INDIVIDUALISM AND TRADITIONALISM IN INHERITANCE LAW IN GERMANY, FRANCE, ENGLAND, AND THE UNITED STATES

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Civil and common-law traditions treat surviving spouses and children differently. The surviving spouse has come to be increasingly protected in common-law and civil law countries. But civil law countries restrict testamentary freedom to protect the shares of children, whereas common-law countries allow the children to be disinherited. The gulf between common-law and civil law countries is, however, in the process of being closed by sociolegal practice and law reforms. In practice, nuclear family members (the spouse and children) everywhere remain the most frequent beneficiaries of inheritances. The attribution of individualist or traditionalist traits to legal concepts of inheritance seems to be futile when legal history is taken into account. The social consequences of inheritance rules depend on the specific historical, social, and economic conditions under which the rules function.

The main legal institutions of civil law have traditionally been property, contract, tort, and the family. Scholars of legal and social change claim that property, contract, and tort law, although adjusted to the needs of changing markets, still preserve their original structure transplanted from Roman law.[1] Family law, in contrast, depends and depended on contemporary legal ideologies[2]—with the consequence that marriage, divorce, custody, filiation, and support laws have been changed as a result of the move toward empowerment, participation and responsibility, autonomy, self-control, and individual ethics, itself a corollary of the triumphal march of the legal ideals of liberty, equality, and security.[3] The reformers have generally inferred the necessity of legal change from the facts of social change. The second demographic revolution, with its decreasing marriage ratios and increasing divorce and illegitimacy ratios, has been interpreted as a deinstitutionalization of the traditional nuclear family, with the consequence that the legal privileges and traditional barriers that protected marriage have been abolished. The legal concept of "subjective rights" was extended to the field of

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family law. The transformation was accompanied by the destruction of marriage-related institutions, including, as Eekelaar has pointed out, the destruction of legitimacy.[4] This development has been following its own legal logic sui generis since the first privatization of family law in bourgeois society. The withering away of the family[5] seemed to be complete when social security became institutionalized and when economic development reduced the number of self-employed persons. For this reason, Durkheim[6] had predicted that the development of the division of labor would render inheritance obsolete.

But the opposite became true. With the exception of a few concessions to modernity (the egalization of the position of marital and nonmarital children and the improvement of the position of the surviving spouse[7] against the children), the institution of succession remains as unchanged as the other central institutions of civil law. According to Burguière and Lebrun,[8] and as all data regarding intergenerational transfers prove,[9] inheritance has even become socially more important. Because social security covers the majority of the population, an increasing number of generations are able to support the social and occupational insertion of their children and grandchildren. Parents invest in the human and social capital of their adult children and secure them against downward mobility by donations. And as inheritance takes place when the heirs are already in their sixties or seventies, it enables the heirs and heiresses to invest in real estate and in the social and occupational insertion of their grandchildren. Inheritance is thus no longer, to quote Tilly and Tilly,[10] an iron chain, which, at a time when the preservation of family property dominated the lives of parents and children, served mainly to guarantee family discipline. Inheritance has instead found its old[11] and new function: protecting the offspring's place in social stratification by adding the old to the new property. And another old function of property is renewed in the times of the withering away of welfarism: the safeguard against reduced pension assets.

Opinion polls in France[12] and Germany[13] demonstrate that the majority of the population value the right to inherit the personal property of their parents as their very personal right, and parents feel the obligation to leave their property to their children. The right to inherit was even not abolished in the Democratic Republic of Germany after private property of the means of production had been abolished.[14] The public discussion in the 1960s initiated by the communist government with the purpose of creating a modern family law showed that the population insisted on the right to give personal property to their children. But statutory portions were denied: the communist legislator reserved the right to a statutory portion to minor or needy heirs and heiresses and hence increased testamentary freedom, bringing it up to the standard of the common-law countries.

