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Disinheriting Your Children: A "Non" "Non" in France, An Accepted Use of Testamentary Freedom in America

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DISINHERITING YOUR CHILDREN: A “NON” “NON” IN FRANCE; AN ACCEPTED USE OF TESTAMENTARY FREEDOM IN AMERICA

Eva Saulnier¹

Inheritance law or—as called in Europe—private law was developed in the shadow of different historical, social, cultural, and economic circumstances. Consequently, countries adopted various characteristics for the disposition of property at death. But with today’s growing globalization, the national regulations’ differences are becoming a growing issue for multinational families.

This Note examines cross-border inheritance through the lens of a current multinational inheritance battle. The late French singer Johnny Hallyday’s testamentary documents disinheriting his two eldest children and asking for Californian law to be applied to his estate is currently being challenged. While freedom of testation and the testator’s intent are key aspects in the disposition of property in America, French law provides for a mandatory forced share given to all the testator’s children.

This Note argues that the current choice of law system is unfit for the needs of multinational families and is too ambiguous for a fair application in all cases. Further, this Note argues that, while unification of the laws would be an ideal solution and that both French and American inheritance law seem to be growing closer together, the current approach to unification is not viable for success. Instead, this Note proposes a different approach where a set of model laws would be agreed upon for cases that would qualify under the Multinational Family definition. Such a solution would further a more equal and fair system, and would respond to the growing need for clarity caused by globalization. Finally, this Note predicts that the adoption of this proposal may lead to a subsequent natural shift of local laws and eventually lead to complete convergence of the laws.

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INTRODUCTION

When the French rock star Johnny Hallyday died in December 2017 at the age of 74 from lung cancer, France was mourning.² With his tight leather pants, his tumultuous love life, his motorcycles, and his 110 million albums sold, Johnny was the equivalent of a French Elvis.³ Over 800 bikers accompanied his casket down the *Champs-Élysées*, united in grief.⁴ However, when Hallyday's two eldest children revealed that Johnny had disinherited them in a will drafted in California, France's love for its idol turned sour.⁵ Hallyday's Californian will made his fourth wife—the young and attractive Laeticia Hallyday—the executor of his estate, leaving everything to her and their two adopted children.⁶

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2. Kim Willsher, *Johnny Hallyday's children seek to freeze estate in row over will*, THE GUARDIAN (Mar. 15, 2018), <https://www.theguardian.com/music/2018/mar/15/johnny-hallydays-children-seek-to-freeze-estate-in-row-over-will> [<https://perma.cc/QAB5-V2WU>].
 3. Rory Mulholland, *French rocker Johnny Hallyday's posthumous album sells 300,000 copies on first day of release*, THE TELEGRAPH (Oct. 20, 2018), <https://www.telegraph.co.uk/news/2018/10/20/french-rocker-johnny-hallydays-posthumous-album-sells-300000/> [<https://perma.cc/UGY7-G4F2>].
 4. Lara Marlowe, *Battle over Johnny Hallyday's will becomes a 'sordid vaudeville'*, THE IRISH TIMES (Mar. 13, 2018), <https://www.irishtimes.com/news/world/europe/battle-over-johnny-hallyday-s-will-becomes-a-sordid-vaudeville-1.3424459> [<https://perma.cc/E54V-XVPK>].
 5. See Henry Samuel, *Inheritance battle over Johnny Hallyday's €100m fortune after two children left nothing*, The Telegraph (Feb. 12, 2018), <https://www.telegraph.co.uk/news/2018/02/12/shock-inheritance-battle-johnny-hallydays-100m-fortune-two-children/> [<https://perma.cc/CRW9-M4GG>].
 6. Willsher, *supra* note 2.

While the power to disinherit children may seem to be a natural right in the United States, the Napoleonic Civil Code ensured that it would be impossible for French parents to disinherit their children.⁷ Indeed, under the French Civil Code, children are entitled to a *réserve héréditaire*, a forced share.⁸ In contrast, American inheritance law is characterized by the doctrine of freedom of testation.⁹ Freedom of testation focuses on the testator's intent and gives people the ability to distribute their property at death as they wish.¹⁰

The battle over Hallyday's estate exemplifies, what seems to be, two diametrically opposed approaches to inheritance law. One law will have to prevail over the other. But how is that determined? On one hand, Hallyday spent most of his life in France, and owned a large home on the outskirts of Paris, as well as a villa on the French island of St. Barthelemy.¹¹ On the other hand, Hallyday lived in Los Angeles since 2013, paid property tax on his two houses in California, and his two youngest children attend school in Los Angeles.¹²

The Hallyday example may suggest that such cross-border inheritance issues are ones that only wealthy families face. On the contrary, one effect of globalization has been the increase of multinational families—whatever their social status may be.¹³ Today, most cross-border inheritance issues are solved by choice-of-law

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7. Luis Acosta, *United States: Inheritance Laws in the 19th and 20th Centuries*, LAW LIB. OF CONG. (Mar. 2014) <https://www.loc.gov/law/help/inheritance-laws/unitedstates.php> [<https://perma.cc/73BK-XB2J>].
 8. Ray D. Madoff, *A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems*, 37 B.C. INT'L & COMP. L. REV. 333, 334 (2014).
 9. *Id.*
 10. Madoff, *supra* note 8; *see also* Michael J. Higdon, *Parents Patriae and the Disinherited Child*, 95 Wash. Law. R. 46 (Forthcoming 2020) (The only exception is that American testators cannot disinherit their spouse, except for in one state).
 11. Willsher, *supra* note 2.
 12. Clément Thiery, *Hallyday's Inheritance: A French-American Legal Battle*, FRANCE-AMÉRIQUE (February 15, 2018), <https://france-amerique.com/en/johnny-hallyday-inheritance-a-french-american-legal-battle/> [<https://perma.cc/475D-BJA9>].
 13. *See generally* Bahira S. Trask, Expert Group Meeting on Assessing Family Policies, Globalization and Families: Meeting the Family Policy Challenge (June 1-3, 2011) (stating that "globalization is associated with transnational phenomena and new forms of bridging geographic and cultural distances. This form of communication has been accompanied by the ability of individuals [all over] the world to connect in virtual communities across interests and concerns"), <https://www.un.org/esa/socdev/family/docs/egm11/Traskpaper.pdf> [<https://perma.cc/B2DB-UXVU>].

analyses:¹⁴ an approach that this author finds flawed. For example, in Europe, the controlling choice-of-law regulation provides that the Hallyday succession will be subject to the law “of the State in which the deceased has his habitual residence at the time of death.”¹⁵ In the United States, the states usually use domicile to determine what law is applicable.¹⁶

In this Note, I argue that the choice-of-law solution has only opened the floodgates for jurisdictional conflicts, conflicts-of-law nightmares, and battles over interpretation. Indeed, the definition of “habitual residence”¹⁷ remains vague and subject to interpretation.¹⁸ Instead, a unified inheritance system that encompasses both testamentary freedom and protection of the family would be the ideal solution.¹⁹ The unification of inheritance law would streamline disputes and provide testators with predictability with respect to the distribution of their estate. Under such a system, the battle over Hallyday’s estate would not occur because French and American law would share practically identical principles. But, past attempts at unification of the inheritance regimes have failed.²⁰ In this Note, I will suggest a new approach to unification.

