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<sup>37</sup> *Tunstall v. Wells*, 50 Cal. Rptr. 3d 468, 565 (Ct. App. 2006).

<sup>38</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see *Shapira*, 315 N.E.2d at 831-32.

<sup>39</sup> *Commonwealth v. Stauffer*, 10 Pa. 350, 355 (1849). Although courts also support wives conditioning their husband's bequest on the husband not remarrying, the opportunity for women to impose these conditions is far more limited since women historically control far less property than their husbands and also tend to live longer than their husbands. IMMORTALITY AND THE LAW, *supra* note 1, at 74 & n.59.

<sup>40</sup> *Shapira*, 315 N.E.2d at 826.

<sup>41</sup> *In re Estate of Keffalas*, 233 A.2d 248, 250 (Pa. 1967).

Sometimes a testator is not just interested in preventing or requiring a new marriage, but is instead interested in ending an existing marriage. The official position of courts is that conditions designed to encourage divorce are against public policy, and accordingly courts have refused to enforce these conditions in several cases.<sup>42</sup> This rule, however, is easy to circumvent because although courts will not enforce conditional bequests where the testator intended to encourage divorce, they will enforce such conditions if the testator intended to provide support in the event of divorce. As one court described it:

A condition to a devise, the tendency of which is to encourage divorce or bring about separation of husband and wife, is against public policy, and void. However, if the dominant motive of the testator is to provide support in the event of such separation or divorce, the condition is valid.<sup>43</sup>

Another surprising area where testators have been permitted to exert control is over the beneficiaries' practice of religion. Freedom of religion is one of the cornerstones of the U.S. Constitution. Yet, courts have consistently upheld bequests conditioned on the beneficiary either practicing or refraining from practicing a particular religion. For example, in one case a woman was entitled to receive income from the trust only "so long as she live up to and observes and follows the teachings and faith of the Roman Catholic Church."<sup>44</sup> Another testator required his grandchildren to remain "members in good standing of the Presbyterian Church."<sup>45</sup> Yet another testator conditioned his son's inheritance on attending "regular meetings of worship of the Emmanuel Church near the village of Cashton, Wisconsin, when not sick in bed or prevented by accident or other unavoidable occurrence."<sup>46</sup>

These conditional bequests may be tolerated more in a culture that values religion, such as the United States, which subscribes to the theory that encouraging people to be more religious is not against public policy. This justification, however, does not explain why courts also regularly allow

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<sup>42</sup> IMMORTALITY AND THE LAW, *supra* note 1, at 74. For example, in the *Keffalas* case requiring the children to marry spouses "of true Greek blood and descent and of Orthodox religion," the court refused to apply the limitation to those children who were already married to other spouses and would therefore have been required to divorce and remarry someone of the appropriate background in order to inherit. *Keffalas*, 233 A.2d at 250.

<sup>43</sup> *Hall v. Eaton*, 631 N.E.2d 805, 807–08 (Ill. App. Ct. 1994).

<sup>44</sup> *Del. Trust Co. v. Fitzmaurice*, 31 A.2d 383, 386 (Del. Ch. 1943); *aff'd in part and rev'd in part on other grounds sub nom.*, *Crumlish v. Del. Trust Co.*, 38 A.2d 463 (Del. Super. Ct. 1944).

<sup>45</sup> *In re Lanning's Estate*, 339 A.2d 520, 521 (Pa. 1975).

<sup>46</sup> *In re Paulson's Will*, 107 N.W. 484, 486 (Wis. 1906).

conditional bequests that require the beneficiary to *refrain* from practicing a particular religion. In one case the testator's daughter only received her inheritance if, at the age of thirty-two, she proved conclusively that "she has *not* embraced, nor become a member of, the Catholic faith nor ever married a man of such faith."<sup>47</sup>

The power of conditional trusts has expanded in recent years as many states have moved to repeal rules imposing time limitations on private trusts.<sup>48</sup> For years, most private trusts were limited in term by their state rule against perpetuities.<sup>49</sup> This rule limited the duration of most private trusts to approximately 90 years.<sup>50</sup> To facilitate the avoidance of federal estate taxes, and in the process bring in money to their local banks, many states have repealed their rule against perpetuities. The repeal of the rule against perpetuities has allowed testators to impose conditions not just on their children, but also an unlimited number of generations to come.