The analysts of the withering away of the family take only one aspect of family law into consideration: personal status, marriage, divorce, support, and the legal position of illegitimate children as well as the cited demographic revolution. They disregard the continuity of family law in the traditional economic sphere of property (i.e., with regard to the matrimonial regime and to succession rights). In contrast to the deinstitutionalization of the personal sphere, these matters have become subject to an increasing regulation and reinstitutionalization by the state.

THE SUBJECT OF THIS ESSAY

This article will focus on the differences in the succession rules of the common-law and civil law traditions. Common-law succession is based on free testacy, whereas the civil law restricts free testacy and reserves statutory portions to nuclear family members. French law prescribes equal portions for all children and the surviving spouse, while Germany privileges the surviving spouse with one-half of the property according to the matrimonial regime and divides the other half between the children.

		Civil Law	
	Common Law	*France*	*Germany*
Freedom of will	Yes	Restricted	Restricted
Restrictions	Dependants have support claims	Protected shares	One-half of the legal share is protected against disinheritance
Surviving spouse	No complete disinheritance	One-half of accrued gains, one-fourth usufruct	Protected share
Equalization of marital and nonmarital children	Yes	Yes	Yes
Succession of same-sex partners to the detriment of nuclear family members	No	No	No
Special rules for inheritance of			
Farmland		Yes	Yes
Business firms		Yes	No

In contrast to family law, the matrimonial regimes and succession law have missed subsequent dramatic changes in the past century: community regimes were stressed, and the position of the surviving spouse was improved—mainly by the regime of matrimonial property. Even when the matrimonial regime of separation of property prevailed, surviving spouses were privileged in the United States, New Zealand, and others by compulsory portions. The only concession to modernity was the disappearance of legitimacy in succession.

LEGAL HISTORY: THE CIVIL LAW TRADITION

When the bourgeois state instituted the nuclear family in family law and reduced family obligations vis-à-vis the extended family, the traditional statutory portions of members of the extended family were abolished. On the other hand, restrictions on party autonomy were introduced for the first time in the economic sphere of the nonfeudal family:

1. Statutory shares in France and in Germany restricted the free testacy that had enabled families to keep their property together.

2. The freedom of contract between spouses with regard to marriage settlements and inheritance contracts was restricted—in France by the Code Napoléon and in 1900 also in Germany. Because marriage and inheritance contracts organized by the extended family had been the traditional device to enforce the iron chain of family property, inheritance contracts and marriage settlements standing marriage were abolished (France), and the full community of property became an optional matrimonial regime (France, Germany). The possibility to counteract inheritance law by settlements and contracts between the spouses was curtailed, so as to keep the variations between surviving spouses' shares within limits. The legal development Maine had described[15] was therefore turned upside down in family law: the direction changed from contract to status. The resulting pattern of inheritance was closer to the aristocratic and agnatic family structures that had weakened the position of the surviving spouse than to the inheritance and matrimonial property regimes of small- and middle-sized farmers, which used to provide for widows.

France

Unigeniture had been preserved in France thanks to testamentary freedom. "The impartible inheritance of one child to the detriment of the surviving spouse and the other children who received minimal compensations" was abrogated by the Code Civil. The northern inheritance model of Britanny and Lorraine, where the property of the parents was divided in equal portions between all children of the marriage,[16] was taken over by the French legislator with the purpose of breaking feudal attitudes and the prolonged economic control of the heir over his or her brothers and sisters. According to Mirabeau and Robespierre, the right to dispose of one's property dies together with oneself. Public interest—not the individual will—decides over successions. Saint Just formulated it like this: "Nul ne peut déshériter ni tester. L'hérédité est exclusive entre les parents directs. Les parents indirects ne succéderont point. Les enfants succèdent également à leur père et leur mère. Les époux ne se succèdent point."[17] Even marital and nonmarital children were treated equally for the short revolutionary period up to the enactment of the Code Napoléon. The equality of all children has now become a prominent principle of French civil law and came to be accepted all over France, even in the Pyrénées, where the impartible inheritance model had its firmest roots.[18] With the help of the notary, the population in this region used to circumvent the intention of the legislator during the first years after the enactment of the Code Civil, but after two hundred years, the inheritance practices of the north and the south show no difference anymore: parents feel the obligation to give the inheritance to their children in equal shares. The equality of all children has now come to be conceived as a human right. Only children conceived in adultery are still excluded from the inheritance—in contravention of the case law of the European Court of Human Rights.

