

UNDUE INFLUENCE AND THE LAW OF WILLS: A COMPARATIVE ANALYSIS

RONALD J. SCALISE JR.*

INTRODUCTION

"A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair."¹ Indeed, even the prospect of a loss of inheritance often drives sons, daughters, relatives, and friends to desperate measures. Consider the following scenario: Bob, prior to his death at the age of 90, was a bachelor with substantial wealth. He was survived only by his great-niece, Angela, and by his friend, Smith. Angela had only sporadic contact with her uncle, which was a source of tension and anger for him. Five years before Bob's death, Smith began taking care of him and assisting him on a daily basis with meals, transportation, and hygiene. Smith also helped Bob with his financial affairs including taking him to an attorney to draft a will. Smith encouraged Bob to disinherit his thankless niece and leave his money to the people who cared about him. After Bob's death, his will was read, and the entirety of Bob's fortune was left to Smith. Angela contests the probate of the will by alleging that it was the product of undue influence exercised by Smith.

Copyright © 2008 Ronald J. Scalise Jr.

* B.A., Tulane University; J.D., Tulane University Law School; LL.M., Trinity College, Cambridge University. McGlinchey Stafford Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Special thanks are due to the following individuals who have read and commented on an earlier draft of this paper: Lucy McGough, Cindy Samuel, Alain Levasseur, Jacques du Plessis, Sjef van Erp, and Paul Baier. Thanks are also due to Irina Fox, Randy Trahan, Viçenc Feliu, Phillip Gragg, and the Baten-Wurtemberg Notary Association for help with foreign sources and to John Pizer and Jason Kilborn for their patience in tutoring me in German. All remaining errors are my own.

1. Although this translation is commonly used, the literal quote reads: "*li uomini sdimenticano più presto la morte del padre che la perdita del patrimonio.*" NICCOLÒ MACHIAVELLI, *IL PRINCIPE* 99 (Giuseppe Lisio ed., 1933) (1515). My thanks to my colleague, Lucy McGough, for suggesting this quote to me and to Phillip Gragg and Viçenc Feliu for finding it.

The above scenario, in one form or another, is a very common one. In deciding how to dispose of his property, a testator, especially an elderly one, is subject to a number of influences, some of which may be "undue." In light of the advancing age of the population and "the high prevalence of cognitive impairment and dementia in older adults," the number of contested wills seems only to be increasing.² In fact, statistical evidence shows that in American law, "the predominant weapon for attempting to undo a will is an allegation of undue influence."³

Perhaps because of the frequency with which undue influence is alleged to exist, the concept of "undue influence" has been correctly characterized as "one of the most bothersome concepts" in American law.⁴ But the situations addressed by the concept of undue influence are not unique to American law. All societies that recognize freedom of testation face problems with self-interested individuals inappropriately influencing testators to make otherwise unintended dispositions. In fact, in early Roman times, where will making was quite common,⁵ the civil law faced problems with undue influence in the realm of wills.⁶ Surprisingly, though, neither modern French nor modern German law contains a concept of undue influence at all. This absence is not because of a cultural immunity that prevents civil law jurisdictions from facing the above problem. Instead, the absence of undue influence in French and German law can be explained by a number of legal institutions and concepts that are the "functional equivalent" of undue influence. In other words, the civil law

2. Kenneth I. Shulman et al., *Assessment of Testamentary Capacity and Vulnerability to Undue Influence*, 164 AM. J. PSYCHIATRY 722, 722 (2007).

3. Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647 (1987). See also EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 7:21 (2d ed. 1999) (stating that "[u]ndue influence is the most commonly asserted ground for invalidating a will").

4. JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 158 (7th ed. 2005).

5. See W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 365 (3d ed. 1963) (discussing the "horror of intestacy" felt in early Roman times). But see David Daube, *The Preponderance of Intestacy at Rome*, 39 TUL. L. REV. 253, 253 (1964) (stating that "[i]t is safe to sum up that, from beginning to end, intestacy was the rule and testacy the exception, and both very much so").

6. The second- and third-century jurist Papinian writes of a husband who influences his wife not to disinherit him. DIG. 29.6.3 (Papinian, Replies 15), in 1 THE DIGEST OF JUSTINIAN (Theodor Mommsen et al eds. & Alan Watson trans.) 113 (1985) [hereinafter Digest]. Not only was Papinian a great jurist of classical Roman law, but his opinion was given primacy of status in the Law of Citations of AD 426. See, e.g., PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 28 (2001).

generally, and French and German law in particular, possesses legal institutions that serve similar—although not identical—functions and purposes as undue influence in American law.⁷

This article discusses comparatively the doctrine of undue influence in the making of wills. Although comparative scholarship flourishes in the areas of tort and contract law, hardly any comparative work exists in the area of succession.⁸ Indeed while other areas of private law have been studied for purposes of unification, "the unification or even harmonisation of succession law is not on the agenda of any law-making body."⁹ In that regard, this article attempts to fill the gap in comparative private law. Part I surveys the history of undue influence from Roman times to the modern day. Part II examines the concept and role of undue influence in American law and the problems that exist with the doctrine. Part III considers the functionally equivalent doctrines that exist in French and German law. Part IV provides comparative insights and lessons.

I. THE HISTORY OF UNDUE INFLUENCE

The concept of undue influence in American law is a notoriously difficult one, and any attempt to define undue influence often degenerates into nothing more than platitudes about "substituting one's volition for another" and generalities concerning whether a testator is "susceptible" to a kind of influence considered "undue" by the law. To fully understand the meaning of undue influence, it is necessary to examine its historical basis.

Early Roman law did not provide for challenges to wills based on undue influence from others. In Justinian's 6th century compilation of Roman law, the Digest, Paul writes that although an individual may

7. Although the scope of comparative examination is almost infinite, this article proceeds in a traditional fashion of using France and Germany as two different influential families in the civil law tradition as a proxy for the civil law.

8. Marius J. De Waal, *Comparative Succession Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1071, 1074 (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("[R]elatively little has been written on the law of succession in a comparative perspective."). *But see* Karl Heinz Neumayer, *Intestate Succession*, in 5 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: SUCCESSION (2002); Sjef van Erp, *New Developments in Succession Law*, 11 ELECTRONIC J. COMP. L. (Dec. 2007), <http://www.ejcl.org/113/article113-5.pdf>; EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE (Kenneth G.C. Reid, Marius J. de Waal, & Reinhard Zimmermann eds., Edinburgh Studies in Law 2007). For an overview of the limited efforts toward harmonizing European succession laws, see Paul Terner, *Perspectives of a European Law of Succession*, 14 MAASTRICHT J. EUR. & COMP. L. 147 (2007).

9. van Erp, *supra* note 8, at 2.

have been compelled to act under fear, the act is still valid because he had the will to act.¹⁰ Later, the praetor (a special Roman magistrate whose job was, in part, to mitigate the harshness of the *ius civile*) would intervene, at least in extreme cases, such as when acts were compelled by duress.¹¹ In the Edict, the praetor stated, "I will not hold valid what has been done under duress [*metus causa*]."¹² Although the exact meaning of *metus causa* has been subject to debate, "[t]raditionally, the praetor was understood to disapprove of acts which had been caused by fear."¹³ Actual intervention and legal protection from fear in juridical acts, however, was not common, as "the duress [*metus causa*] relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character."¹⁴ The average Roman was expected to be "responsible for his actions and his declarations, and any attempt to get away from what he had done or said was instinctively frowned upon."¹⁵ Fear of "death,"¹⁶ "prison,"¹⁷ or "sexual assault"¹⁸ were clearly enough to constitute "*metus causa*," but not fear of "*infamia*" or "annoyance."¹⁹ Moreover, being influenced by reverence for the opposing party was likewise insufficient.²⁰ Justinian's Code, a twelve-book compilation of imperial constitutions, provides that "the senatorial dignity of your adversary is not alone sufficient to cause the fear by which you allege the contract has been entered into."²¹

Instead, force or fraud was necessary before a will would be invalidated.²² The subtle pressure often characteristic of undue influence, which occupies a position somewhere between fraud and duress, was not recognized as a ground for nullification of a will.