Unification is all the more possible considering that American and French inheritance regimes have recently grown closer to each other.²¹ In the United States, growing limitations for a testator’s disposition of property are evidenced by state probate codes and the UPC, which

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14. See Walter Häberling & Alexandra Schnyder, *International inheritance law - avoiding conflicts of jurisdiction*, MEYERLUSTENBERGER LACHENAL LTD. (Feb. 22, 2018) (providing explanation of application in practice), <https://www.mll-legal.com/news-events/news/detail/international-inheritance-law-avoiding-conflicts-of-jurisdiction/> [<https://perma.cc/Y3S5-TSGJ>].
 15. Commission Regulation 650/2012 of July 4, 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (EU), O.J. (L 201) 107, 120.
 16. Lawrence & Rizzo, *Basic Conflicts of Law Principles*, American Bar Association, 4.
 17. See 2012 O.J. (L 201) 107 (describing how to determine habitual residence by evaluating the duration and regularity of a persons’ presence in a state and the conditions and reasons for that presence).
 18. Thiery, *supra* note 12.
 19. Justice Kennedy, *The Unification of Law*, 10 J. OF THE SOC’Y OF COMP. LEGIS. 212, 214 (1910) (“The certainty of enormous gain to civilized mankind from the unification of law needs no exposition.”).
 20. See Eugene Scoles, *The Hague Convention on Succession*, 42 AM. J. OF COMP. LAW 86, 89 (1994).
 21. See Madoff, *supra* note 8, at 333-344.

provide for strict requirements for a will to be valid.²² In addition, American courts use tools such as mental capacity, undue influence, and fraud to void a testator's will that does not provide for his children.²³ Finally, reforms of the French Civil Code now allow a testator to significantly reduce the reserved share and to exercise a greater control over the distribution of his estate.²⁴

Section I of this Note discusses the history of American and French inheritance law and considers the various historical reasons for the differences between the two systems. Section II explores the similarities and differences between the current American and French inheritance law. Section III looks into the choice-of-law regime in Europe. Section IV delves into the history of past attempts at unification both in Europe and in the United States and argues that a different approach to unification must be adopted to achieve success in unification. Finally, Section V lays out the proposal for a new approach to unification that may have more chances for success.

I. HISTORY

A. *American Inheritance Law- Common Law*

The United States does not have a single, uniform body of law when it comes to inheritance.²⁵ Rather, inheritance is generally a matter of state law.²⁶ While each of the fifty states has its own history, the evolution of inheritance law can be divided up into four different time periods: (1) the colonial period, (2) the post-revolutionary period, (3) the nineteenth century, and (4) the twentieth century.²⁷

The colonial period largely adopted English inheritance law.²⁸ While some rules from Medieval England persisted, English inheritance law in the seventeenth century favored testamentary freedom.²⁹ The remaining Medieval rules consisted of: (1) primogeniture; (2) dower;

22. *See generally* GERRY W. BEYER, *EXAMPLES & EXPLANATIONS: WILLS, TRUSTS, AND ESTATES*, 73-116 (Wolters Kluwer, 6th ed. 2015) (providing various requirements for a will to be valid).

23. *Id.*

24. *See*, CODE CIVIL [C.CIV.] [CIVIL CODE] art. 913 (Fr.); *see also*, CODE CIVIL [C.CIV.] [CIVIL CODE] art. 957 (Fr.).

25. Luis Acosta, *United States: Inheritance Laws in the 19th and 20th Centuries*, LAW LIB. OF CONG. (Mar. 2014) <https://www.loc.gov/law/help/inheritance-laws/unitedstates.php>.

26. *Id.*

27. Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. OF LEGAL HIST. 145 (1987).

28. *See id.* at 145.

29. *Id.* at 150.

and (3) curtesy.³⁰ Under the primogeniture rule, all realty had to pass to the eldest son.³¹ The dower provided that a widow was entitled to a life estate in one-third of real property that her husband owned at any time during the marriage.³² Finally, the curtesy stipulated that a widower was entitled to a life estate in all of his wife's real property.³³ Most statutes, however, provided that a testator could disinherit whomever they pleased.³⁴ During this time, the only claim a woman could have on her husband's estate was her dower rights.³⁵ Further, in cases of intestacy, courts used a formula established by a statute enacted in 1670 to distribute property.³⁶ The widow received one-third of the estate and the children inherited the remainder equally. If no children survived, the widow split the assets with her husband's family.³⁷

With this heritage in mind, the English colonists followed the lead of the mother country, relied on the common law, and favored testamentary freedom.³⁸ Only when they wanted to alter the customary rules did legislatures go further and pass statutes.³⁹ Settlements dominated by Puritans and Quakers were the ones that most often departed from English precedents.⁴⁰ In Pennsylvania, for example, the state legislature enacted statutes severely limiting testamentary power, and prevented men from disinheriting their wives and children.⁴¹ Other colonies, dominated by dissenters, rejected the primogeniture and gave the eldest son a double share, instead of distributing the whole estate to that son.⁴² The youngest children still were entitled to a share.⁴³ As to the rights of widows, most colonies followed the English practice, granting testators freedom to will personal property.⁴⁴ Only two

30. *Id.* at 146-147.

31. *Id.* at 146.

32. *Id.* at 147.

33. *Id.*

34. *Id.* at 150.

35. *See id.*

36. *Id.* at 149.

37. *Id.*

38. *See id.* at 150-55.

39. *Id.* at 155.

40. *Id.* at 154.

41. *Id.*

42. *Id.* at 156.

43. *Id.*

44. *Id.* at 149.

colonies—Maryland and Virginia—allowed widows to claim a share of personal property notwithstanding the will.⁴⁵

The post-revolutionary period saw a movement toward codification.⁴⁶ Lawmakers did not generally change English rules but rather codified areas where American law differed from English law, therefore delineating those areas in which standard English customs would continue.⁴⁷ Because most states did not establish rules for disinheriting children, it is likely that states embraced the English testamentary freedom that permitted a parent to disinherit his children.⁴⁸ If a parent died intestate, however, sons and daughters received equal shares in property in most states.⁴⁹

In the nineteenth century, as the United States expanded westward, state laws on inheritance continued to evolve.⁵⁰ Eight jurisdictions—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—entered the Union as community-property states.⁵¹ In community-property states, directly derived from Spanish influence, wives automatically inherited one-half of all property acquired during the marriage.⁵² Common law jurisdictions followed that lead by giving equal intestacy shares to husbands and wives.⁵³ It also became more difficult to disinherit a child.⁵⁴ Indeed, the number of states requiring parents to specifically state in their will their intention to leave out a son or daughter jumped from three to twenty.⁵⁵

Over the course of the twentieth century, the proportion of a decedent's estate that went to the spouse under intestacy rather than to the children increased in many common-law jurisdictions.⁵⁶ As such, spouses were now treated relatively more favorably than children and other relatives in intestacy statutes.⁵⁷ By the end of the twentieth century, while protection of children from disinheritance was “almost

45. *Id.* at 158.

46. CAROLE SHAMMAS *ET AL*, *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO PRESENT*, 63 (1987).

47. *Id.*

48. *Id.* at 63–64.

49. *Id.* at 67.

50. *See id.* at 100.

51. *Id.* at 84.

52. *Id.*

53. *Id.* at 85.

54. *Id.* at 100.

55. *Id.*

56. *Id.* at 165.

57. *Id.* at 166.

nonexistent,”⁵⁸ the law embodied a diverse array of spousal protections.⁵⁹

B. French Inheritance Law- Civil Law

French inheritance law was founded on two separate legal systems: Roman law and *droit coutumier* (customary law).⁶⁰ These two bodies of law were unified in 1789 by the Revolutionaries who made sure to incorporate the principle of equality in all aspects of property disposition.⁶¹ Finally, the *Code Civil* in its final form effected a compromise between the various bodies of law.⁶²

Roman inheritance law was guided by the principle of testamentary freedom.⁶³ The head of the household was empowered to freely dispose of his property in any manner he wished.⁶⁴ The only limitation to this freedom was the existence of the *légitime*, which essentially was a forced share and that secured close relatives—descendants, ascendants, and siblings—a quarter of what they would have received in intestacy.⁶⁵ Romans justified this rule by the notion that a testator who did not leave at least some of his estate to his close relatives must have been lacking the testamentary capacity to draft a will; in other words, the

58. WILLIAM H. PAGE ET. AL, PAGE ON THE LAW OF WILLS, at 116 (2003).

59. *Id.* at 117-18 (2018) (“[C]ommon law dower has been substantially retained by fifteen states; statutory dower, by which the widow is more generously allowed to take a fee interest rather than a life interest, exists in eight jurisdictions; ten states have done away with dower altogether and have created in its place an inchoate, statutory interest in the other spouse’s property which is protected during coverture by the husband’s inability to convey unencumbered title by his sole act; and the remaining states do not give the wife an inchoate interest during coverture but limit her instead to a forced share in whatever property the husband leaves in his estate at death. The present state of the law represents a jungle, with hardly two states to be found that are exactly alike, and there exists in reality fifty different schemes most of which, when analyzed, are not built upon a single adequate interest given the surviving spouse; but instead give her a bit of homestead, a bit of widow’s allowance, and in addition a bit of dower or some statutory substitute therefor.”).