The surviving spouse nowadays receives one-half of the community of accrued gains under the matrimonial property regime and also, if concurring with children of the deceased, inherits the usufruct of one-quarter of the estate, with the consequence that the children cannot sell this part of the estate at the death of the first parent. This legal rule counteracts the privileged position of children in French law; its practical significance was altered, though, when the legislator equalized the rights of marital and nonmarital children because the surviving spouse now has to suffer the concur-

Figure 1. Partible and Impartible Inheritance
Source: Emmanuel Todd, *L' Invention de l'Europe* (Paris: Editions du Seuil, 1996), 42.

rence of nonmarital children too. Testators are not free to leave the whole of their property to the surviving spouse. If there are children, they can, depending on the number of children, only leave between a quarter and half of their property to the surviving spouse. Before marriage, marriage contracts can be entered into freely, but if one wants to change the marriage contract standing marriage or make an entirely new contract, this contract must be approved by the court to prevent the indirect disinheritance of the children by way of the marriage contract. This legal intervention into the family is legitimated by a reference to "the best interests of the family." One way to pass it by are donations between the spouses because the donated goods become the personal property of the donatee, but such donations are not allowed anymore after two years of marriage.

Germany

The German civil law is less strict than the French civil law in regard to the *Pflichtteil*, the compulsory share of children. The share of children can be reduced to half of what it would otherwise be by will. In 1900, under the matrimonial regime of the separation of goods, the surviving spouse was allotted one-quarter of the estate if there were children and half if there were no children. The surviving spouse's position was improved by the reform of the matrimonial regime in 1957: under the community of accrued gains, the surviving spouse can now take his or her half of the community before laying claim to his or her share of the inheritance.[19] The portion of the surviving spouse can be increased by will or by marriage or inheritance contracts. In contrast to what is the case under French law, the surviving spouse can be instated as a provisional heir of the whole property, with the obligation to give the property to the children after her or his death.[20]

The partible inheritance system favoring equal shares for the children and protecting the surviving spouse as a provisional heir has its roots in the German towns of the Middle Ages. The testament of Martin Luther illustrates this practice: his wife should inherit the property as a provisional heir, and the children should receive the estate from the hands of their mother. Compared to the French inheritance pattern, the German one is more spouse oriented and follows the contraction law of Durkheim and the conception of Hegel[21] that *Sittlichkeit* exists only in the relation of the spouses, and inheritance law should therefore privilege the spouses over adult children.

Exceptions in France and Germany

Exceptions in favor of the preservation of farms and enterprises were introduced by the French legislator only from the end of the nineteenth century onwards, first in favor of keeping the worker's home undivided (1894), then in favor of the succession of farmers (1908, 1909) and of entrepreneurs (1938, 1961, 1968).[22] In Germany, on the other hand, the paradigm of separate property rules for the towns and the countryside has survived. Traditionally, inheritance of farmland and of the estates of the nobility was impartible.[23] The doctrine of ancestral estates, analogous to the old *fideicommis* of the nobility,[24] privileged one heir. Some regional laws concerning farm inheritance still enable the testator and the main heir to counteract the statutory portions of the other heirs.[25] The German legislator has thus adopted the French inheritance pattern as a general rule and the Roman pattern of free testacy in regard to land law. Even in the

Figure 2. Partible and Impartible Inheritance of Farms in Germany
Source: Bartel Huppertz, *Räume und Schichten bäuerlicher Kulturformen* (Bonn: Röhrscheid, 1939).

1970s, the German Constitutional Court, in a case in which one heir received the farm and the others were reduced to a claim on the farm's revenue of one year, considered this exception to the constitutional principle of equality to be justified by the interest of the state in a flourishing agriculture.[26] The legislator in this respect follows the inheritance pattern of the majority (two-thirds to three-fourths) of German peasants.[27] Notaries and legal experts now propose to extend this exception to the succession of entrepreneurs.