10. DIG. 4.21.5 (Paul, Edict 11).

11. DIG. 4.2.1 (Ulpian, Edict 11).

12. *Id.*

13. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 654 (1996).

14. DIG. 4.2.6 (Gaius, Provincial Edict 11).

15. Jacques du Plessis & Reinhard Zimmermann, *The Relevance of Reverence: Undue Influence Civilian Style*, 10 MAASTRICHT J. EUR. & COMP. L. 345, 347 (2003).

16. DIG. 4.2.7 (Ulpian, Edict 11); *see also* Code Just. 2.20.7, in *THE CIVIL LAW* (S. P. Scott ed. & trans., 1932) [hereinafter Code Just.]; du Plessis & Zimmermann, *supra* note 15, at 348.

17. DIG. 4.2.7 (Ulpian, Edict 11).

18. DIG. 4.2.8 (Paul, Edict 11).

19. DIG. 4.2.7 (Ulpian, Edict 11).

20. *See* du Plessis & Zimmermann, *supra* note 15, at 350-52.

21. Code Just. 2.20.6.

22. DIG. 4.2.1 (Ulpian, Edict 11).

Flattery and general supplications, if not connected with fraudulent activity, were insufficient.²³ In addition, a showing of force or intimidation was necessary to demonstrate that one's freedom of will had been compromised.²⁴ The most obvious example of the Roman law's disregard for undue influence on a testator comes from Papinian:

I advised that a husband who had intervened to prevent his wife from making a codicil when she had changed her intentions toward him to his disadvantage and who had used neither force nor fraud but, as commonly happens, had soothed the displeasure of his upset wife by talking to her as a husband, had not committed any crime and what had been left to him by will should not be taken away.²⁵

Moreover, Justinian bolsters Papinian's statement and writes that "[i]t is not a criminal act for a husband, by his representations, to induce his wife to make her will in his favor."²⁶

Despite the difficulty in invalidating a will for what is today considered undue influence, acts of influence by interested heirs or "legacy hunters" certainly existed and, in fact, preoccupied satirists and moralists in Roman times.²⁷ The Romans called this kind of conduct *captatio*,²⁸ from the Latin word *captare*, meaning "to chase after," as in one who chases after a legacy. Pliny, sometime between AD 96 and 100, in his letter to Calvisius writes disapprovingly of the captative actions of Regulus. Pliny tells of Regulus who visited a woman who "was lying seriously ill," but who convinced her to leave him a legacy by assuring her that although she was going through a critical period, she would survive.²⁹ Shortly after, when the woman

23. MOSES DROPSIE, *ROMAN LAW OF TESTAMENTS, CODICILS, AND GIFTS IN THE EVENT OF DEATH* 44-45 (Philadelphia, T. & J.W. Johnson 1892).

24. Code Just. 6.34.1 (suggesting such forcible conduct was punishable by the criminal law). See also DROPSIE, *supra* note 23, at 44-45. For argument that *captatio* was not regarded as a misdemeanor in Roman law and resulted only in the denial of *bonorum possessio* and confiscation, see J.W. Tellegen, *Captatio and Crimen*, 26 *REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE* 387 (1979).

25. DIG. 29.6.3 (Papinian, Replies 15).

26. Code Just. 6.34.3.

27. See EDWARD CHAMPLIN, *FINAL JUDGMENTS: DUTY AND EMOTION IN ROMAN WILLS*, 200 B.C. – A.D. 250, at 82-102 (1991). Despite this preoccupation, the prevalence of undue influence in Roman law is disputed. See *id.* at 100 ("[T]here is no evidence that *captatio* existed as a widespread social practice.").

28. See *id.* at 101.

29. J.W. TELLEGEN, *THE ROMAN LAW OF SUCCESSION IN THE LETTERS OF PLINY THE YOUNGER* 49 (1982).

was dying, she realized Regulus's duplicity and proclaimed him "wicked and treacherous."³⁰ Furthermore, Pliny recounts that Regulus, with an eye to an inheritance, "beseeche[d] and beg[ged] the doctors" of an ill, rich man to prolong his life.³¹ Once the man changed his will to favor Regulus, however, Regulus questioned the doctors, "How much longer are you going to torture this poor man?"³² Finally, Regulus "forced" a woman to rewrite her will and leave assets to him, all the while "he watched while she was writing and checked what she had written."³³ As morally condemnable as Regulus's conduct was, it was not prohibited by law. After all, Pliny writes of the economic success of Regulus "who by means of these evil deeds, has risen from a position of poverty and obscurity to . . . great wealth."³⁴

Despite the widespread references to *captatio* in Roman literature, examples of such conduct seem to be limited to persons outside the testator's family. Although *captatio* exerted by family members is imaginable, "*captatio* as presented by historians, satirists and moralists d[id] not allow for that possibility."³⁵ Instead, it seemed to be limited to "the denial of family claims, the rupture of family ties, the triumph of the outsider—the possibility of a member of the family captating as well is out of the question."³⁶ The closest family relation who seems to have been guilty of such *captatio* was the stepmother. Gaius writes that parents generally disinherit their children "when they have been led astray by the blandishments or incitements of stepmothers."³⁷ And even then such influence was only prohibited if it led the testator to pass over or disinherit one who had a legal claim to a parent's estate.³⁸

Perhaps because of the broad tolerance of influence on testators, Roman law enacted an outright prohibition on legacies to those most able (and perhaps most likely) to unduly influence a testator, namely,

30. *Id.* at 53.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* For a warning as to the reliability of Pliny's view of Regulus, see CHAMPLIN, *supra* note 27, at 99.

35. CHAMPLIN, *supra* note 27, at 89. See also TELLEGEN, *supra* note 29, at 53.

36. CHAMPLIN, *supra* note 27, at 89.

37. DIG. 5.2.4 (Gaius, *Lex Glitia*) (discussing claims for undutiful will or the *querela inofficiosi testamenti*).

38. *Id.*

witnesses to wills.³⁹ According to Justinian's Institutes (a textbook summarizing Roman law for students), not only can an heir not serve as a witness to a will, but neither can his brother, father, or anyone under his control.⁴⁰ Although early Roman law appears to have reluctantly allowed close relatives to serve as witnesses to wills, Justinian explicitly prohibited what the ancient authorities had only discouraged.⁴¹ Even at the time of Ulpian, however, the prohibition seems to have been clear: "A person instituted heir in a will cannot be a witness to the same will."⁴² This idea was a specific application of the more general principle that "[n]o one is a satisfactory witness in his own cause."⁴³ The Roman preference for disinterested witnesses is at least in part to prevent fraudulent and captative conduct of others.⁴⁴

"[M]edieval lawyers were more sympathetic to those who did not meet the exacting standard of the *vir constantissimus*, and had thus become the victim of fear, than had been the Roman lawyers of the classical period."⁴⁵ The influential glossator Accursius writes that a wife can rescind a sale or mortgage entered into on account not only of fear but also out of reverence.⁴⁶ Even more so, the sixteenth- and seventeenth-century scholars of the *ius commune* seem to have been sensitive to undue influence on donors of weakened constitution. Matthaeus de Afflictis, the sixteenth-century Neapolitan jurist, writes of the invalidity of a disposition of immovable property from a wife to her husband when the legacy was made on the wife's deathbed and after her husband secretly entered the room and flattered her into leaving the legacy to him.⁴⁷ Later, Samuel Pufendorf, the seventeenth-century natural law scholar, in describing the ambulatory character of a will and the importance of individual will and intention, states that "the law of humanity demands that no man be deceived with empty

39. DROPSIE, *supra* note 23, at 80 ("One cannot be a witness to the testament in which he is instituted as heir.").

40. J. INST. 2.10.10, in THE CIVIL LAW (S.P. Scott ed. & trans., 1932) [hereinafter J. INST.].

41. *Id.*

42. DIG. 28.1.20 (Ulpian, Sabinus 1).

43. DIG. 22.5.10 (Pomponius, Sabinus 1).

44. See DROPSIE, *supra* note 23, at 77. This prohibition was limited, however, only to heirs, who under Roman law succeeded to the decedent's entire estate. Legatees, or those receiving only individual dispositions, could be witnesses, as "they [we]re not universal successors." J. INST. 2.10.11.