60. ANNE MARIE LEROYER, DROIT DES SUCCESSIONS, 5-7 (Daloz, 3rd ed. 2014) (Fr.).

61. *Id.* at 8.

62. *See id.* at 9.

63. HENRY DYSON, FRENCH PROPERTY AND INHERITANCE LAW- PRINCIPLES AND PRACTICE 233 (2003).

64. LEROYER, *supra* note 60, at 5 (explaining that the *pater familias* could decide how his property were to be disposed at his death).

65. DYSON, *supra* note 63, at 234 (stating the *légitime* was thus a forced share of a testator’s estate from which the testator could not disinherit his close relatives); *see also* LEROYER, *supra* note 60, at 6.

testator was of unsound mind.⁶⁶ This concept of a forced share is known in the current French inheritance law as the *réserve*.⁶⁷ In cases of intestacy, it was the principle of equality that prevailed.⁶⁸ All beneficiaries were treated in an equal manner, regardless of age or sex.⁶⁹ The surviving spouse was entitled to a fourth of the estate or in usufruct⁷⁰ if there were any live descendants.⁷¹

The *droit coutumier*, of Germanic descent, was in opposition to Roman principles. Paramount to the *droit coutumier* was the idea that property should remain within the family.⁷² At death, a decedent's estate was divided into two categories: property inherited from the family and property personally acquired.⁷³ Four-fifths of the property inherited was to be distributed to the testator's descendants.⁷⁴ In the absence of descendants, the property inherited was returned to the side of the family from which it came.⁷⁵ The property acquired, however, could generally be disposed of at the testator's wish.⁷⁶ Another discrepancy with Roman law was the establishment of primogeniture,⁷⁷ which was the right of the paternally-acknowledged firstborn son to inherit his parent's entire or main estate.⁷⁸ The surviving spouse was only entitled to a third of the property acquired or the usufruct if there were any living descendants.⁷⁹

Roman law and *droit coutumier* principles co-existed in a mosaic of local rules up to the French Revolution.⁸⁰ The Revolutionaries sought

66. DYSON, *supra* note 63, at 234.

67. *See id.* (explaining that the *réserve* is a form of forced share present in current French inheritance law).

68. *See id.*

69. LEROYER, *supra* note 60, at 6 (stating that such equality was lost afterwards and only came back later with first reforms of the French Revolution, the Code Civil, and later reforms).

70. *Id.*; *see also* *Usufruct*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/usufruct> (last visited Oct. 1, 2019) (defining usufruct as the legal right of using and enjoying the fruits or profits of something belonging to another).

71. *See generally id.*; *see also* LEROYER, *supra* note 60, at 6.

72. *Id.* at 7.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. LEROYER, *supra* note 60, at 7.

79. *Id.* at 8.

80. *Id.*

to harmonize French inheritance law throughout the whole country with revolutionary ideals.⁸¹ They sought to put absolute equality at the center of succession law.⁸² First, the primogeniture was abolished.⁸³ Then, the Roman law *légitime* was expanded into the idea of a *réserve*.⁸⁴ With these two amendments, all descendants were entitled to an equal share of their father's estate, regardless of age or sex.⁸⁵ Such amendments were not only prompted by ideological motives but also political ones.⁸⁶ Indeed, the Revolutionaries hoped that placing all heirs in equality would divide large fortunes and big estates into smaller ones, which would in turn weaken the aristocracy.⁸⁷

Next, the *Loi de Nivôce* was enacted in 1794.⁸⁸ Under this law, the *droit coutumier* practice of dividing property according to its origin was abolished.⁸⁹ All property was now treated as one.⁹⁰ Finally, this law provided a strict scheme of property disposition.⁹¹ The *réserve* now consisted of nine-tenths of a decedent's estate and was to be equally divided between the decedent's children.⁹² The disposition of the remaining one-tenth—also called the *quotité disponible*—was at the discretion of the testator, but it could not be used to favor one child over the other.⁹³ The surviving spouse was intentionally left out and therefore could only inherit the *quotité disponible* if the testator had so provided.⁹⁴

In true French fashion, such reforms were not without protest. It was only with the enactment of the Napoleonic Civil Code that French

81. Nicolas Boring, *France: Inheritance Laws in the 19th and 20th Centuries*, THE L. LIBR. OF CONGRESS, 1, 1-2 (2014).

82. *Id.* at 2.

83. LEROYER, *supra* note 60, at 8.

84. DYSON, *supra* note 63, at 234.

85. LEROYER, *supra* note 60, at 8.

86. DYSON, *supra* note 63, at 234 (“[T]his did not represent a progression of the *droit coutumier* so much as an application of the political philosophy current at the time of the French Revolution, that property should remain in the family and that freedom of disposition on death should be available in respect of only a very small proportion of a deceased person's estates.”).

87. Boring, *supra* note 81, at 2.

88. *Id.*

89. LEROYER, *supra* note 60, at 8.

90. *Id.*

91. *Id.*

92. *See id.* at 9 (stating that the *quotité disponible* was reduced to 1/10th).

93. DYSON, *supra* note 63, at 234.

94. Boring, *supra* note 81, at 2.

inheritance law finally settled into one body of law.⁹⁵ The Civil Code effected a compromise between the strict Revolutionary rules, the *droit coutumier* family rights, and Roman law's individual freedom.⁹⁶ To do so, it increased the amount of the *quotité disponible* while preserving the *réserve*.⁹⁷ Further, it allowed a testator to favor one beneficiary by giving to that beneficiary a share in the *quotité disponible* in addition to the share in the *réserve*.⁹⁸ The surviving spouse, however, was left with few rights and only slim chances to inherit.⁹⁹ A surviving spouse could only become an heir if no descendants, ascendants, or siblings were alive.¹⁰⁰

C. Freedom of Disposition v. Limitation through the Law

In both France and the United States, legislative drafters found themselves torn between two ideas regarding inheritance: full liberty of bequest or limitation through the law. American drafters preferred the former option, following tradition developed in England. Meanwhile, the drafters of the Napoleonic Code preferred the latter— again following tradition from the *droit coutumier*. Arguments for and against the freedom of disposition were extensively reviewed by French authors in the first half of the nineteenth century.¹⁰¹

The defenders of the full liberty of bequest argued that such freedom was a necessary condition for capital accumulation.¹⁰² Without the liberty to choose which heirs receive the legacy, the incentive to save money is reduced.¹⁰³ Their second argument was that freedom of disposition allows a better individual consideration of the different faculties and needs of the children.¹⁰⁴ “Children have different gifts, unequal abilities, and varying aptitudes to study or to work. Consequently, they do not have the same power to make efficient use of inherited capital, and it would be unfair to transfer the same amount

95. *See id.* at 3.

96. *Id.*

97. DYSON, *supra* note 63, at 234.

98. *Id.*

99. LEROYER, *supra* note 60, at 9.

100. *Id.* at 8.