Historical evidence suggests that impartible inheritance systems emerged first in the eleventh and twelfth centuries for the nobility as French and Spanish models of inheritance were transferred to Germany. In the sixteenth and seventeenth centuries, impartible inheritance was imposed on peasants by state control, manorial organization, and the colonization of uninhabited areas.[28] Surveys of inheritance practices in the twentieth century point to a general division between the partible practices of the southwest and the impartible practices of the north and east, but many regional exceptions to this general tendency are observed—in some counties (e.g., Baden, Württemberg, or Hannover), islands of divergent practices have survived, and many mixed practices, deriving from medieval traditions, can be observed. Similarly puzzling are the very different rules of matrimonial property in neighboring and very similar communities in Germany and Switzerland.[29] In France, on the contrary, the dividing line

between partible and impartible inheritance traditionally ran between the southwest and the northeast.[30]

LEGAL HISTORY: THE COMMON-LAW TRADITION

The common-law tradition of free testacy, adopted from Roman law, made it possible for social change to occur without legal change. The testator could dispose freely of both movables and immovables. Under the influence of the idea of economic efficiency and as a devise to exclude women from the inheritance, a move from partible to impartible inheritance took place in England in the sixteenth century. Results akin to those obtained by the use of fideicommis in the civil law were reached through a combination of the separation of the property of husband and wife, free testacy, the transmission of capital by the construction of trusts,[31] and the "patrilineal, primogenitive and patriarchal" strict settlement.[32]

Only a few legislative restrictions on free testacy were imposed in the nineteenth and twentieth centuries. Perpetuities were banned by the Settled Land Act of 1882 and the Administration of Estates Act of 1925. The Family Provisions Acts of 1938 and 1966 and the Family Provisions Orders of 1972 and 1977 made it possible to invalidate wills disinheriting the spouse to the detriment of the family. A further challenge to testamentary freedom was enacted by the Inheritance (Provision for Family and Dependants) Act of 1975, which extended the protection to all persons dependent on the deceased. Persons who were dependent on the deceased can apply to court for an order for maintenance out of the estate if the testator has failed to make a reasonable financial provision for their maintenance. The major beneficiary is the surviving spouse. In settling her provision, the courts should consider what the wife might reasonably have expected on divorce and what she contributed (or did not contribute) to the family. This legislation enables the courts to recognize the diversities of families but does not provide clear guidelines to the judiciary. In 1995, the category of persons protected under the act was enlarged. If no will has been made, the rules of intestate succession become operative. Under these rules, the surviving spouse takes the personal chattels and, if the deceased leaves issue, £125,000 from the inheritance; of the residue, she or he has a life interest in half. If the deceased leaves no further issue, the surviving spouse takes £200,000 and an absolute interest in half of the residue, and if the deceased leaves no other kin at all, she or he inherits everything. The surviving spouse retains the marital home up to a value of £130,000. The children inherit half of the residue in concurrence with the surviving spouse and the whole estate if there is no surviving spouse.

In the United States, the surviving spouse has come to be increasingly protected during the past decade. Although the equal division of land had been the general rule in the United States, several states still had primogeniture for real property. After the doctrine of ancestral estate had been abolished in England, primogeniture in those American states was also abolished in the 1930s.[33] In 1990, the Uniform Probate Code (UPC) modernized inheritance law to bring it into accordance with recent trends in marital behavior in the United States, such as the increase in divorce and remarriage rates and in the number of reconstituted families. Formerly, a surviving spouse took one-third of the deceased spouse's estate. Under the new intestacy scheme in states that have adopted the UPC, the decedent's entire estate goes to the surviving spouse, unless the deceased leaves issue who are not also the survivor's issue. Children of the marriage

generally do not receive protection. If the deceased has made a will deviating from the rules of intestate succession, the survivor has still a right to a percentage of the estate based on the duration of marriage. The minimum share is 5 percent, and it increases with every year of marriage. Some legislatures have provided a different share to a surviving spouse who has children in her or his care. There is, however, no obligatory provision for children.[34]