45. du Plessis & Zimmermann, *supra* note 15, at 352.

46. *Id.* at 352 (quoting the Accursian Gloss, "*Et nota hic argumentum quod mulier quae rem suam vendidit vel hypothecavit, si renuntiavit metu vel reverentia, quod possit revocare.*").

47. *Id.* at 357 (quoting and citing MATTHAEUS DE AFFLICTIS, DECISIONUM SACRI REGNI NEAPOLITANI CONSILII (Francofurti 1600), Dec. LXIX).

hopes."⁴⁸ Johannes Voet, in his commentary on the Digest, similarly concludes that a will can be nullified due to "acts and tokens from which it can be inferred that compulsion, intimidation or unreasonable and fraudulent fawnings have taken place with the object of extorting or obstructing a last will."⁴⁹

The Roman-Dutch version of the *ius commune* in the seventeenth century also continued the Roman prohibition on heirs as witnesses "because [the witness] would be directly a witness in his own cause, since it is believed that the whole of this transaction which is undertaken with the object of arranging a last will is undertaken between testator and heir."⁵⁰ In addition, no one who has written a will for another could receive anything under the will.⁵¹ Specifically, a notary and his near relatives were forbidden from receiving anything under a will that he had written for another.⁵²

Despite the increasing recognition of the nullifying effect of undue influence on the continent, undue influence does not appear to have spread to England in the thirteenth and fourteenth centuries, even from the ecclesiastical courts whose influence in testamentary matters was strong.⁵³ Cases as early as 1737 used the concept of undue

48. 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 614 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688). Pufendorf applauds Pliny's praise of Domitius Tullus. *Id.* at 615. Pliny describes Domitius Tullus as a man whose "limbs were so dislocated and deformed that he could only perceive his wealth with his eyes and could only move in his bed with the help of others," and who despite expectations, left legacies to his daughter, grandchild, and great grandchild, much to the disappointment of the "perverse hopes" of the "legacy-hunters" who had courted him. TELLEGEN, *supra* note 29, at 152-53.

49. 5 JOHANNES VOET, THE SELECTIVE VOET BEING THE COMMENTARY ON THE PANDECTS 79 (Percival Gane trans., 1956) (1829).

50. 4 *id.* at 617. *See also* 1 HUGO GROTIUS, THE JURISPRUDENCE OF HOLLAND 137 (R.W. Lee trans., 1936) ("Under witness might not be included the instituted heir; but a legatee might.").

51. 5 VOET, *supra* note 49, at 278. Roman law appears to have allowed those to whom wills were dictated to also receive a legacy under the same will. Marcian states that a son or a slave could receive a legacy under a will dictated to them if the testator signed a "general clause" confirming the will. DIG. 48.10.1.8 (Marcian, Institutes 14). If, on the other hand, the party writing the will was a stranger, before he could receive a legacy under the will, the testator would have to sign a specific clause stating, "which I have dictated to him and have confirmed." *Id.*

52. 5 VOET, *supra* note 49, at 279.

53. JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 89 (1995) ("In England, more than in most regions of medieval Europe, canonical courts became the regular forum for the probate of wills and testaments and the disposition of claims arising under them. The dominance of canon law over probate jurisdiction was already well-established by the end of the twelfth century and Glanvill refers to it as if it were a routine matter that secular courts did not contest."). Glanvill states plainly, "[P]leas concerning testaments ought to be dealt with before an ecclesiastical judge." THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY

influence in transactions involving parents and children,⁵⁴ but it was not until the nineteenth century that the concept of undue influence took hold in England, first in the context of inter vivos donative transactions and then in the context of wills. There, the concern of a parent unduly influencing a child to bestow a gift in his favor was so great that courts took action. In *Morris v. Burroughs*, the court stated that "to prevent any undue influence . . . there must . . . be a valuable consideration moving from the father, and an actual benefit accruing to the child."⁵⁵ Subsequent cases extended the vitiating role of undue influence to gifts made from clients to solicitors.⁵⁶ The French doctrinal writer, Robert Pothier, seems to have been influential in the development of the idea of undue influence in the common law.⁵⁷ In *Huguenin v. Baseley*, penitents making gifts to clergy were the subject

CALLED GLANVILL, bk. VII, pt. 8, at 81 (G.D.G. Hall ed. & trans., 1965). See also 6 HENRICI DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, bk. V, treatise 5, at 167 (Travers Twiss trans., 1883) ("[A] laic is not to be convened before an ecclesiastical judge concerning any matter, which pertains to the crown . . . Likewise neither concerning debts nor chattels, unless they are concerning a testament or matrimony or such like . . ."). On the continent, testamentary matters appear to have been under the jurisdiction of both secular and ecclesiastical courts. "Civil law and secular courts on the Continent were less ready than their English counterparts to yield control over testamentary matters to the church." BRUNDAGE, *supra*, at 89; *COUTUMES DE BEAUVAISIS* OF PHILIPPE DE BEAUMANOIR 153 (F.R.P. Akehurst trans., 1992) ("And if the suit over a will is brought to an end in a secular court, however it is administered, and for whatever parties, the ecclesiastical court can inquire how the case went, so that if there is something to be set right, it can be set right by the ecclesiastical court, for it is they who, more than other people, have authority over what is done for the salvation of souls.").

54. *Morris v. Burroughs*, (1737) 1 Atk. 398 (U.K.). See also W.H.D. Winder, *Undue Influence and Coercion*, 3 MOD. L. REV. 97, 98 (1939).

55. *Morris*, 1 Atk. at 403. See also Winder, *supra* note 54, at 98.

56. *Welles v. Middleton*, (1784) 1 Cox 112 (U.K.). See also Winder, *supra* note 54, at 100.

57. See GEORGE W. KEETON & L.A. SHERIDAN, *EQUITY* 263 (3d ed. 1987) (noting that the Court of Chancery was "struggling with the problem of the undue influence exercised by husbands upon wives to compel them to surrender their property" and stating that "it would seem that the Court of Chancery was influenced by Pothier's treatise, *Traité des donations entre vifs*"). For a more measured estimation of the role of Pothier in the Chancery Court's formulation of undue influence, see Gerhard Lubbe, *Voidable Contracts*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 261, 296 (Reinhard Zimmermann & Daniel Visser eds., 1996) (noting that "Lord Eldon's judgment, however, contains no reference to Pothier" and that "Keeton and Sheridan's claim seems to be based on the heads of argument presented to the Court by Samuel Romilly"). See generally du Plessis & Zimmermann, *supra* note 15, at 363-64. For other important influences of Pothier on the common law, see, for example, Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 272 (2005); Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721 (2007).

of undue influence allegations.⁵⁸ In his argument to the court on behalf of the plaintiffs in *Huguenin*, Sir Romilly stated that "[a]ccording to Pothier, it has been decided, upon the same principles of public utility, that a confessor, or director of conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character."⁵⁹

In an early and seminal case in the English probate courts, *Hall v. Hall*, the jury was instructed that "[t]o make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, —these are all legitimate, and may be fairly pressed on a testator."⁶⁰ What is forbidden in the context of testaments is "pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment."⁶¹ This, the court instructed, was "a species of restraint under which no valid will can be made."⁶² In short, the court stated, "a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."⁶³

Shortly thereafter, the English probate courts made clear that the presumption of undue influence that arises in the Courts of Equity based upon the relationship of the parties does not exist in the probate courts.⁶⁴ In *Parfitt v. Lawless*, a priest who lived with the decedent and served as her confessor received the bulk of the decedent's estate under her will. The court held that the priest's role and "his position in the house" were alone not enough to prove undue influence.⁶⁵ Although the defendant had relied upon "cases . . . related to gifts inter vivos decided in the courts of equity," the court rejected such arguments because "as regards wills, if there be capacity and a knowledge of business proved or admitted, and an expressed desire to do what was done, undue influence cannot be presumed

58. *Huguenin v. Baseley*, 14 Ves. 273 (1807), in 2 A SELECTION OF LEADING CASES IN EQUITY WITH NOTES (Frederick Thomas White & Owen Davies Tudor eds., 1877).