101. Claire Silvant, *The Question of Inheritance in MidNineteenth Century French Liberal Thought*, 22 EURO J. HISTORY OF ECONOMIC THOUGHT 51, 54 (2015)(explaining that most French liberal authors advocated for full bequest, including Bastiat, Braudrillart, Broglie, Courcelle-Seneuil, Dunoyer, Faucher, Fontenay, Garnier, Le Play, Levasseur, Molinari, Parieu, Passy, and Puynode).

102. *Id.* at 55.

103. *Id.*

104. *Id.* at 56.

to each.”¹⁰⁵ The advocates of testamentary freedom legitimized inheritance laws only in the case of intestacy.¹⁰⁶

The opponents of testamentary freedom, however, contended that the limitation by law of the individual right to bequeath is more efficient and leads to a better and more equalitarian income distribution.¹⁰⁷ They noted that a testator’s decision was not systematically a rational one, and that heirs should be protected against a testator’s irrational behavior.¹⁰⁸ Finally, they argued that, from the heir’s point of view, equal shares also create better incentives to work because there are no contradictory personal interests in families, motivating each member to improve the total family estate.¹⁰⁹

This dilemma existed for a reason—both freedom of disposition and limitation of disposition through the law have great advantages. Instead of choosing one system over the other, it seems the solution is to incorporate elements from the two methods of disposition in order to form one.

II. FRENCH & AMERICAN SYSTEMS TODAY

Despite their apparent discrepancies in origin and history, the two bodies of law are more similar than they initially appear and merging these systems is possible.¹¹⁰ A closer look into the nuances of each system reveals that American testators do not have as much freedom as we may think.¹¹¹ Similarly, French testators now have ways to contract around the strict *réserve héréditaire* to significantly reduce a child’s share.¹¹² To have a better understanding of such nuances the following topics must be examined: (1) the intestate protection for heirs under U.S. inheritance law, (2) the protection for heirs under French inheritance law, (3) the unexpected testate protection for heirs under U.S. inheritance law, and (4) the expanded freedom of testation under French inheritance law.

105. *Id.*

106. *Id.* at 58.

107. Silvant, *supra* note 101, at 58 (including Wolowski, Cauwès, Royer, Dufour, and Montesquieu).

108. *Id.* at 59.

109. *Id.*

110. See Madoff, *supra* note 8, at 334. (arguing that a closer inspection of the nuances of each body of law make them more similar than they appear).

111. *Id.* at 333.

112. *Id.* at 347-348.

Between 60 and 75% of Americans die without a will.¹¹³ As such, most successions are divided according to the controlling probate law.¹¹⁴ Because inheritance in the United States is generally a matter of state law, each of the fifty states have a slightly different approach to the disposition of one's property at death.¹¹⁵ Nevertheless, the Uniform Probate Code offers a body of law consistent with the general view.¹¹⁶ Under section §2-106 of the UPC, descendants are protected and receive equal shares of the decedent's estate.¹¹⁷ The surviving spouse is also protected under §2-102.¹¹⁸

Just like in the United States, most people in France die without a will.¹¹⁹ Under French law, whether one dies with or without a will, that person's children must receive a share of the estate under the *réserve* requirement.¹²⁰ Article 913 of the Civil Code determines the percentage of the *réserve* depending on the number of children that the decedent leaves behind.¹²¹ The *réserve* is then divided in equal shares between the children.¹²² The percentage remaining amounts to the *quotité disponible* that the testator can bequeath without restrictions.¹²³

But not all people die without a will.¹²⁴ In the United States, inheritance law is characterized by the principle of freedom of testation: the apparently unlimited right of a person to dispose of his property however he chooses.¹²⁵ Such a principle has been reiterated on numerous occasions. First, the United States Supreme Court held in *Hodel v.*

113. GERRY W. BERRY, *EXAMPLES & EXPLANATIONS: WILLS TRUSTS & ESTATES*, 14 (Wolters Kluwer, 6th ed. 2015).

114. Mary Randolph, *How an Estate is Settled if There's No Will: Intestate Succession*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-estate-settled-if-theres-32442.html> (last visited October 4, 2019) [<https://perma.cc/P8UW-6CSJ>].

115. *Id.*

116. *See generally* UNIF. PROBATE CODE.

117. UNIF. PROBATE CODE § 2-106(b) (amended 2010).

118. UNIF. PROBATE CODE § 2-102 (amended 2010).

119. *Succession sans testament* [Succession in Intestacy], TESTAMENTO, <https://testamento.fr/fr/guides/succession/succession-sans-testament> [<https://perma.cc/9THA-BHH3>] (“Today in France 9 succession out of 10 are made in intestacy.”).

120. *Id.*

121. CODE CIVIL [C.CIV.] [CIVIL CODE] art. 913 (Fr.).

122. *Id.*

123. LEROYER, *supra* note 60 at 395-396.

124. *See* BERRY, *supra* note 113.

125. Elaine Lam, *Disinheritance vs. Forced Heirship: A Comparative Study Between the Succession Regimes of the United States and France*, 32 PROB. & PROP. 40 (2018).

Irving that the ability to transmit property at death is a constitutionally protected right that includes the right to exclude.¹²⁶ Second, American courts have regularly noted that children do not have a right to inherit property.¹²⁷ Looking at this evidence alone, the discrepancy between French and American law could not be greater.

Among the fifty states, only Louisiana provides direct protection to children intentionally disinherited by a parent.¹²⁸ A product of French influence, Louisiana's forced heirship previously applied to all children, regardless of their age.¹²⁹ In 1989, the class of children eligible for such protection was limited to children under age 23 or who have mental disabilities.¹³⁰ Ralph C. Brashier argues that Louisiana should not have to stand alone in protecting children from disinheritance,¹³¹ noting that most modern nations throughout the world have provisions in place protecting children from disinheritance.¹³²

States and courts have done just that; they both employ tactics that show that, while testamentary freedom is still paramount, it is not an impossible hurdle. For example, some states have now adopted "pretermitted heir statutes," which express that if a testator simply omits his children from the will, then the children will nevertheless inherit.¹³³ With pretermitted heir statutes, courts will assume that such an omission was accidental and give each child a share equal to what they would have gotten under intestacy.¹³⁴

126. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, at 176 (1979)).

127. *E.g.*, *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 828 (Ohio Ct. Com. Pl. 1974) ("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.").

128. Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996).

129. Madoff, *supra* note 8 at 338.

130. LA. CIV. CODE art. 1493 (A); Madoff, *supra* note 8 at 338.

131. Brashier, *supra* note 128, at 26.

132. *Id.* at 1 (noting in footnote 3 that among the countries (or their subdivisions) that protect children from disinheritance by their parents are: Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, India, Ireland, Italy, Japan, Republic of Korea, Lebanon, Liechtenstein, Malta, Mexico, Mongolia, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, Scotland, Spain, Sweden, Switzerland, Ukraine, Uruguay, and Venezuela).

133. CAL. PROB. CODE § 21620 (1997); OHIO REV. CODE § 2107.34 (2002).

134. Brashier, *supra* note 128 at 9.

Other examples demonstrating how American courts do not necessarily put testamentary freedom above all are the doctrines of mental capacity, undue influence, and fraud, as well as formal requirements for writing wills.¹³⁵ While examining case law concerning the validity of wills over a five-year period, Professor Melanie Leslie found that courts will often seek to void an offensive will with the use of doctrines such as capacity, undue influence, or fraud.¹³⁶ By voiding a will, Courts are assuring that the estate will be distributed to family members under the controlling intestacy rules.¹³⁷

While American courts tend to move away from testamentary freedom when it frustrates prevailing normative views,¹³⁸ recent reforms in France seem to bring French inheritance law closer to the American freedom of testation.¹³⁹ The French law of succession has seen very few reforms since it was first established in 1804.¹⁴⁰ In fact, “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.”¹⁴¹ Nevertheless, the few reforms adopted in 2001 and 2006 significantly expanded freedom of testation in several ways.¹⁴²

First, with the 2001 and 2006 reforms, ascendants lost their entitlement to a forced share while surviving spouses became entitled to a forced share in the absence of any descendants.¹⁴³ With this change, a testator no longer had to give the whole *quotité disponible* to the surviving spouse in order to provide for the spouse.¹⁴⁴

135. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 237 (1996).