#### INHERITANCE LAW IN FRANCE: PROTECTION FOR HEIRS

The inheritance law of France is in many ways diametrically opposed to that of the United States. Whereas the starting point for inheritance law in the United States is the *donor's* freedom of testation—granting virtually unlimited rights of a decedent to transfer property at death as he or she sees fit, the starting point in French law is the *heir's* rights to the *réserve héréditaire*—the minimum share of a decedent's estate to which the heirs are entitled. This share is "*réservée*"—reserved—to these persons. The *réserve héréditaire* is defined in opposition to the *quotité disponible*, the "disposable portion," which is the share of the estate that each person can freely control at death. Depending upon the existence of other heirs, the *quotité disponible* can be as little as one-quarter of the decedent's estate.<sup>51</sup>

The *réserve* does not just limit transfers at death, but also applies to transfers made during life. Under French inheritance law, all lifetime gifts

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<sup>47</sup> E. LeFevre, Annotation, *Validity of Provisions of Will or Deed Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith*, 50 A.L.R.2d 740, § 2 (1956) (citing *U. S. Nat'l Bank of Portland v. Snodgrass*, 275 P.2d 860 (Or. 1954)).

<sup>48</sup> See IMMORTALITY AND THE LAW, *supra* note 1, at 72–85.

<sup>49</sup> *Id.* at 76.

<sup>50</sup> *Id.*

<sup>51</sup> Ray D. Madoff & Pierre-Alain Conil, *Inheritance and Death: Legal Strategies in the United States, England, and France*, in THE ROUTLEDGE HANDBOOK OF FAMILY LAW AND PRACTICE (forthcoming 2014) (manuscript at 164, 183–84). The author thanks notaire (and former student) Pierre-Alain Conil for his assistance in understanding French law of inheritance and commends his excellent article on this subject: Pierre-Alain Conil, *La Mise en Parallèle des Systèmes Successoriaux Français et Américain.—Une Tentative D'aller Au-delà des Mythes*, n.2 DROIT DE LA FAMILLE 9 (Feb. 2013)(Fr.).

are taken into account at the time of death in calculating the heir's *réserve héréditaire*.<sup>52</sup> The notary in charge of the inheritance case will calculate a fictive estate—the *masse de calcul*<sup>53</sup>—that represents the amount of property that the decedent would have owned if he hadn't made any lifetime gifts. If, at his death, the *héritiers réservataires* (the forced heirs) don't receive the share of the estate reserved for them by the law, the heirs are allowed to initiate a lawsuit against the persons or organizations who received gifts from the decedent in order to retrieve the amount necessary to satisfy the heirs' legal share.<sup>54</sup>

The amount of the *réserve héréditaire* depends upon the particular family situation of the decedent, in particular, the existence of children and spouses. If the decedent has no descendants and no spouse, then the decedent is free to dispose of his entire estate as he chooses.<sup>55</sup> But, before 2006, parents were also forced heirs, and were thus entitled to one-half of the decedent's estate in the event that the decedent died without children.<sup>56</sup>

Under current law, the decedent's only forced heirs are her children, and, only if there are no children, the decedent's spouse. The amount that each child is entitled to receive in her *réserve héréditaire* depends on the number of children.<sup>57</sup> If the decedent has one surviving child, the *réserve* is one-half of the estate and the *quotité disponible* is the other half. If the decedent has two children, each child is entitled to receive one-third of the decedent's estate (for a total of two-thirds) and the *quotité disponible* is the remaining one-third. If the decedent has three or more children, the children are entitled to divide the *réserve héréditaire* of three-quarters of the decedent's estate and the *quotité disponible* is the remaining one-quarter share.

In determining a child's share, French law used to distinguish between children born of the marriage and those born outside of a marriage, and those in the latter category received only half the share of a child born of the marriage. After the European Court of Human Rights held that there was no justification for discrimination against a child based on the marital status of the parents, the French rule was modified to treat all children the same, regardless of the marital status of the parents.<sup>58</sup>

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<sup>52</sup> C. CIV. art. 922 (Fr.).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* arts. 921, 924.

<sup>55</sup> *Id.* art. 916.

<sup>56</sup> Godard, *supra* note 3, at 51.

<sup>57</sup> C. CIV. art. 913 (Fr.).