59. *Id.*

60. *Hall v. Hall*, (1868) 1 L.R.P. & D. (Ct. Prob. & Divorce) (U.K.).

61. *Id.*

62. *Id.*

63. *Id.*

64. *See Parfitt v. Lawless*, (1872) 2 L.R.P. & D. (Ct. Prob. & Divorce) (U.K.).

65. *Id.*

from the mere position of the parties."⁶⁶ Moreover, the court stated that "it is very doubtful whether the same meaning [of undue influence in Probate Courts] is attached to those words in the courts of equity. In testamentary cases it is always defined as coercion or fraud, but *inter vivos* no such definition is applied."⁶⁷

It was not until the nineteenth century that American law, via importation from England, received the doctrine of undue influence. The English prohibition on attesting witnesses receiving legacies under the will was "generally adopted in the United States as a salutary provision."⁶⁸ Early treatises cited English cases such as *Huguenin v. Baseley* and readily adopted the doctrine of undue influence.⁶⁹ Thomas Jarman's influential treatise on wills was published "with notes and references to American decisions" in 1845,⁷⁰ and at that time, undue influence was limited to discussion of the English case of *Mountain v. Bennett*, in which a will was challenged on the grounds of "undue influence . . . [by] the testator's wife, whom he married from an inferior station."⁷¹ The discussion of the topic occurs in the Chapter on "Personal Disabilities of Testators" and in the midst of a discussion of the ability of lunatics to make wills.

By the time the second American edition of Jarman's work was published in 1849, the editors "added to the original text chapters" an entire section on "Undue Influence," which is produced with copious citations to American cases.⁷² In Woerner's multivolume treatise on the American Law of Administration, first published in 1889, English and American cases on undue influence are cited interchangeably thus giving the impression that the doctrine of undue influence in wills was the same in the two jurisdictions.⁷³

Despite the increasing prevalence of undue influence cases in nineteenth-century America, the case law was strict in the kind of influence necessary before it would be considered undue. Mere

66. *Id.*

67. *Id.* Moreover, the English rule, even more strictly than that provision of the *ius commune*, invalidated any testamentary transfer to an attesting witness. 25 George II.

68. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 509 (6th ed. 1848).

69. *See, e.g.*, 2 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 412-14 (3d ed. 1846); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 248, 251, 256, 263 (1886).

70. THOMAS JARMAN, TREATISE ON WILLS (1st American ed. 1845).

71. *Id.* at 30 (citing *Mountain v. Bennett*, (1787) 1 Cox. 353, 355 (U.K.)).

72. THOMAS JARMAN, TREATISE ON WILLS 36-40 (2d American ed. 1849).

73. *See* 1 J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION § 31, at 45-49 & nn. 8-9, at 47 (1889).

circumstantial evidence of undue influence was not enough; proof of actual coercion or fraud was necessary. For example, in rejecting a claim for undue influence against a wife of an inebriated testator, the court in *Gardner v. Gardner* rhetorically asked, "Was there fraud? Was there terror? Was there harassing importunity, and a compliance for the sake of peace in the dying hour!"⁷⁴ Similarly, in *O'Neall v. Farr*, the court rejected the claim of undue influence leveled against a female slave who received a large disposition after a testator's death and who had served as his paramour. Even though "she derived from her situation a certain degree of influence, and that she was indulged in her wishes in the management of the domestic affairs," no undue influence existed.⁷⁵

By the twentieth century it was still standard practice to read discussions about undue influence in law school textbooks that made clear that the kind of influence needed to invalidate a will "always contains an element of coercion or fraud."⁷⁶ Treatises explained that for there "to be undue influence in the eye of the law there must be coercion."⁷⁷ Coercion, it is said, could "consist of actual violence, of threats expressed or implied, or of harassing importunity."⁷⁸ An important early student textbook on wills describes the kind of influence that does not qualify as undue as follows:

[C]onsiderations addressed to a testator's good feelings, simply influencing his better judgment; the earnest solicitations of a wife, or the exercise of influence springing from family relations, or from motives of duty, affection, or gratitude; persuasion, argument, or flattery; kindness and attentions to the testator; and influence worthily exerted for the benefit of others, cannot be considered "undue," so as to affect the validity of a will inspired thereby.⁷⁹

Despite some statements by others to contrary, Rood wrote in the early twentieth century that he had "not found a decision refusing a will probate on the ground that the testator was induced to make it by sweet speeches made with the design of procuring the will."⁸⁰ Wills

74. *Gardner v. Gardner*, 22 Wend. 526 (1839).

75. *O'Neall v. Farr*, 1 Rich. 80 (S.C. 1844).

76. THE LAW OF DECEDENTS' ESTATES INCLUDING WILLS 18 (W.M. F. Woerner & F.A. Wislizenus eds., 1913) [hereinafter DECEDENTS' ESTATES].

77. JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 176, at 105 (1904).

78. *Id.* at 106.

79. DECEDENTS' ESTATES, *supra* note 76, at 19.

80. ROOD, *supra* note 77, § 181, at 110.

made in favor of paramours or mistresses to the exclusion of one's lawful spouse and children were condemned morally but upheld as long as the testator disposed of the property according to his own wishes.⁸¹ It is clear that the question of undue influence was "whether the testator had the intelligence enough to detect the *fraud*, and strength of will enough to resist the influence brought to bear upon him."⁸²

Not long after, however, the concept of undue influence in American law was liberalized. Throughout the twentieth century, the English rule that undue influence was never presumed was softened to allow circumstantial evidence, such as the existence of a fiduciary relationship between the testator and legatee (e.g., attorney/client), to "raise[] the presumption of undue influence, which [was] fatal to the bequest unless rebutted by proof of full deliberation and spontaneity on the part of the testator, and good faith on the part of the legatee."⁸³ The Michigan Supreme Court explained that "[t]here are certain cases in which the law indulges in the presumption that undue influence has been used, as where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser."⁸⁴

By the 1920s, although physical coercion or threats could still constitute undue influence, the "more common kind of undue influence . . . [was] where the mind and the will of the testator have been overpowered and subjected to the will of another, so that while the testator appeared to execute willingly and intelligently, it was really the will of another."⁸⁵ When Atkinson wrote his famous handbook on wills in the 1940s concepts of "coercion" are deemphasized,⁸⁶ and undue influence is explained as "destroy[ing] the free agency of the testator" and "substitut[ing] another's volition for" the testator's.⁸⁷ The "ordinary case of undue influence," according to Atkinson, occurs not in the case of explicit coercion, but in the case in which the testator executes a will that merely "does not represent his

81. *Id.* § 182, at 110-11 (citing numerous decisions).

82. DECEDENTS' ESTATES, *supra* note 76, at 19 (emphasis added).

83. *Id.* at 20 (noting also that in some states the mere relationship did not create a presumption but simply mandated "jealous scrutiny" of the transaction and further proof of "some act of the beneficiary, however slight . . . connecting him with the will").

84. *In re Hartlerode's Will*, 148 N.W. 774, 777 (Mich. 1914).

85. 1 JAMES SCHOULER, LAW OF WILLS: EXECUTORS AND ADMINISTRATORS § 263, at 325 (6th ed. 1923).

86. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 256 (2d ed. 1953).

87. *Id.*

true wish or desire."⁸⁸ Moreover, it was clear that when a legatee engaged in some activity to procure a will in his favor, "such relationships as those of attorney and client, clergyman and parishioner, physician and patient, or close business associates are sufficient to give rise to a presumption" of undue influence.⁸⁹ Later, Mortmain Statutes that allowed spouses and children to nullify death bed gifts to charities and which were originally motivated by the fear of "overreaching by priests taking the last confession and will," were either repealed or declared unconstitutional.⁹⁰

II. THE ROLE OF AND PROBLEMS WITH UNDUE INFLUENCE

As elusive a concept as undue influence is and has been, its role in assessing the validity of wills is significant. At bottom, a will is a "legal expression or declaration of a person's mind or wishes as to the disposition of his property, to be performed or take effect after his death."⁹¹ In addition to the compliance with certain formalities, for a will to be effective, a person's mind must be free to voluntarily choose both the action (i.e., the making of a will) and the disposition of his property in favor of certain intended beneficiaries. In other words, autonomy is crucial for the making of an effective will, and "an autonomous individual is 'free from both controlling interferences by others and personal limitations . . . that prevent meaningful choice.'"⁹² The law of undue influence attempts to protect this autonomy and freedom of choice by invalidating wills that are not the products of the full volition and untrammelled will of the testator.⁹³ If freedom of testation did not exist and society were instead governed by a system of collective inheritance, undue influence would be unimportant. In

88. *Id.* at 257.