To conclude: England and the United States have produced contrasting responses to the question of statutory shares for surviving spouses, while many common-law countries deny statutory shares for children. Continental civil law generally prescribes the protection of all nuclear family members (spouse and children) in inheritance matters, whereas the English common law privileges free testacy, corrected by laws protecting surviving spouses. This is why common-law provisions are considered to be individualistic.[35]

LEGAL IDEOLOGY

The ideological labels *individualistic* and *traditionalist* would seem to be interchangeable with regard to succession. In contrast to what was traditionally the case in England, the critics of civil law practices blamed the partible inheritance in France and Germany for its individualism. In the nineteenth century, Le Play[36] and Riehl[37] pleaded for free testacy to protect the stem family and the patriarchal social order. They thought that impartible inheritance would reintroduce the iron chain of inheritance and the Roman tradition of the paterfamilias who controlled his family as long as he lived in a capitalist society. The partible inheritance system was held responsible for the concept of welfarism and the substitution of the family by the welfare state, as it induced the withering away of self-sufficiency and of family responsibility vis-à-vis needy family members.

The history of the stem family does not support Riehl's and Le Play's thesis. The testamentary preference for primogeniture emerged, according to Burguière and Lebrun,[38] in South England in the sixteenth century, in times of high wages. Under the developing market conditions, the transmission of land to one heir was a reasonable economic choice from the point of view of an efficient use of the land. Macfarlane[39] relates these practices to the origins of English individualism in South England, the early laboratory of capitalism. The testators in New England also adopted the unigenitive pattern, although the equal division of land and property among several heirs had been the legal rule in the United States since the Revolution. In addition, many American states adopted the doctrine of ancestral estates, especially with the purpose of excluding women from inheritance and the disposition of property[40]—the very central human right in developing capitalism. Not until the 1930s did reforms result in the abolition of the special provisions regarding ancestral assets.[41] Le Play and Riehl willingly ignored that since the Middle Ages, the inheritance of capital had always been practiced in equal shares in the urban centers of Germany and France and that partible inheritance was generally preferred in the southwest of Germany. This region—on the right and the left side of the Rhine—is one of the traditional centers of partible inheritance and communal property.[42]

Blinded by the intention to legitimate patriarchal values, the ideological reconstruction of succession rules has ignored legal and social history. Burguière and

Figure 3. The Stem Family
Source: Emmanuel Todd, *L'invention de l'Europe* (Paris: Editions de Seuil, 1996), 59.

Lebrun[43] stress the point that the social consequences of inheritance patterns depend on the historically specific social and economic milieu in which the rules function and that inheritance patterns have no universal meanings since the notions of equality, jus-

tice, and stability, as well as economic rationality and family strategies, change with time. The German public campaigns of 1850, 1870, 1930, and 1950 in defense of the system of the impartible inheritance of land may serve as an illustration of this argument. The ideas of national heritage and identity were used to defend the solution least favorable to women. Historians and law teachers in the nineteenth century tried to reconstruct ancient Germanic principles by the use of comparative legal history. They extracted the essence of the Germanic *Volksgeist* from a few very selected sources: Germanic myths of islands without Roman influence and the practices of isolated German minority colonists in the Baltic states.[44] The literature they relied on referred exclusively to the West Germanic inheritance laws, which excluded women, but not to the East Germanic laws,[45] which included women.[46] Gierke's argument[47] that Roman individualistic property rights and English individualism had destroyed the traditional peasant life patterns that used to be protected by primogeniture went in the face of the role that testamentary freedom has played in England and the United States in safeguarding primogeniture and ignored the existence of pluralistic inheritance patterns in Germany and France. Research in social and legal history does not support universalistic reasons for the emergence of impartible or partible inheritance systems.