<sup>58</sup> *Id.* art. 733; Mazurek v. France, 2000-II Eur. Ct. H.R. 23, 39, available at [http://www.echr.coe.int/Documents/Reports\\_Recueil\\_2000-II.pdf](http://www.echr.coe.int/Documents/Reports_Recueil_2000-II.pdf).

The second category of forced heirs is spouses. Prior to 2001 spouses were not entitled to any protection under the *réserve héréditaire*.<sup>59</sup> Even today, the surviving spouse is only entitled to a *réserve héréditaire* if there are no children of the decedent.<sup>60</sup> If the decedent has no children, but is survived by a spouse, the spouse is entitled to one-quarter of the decedent's estate and the decedent is able to control the remaining three-quarters of his estate.<sup>61</sup> Regardless of whether the surviving spouse is entitled to a *réserve héréditaire*, all spouses are also protected under community property rules that entitle each spouse to one-half of all property earned by either spouse during the marriage.<sup>62</sup>

Despite these minor changes, the French law of succession has shown remarkable stability since it was first officially established in the 1804 Napoleonic Code. It was recently pointed out in the French Senate that one of the paradoxes of the French Nation is that over the last two centuries one can count fourteen different Constitutions, but the main principles of succession law have remained unchanged.<sup>63</sup>

#### UNEXPECTED PROTECTION FOR HEIRS UNDER UNITED STATES INHERITANCE LAW

Despite broad language supporting freedom of testation in the United States, in practice and in law, heirs are provided greater protections (and testators are subject to greater restraints) than a superficial inquiry might suggest.

Although the guiding principle of American inheritance law is freedom of testation, the vast majority of Americans—estimated at over one half of Americans in 2009—forego freedom of testation and instead have their property disposed of under state intestacy statutes.<sup>64</sup> Intestacy statutes allocate the decedent's estate among family members, giving a set share to a spouse and dividing the rest evenly among the decedent's children. Although no one can be sure of the reasons why so many people forego writing

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<sup>59</sup> Madoff & Conil, *supra* note 51 (manuscript at 183).

<sup>60</sup> C. CIV. art. 914-1 (Fr.).

<sup>61</sup> *Id.* In the 2001 reform, spouses were granted a forced share of  $\frac{1}{4}$  in absence of descendants and ascendants. Godard, *supra* note 3, at 51. At that time, ascendants were forced heirs for  $\frac{1}{4}$  each. *Id.* The 2006 law took away from the parents the quality of forced heirs and improved the protection of the surviving spouse by making him *réservataire* for  $\frac{1}{4}$  when the decedent leaves no children, even if the parents are still alive. *Id.*

<sup>62</sup> See C. CIV. arts. 1400–1491 (Fr.).

<sup>63</sup> Godard, *supra* note 3, at 50.

<sup>64</sup> JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 63–69 (9th ed. 2013).

wills, scholars have suggested fear of confronting one's own mortality<sup>65</sup> and the perceived time and cost involved in seeing a lawyer to write a will might contribute to the general unwillingness to write a will.<sup>66</sup> Regardless of the reason, the effect of the vast majority of Americans dying intestate is that they distribute their property to family members under a state prescribed plan of distribution.

More importantly, where testators deviate from distributing property to their families, the law often steps in to void the will. In *The Myth of Testamentary Freedom*, Professor Melanie Leslie examined case law over a five-year period that concerned the validity of wills.<sup>67</sup> Professor Leslie looked at cases involving both doctrines of intent (including mental capacity and undue influence) and formal requirements for writing wills (such as the requirement of a signature or witnesses).<sup>68</sup> What she found is that despite the rhetoric in favor of testamentary freedom, this freedom was largely a myth due to the fact that courts are interested in assuring that testators devise their estates in accordance with prevailing norms, in most cases meaning to the testator's family.

A careful review of case law, however, reveals that many courts do not exalt testamentary freedom above all other principles. Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent . . . . Courts impose and enforce this moral duty to family through the covert manipulation of doctrine. To begin with, courts faced with an offensive will often use other doctrines ostensibly designed to ascertain whether the testator formulated testamentary intent—doctrines such as capacity, undue influence and fraud—to frustrate the testator's intent and distribute estate assets to family members. Moreover, this tendency to protect family members is evident in many cases that purport to determine only whether requisite will formalities have been met. Notwithstanding reformers' claims that courts always insist on strict compliance with will formalities, courts throughout this century often have accepted less than strict compliance when

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<sup>65</sup> Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008); see also JEAN KOPPEN, AARP, THOUGHTS ON THE AFTERLIFE AMONG U.S. ADULTS 50+ (2007), available at <http://assets.aarp.org/rgcenter/general/afterlife.pdf>.