89. *Id.* at 550.

90. DUKEMINIER ET AL., *supra* note 4, at 869. Georgia is the lone exception. *See, e.g.*, GA. CODE ANN. § 53-2-10 (2008). For a discussion of the role of mortmain statutes and undue influence in religiously-motivated giving, see Jeffrey G. Sherman, *Can Religious Influence Ever Be "Undue" Influence?*, 73 BROOK. L. REV. 579 (2008).

91. BLACK'S LAW DICTIONARY 1598 (6th ed. 1990).

92. Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 524 (1996) (quoting TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (3d ed. 1989)).

93. *See generally* Nicole M. Reina, Notes & Comments, *Protecting Testamentary Freedom in the United States by Introducing the Concept of the French Notaire*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 427 (2003); *see also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236-37 (1996).

America, however, where autonomy and, thus, freedom of testation are paramount, undue influence plays a central role in ensuring that only completely free and autonomous dispositions are honored.

In addition to protecting autonomy, the doctrine of undue influence has the derivative effect of helping to protect the natural objects of the testator's bounty, who are likely members of the decedent's immediate family. Because the default rules of intestate succession generally favor one's close familial relations, deviations from those rules by a will may only be done by a free, deliberate, and voluntary choice of the testator. To the extent a testamentary disposition has been "unduly" caused or influenced (oftentimes by one outside the normal order of succession), the will is invalid and thus one's close familial relations are recognized in the intestate distribution scheme and protected from disinheritance.

Of course, part of the problem with undue influence is detecting it. "Every one is more or less swayed by his associations with other persons. Obviously the courts would not characterize all such environmental influence as undue."⁹⁴ For influence to be undue, "the influence must place the testator in the attitude of saying: 'It is not my will but I must do it.'"⁹⁵ Threats to abandon a sick testator, unless he makes a will favorable to the influencer, have been held to be undue.⁹⁶ Likewise, appeals to affections or emotions have also been characterized as examples of undue influence.⁹⁷ It is even possible that "excessive flattering attentions may cause disallowance of the will."⁹⁸

In an attempt to help identify instances of undue influence, many courts have adopted a four-pronged test to assess whether the influence exerted upon a testator is undue. That is, (1) the testator must be susceptible of such influence, (2) the influencer must have the opportunity to exercise such influence, (3) the influencer must have the disposition to do so, and (4) the influencer must achieve the coveted result.⁹⁹ As pervasive as this test is, it is often vague and unhelpful. Some courts have characterized it as "almost totally meaningless" and containing elements that "beg[] the question."¹⁰⁰

94. ATKINSON, *supra* note 86, at 256.

95. *Id.*

96. 1 PAGE ON THE LAW OF WILLS § 15.3, at 826 (2003) [hereinafter PAGE].

97. *Id.*

98. ATKINSON, *supra* note 86, at 258 (citing *Keller v. Keller*, 86 A. 1065, 1066 (1913)).

99. DUKEMINIER ET AL., *supra* note 4, at 158-59.

100. *Succession of Reeves*, 704 So.2d 252, 259 (La. App. 3d Cir. 1997) (criticizing the test in reference to influence exerted by a spouse).

Given the difficulties faced by courts in ascertaining the motives of recipients under wills and the state of mind of those now deceased, circumstantial evidence must be used to prove undue influence.¹⁰¹ Consequently, courts have, perhaps unknowingly, adopted a series of rules of thumb for detecting when undue influence is likely to exist. These objective indicia, although helpful in some cases, seem to depart from the ultimate goal of ascertaining when a testament is not the product of the free volition of the testator. The following circumstances have become objective indicia of the nebulous concept of undue influence.

A. Relationship of Confidence

First, and perhaps most importantly, relationships of confidence between testator and influencer, such as attorney and client, have been held by some courts to create a presumption of undue influence when the beneficiary receives a disproportionate benefit.¹⁰² For example, in *Delapp v. Pratt*, a Tennessee appellate court evaluated a claim by a group of siblings against their brother for having unduly influenced their mother to leave to him the family farm.¹⁰³ The brother not only lived next door to their mother but also farmed the family land and was given his mother's power of attorney.¹⁰⁴ In affirming the jury verdict finding undue influence, the court stated that "the existence of a confidential relationship followed by a transaction wherein the dominant party receives a benefit from the other party, [raises] a presumption of undue influence . . . that may be rebutted only by clear and convincing evidence of the fairness of the transaction."¹⁰⁵

Other courts require both a confidential relationship and "suspicious circumstances" to exist before such a presumption arises. These "suspicious circumstances" must surround the "preparation, execution, or formulation of the donative transfer."¹⁰⁶ The

101. Roy D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 582 (1997).

102. ROSS & REED, *supra* note 3, § 7:11. Some courts have steadfastly held that that "undue influence can never be presumed and must be proved by direct and circumstantial evidence." *See id.* § 7:11 at 7-53 - 7-54 (citing cases from Indiana, Iowa, North Dakota, West Virginia, and D.C.).

103. *Delapp v. Pratt*, 152 S.W.3d 530, 532-33 (Tenn. Ct. App. 2004).

104. *Id.* at 541.

105. *Id.* at 540 (quoting *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995)).

106. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. f (2003).

presumption of undue influence exists in the above instances because "[s]uspicious circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor."¹⁰⁷ Among the circumstances considered "suspicious" are "the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute" and "whether the will or will substitute was prepared in secrecy or in haste."¹⁰⁸ "The effect of the presumption is to shift to the proponent the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption."¹⁰⁹

B. Age and Mental State of the Testator

Another fertile ground for undue influence cases exists when wills are made by testators whose mental status, while capable, is of a weakened state. The frequency with which cases involve both claims of incapacity and undue influence should not be surprising. After all, "[p]roof of undue influence requires a showing that another party's influence on the testator was so great that the influencer was able to substitute his wishes for those of the testator. Clearly, the lower the mental capacity of the testator, the easier it is to convince a jury or court of the existence of undue influence."¹¹⁰

In the words of one popular trusts and estates textbook, "[a] robust, independent testator is generally less susceptible to undue influence than a dependent, weakened testator. Courts often require evidence of 'weakened intellect' or 'weakened mental state' before they will sustain a finding of undue influence."¹¹¹ Courts often use facts such as old age and frailty in analyzing whether a decedent was "susceptible" to undue influence. In so doing, one court has noted that "[w]hile not determinative, the primary factors to be considered are testator's age, personality, physical and mental health, and his ability to handle business affairs."¹¹²

107. *Id.* § 8.3 cmt. h.

108. *Id.*

109. *Id.* § 8.3 cmt. f.

110. Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to do with It?*, 57 U. PITT. L. REV. 841, 845 (1996).

111. JOEL C. DOBRIS, STEWART E. STERK & MELANIE LESLIE, *ESTATES AND TRUSTS: CASES AND MATERIALS* 437 (3d ed. 2007).

112. *In re Estate of Hamm*, 227 N.W.2d 34, 38 (Wis. 1975).