136. *Id.* at 236-237 (“Notwithstanding reformer’s claims that courts always insist on strict compliance with will formalities, courts throughout this century often have accepted less than strict compliance when necessary to ensure fulfillment of a testator’s moral duty.”).

137. *See generally id.* at 235. “[C]ourts void potential wills for the ‘most minute defect in formal compliance, ... no matter how abundant the evidence that the defect was inconsequential.’”

138. Madoff, *supra* note 8, at 345.

139. *Id.* at 347.

140. *Id.* at 344.

141. *Id.*

142. *Id.* at 344, 347.

143. LEROYER, *supra* note 60 at 395.

144. *See generally* LEROYER, *supra* note 60 at 391-395 (explaining that prior to the reform, the only way a testator could make sure that the surviving spouse would receive something was by gifting the *quotité disponible* to their spouse).

Then, the 2006 reforms adopted a provision that allows an heir to enter into an agreement during life to forego his statutory rights of a *réserve* share.¹⁴⁵ Such an ability to renounce a forced share was intended to allow families more flexibility in dividing up inheritances.¹⁴⁶ A child with special needs could be able to inherit more thanks to his siblings' renunciation of their reserved share.¹⁴⁷ This change also negates one of the biggest critiques of French inheritance law.¹⁴⁸ In her article, Elaine Lam argued that testamentary freedom in the United States allows people like Mark Zuckerberg, founder of Facebook, to disinherit his daughter, and instead pass down his fortune for the betterment of society.¹⁴⁹ She adds that "this kind of decision would be prohibited under [the French] succession regime of forced heirship" and that Zuckerberg would thus "miss the opportunity to create greater good."¹⁵⁰ It is true that, under French law, Zuckerberg could not *unilaterally* take such action.¹⁵¹ However, with the consent of his daughter, it would be possible for Zuckerberg to distribute his estate to whomever he wants, just like American law allows.¹⁵²

Finally, the 2006 amendments limited the nature of a descendant's remedy from a *réserve héréditaire* claim to monetary damages.¹⁵³ In other words, while prior to the 2006 law, children could recover the property itself,¹⁵⁴ now the recipient of such property can only receive the cash value of that property.¹⁵⁵ This gives the decedent greater control over dispositions of particular items of real or personal property.¹⁵⁶

In addition to the changes made by the 2001 and 2006 reforms, there are a number of available estate planning techniques that can significantly reduce the rights of heirs.¹⁵⁷ First, testators can purchase a life insurance policy and name whomever they want as a

145. CODE CIVIL [C.CIV.] [CIVIL CODE] art. 929 (Fr.).

146. Madoff, *supra* note 8, at 348.

147. *Id.* at 349.

148. *Id.* at 334.

149. Lam, *supra* note 125.

150. *Id.*

151. Madoff, *supra* note 8, at 348.

152. *Id.*

153. *Id.* at 349.

154. *Id.*

155. *Id.*

156. *Id.*

157. Madoff, *supra* note 8, at 347.

beneficiary.¹⁵⁸ Because life insurance is not treated as part of the estate for purposes of calculating the *réserve*, purchasing a life insurance policy can significantly reduce the children's shares.¹⁵⁹ Second, if a testator owns a property as a joint tenant,¹⁶⁰ then the surviving joint tenant (usually the surviving spouse) will receive the property outright, regardless of the existence of other heirs.¹⁶¹ Finally, a testator can protect his spouse by creating a usufruct interest for the spouse.¹⁶² The usufruct gives the spouse the right to use and generate income from the property for life, and the children only receive the property after the spouse's death.¹⁶³

Although the two bodies of law have just started to slowly grow closer to each other, they remain very different. Numerous problems may occur when both American and French law have jurisdiction over a decedent's estate—as it is the case in the Hallyday battle. The following section presents the current choice-of-law rules that have been used to resolve such discrepancies in the distribution of a decedent's estate.

III. CHOICE OF LAW

A conflict of law occurs when a court must determine whether to apply its law or the laws of another interested jurisdiction to a dispute.¹⁶⁴ In the Hallyday case, both Californian and French courts have jurisdiction over the matter; in France, because the parties in question are French,¹⁶⁵ and in California, because that is where Hallyday's will and trust were executed.¹⁶⁶ The question then is: should

158. *Id.*

159. *Id.*

160. *Id.* The equivalent of a joint tenancy is called a “tontine” in French law.

161. *Id.*

162. Madoff, *supra* note 8, at 348.

163. *Id.* The usufruct is essentially a life estate, although there are some differences.

164. Lawrence & Rizzo, *supra* note 16 at 3.

165. Personal jurisdiction. CODE CIVIL [C.CIV.] [CIVIL CODE] art. 14 (Fr.). Article 14 in the French Civil Code gives French Courts jurisdiction over virtually any action brought by a plaintiff of French nationality. “Thus a person can sue at home on any case of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests.” Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction Viewed from the United States*, CORNELL LAW FACULTY PUBLICATIONS, 2-3 (2004).

166. Adam Streisand, “*Que Je T'Aime: L'affaire d'héritage de Johnny Hallyday*,” THE NATIONAL LAW REVIEW (August 21, 2018), <https://www.natlawreview.com/article/que-je-t-aime-l-affaire-d-heritage-de-johnny-hallyday>. Under California law, the California court has subject

French or Californian law apply? Merely because a state has constitutional authority to apply its own law to a dispute does not necessarily mean that it will or should do so.¹⁶⁷

Traditionally, under the laws of most common law jurisdictions,¹⁶⁸ choice of law analysis in property succession cases depends on the deceased's domicile.¹⁶⁹ Domicile consists of two elements that must exist concurrently: (1) physical presence in the jurisdiction, and (2) the intent to remain indefinitely.¹⁷⁰ The Restatement (Second) of Conflict of Laws adopts a more modern approach and provides that the applicable law will be the one with the most significant relationship to the given situation.¹⁷¹ In making this determination, the Restatement listed various important factors to be considered:

- (2) [T]he factors relevant to the choice of the applicable rule of law include:
- (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.¹⁷²

France's conflict of law regime in succession cases occurs under European Regulation No. 650/2012.¹⁷³ Signed in 2012 and taking effect

matter jurisdiction over a trust administered in California (Hallyday's trust is administered in California by Bank of America) and personal jurisdiction over anyone who might have claims in the assets of the trust. *Id.*

167. Reynolds & Richman, *Multi-Jurisdiction Practice and the Conflict of Laws*, AMERICAN BAR ASSOCIATION (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice/mjp_w_reynolds.

168. Lawrence & Rizzo, *supra* note 16, at 4. And, therefore, under the laws of the United States. *Id.*

169. *Id.*

170. *Id.*

171. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 cmt. Subsec. 2 (1971).

172. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

173. 2012 O.J. (L 650) *supra* note 15, at art. 2.

on August 17, 2015,¹⁷⁴ the Regulation provides that international inheritance is subject to “the law of the State in which the deceased had his or her habitual residence at the time of death.”¹⁷⁵

There are several difficulties with the “habitual residence” choice-of-law rule. First, the court making the determination could be biased, especially when it comes to the death of a national icon so deeply rooted in a country’s modern culture.¹⁷⁶ A court might also be biased towards its own law due to a misunderstanding of the foreign law principles, an ignorance of the policies behind it, or just a fundamental difference in the analysis of a particular situation.¹⁷⁷

The second issue with the current choice of law rules is that they seem to confuse “residence” and “domicile”—at least from the American perspective. While domicile involves a requisite attitude of mind,¹⁷⁸ residence requires only physical presence in a particular locality.¹⁷⁹ Therefore, one person can have several residences but only one domicile.¹⁸⁰ Regulation No. 650/2012 employs the word “residence” but the word “habitual” immediately preceding it seems to infer that “domicile” and “residence” were meant to be used interchangeably here. Whatever the intent was with the use of “habitual residence,” it creates confusion and leads to the possibility of differing interpretations.¹⁸¹

Articles written by American and French firms show a clash of cultures and severe confusion regarding the domicile question.¹⁸²

174. *Id.* at 83. Hallyday died in December 2017. Willsher, *supra* note 2.