<sup>66</sup> See McCunney & DiRusso, *supra* note 65, at 35, 59–60.

<sup>67</sup> Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

<sup>68</sup> *Id.* at 236–37.

necessary to ensure fulfillment of a testator's moral duty. Conversely, courts are more likely to require strict compliance when a will's provisions can be viewed as a breach of that duty. At the end of the day, testamentary freedom exists for the vast majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes—but often not for those who hold non-conforming values.<sup>69</sup>

Moreover, this preference for family is often built right into the fabric of the doctrines purportedly designed to protect testator intent. In *Unmasking Undue Influence*, the author deconstructs the “undue influence” doctrine to illustrate how preference for biological family members is not a result of court's *misapplying* the undue influence doctrine, but rather is a result of the *correct* application of the doctrine.<sup>70</sup> One can see a sign of this direct link between family protection and the undue influence doctrine in the history of Louisiana's law regarding family protection. When Louisiana had a statute that explicitly protected family members, it did not recognize capitation (another term for undue influence) as a cause of action against a will.<sup>71</sup> When the state cut back its family protection provisions, it brought back the claim of undue influence.<sup>72</sup>

Finally, in recent years some courts have begun to limit conditional bequests. For the first time, a court ruled that a provision in a will disinheriting grandchildren who married non-Jews was void because it was against public policy.<sup>73</sup> Although this decision was overturned on appeal, it is possible that later cases will pick up the reasoning of the lower court, particularly since this position was included in the latest version of the Restatement (Third) of Trusts (the Restatement).<sup>74</sup> According to the Restatement, trust provisions are contrary to public policy (and therefore potentially invalid) if they restrain beneficiary behavior, and provisions restrain beneficiary behavior if they influence who the beneficiary can marry, what religion the beneficiary can or cannot practice, or which career the beneficiary can

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<sup>69</sup> *Id.*

<sup>70</sup> See generally Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (exploring the application of the undue influence doctrine).

<sup>71</sup> *Id.* at 618–19.

<sup>72</sup> *Id.*

<sup>73</sup> *In re Estate of Feinberg*, 891 N.E. 2d 549, 555 (Ill. App. 2008), *rev'd by In re Estate of Feinberg*, 919 N.E. 2d 888, (Ill. 2009).

<sup>74</sup> RESTATEMENT (THIRD) TRUSTS § 29 (2003); DUKEMINIER & SITKOFF, *supra* note 64, at 14.

choose.<sup>75</sup> The Restatement, however, also calls for balancing of conflicting social values.<sup>76</sup>

#### EXPANDED FREEDOM OF TESTATION UNDER FRENCH INHERITANCE LAW

Just as American law provides far greater protection for family members than the reverence for freedom of testation suggests, French law provides less protection for heirs than the system of the *réserve héréditaire* initially suggests. Freedom of testation in France has become even more pronounced since the enactment of the 2006 amendments to French inheritance law, which expanded freedom of testation in a variety of ways.<sup>77</sup> But even prior to the 2006 amendments, it was possible for a person to impede the protections provided by the *réserve héréditaire*.

Prior to the enactment of the 2006 laws, there was a number of available estate planning techniques that could significantly reduce the rights of the heirs. First, a testator could purchase a large life insurance policy and name whomever he wanted as a beneficiary.<sup>78</sup> Life insurance is not treated as part of the estate for purposes of calculating the *réserve héréditaire*, therefore these amounts are not generally subject to claims by the children.<sup>79</sup> If, however, the amount of the insurance policy is excessively large in comparison to the rest of the estate, then it can be brought back into the estate. Though there is no hard line rule for determining what constitutes excessively large, a policy for 20 percent of the value of the estate is generally considered to be within the bounds of the law, and thus not excessively large.<sup>80</sup>

Another way of limiting the children's right to their *réserve héréditaire* was through the creation of a tontine. A tontine is a form of joint tenancy that can be created upon the initial purchase of real estate. If property is owned under a tontine, when one of the joint tenants dies, the surviving joint tenant (usually the spouse) receives the property outright, regardless of the existence of other heirs.<sup>81</sup>

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<sup>75</sup> RESTATEMENT (THIRD) TRUSTS § 29.