On many occasions, advanced age even stands in as a proxy for weakened mental state. Some scholars suggest that most victims of undue influence are older and that no cases of undue influence involve younger people.¹¹³ Thus, it is almost inevitable that the number of undue influence claims will increase with the aging of the population.¹¹⁴ Part of the explanation for this phenomenon is that older people suffer greater instances of physical and mental decline than younger ones, which thus makes them more susceptible to undue influence.¹¹⁵ Commentators have suggested that the tendency of courts to use advanced age as a proxy for an unduly influenced testator "represents prejudicial attitudes about the elderly that equate being older with being mentally frail and emotionally susceptible."¹¹⁶

C. Abnormal Disposition

Finally, scholars have noted that the doctrine of undue influence "permits a will to be invalidated because of judicial disapproval of the testamentary plan of distribution."¹¹⁷ In other words, the more abnormal or uncommon the disposition, the greater the chance a court will find undue influence. Somewhat ironically, however, the standard of normality often used to assess the naturalness of the disposition is whether it accords with the state's intestate scheme, which after all is supposed to model the intent of the average person.¹¹⁸ Thus, provision for one's heirs, spouse, and close relatives is viewed as natural and normal, whereas leaving one's estate to a random associate or new acquaintance is viewed as abnormal or unnatural.¹¹⁹ "[R]eliance on people outside of the formal family structure is only countenanced when the family has done something to 'deserve' being disinherited."¹²⁰ This conclusion is somewhat understandable given that "the catalyst and strength of all undue influence cases is the perceived 'unnaturalness' of the testamentary disposition."¹²¹

113. Frolik, *supra* note 110, at 844.

114. *Id.* at 879.

115. *Id.*

116. *See id.* at 852.

117. *Id.* at 868.

118. Madoff, *supra* note 101, at 590.

119. *Id.*

120. *Id.* at 591.

121. *Id.* at 589.

Similarly, the exclusion of one heir in favor of other heirs is also viewed as unnatural, unless the excluded heir has done something to merit disinheritance. For instance, in *Murphy v. O'Neill*, the Rhode Island Supreme Court considered an allegation of undue influence against a testator's son in a suit brought by the testator's three other children and eight grandchildren.¹²² Although the court ultimately ordered a new trial because of an erroneous jury instruction, it did note that "[t]here is a body of case law which may be cited for the proposition that an unexplained, unnatural disposition in a will, when considered with other factors, can give rise to the drawing of an inference of undue influence."¹²³ In explaining the reason for such an inference, the court stated that in such cases, "one instinctively seeks for an explanation" of the decedent's conduct.¹²⁴ If the other party offers no proof to rebut the presumption, the party alleging undue influence is entitled to have the issue decided by the jury and "runs the risk that the jury may find against him"¹²⁵

Some have explained the phenomenon in evolutionary biological terms by stating that "[w]e share an unconscious impulse to promote our genetic survival by assisting our genetic descendants, and we collectively express that instinct by the application of the doctrine of undue influence."¹²⁶ Others have explained this phenomenon by stating that "family protectionism is built into the very fabric of the undue influence doctrine."¹²⁷ While the doctrine of undue influence purports to protect the testator against nefarious influences of others, the doctrine also "protect[s] the testator's biological family from disinheritance."¹²⁸ "Thus, the impact of the undue influence doctrine is to act as a form of forced heirship. People can either provide for a 'natural' disposition of their property themselves (i.e., to their families) or the court will do it for them via the intestacy statutes."¹²⁹

While none of the above factors—mental status, abnormal disposition, or confidential relationship—necessarily demonstrates the existence of undue influence, the more significant the coincidence of these factors, the greater the likelihood that a court will find the

122. *Murphy v. O'Neill*, 454 A.2d 248, 249 (R.I. 1983).

123. *Id.* at 249.

124. *Id.* at 250 (quoting *Huebel v. Baldwin*, 119 A. 639 (R.I. 1923)).

125. *Id.*

126. Frolik, *supra* note 110, at 843.

127. Madoff, *supra* note 101, at 577.

128. *Id.* at 577.

129. *Id.* at 611.

existence of undue influence. Thus, an aged, weak testator who in her will favors exclusively a distant relative who helped draft the will is a prime candidate for an undue influence suit.

III. FUNCTIONAL EQUIVALENTS OF UNDUE INFLUENCE¹³⁰

After having assessed the role of and problems with the doctrine of undue influence, foreign systems will now be examined to consider how those same problems are dealt with abroad. In doing so, the functionalist approach shall be employed. Functionalism has been described as "[t]he basic methodological principle of all comparative law."¹³¹ At its foundation, functionalism involves examining multiple legal systems to determine whether they have the same legal rules or institutions that provide the same solutions to the same problems, different rules or institutions that provide different solutions to the same problems, or the absence of certain rules or institutions to deal with a problem altogether.¹³² "A diligent search for similarities and differences ought to encompass all of those possibilities," and the comparatist needs to be aware that sometimes similar solutions often disguise themselves under different names.¹³³ In that vein, Part III of this paper examines French and German law—systems without an explicit concept of undue influence—in an effort to locate those functional equivalents to undue influence.

A. Explicit Prohibitions: Captation and Dispositions Contra Bonos Mores

Although French law does not recognize an explicit concept of undue influence in any legislative text, it does doctrinally and jurisprudentially acknowledge captation and suggestion. The concept of captation is defined, much like undue influence, as "[t]he act of one who succeeds in controlling the will of another, so as to become a

130. A thoroughly comprehensive examination of the issue of undue influence would include the different approaches to mistake or error in each jurisdiction, but such an examination is beyond the scope of this paper and will be addressed in a subsequent article.

131. KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (Tony Weir trans., 3d ed. 1998).

132. John C. Reitz, *How to do Comparative Law*, 46 AM. J. COMP. L. 617, 622 (1998). See also Jaakko Husa, *About the Methodology of Comparative Law—Some Comments Concerning the Wonderland* (Maastricht Faculty of Law, Working Paper No. 5, 2007), available at <http://www.uni-maastricht.nl/bestand.asp?id=9343>. For an overview on the debate about the merits of functionalism, see Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 8, at 383-419.

133. Reitz, *supra* note 132, at 622; see also Husa, *supra* note 132.

master of it."¹³⁴ "Captation consists in capturing the confidence of a person to attract his good graces with the goal of obtaining a liberality; suggestion resides in the act of influence on the will of a person (for example, in stirring up the aversion in this regard to other members of the entourage) to the same end."¹³⁵ In the 18th Century captation was characterized merely as maneuvers designed to elicit a disposition in one's favor.¹³⁶ A legacy was procured by suggestion when it was made by a donor without having full will and in an attempt to free himself of solicitations.¹³⁷ Although captation and suggestion are conceptually different, the two are often considered together under the title of captation, which is not infrequently alleged in the context of testators weakened by illness.¹³⁸

Historically, the pre-code regime in France took a very broad approach to invalidating wills based upon undue influence. In fact, "it was possible to invalidate a will inspired by a blind and unjust hatred of legitimate relatives."¹³⁹ The Ordinance of 1735 introduced legislation that annulled certain dispositions on grounds of "captation" or "suggestion."¹⁴⁰ Certain authors were particularly strict on these matters and considered "all dispositions of which the testator had not had the initiative" to be blemished by suggestion.¹⁴¹ Domat, on the other hand, was more permissive and allowed many forms of influence that others would prohibit:

We must not confound with the unlawful ways . . . certain ways which a great many persons make use of to engage the

134. BOUVIER'S LAW DICTIONARY 205 (11th ed. 1865). The concept of captation is, in modern times, thought of in terms of incapacity. Incapacities in French law are of two types, absolute and relative incapacities. See PHILIPPE MALAURIE, *DROIT CIVIL: LES SUCCESSIONS LES LIBÉRALITÉS* 155 (2d ed. 2006). Absolute incapacities are those concerning age and mental status and affect all testators. See *id.* at 156-57. Relative incapacities are those that affect only certain person's ability to give to specific other persons and exist only by virtue of the relationship between the parties. See *id.* at 165. Certain relationships, as will be discussed below, create relative incapacities and rest on a presumption of captation. See *id.*

135. HENRI MAZEAUD ET AL., *SUCCESSIONS – LIBÉRALITÉS* No. 1343, at 554 n.1, in *LEÇONS DE DROIT CIVIL t.IV, V. II* (1999) (author's translation); ANDRÉ TRASBOT & YVON LOUSSOUARN, *DONATIONS ET TESTAMENTS*, in 5 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 272 n.2 (2d ed. 1957).

136. MARCEL PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, No. 2877, at 412 (La. State L. Inst. transl. 1959) (1939). See also ROBERT POTHIER, *TRAITÉ DES DONATIONS TESTAMENTAIRES*, in 3 *ŒUVRES DE POTHIER* 95-97 (3d ed. 1823).