175. 2012 O.J. (L 650) *supra* note 15, at art. 21.

176. Streisand, *supra* note 166.

177. *Id.*

178. As stated above, domicile consists of two elements that must exist concurrently: (1) physical presence in the jurisdiction, and (2) the intent to remain indefinitely. LAWRENCE & RIZZO, *supra* note 16 at 4.

179. Lawrence & Rizzo, *supra* note 16 at 5.

180. *Id.*

181. Eugene Scoles, *The Hague Convention on Succession*, 42 AM. J. OF COMP. L. 86, 91 (1994) (explaining that The Hague Convention chose to use the neutral term “habitual residence” because the term “domicile” is not well regarded in Europe and countries of immigration like the United States, do not favor the “nationality” test. While undefined in the Convention, habitual residence carries much of the same connotations of principal residence or “home” as constitute the American concept of domicile); *see also* Monasky v. Taglieri, 589 U.S. ____ (2020) (defining and unifying the definition of “habitual residence” under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and holding that “a child’s habitual residence depends on the totality of the circumstances specific to the case.” Whether this definition could also be used to determine the “habitual residence of a testator is unclear).

182. Streisand, *supra* note 166.

Various law firms in California argue that local law should apply because Hallyday's estate documents were executed in California, under California law, and includes properties in Santa Monica and Los Angeles.¹⁸³ Moreover, they argue that, on the question of domicile, "[i]t was quite well known that Hallyday was a resident of Los Angeles" because he paid his taxes there and was generally understood to be a California resident by both press and tax authorities.¹⁸⁴ The articles go as far as stating that "despite his citizenship and place of death, Hallyday made it clear that he was indeed a Californian."¹⁸⁵

As expected, the French see the situation significantly more, well, French. Some of the arguments advanced for his domicile to be France is that Hallyday was born in France, spent most of his life there, was mostly known in the French-speaking world, and only moved to the United States in 2013.¹⁸⁶ Even then, Hallyday spent a substantial amount of time in France either performing or being treated for his illnesses.¹⁸⁷ Moreover, Hallyday passed away in Marnes-la-Coquette near Paris and is now buried on the French Caribbean island of Saint-Barthélemy where he owned a house.¹⁸⁸ Finally, it was generally understood that Hallyday only moved to Los Angeles for tax purposes—even though he was still subject to French tax since much of his earnings came from the French market.¹⁸⁹

Finally, the third problem with the choice of law rule is that it does not always allow for a predictable result. A quick look at precedent similar to the Hallyday case may lead us to think that, in fact, the result is predictable. In 2009, when the French musician Maurice Jarre passed away in Malibu, it was Californian law that prevailed.¹⁹⁰ Just like Hallyday, Jarre had excluded his children from his last will and

183. *Id.*

184. FLANIGAN LAW GROUP, *Live in LA, Write Your Will in LA* (March 3, 2018), <https://www.flaniganlawgroup.com/blog/2018/03/live-in-la-write-your-will-in-la.shtml>.

185. *Id.*

186. Thiery, *supra* note 12.

187. *Id.*

188. Amandine Ascensio, *Saint-Barthélemy se prépare à accueillir Johnny Hallyday pour l'éternité*, LE FIGARO (Oct. 12, 2017), <http://www.lefigaro.fr/musique/2017/12/09/03006-20171209ARTFIG00084-saint-barthelemy-se-prepare-a-accueillir-johnny-hallyday-pour-l-eternite.php>.

189. Angelique Chrisafis & Kim Willsher, *Johnny Hallyday, the 'French Elvis', dies at 74*, THE GUARDIAN (Dec. 6, 2017), <https://www.theguardian.com/music/2017/dec/06/johnny-hallyday-french-rock-star-dies-aged-74-lung-cancer>.

190. Thiery, *supra* note 12.

testament.¹⁹¹ Jarre’s “habitual residence” was not hard to determine. Because Jarre had been living in California for almost thirty years, was living in California at the time of his death, and had gotten married in the United States, the Court held that Jarre’s “habitual residence” was California.¹⁹² As such, California law prevailed, and Maurice Jarre—despite being French—was legally able to disinherit his children.¹⁹³ As stated above, determining “habitual residence” in the case of Hallyday is much harder. On the one hand, Hallyday spent most of his life in France and only moved to the United States in 2013.¹⁹⁴ Even then, Hallyday spent a substantial amount of time in France¹⁹⁵ On the other hand, Hallyday paid taxes in California since 2013, owned several properties in California,¹⁹⁶ was a green card holder since 2015 and planned to apply for naturalization.¹⁹⁷

While choice-of-law may be an efficient method to resolve international conflicts in the presence of treaties; it is harder to apply in the absence of a codified procedure. The United States and France do have a bilateral treaty with respect to family law judgments, but not to inheritance matters.¹⁹⁸ Without a codified method, choosing one law over the other leaves an arbitrary impression. If California law is chosen, then Hallyday’s intent will be respected, but it will be disregarding one of the most fundamental principles of French inheritance: the forced share. In addition, it will set yet another precedent inciting more people to run away from France in order to escape the forced heirship rules. If French law applies, Hallyday’s intent

191. *Id.*

192. See Aurelien Bamde, *The Maurice JARRE Judgment: The Hereditary Reserve does not Fall Under International Public Order (Cass, 1st civ 27 Sept. 2017)*, A. BAMDE & J. BOURDOISEAU, (Feb. 22, 2018), <https://aurelienbamde.com/2018/02/22/larret-maurice-jarre-la-reserve-hereditaire-ne-releve-pas-de-lordre-public-international-cass-1ere-civ-27-sept-2017/> (citing to the Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., 27 Sept. 2017, Bull.civ.I, No. 16-17.198(Fr.)) (explaining the Court of Cassation’s opinion on the Jarre case).

193. Thierry, *supra* note 12.

194. *Id.*

195. *Id.*

196. *Id.*

197. David Chazan, *France claims jurisdiction in Hallyday inheritance dispute based on rocker’s Instagram posts*, THE TELEGRAPH (June 2, 2019), <https://www.telegraph.co.uk/news/2019/06/02/france-claims-jurisdiction-hallyday-inheritance-dispute-based/>.

198. Hague Conference on International Law, *Members & Parties*, HCCH, <https://www.hcch.net/en/states/hcch-members/details1/?sid=76> (last accessed Sept. 28, 2019) (explaining that the United States and France are parties of the 1980 Hague Convention).

will be blatantly ignored, thus disregarding a fundamental principle of American inheritance law. Moreover, it will cause a reliance issue by putting into question similar estate documents made by international families.¹⁹⁹

IV. UNIFICATION

Another way to solve multinational inheritance battles is unification. In 1912, Lord Justice Kennedy wrote that the unification of law is desirable because it facilitates international intercourse, tends to conserve peace, and greatly simplifies the complexities of international commerce.²⁰⁰ But is the unification of law, and more particularly inheritance law, feasible? Lord Justice Kennedy argued that “the more the element of human emotion enters any department of law... the greater becomes the probability that existing divergences between the laws of different countries may in that department continue, or even that new divergences may appear.”²⁰¹ The importance of the emotional and psychological aspects of inheritance law is difficult to overlook. Emotions such as anger, grief, frustration, sadness, incomprehension, disgust, surprise, fear, indignation, envy, and love all come into play with inheritance law.²⁰² Nevertheless, unification of two bodies of law could be possible with the close study and understanding of each law.²⁰³ Indeed, “[t]here is not much use in trying to persuade a man to prefer our system to his, or to modify his own, if he sees that we do not understand what the principles and rules of his system are.”²⁰⁴

There are numerous examples of successful unification of laws. For example, the establishment of the International Institute for the

199. In May 2019, the French court in Nanterre determined that France was Hallyday’s “habitual residence” and therefore that French law applied. See Emmanuel Jerry, *Rocker Hallyday’s estate to be shared under French, not U.S., law*, REUTERS (May 28, 2019), <https://www.reuters.com/article/us-france-hallyday/rocker-hallydays-estate-to-be-shared-under-french-not-u-s-law-idUSKCN1SY1LL>. The Court made that determination thanks to a chart tracking Hallyday’s movements from Instagram which showed that Hallyday spent 151 days in France in 2015 and 168 in 2014—enough for him to be considered a French resident. See Chazan, *supra* note 197.