<sup>76</sup> *Id.*

<sup>77</sup> See Godard, *supra* note 3, at 51–53.

<sup>78</sup> CODE DES ASSURANCES [C. ASSUR.] art. L132-12 (Fr.).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> The tontine is treated under French law as *un contrat à titre onéreux* which means “a contract in return for a payment,” as opposed to a gratuitous transfer. Therefore, it is not limited by the *réserve*. This construction is based on the idea of the *aléas* (hazard): when two people buy the property they don't know who will ultimately benefit from it. It is assumed that each of them have approximately the same chance of surviving or, if that is not the case, then the one who is more likely to survive will pay a greater share of the price. Therefore, if when the deed is signed, the



Finally, a testator could protect his spouse by creating a usufruct interest for the spouse in property that would otherwise be covered by the *réserve héréditaire*.<sup>82</sup> After setting up a usufruct interest, the decedent can pass his entire estate to his spouse by giving the *quotité disponible*—the disposable portion—outright to the spouse, and giving the rest to the spouse as a usufruct. The usufruct can be established either during life or at death.<sup>83</sup> The usufruct gives the spouse the right to use, and generate income from, the property for her life, and the children only receive the property after her death.<sup>84</sup> The usufruct purports to protect the children's *réserve héréditaire*, because they are still given bare title over the property upon the spouse's death. But, because the surviving spouse is given the right to use the property for her life, this can significantly undermine the value of the *réserve héréditaire*. If the spouse is much younger than the decedent, then this type of planning can keep the children from enjoying the inheritance during their lives.

In 2006, French inheritance law underwent significant transformation, the effect of which was to further increase freedom of testation and reduce protection for heirs.<sup>85</sup> The most direct challenge to the *réserve héréditaire* was the adoption of a provision that allows an heir to enter into an agreement during life to forego his or her statutory rights through the use of a *renonciation anticipée à l'action en réduction*.<sup>86</sup> Arguably the children still receive some protection through the fact that their consent is required in order to deviate from the *réserve héréditaire*. But, it may prove to be psychologically difficult for a child to oppose his parent's wishes while the parent is still alive. As a result of this provision, a French testator is now able to dispose of a greater portion of his estate—even as much as the entire estate—as he chooses, knowing that the disposition cannot later be challenged. The creation of the ability of a child to renounce his *réserve héréditaire* was intended to allow families more flexibility in dividing up in-

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hazard is not really present (for example when one of them is a much younger spouse who doesn't pay a significant share of the price), then the contract can be deemed to be actually a gratuitous transfer and, as all *contrat à titre gratuit* (like gifts, bequests, etc.) it will be subject to the rules of the *réserve*. This is a limitation to the principle of the tontine, that is supposed to avoid excessive and fraudulent use of it. F. TERRE & Y. LEQUETTE, *LES SUCCESSIONS, LES LIBERALITES* 483 (3d ed. 1997).

<sup>82</sup> The usufruct is essentially a life estate, though there are some differences. See JEFFREY A. SCHOENBLUM, *MULTISTATE AND MULTINATIONAL ESTATE PLANNING* 18-15 to -17 (2009).

<sup>83</sup> C. CIV. arts. 579, 1094-1 (Fr.).

<sup>84</sup> See *id.* arts. 578, 579, 582, 617, 1094-1.

<sup>85</sup> Alexandra Braun, *Testamentary Freedom and Its Restrictions in French and Italian Law: Trends and Shifts*, in *FREEDOM OF TESTATION/TESTIERFREIHEIT* 57, 69 (Reinhard Zimmermann ed., 2012).