137. PLANIOL, *supra* note 136, No. 2881, at 412; POTHIER, *supra* note 136, at 95-97.

138. MAZEAUD ET AL., *supra* note 135, at 554.

139. PLANIOL, *supra* note 136, No. 2878, at 412.

140. *Id.* No. 2880, 2881, at 414.

141. TRASBOT & LOUSSOUARN, *supra* note 135, at 270-72.

testator to make his will in their favor, such as services, good offices, caresses, flatteries, presents, the interpositions of persons who cultivate for them the good will of the testator, and engage him to make some bequest in their favor: for although these kinds of ways may be inconsistent either with decency or good conscience, or even contrary to both, yet the laws of men have not inflicted any penalties on those who practise them.¹⁴²

Of all of the ancient authors, however, Furgole appears to have been the most influential on the topic of captation.¹⁴³ Writing in his treatise on testaments, Furgole argued that many of the other scholars had "gone too far in being satisfied with simple persuasion as constituting suggestion or in having declared suggested the dispositions made 'on the interrogation of another.'"¹⁴⁴ Furgole took a much more restrictive view of captation and suggestion and concluded that captation and suggestion were simply specific types of fraud.¹⁴⁵ Other types of influence were not actionable.

By the time of the enactment of the French Civil Code, the grounds of captation, suggestion, and hatred as explicit bases for invalidating a will were eliminated.¹⁴⁶ In his presentation to the Corps-Législatif, Bigot-Préameneu explained the absence of captation and suggestion as follows:

The law keeps silent on the defect in the liberty that can result from suggestion or captation, and about the vice of consent determined by anger or through hatred. Those who have tried to annul the dispositions through similar motives have not hardly ever succeeded in finding sufficient proof . . . ; and maybe it would be better for the general interest, that this source of ruinous and scandalous lawsuits would dry up,

142. 2 JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* No. 3152, 341 (William Strahan trans. 1853).

143. TRASBOT & LOUSSOUARN, *supra* note 135, at 270-72.

144. *Id.*

145. JEAN-BAPTISTE FURGOLE, *TRAITÉ DES TESTAMENS, CODICILES, DONATIONS A CAUSE DE MORT ET AUTRES DISPOSITIONS DE DERNIERE VOLONTÉ*, in 1 *ŒUVRES COMPLETTES DE M. FURGOLE* 247 (1875) (citing Menochius).

146. *See* PLANIOL, *supra* note 139, No. 2878, at 413. In fact, if a testator had capacity, the code failed to provide for any grounds at all upon which consent could be vitiated, even the standard ones of fraud, violence, or error. *See id.* Be that as it may, the doctrine and jurisprudence concluded that the "general rules appl[ied]" and found wills to be annulable on grounds of error, fraud, and violence. *Id.* No. 2879-2886, at 413-16. *See also infra* note 256.

in declaring that the causes of nullity will not be admitted¹⁴⁷

Far from endorsing this kind of immoral behavior and influence over testators, Bigot-Préameneu explained that the new approach left the matter to the courts. He stated that "[i]t is the wisdom of the courts that can only appreciate these acts, and to hold the balance between the strength due to the acts and the interest of families; they prevent them from being robbed by greedy people who subjugate the dying."¹⁴⁸

In French law today, it is "[t]he ideas of Furgole [that] dominate," insofar as suggestion and captation are no longer independent grounds for annulling a will.¹⁴⁹ It is only when such acts "present the character of fraud" and "are accompanied by practical artifices or lying insinuations" that they can serve as grounds for rescinding a will.¹⁵⁰ Lies or fraudulent means are necessary to establish the kind of captation necessary to annul a will.¹⁵¹ Isolating a testator from his friends and family combined with deceptive techniques to procure a disposition can constitute fraudulent captation,¹⁵² as can lies regarding one's co-heirs in an effort to deprive them of a legacy.¹⁵³ In such cases, captation can be found by examining the "totality of the circumstances," without need of particular fraudulent or deceptive acts.¹⁵⁴

As a supplement to the rather high level of deceptive conduct required by French law to annul a will, the French Civil Code, much like early Roman law, also provides a series of outright prohibitions on gifts in those cases in which suggestion, captation, or American-

147. Bigot-Préameneu, M., *Présentation au Corps Législatif et Exposé des Motifs*, in 12 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 521 (1968) (author's translation); see also A. DURANTON, COURS DE DROIT FRANÇAIS, SUIVANT LE CODE CIVIL 330 (1834).

148. 12 FENET, *supra* note 147, at 521 (author's translation); see also DURANTON, *supra* note 147, at 330.

149. TRASBOT & LOUSSOUARN, *supra* note 135, at 270-72.

150. *Id.*

151. MAZEAUD ET AL, *supra* note 135, at 554-55.

152. Première chambre civile [Cass. 1e civ.], Oct. 30, 1985, Bulletin des arrêts de la Cour de cassation, chambres civiles [Bull. civ.] No. 282; MAZEAUD ET AL, *supra* note 135, at 554-55.

153. Cass. 1e civ., Oct. 28, 1895, 1896 DPG No. 1, 36; MAZEAUD ET AL, *supra* note 135, at 545-55.

154. Cass. 1e civ., Feb. 11, 1976, Bull. civ. No. 65. *But see* Cass. 1e civ., Oct. 24, 2000, Bull. civ. No. 270 (holding that a son could not annul his mother's will made five days after leaving a clinic and in favor of the clinic director, unless he could show fraudulent maneuvers on the part of the director).

style undue influence are especially common (e.g., certain fiduciary relationships). For example, Article 909 provides that "[m]edical or surgical doctors, health officials, and pharmacists who treated a person during the illness that led to death, cannot profit from inter vivos or testamentary dispositions that were made in their favor during the course of this illness The same rules will be observed with regard to ministers of worship."¹⁵⁵

The above blanket prohibition was seen as necessary because "the sick can be easily submissive to this doctrine in which he easily sees a savior to whom nothing could be refused."¹⁵⁶ Moreover, "[a] physician who attends a sick person easily gains great influence over his mind, especially because the sick person expects from the physician a recovery and is often willing to make great sacrifices to obtain it."¹⁵⁷ Thus, the prohibition is necessary not only for the protection of the sick but also for the doctor because it puts his practice "above any suspicion."¹⁵⁸ The Civil Code is "rigorous" in imposing a presumption of captation that is irrebutable.¹⁵⁹ The law does not allow debate into the merits of a particular disposition; all testamentary dispositions to such persons are forbidden.¹⁶⁰

The harshness of the above prohibition, however, is mitigated by the restrictive scope of its application.¹⁶¹ Rather than imposing a broad prohibition, the law precludes disposing only if three conditions are met. First, the relative incapacity applies only to the listed individuals, such as a doctor or at least one who performs the same function of "treating the sick," even though he may not possess the title.¹⁶² "The incapacities decreed by article 909 cannot be extended to other professions which are not enumerated."¹⁶³ Legacies to nurses or masseuses are not covered by the above rule any more than a legacy

155. CODE CIVIL [C. CIV.] art. 909 (author's translation).

156. MALAURIE, *supra* note 134, at 167.

157. PLANIOL, *supra* note 136, No. 2962, at 450.

158. *Id.*

159. MALAURIE, *supra* note 134, at 166 (author's translation).

160. *Id.*

161. The prohibition in article 909 of the Civil Code is subject to the following exceptions: (1) remunerative dispositions made under particular title, having regard for the faculties of the disposer and for services rendered; (2) universal dispositions in the case of relatives of the fourth degree inclusive, provided, however, the decedent did not have relatives in the direct line; unless he who profits from the disposition that was made is not himself one of the heirs. C. CIV. art. 909; *see also* MALAURIE, *supra* note 134, at 167.