200. Kennedy, *supra* note 19, at 214.

201. *Id.* at 217.

202. *Id.* (“But the more the element of human emotion enters any department of law, as for instance that which deals with the relations of husband and wife, or of parent and child, or that which defines the freedom of the individual as against the State, the greater becomes the probability that existing divergences between the laws of different countries may in that department continue, or even that new divergences may appear.”).

203. *Id.* at 218.

204. *Id.*

Unification of Private Law (UNIDROIT) in 1926 led to the unification of substantive law with respect to international business law—particularly in the areas of trademark, investment, and competition law.²⁰⁵ Another unifying force of growing importance is international business practice and custom.²⁰⁶ To determine whether unification of inheritance law is feasible, we must look at the past attempts at unification in both Europe and the United States.

In Europe, there have been talks about achieving wide-ranging harmonization since at least the 1970s, where there were demands in the European Community for the adoption of a European Civil Code.²⁰⁷ There were, however, no such demands for international inheritance law.²⁰⁸ Indeed, until recently European scholars considered international inheritance law irrelevant because there were few cross-border successions and because property was rarely purchased abroad.²⁰⁹ Reinhard Zimmermann, the Director of Max Plank Institute for Comparative and International Private Law, called this area the “virgin territory” because it has been neglected by modern scholarship.²¹⁰

In 1989, however, the Hague Conference issued its 32nd Convention, the “Convention on the Law Applicable to Succession to the Estates of Deceased Persons.”²¹¹ This Convention’s goal was to determine a single law that would apply to the various inheritance issues.²¹² But, negotiating rules that would accommodate the policies of all parties revealed to be a challenge.²¹³ As noted by Eugene Scoles: “Most people feel strongly that their views on this very personal area of the law are both superior and very much an integral part of the fabric of their

205. *Conflict of laws*, BRITANNICA ONLINE ENCYCLOPEDIA, <https://www.britannica.com/print/article/333023> (last visited Jan. 30, 2019).

206. *Id.*

207. Marius Zalucki, *Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*, 103 IOWA L. REV. 2317, 2322 (2018). Some projects unifying bodies of law in Europe are: The Principles of European Contract Law, The Principles of the Existing EC Contract law, or The Draft Common European Sales Law. *Id.*

208. *Id.* at 2324.

209. *Id.*

210. *Id.* at 2322.

211. Barbara R. Hauser, *European Harmonization: Will Brussels IV succeed?*, TRUSTS & ESTATES (November 2010), <https://www.brhauser.com/articles/trustsestateseuharmonizationoct2010hauserlayoutver2.pdf>.

212. *Id.*

213. Scoles, *supra* note 181, at 89.

society.”²¹⁴ At the end, the Hague Convention only provided a choice of law rule for international cases that requires the identification of a law to be applied.²¹⁵ The Convention does not address the substantive, procedural, or administrative matters of a decedent’s estate.²¹⁶

After 1989, no significant international attempts were made to harmonize inheritance laws, until the European Commission issued a “Green Paper” in 2005, titled “Succession and Wills.”²¹⁷ The Green Paper was designed to open the discussion on the rules of succession in order to identify the problems associated with unification.²¹⁸ One of the recitals in the draft report referred to the marked differences in the inheritance laws of member countries.²¹⁹ Another recital presaged that any sort of unification might be difficult.²²⁰ Finally, it stated that no progress in the field of the inheritance law could be made before unifying the rules of conflicts of law.²²¹

That determination led to the adoption of Regulation (EU) 650/2012²²² commonly referred to as Brussels IV.²²³ As seen above in Section III, the Regulation provides that, only one law would apply to multinational successions.²²⁴ The law to be applied is the “law of the last habitual residence of the deceased.”²²⁵

What this history tells us is that—despite the shared desire for unification in Europe and the multiple attempts to unify inheritance laws—member states have not been able to agree on more than a mere

214. *Id.*

215. *Id.*

216. *Id.*

217. Hauser, *supra* note 211.

218. Zalucki, *supra* note 207, at 2326-27.

219. European Parliament Resolution with Recommendations to the Commission on Succession and Wills, EUR. PARL. DOC.,(2005/2148(INI)) (2006) (“Whereas those differences, in so far as they are capable of making it difficult and expensive for heirs to take possession of the estate, could create obstacles to the exercise of the freedom of movement and the freedom of establishment referred to in Articles 39 and 43 of the EC Treaty and the enjoyment of the right to own property, which is a general principle of Community law.”).

220. *Id.* (“Whereas, when dealing with the subject of succession and wills, it is essential to uphold certain fundamental tenets of public policy which impose limits on testamentary freedom for the benefit of a testator’s family or other dependants.”).

221. Zalucki, *supra* note 207, at 2326-27.

222. *Id.* at 2327.

223. *Id.* at 2328.

224. Hauser, *supra* note 211.

225. EUR. PARL. REG. 2012, *supra* note 15, at 109.

conflict-of-law rule.²²⁶ Moreover, that conflict-of-law rule is widely criticized by common law countries such as England.²²⁷ Nevertheless, it has been recognized that the need for unification is growing.²²⁸ Indeed, the European Commission stated in 2009 that:

In a Europe whose citizens are ever more mobile, the great difficulties caused by the disparate rules applicable to successions in the Member States can no longer be ignored. It is reckoned that there are 4.5 million successions a year in the EU, about 10% of which have an international dimension. This means there are almost 450,000 successions in the EU with a cross-border dimension. The value of these international successions is estimated at EUR 123 billion a year.²²⁹

There has not yet been any attempt for unification of the inheritance laws between the United States and Europe or the United States and France.²³⁰ Although the United States is a member of the Hague Conference, it has only signed one convention among the various Hague conventions related to inheritance.²³¹

This history of past attempts for unification shows that such achievement is not simple and requires a thorough knowledge of all inheritance laws to be unified. Nevertheless, unification is needed and is an endeavor from which Europe (France included) and the United States cannot retreat.²³² As citizens around the world are ever more mobile, the difficulties caused by separate rules applicable to successions are only going to grow.²³³

Unification can be achieved but a different approach must be adopted to succeed. The past attempts at unification have been

226. Hauser, *supra* note 211.

227. *Id.*

228. Zalucki, *supra* note 207, at 2325-26.

229. *Commission Proposal for the Simplification of Regulation on International Successions*, COM (2009) 447 (Oct. 14, 2009).

230. *See generally* Hague Conference on International Law, *supra* note 198 (showing the lack of treaties signed by the United States).

231. *Id.* (showing that the United States signed the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition). *See also* Iain Murray, *Why America Doesn't Ratify Treaties*, COMPETITIVE ENTER. INST. (Oct. 17, 2007), <https://cei.org/content/why-america-doesnt-ratify-treaties>.