To conclude: the association, in Germany and France, of individualism with partible and of traditionalism with impartible inheritance has been the work of legal ideology but is not supported by social research. Unrestricted individual property rights in England may have had the same effects in favor of primogeniture as state intervention had in Germany.

	Ideological Debate	
	Partible Succession	*Impartible Succession*
Critique	Individualistic	Traditional
Public interest	Preservation of social order	Preservation of social order
Economic logic	Obstacle to accumulation	Obstacle to profit motives

FAMILY IDEOLOGY

In a research project on comparative kinship, Farber[48] investigated whom people gave priority as heirs and from this derived which conceptions of kinship existed in the United States. The sample of families he interviewed in Phoenix was asked which relatives were closer than others. The model the majority adopted was named the standard American kinship model. Persons who conformed to this model were Protestants, did not belong to minorities, had a middle-class income, and had fathers who were native born, in contrast to European migrants, Catholics, and others who preferred the civil law model. Farber speculates that the "unexpected" emergence of this model, which emphasizes the social closeness of relatives in ascending generations, is due to family capitalism and Protestantism in American society. He attributes to the American model the "organisation of genealogical space," in contrast to the civil law model, which differs in regard to the priority position of aunts, uncles, nieces, nephews, first cousins, and so on.

Table 1
Modal Responses to Intestacy Questions for Cases Falling into Residual Category of Kinship Classifications

Kin Types Compared in Intestacy Question	*Modal Kin Type*	*Percentage of Cases Falling into Modal Category*[a]
Grandparents versus aunts and uncles	Grandparents	53.8
Aunts and uncles versus nieces and nephews	Aunts and uncles	78.8
Nieces and nephews versus grandparents	Grandparents	78.8
First cousins versus nieces and nephews	Nieces and nephews	41.7
First cousins versus grandnieces and grandnephews	First cousins	75.8
First cousins versus aunts and uncles	Aunts and uncles	56.1
Brothers and sisters versus parents and grandchildren	Brothers and sisters	60.6
Brothers and sisters versus parents	Parents	52.2
Parents versus children	Parents	49.2

Source: Bernard Farber, *Conceptions of Kinship* (New York: Elsevier, 1981), 49.
a. Number of cases classified as residual = 132.

Five items of the depicted parentela order differ from the American model. Ascending generations are favored by the American model, in contrast to the German ranking.

	German Ranking of Descent Lines
1. Line of the deceased	1.1 children, 1.2 grandchildren, 1.3 great-grandchildren
2. Line of the parents	2.1 brothers and sisters, 2.2 nephews and nieces, 2.3 grandnephews and grandnieces
3. Line of grandparents	3.1 uncles and aunts, 3.2 first cousins

Table 3 demonstrates which relatives are privileged by the Phoenix interviewees.

The different parentelic systems in common and civil law are characterized by different methods of counting degrees of relationship among collaterals. Farber holds back the information that the American model to a good deal corresponds to the Romanic civil law model, with the exception that the American model unilaterally favors the ascending generations, whereas the Romanic model gives brothers and sisters equal rights to grandparents.[49]

The descent lines follow the Roman law: the deceased and his issue are the first line, the decedent's parents and their issue are the second line, and his grandparents and their issue are the third line, and each line member has equal rights. The German civil law parentelic system, on the contrary, is based on the Germanic bilateral conception of kinship, which counts degrees of consanguinity that determine the portion of the inheritance relatives receive. Those relatives who belong to the second or third order are called to inherit only if at the time no relative of the first order is capable of being an heir.[50] Adherence to the American standard model varies by age and sex. The influence of age can be attributed to stages in the family cycle. As people get older, their interest in lines of descent increases; especially older women, who presumably have children, then prefer lines of descent. As far as men are concerned, however, the American standard model dominates in all cohorts.