<sup>86</sup> C. CIV. art. 929 (Fr.).

heritances. For example, the increased flexibility of the *renonciation anticipée à l'action en réduction* would allow a family to make additional transfers of property to children with special needs or to transfer a family business to the child that is most active in the operation of the business, without having to worry about these transfers being undone after death.<sup>87</sup> Although the provision was enacted for these particular narrow purposes, the statute is not drafted in a limited fashion. Therefore, as long as the testator can get the consent of his heirs during life, he can distribute his estate to whomever he wants.<sup>88</sup>

In addition, French inheritance law was also modified to allow a decedent to appoint someone to manage part or all of the estate for a limited period of time, not to exceed five years, even though the assets that will be under this management are part of the forced share and are therefore supposed to be distributed outright to the heirs.<sup>89</sup> This provision is designed to address situations where the inheritance involves a complex asset, such as a business interest, or where there are minors among the heirs.<sup>90</sup> This provision has been highly controversial, with some commentators expressing fear that the testator will be able to continue administering his property from the grave.<sup>91</sup>

Finally, the 2006 amendments cut back the protections provided by the *réserve héréditaire* by limiting the nature of their remedy to monetary damages. Prior to the 2006 law, children who brought a successful *réserve héréditaire* claim could recover the property itself.<sup>92</sup> After 2006, the recipient has a choice of giving the child the property itself *or* the cash value of the property.<sup>93</sup> This gives the decedent greater control over dispositions of particular items of real or personal property.

## CONCLUSION

The United States and France take very different approaches to inheritance law. The United States starts with the individual and his right to control his property at death as he chooses. France starts with the family and the rights of children to receive a pro-rata share of their parents' estates.

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<sup>87</sup> *Id.*; Braun, *supra* note 85, at 70.

<sup>88</sup> There are, however, rigorous requirements designed to ensure that the heirs do not give away their rights without fully understanding the consequences of their actions. C. CIV. art. 930 (Fr.).

<sup>89</sup> C. CIV. art. 812 (Fr.).

<sup>90</sup> Braun, *supra* note 85, at 73.

<sup>91</sup> *Id.*

<sup>92</sup> Godard, *supra* note 3, at 51.

<sup>93</sup> *Id.*

And yet, despite these differences, and despite what might be suggested by de Tocqueville's quote that opened this essay, the United States and France share many similar patterns of succession.

What explains this result?

First, both the United States and France have high rates of intestacy. This means that in both countries, the majority of individuals pass all of their property to their spouse and children, and the children divide their share evenly.

Second, despite the rhetoric of freedom of testation in the United States, when testators in the United States do write wills, their pattern of distribution is very similar to that which is required under traditional French inheritance law. In particular, most testators distribute their property to their spouse and to their children in equal shares. The difference in distribution patterns is explained by the fact that married testators in the United States are most likely to defer giving property to their children until the death of their spouse. Although this might seem very different from French law, the availability of the usufruct under French law makes it easy for French testators to follow this same plan.

Another apparent difference is that in the United States, although testators tend to provide equally for their children at death, it is not uncommon for testators to make uneven distributions by gift during life. This is particularly likely to be the case when there is a child with special needs, or a family business in which only some children participate. Though here again, the adoption of the *renonciation anticipée à l'action en réduction* in France makes it possible for testators to do the same thing, provided they get consent from the other children.

Third, when it comes to freedom of testation, the countries are a lot more similar than they initially appear. Surprisingly, French inheritance law might provide even greater protection than inheritance law in the United States. The reason for this is that the United States restricts freedom of testation in indirect ways, such as through the doctrines of undue influence and lack of mental capacity. These doctrines, however, are blunt tools that provide protection for all relatives—no matter how distantly related. Although French law provides explicit protections for children and spouses through the *réserve héréditaire*, to the extent that a person seeks to control his *quotité disponible*, the “disposable portion,” he is largely free to do as he pleases.

Although these two systems appear to converge somewhat, there are still significant differences in how they allocate power between parents and children over the disposition of the parents' estate. In the United States, children will have little recourse against a parent determined to disinherit them, provided the parent takes the steps necessary to avoid a will dispute.

In France, parents have little recourse against children determined to secure their inheritance.

Moreover, these continuing differences reflect a strong devotion to different underlying values. In France, there remains an explicit cultural value that, absent unusual circumstances—like a special needs child or a family business—children should be treated equally. These values, underlying the power of the *réserve héréditaire*, continue to be embraced by the French people and will no doubt serve as a continued restraint on changes to French law.

Similarly, in the United States, there remains a strong cultural value that individuals should have the power to control their property as they choose. Although this power may be more limited than it initially appears when it comes to uneven distribution among family members or providing for a non-family member in place of family members, it remains strong in terms of the ability of individuals to impose conditions on bequests, and most importantly when it comes to making charitable bequests.

What explains this continuing embrace of competing values? In the end it may best be explained by *à chacun son gout!*