232. Zalucki, *supra* note 207, at 2338.

233. Donald J. Carroll et al., *The New EU Regulation (Brussels IV): Understanding the Impact on Cross-Border Estate Planning and Administration*, ABA SEC. OF INT'L L. (May 30, 2016), <https://shop.americanbar.org/PersonifyImages/ProductFiles/237345198/Session%205.pdf>.

unsuccessful because there was a lack of understanding of all laws, their history, and the public policies behind them.²³⁴ With the following proposal each country that wishes to unify will have to be thoroughly educated on each inheritance law. I predict that this increased awareness of policy of domestic regimes will lead to more compromises. This will, in turn, promote a more acceptable regulation to which both the United States and France will feel more comfortable opting-in.

V. PROPOSAL

Instead of adopting a mere choice-of-law rule—which I find flawed for the reasons laid out in Section III—each country will adopt a set of model rules applicable to cases of multinational inheritance only. Multinational inheritance occurs when (1) more than one domestic law has jurisdiction over the inheritance and (2) when the two laws differ in the distribution of the estate—as it is the case in the Hallyday battle.²³⁵ A detailed definition of which factors will qualify a country for jurisdiction will have to be agreed upon.²³⁶ For example, the mere fact that beneficiaries do not have the same nationality as the decedent should not be the only factor to qualify the beneficiaries' country for jurisdiction.²³⁷ The set of model rules may take the form of a treaty or a convention. Once ratified, the rules will be binding.

This proposal was inspired by the widely successful United Nations Convention on Contracts for the International Sale of Goods (CISG).²³⁸

234. Zalucki, *supra* note 207, at 2326-27.

235. In the Hallyday battle, if Californian law applies then Laetitia Hallyday, Hallyday's widow, would be the beneficiary of all properties included in the JPS trust. If French law applies then all four children would receive an equal share of $\frac{3}{4}$ of the estate. Laetitia would receive the remaining of the estate.

236. See Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction Viewed from the United States*, CORNELL L. FAC. PUBL'N, 2-3 (2004) (explaining that France's rule on jurisdiction is much broader than in the United States. Article 14 in the French Civil Code gives French Courts jurisdiction over virtually any action brought by a plaintiff of French nationality. "Thus a person can sue at home on any case of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests.").

237. If there is a dispute as to whether more than one country has jurisdiction, then this matter should be sent to an arbitration court to be resolved. The arbitration decision will be binding.

238. Peter Schlechtriem, *Basis Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations*, 10 JURIDICA INT'L, 27, 30 (2005) (explaining that the CISG was so successful that some countries have enacted it not only as their law for cross-border sales but also as their domestic sales law. For example, Norway implements the CISG both as an international convention and as its domestic sales law.

As of February 15, 2017, UNCITRAL and the UN reports that 85 countries have adopted the CISG.²³⁹ The CISG predicted that with uniformity comes the danger that practitioners, legal writers, and courts apply the uniform rules in a manner that is keeping with their domestic law.²⁴⁰ In order to prevent such “re-nationalization” of international uniform law, Article 7 of the CISG gives directives for its interpretations and provides for gap-filling.²⁴¹ Just like the CISG, a treaty unifying inheritance law should provide distinct directives for its interpretation and should specify that all conflicts need to be resolved from principles on which the treaty is based rather than on the domestic laws’ principles.

In order to reach a compromise on differing laws, each country will need to educate the other countries on the history and policies of their domestic law. With an understanding of each law in mind, reaching a compromise will most likely be easier. Furthermore, because the treaty will only apply on multinational disputes and will have no effect on each domestic law, countries will most likely feel more comfortable opting-in.

A compromise that could easily solve the Hallyday battle would be to average out each sum that a beneficiary would receive under each law. The calculation would be as follows. Under California law, Hallyday’s will disinheriting his two eldest children would apply and they would not get anything.²⁴² Under French law, all four children, including the two eldest ones, would receive an equal share of three-quarter of Hallyday’s estate.²⁴³ Thus, if Hallyday’s estate amounts to 100 million euros²⁴⁴ then each child would equally share 75,000,000 euros, which would amount to 18,750,000 euros each. By averaging the Californian law with the French law, then the forced share would essentially be divided by two—equaling to a 9,375,000 euros forced share for each of the four children. The remaining of the estate will go to Hallyday’s widow—Laeticia Hallyday—as provided in his will.

I believe there are several reasons why France and the United States would agree to ratify such a treaty. First, this solution would obviously

Similarly, the Tokelau Islands, enacted the CISG as a sales law both for international and for domestic sales).

239. IICL, CISG: TABLE OF CONTRACTING STATES (last visited on March 20, 2019), <http://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states>.

240. SCHLECHTRIEM, *supra* note 242.

241. *Id.*

242. *See generally* Section I of this Note.

243. *See*, CODE CIVIL [C.CIV.] [CIVIL CODE] art. 913 (Fr.).

244. Henry Samuel, *Court freezes assets of late French rocker Johnny Hallyday in €100m inheritance battle*, THE TELEGRAPH (April 13, 2018), <https://www.telegraph.co.uk/news/2018/04/13/court-freezes-assets-late-french-rocker-johnny-hallyday-100m/> (estimating Hallyday’s estate at 100 million euros).

serve France's best interests because it will recognize France's most fundamental principle of French inheritance: the forced share. Moreover, it will deter French citizens from escaping the forced heirship rules—at least in part.

Second, this solution would also serve the United States' best interests. Let's suppose that John is an American citizen that decided to spend the remaining years of his life in France where he owned property. Let's further suppose that John is not on good terms with his children and that he has not talked to them for the last twenty years of his life. As such, John disinherited his children in his will. With the current choice-of-law rule, there is a risk that John's "habitual residence" will be determined to be France. Under French law, John's will disinheriting his children will not be recognized and his children will receive a forced share amounting to three-fourths of John's estate. With the proposed solution, John's children would still receive a forced share, but that forced share would be considerably less. By adopting this solution, the United States would be protecting one of the major tenets of American inheritance law—testamentary freedom.

Third, as seen in Section II of this Note, American and French inheritance laws are increasingly growing closer together. Children are protected under American probate statutes when the decedent dies without a will, which happens in 60% to 75% of the time.²⁴⁵ Moreover, courts in the United States are generally hesitant to enforce an offensive will and use doctrines of mental capacity, undue influence, and fraud to protect family members.²⁴⁶ Further, France has seen a number of recent reforms designed to expand the freedom of testation.²⁴⁷ Finally, a number of real estate techniques are increasingly being used to reduce the forced-share.²⁴⁸ All of these current developments in American and French law suggests that a convergence of the laws are slowing taking place. Adopting my proposal could start the discussion for more reforms within the countries' domestic law—eventually achieving complete convergence.

VI. CONCLUSION

Neither choice-of-law provisions nor the current approach to unification seem to be a sufficient answer to the issues that multinational families are facing today. Adopting a model set of rules that would apply for only a limited number of cases seems to be a solution that countries will feel more comfortable opting into.

245. BERRY, *supra* note 113.

246. Leslie, *supra* note 135.

247. Madoff, *supra* note 8 at 349.

248. *Id.* at 347.

The battle over Hallyday's estate will most likely take years to be resolved.²⁴⁹ Adopting my proposal would allow for a fair, equitable, and speedy distribution of his estate while respecting the major tenets of Californian and French inheritance law.

249. While Hallyday's widow and Hallyday's eldest children seemed to have reached an agreement regarding the distribution of his estate, an additional debt of 13 million euros of the already-known 17 million euros debt was recently discovered by the French equivalent of the IRS. Hallyday's widow would be responsible to repay that debt which could greatly jeopardize her negotiations with Hallyday's eldest children. See Jamal Henni, *Laeticia Hallyday perd un procès crucial contre le fisc*, CLOSER, (17 Apr., 2020), <https://www.capital.fr/entreprises-marches/laeticia-hallyday-perd-un-proces-crucial-contre-le-fisc-1367714>.