Table 2
Patterns of Answers to Intestacy Questions
Used to Classify Respondents by Kinship

Kin Types Compared in Intestacy Questions	*Parentela Orders*	*Civil Law*	*Genetic Mode*
Grandparents versus aunts and uncles	Grandparents	Grandparents	Equal claim
Aunts and uncles versus nieces and nephews	Nieces and nephews	Equal claim	Equal claim
Nieces and nephews versus grandparents	Nieces and nephews	Grandparents	Equal claim
First cousins versus nieces and nephews	Nieces and nephews	Nieces and nephews	Nieces and nephews
First cousins versus grandnieces and grandnephews	Grandnieces and grandnephews	Equal claim	Equal claim
First cousins versus aunts and uncles	Aunts and uncles	Aunts and uncles	Aunts and uncles
Brothers and sisters versus grandchildren	Grandchildren	Equal claim	Brothers and sisters
Brothers and sisters versus parents	Parents	Parents	Equal claim
Parents versus children	Children	Equal claim	Equal claim

Source: Bernard Farber, *Conceptions of Kinship* (New York: Elsevier 1981), 47.

Table 3
Ranking of Distances from Ego According to Model Based on Modal
Responses in Residual Category (Standard American Kinship Model)

*Order in Line of Descent (*i*)*	*Order in Ascending Generations (*j*)*		
	0	*1*	*2*
0	Ego (0)[h]	Parents (1)	Grandparents (2)
1	Children (3)	Brothers and sisters (4)	Aunts and uncles (5)
2	Grandchildren (6)	Nieces and nephews (7)	First cousins (8)
3	Great-grandchildren (9)	Grandnieces and grandnephews (10)	

Source: Bernard Farber, *Conceptions of Kinship* (New York: Elsevier, 1981), 49.
Note: Computational formula is $(3i + j)$. For these kinship types, the appropriate formula for the parentela orders model is $(i + 4j)$. Ranking of distances in the in the parentela orders model is as follows: (1) children, (2) grandchildren, (3) great-grandchildren, (4) parents, (5) brothers and sisters, (6) nieces and nephews, (7) grandnieces and grandnephews, (8) grandparents, (9) aunts and uncles, and (10) first cousins.

The research of Farber demonstrates that Phoenix middle-class families gave priority to ascending lines and that European migrants favor brothers and sisters and cousins, a culture that European migrants imported from the Mediterranean, the republic of cousins.[51] But Farber does not explain why the male preference for ascending generations is labeled as individualistic and the equal position of collaterals in Romanic civil law as traditional.

SOCIOLEGAL RESEARCH

The more interesting question than the one that parentelic lines people value theoretically is which kinship conceptions determine successions. Do the different legal

Table 4
Degree of Relationship according to Civil Code Models

	Distance from Ego: Degree of relationship				
Generations	*0*	*1*	*2*	*3*	*4*
2			Grandparents		Great aunts/uncles
1		Parents		Aunts/uncles	
0	Ego		Siblings		First cousins
–1		Children		Nieces/nephews	
–2			Grandchildren		Grandnieces/ grandnephews

Source: Bernard Farber, *Conceptions of Kinship* (New York: Elsevier, 1981), 8.

models produce different inheritance practices? Do testators use the possibility to disinherit nuclear family members in accordance with the prediction of Durkheim? Does legitimacy disappear? All surveys in Germany, France, England, and the United States show that the heirs are predominantly members of the nuclear family.[52] Members of families of choice such as the spouse and the children remain the most frequent beneficiaries across time. The only change that, according to American research, has taken place is that daughters and surviving spouses now receive equal shares, whereas in the past women were discriminated against in the United States, especially by the wealthy. Neither could recent research find evidence of discrimination between sons and daughters in France or Germany.[53] Germany and France, on one hand, and the United States, on the other hand, have different figures in regard to the differential treatment of children as heirs. Sussman, Cates, and Smith[54] had shown in the 1970s that parents in the United States cherish the doctrine of equal shares, but more recent French research points to the practice in the United States of investing more in the more successful children—in contrast with what is the case in France and Germany. Spouses are privileged in Germany because couples institute the surviving spouse as a provisional heir.[55] Many German couples make a will around the age of sixty—when their property amounts to at least 100,000 DM.[56] In France, the estates are usually much smaller.[57]

American empirical studies of wills have found that an overwhelming majority of the testators leave everything to their spouses. These studies were confirmed by surveys by interview, from which it appears that the majority of people intend to leave everything to the surviving spouse.[58] A similar phenomenon is to be observed in France, where even couples who have opted for the matrimonial regime of the separation of property make provisions for the surviving spouse. A full exclusion of the surviving spouse to the benefit of the children has, probably due to the differences in the matrimonial property regimes, not been observed in France and Germany but appears to exist in England,[59] despite the fact that a majority of respondents (55 percent) interviewed by the Social Survey Division of the Office of Population Census and Surveys would have required a married man and woman to include the surviving spouse in their will. Questioned to choose between automatic rights of inheritance and a discretionary system, more respondents pleaded for automatic rights (58 percent). However, one-third of those who preferred automatic rights did so because they disliked the idea of going to court. Astonishingly, these results were interpreted by the Law Commission to imply that fixed inheritance rights for the surviving spouse lacked support in the population. In the main, it is the legal profession, followed by about 40 percent of the population, that objects to statutory portions in England and Wales.[60] Thus, both the

Table 5
Wills by Family Status

Family Status	*Wills (percentage)*
Widower without children	26
Reconstituted family	22
Married without children	17
Unmarried	16
Widower with children of different unions	8
Married with children	6
Divorced	5
Widower with children	5
Total	9

Source: Anne Laferrère and Daniel Verger, "La Transmission du Patrimoine," *La société française* (1993): 384.

legal profession and the population in Germany, the United States, and France may be seen to be more spouse oriented than in England.[61]

LAW REFORMS

Recent law reforms in the Netherlands and Sweden have improved the position of the surviving spouse. Children of the couple (the surviving spouse and the deceased) are restricted in their inheritance claims to protect the living standard of the surviving spouse. Legal experts, basing themselves on the support theory of succession, argue that children are already in their fifties or sixties when inheriting and are therefore not in need of the inheritance to promote their professional formation and insertion. In Sweden and the Netherlands, only the children of the deceased with a partner other than the surviving spouse can claim a compulsory share. Children of different relations are protected by the legislator, whereas mutual children are assumed not to need legal protection. This legal construction rewards a lifelong marriage and at the same time takes family developments into consideration by allocating compulsory shares to children of different unions. The reformers did not consider social research on generational transfers, which demonstrates that most children, especially daughters and daughters-in-law, in their fifties and sixties care for their elderly parents. Such social care obligations are not rewarded by inheritance law.

SUMMARY

In matters of inheritance, the old family and the old property still prevail. The gulf between common law and civil law has been closed by sociolegal practice and law reforms, although both the children and the surviving spouse still benefit from compulsory shares in continental Europe. The attribution of individual or traditional traits to legal concepts of inheritance seems to be futile when the history of legal ideology is taken into account. Why should testamentary freedom necessarily be more individualistic? And is it really adequate to describe restrictions on the disinheritance of nuclear family members as traditionalist? As Fulchiron[62] suggests, family research is needed to evaluate if illegitimate children are taken into account and what succession strate-

gies are used in reconstituted families. The effects of the modernization of inheritance law can be judged only on the basis of such empirical data. A gulf might emerge between children profiting from multigenerational transfers within the cognate family and nonmarital children and children of divorced couples, who might profit only from intergenerational transfers in the mother's line. Donations and gifts among the living can easily counteract nonmarital children's rights in the inheritance. And as divorced and nonmarried parents are less prosperous than traditional families, something like the Latin American model might result in which only wealthy families opt for the traditional family law and for long-term involvements and investments in children and their offspring.

The treatment of same-sex partners in different national legislations demonstrates the reluctance to put them on an equal footing with spouses as far as inheritance is concerned. In the Romanic civil law countries, same-sex partners are excluded from inheritance. In countries where marriage-like provisions for same-sex partners have been instituted, the partners' children from other relations have compulsory shares in the inheritance.

NOTES

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