162. MALAURIE, *supra* note 134, at 166-67.

163. *Id.* at 167 n.39 (quoting Chambres des requêtes [Cass. Req.] [chamber of requests], May 12, 1931, Recueil hebdomadaire Dalloz [DH] 1931, 348) (author's translation).

to a lawyer is because they do not "treat" the sick.¹⁶⁴ Ascertaining what constitutes "treatment" is a matter that rests solely with the discretion of the *juge du fond*, but "the classification of these facts within the meaning of Article 909 is subject to review by the Court of Cassation."¹⁶⁵

A minister who attends a donor during his last illness is covered under the above article, but only if he "attended the decedent during his last illness by giving him what might be called spiritual treatment. If he only visited him as a friend, he does not fall under the statutory provision."¹⁶⁶ Planiol indicates that pharmacists also are included because "these persons give less guarantee of honesty than graduated physicians, and also because their clientele usually comes from the less enlightened groups of the population."¹⁶⁷

Second, in addition to being a doctor or similar party, the doctor must have cared for the testator during his last illness and the gratuity must have been made at that time.¹⁶⁸ Recent jurisprudence from the Cour de Cassation confirms that gifts to a donor are not stricken with nullity if the donor was treated by the beneficiary for an illness other than the one that caused death.¹⁶⁹ Third, the decedent must have died during the illness. "If the sick person recovers, the gratuity is valid, although it could have been brought about by inducement. If it is a testamentary gratuity, it can be revoked"¹⁷⁰

Just as in French law, "in German law there is neither a specific legal provision nor even any particular legal term for undue influence"¹⁷¹ The German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), deals with the problem of undue influence by refusing to enforce instruments or legal acts that "'contravene[]" the

164. *Id.*

165. AUBRY & RAU, *DROIT CIVIL FRANÇAIS*, § 649, 44-45, in 3 *CIVIL LAW TRANSLATIONS* (Carlos Lazarus trans. 1969).

166. PLANIOL, *supra* note 136, No. 2967, at 452.

167. *Id.* No. 2963 at 450. The fear of undue pressure or influence in these relationships is also manifest in the French prohibition on enforcing "[d]ispositions inserted in a testament made in the course of a sea voyage for the benefit of officers of the ship other than relatives." C. CIV. art. 995. The "old adage," according to Planiol, is that "a commanding officer of a vessel is the master on the board, 'after God'; thus "his possible influence must be feared just as that of physicians and priests." PLANIOL, *supra* note 136, No. 2968, at 453.

168. MALAURIE, *supra* note 134, at 167.

169. Cass. 1e civ., July 1, 2003, D. 2003, 2404.

170. PLANIOL, *supra* note 136, No. 2964, at 451 n.118.

171. Armin Hadjjani, *Duress and Undue Influence in English and German Contract Law: A Comparative Study on Vitiating Factors in Common and Civil Law*, 2002 OXFORD UNIV. COMP. L. FORUM 1, 27 (2002), available at ouclf.iuscomp.org/articles/hadjjani.shtml.

sense of decency of every person who possesses understanding for what is just and equitable"¹⁷² Specifically, Section 138(1) of the BGB provides that a "legal transaction which is against public policy is void."¹⁷³ This kind of prohibition is sometimes referred to as one that inquires into the "objective content" of the transaction.¹⁷⁴ For example, when a testator attempts to impermissibly control the behavior of beneficiaries by providing that a legatee will receive an inheritance only if she "gets divorced" or "adopts a different faith," the content of the will runs afoul of Section 138(1) and risks at least partial invalidity.¹⁷⁵ Thus, the German courts use Section 138 (1) "for establishing some measure of moral control over unscrupulous testators wishing to abuse the freedom of testation for purposes of which the law must disapprove."¹⁷⁶

Although Section 138(1) cannot be used to challenge any will that deviates from the intestate order of succession, it has been used to invalidate testamentary dispositions designed to exclude those entitled to a compulsory share or to recompense for an adulterous relationship.¹⁷⁷ Historically, courts invalidated so-called paramour wills, whereby a spouse was excluded from a will in favor of a paramour, under this provision of German law. Modern law considers the motive of the testator and invalidates the dispositions only if the purpose is a meretricious one, rather than one for payment of household services.¹⁷⁸ Some scholars have described the modern German approach under Section 138 as analogous to the French idea of "immoral cause."¹⁷⁹

172. 1 E. J. COHN, MANUAL OF GERMAN LAW 277 (1968).

173. BÜRGERLICHES GESETZBUCH [BGB] § 138(1).

174. See RAINER FRANK, ERBRECHT 92-104 (C.H. Beck 2005).

175. *Id.* But see BVerG FamRZ 2000, 945.

176. 1 COHN, *supra* note 172, at 277. The immorality of the will is generally determined at the time of the making of the will, rather than the time of inheritance. See PETER GOTTWALD, DIETER SCHWAB & EVA BÜTTNER, FAMILY & SUCCESSION LAW IN GERMANY 125 (2001) (citing BayObLG FamRZ 1997, 656, 661). But see FRANK, *supra* note 174, at 52 (citing doctrinal sources arguing that the time of devolution is the appropriate time for assessing immorality).

177. Bundesgerichtshof [BGH], Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 53, 369 (1970).

178. See FRANK, *supra* note 174, at 49. See also GOTTWALD ET AL., *supra* note 176, at 125.

179. 3 MICHEL FROMONT & ALFRED RIEG, INTRODUCTION AU DROIT ALLEMAND (REPUBLIQUE FÉDÉRALE) 297 (1991) ("*Aujourd'hui, la jurisprudence est plus nuancée et peut être comparée avec les décisions françaises relatives à la 'cause immorale'. Elle tient compte essentiellement de deux facteurs: la motivation du testateur, d'une part, les effets concrets de la disposition à cause de mort, d'autre part.*"). For a general explanation of the French concept of "illicit" or "immoral" cause, see generally PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE

In German law, however, legal acts that are "contra bonos mores" extend further. Section 138(2) of the BGB provides that a "legal transaction is void in which someone by exploiting the plight, inexperience, lack of discernment or significant weakness of will of another, causes to be promised or granted disproportionate pecuniary advantages to himself or to a third party in exchange for a performance."¹⁸⁰ When a person "exploits his professional position of trust," he violates this kind of prohibition.¹⁸¹ Thus, when a doctor abuses his professional position to convince an elderly patient to leave him something in his will, a violation of Section 138 exists and the testamentary disposition is without effect.¹⁸² A legacy, however, that results from mere incessant importuning requests, without the testator being in a position of necessity or having a weakened will, does not violate Section 138(2).¹⁸³

Similarly, Section 134 of the BGB nullifies wills that violate statutory prohibitions.¹⁸⁴ Most notably in this context, German law contains an explicit prohibition on the receipt of testamentary gifts by the managers or employers of nursing homes from their residents.¹⁸⁵

STOFFEL-MUNCK, DROIT CIVIL: LES OBLIGATIONS 293 (2004) (stating that "an obligation in which the cause is illicit is only null if the motives of the debtor are illicit").

180. Bürgerliches Gesetzbuch [BGB] [civil code] § 138(2) (author's translation).

181. FRANK, *supra* note 174, at 49. *See also* Jacques du Plessis, *Threats and Excessive Benefits or Unfair Advantage*, in EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES 151, 161 (Hector MacQueen & Reinhard Zimmermann eds., Edinburgh Studies in Law 2006) ("The courts therefore expanded the illegality requirement of § 138(1) BGB to cover these cases that were analogous to those falling under § 138(2) BGB. In addition § 138(1) BGB could be made to cover situations where disadvantageous contracts were concluded by economic inferior or pressurized parties, or by parties who had been subjected to undue solicitations. In this way, German law could now also provide relief in situations comparable to those covered by the Common Law of undue influence.").

182. FRANK, *supra* note 174, at 49.

183. BGH, BWNotZ 1965, 348.

184. BGB § 134. German law provides that a "legal transaction which violates a statutory prohibition is void, unless the law provides otherwise." *Id.* This provision is equally applicable to wills, as it is to contracts and other legal transactions. *See id.* The BGB, unlike the French Civil Code, is divided into five books, with "Successions" being the last. Even though Book V includes only sections 1922 to 2385, provisions contained in the General Part (Book I), including section 138, are applicable nonetheless. More specifically stated, "The rules on nullity of legal transactions as laid down in the first book of the Civil Code are in general applicable to wills." 1 COHN, *supra* note 172, at 277.

185. Heimgesetz [HeimG] 1974 Bundesgesetzblatt, Teil I [BGB1. I] art. 14 § 5 (F.R.G.). The *Heimgesetz*, however, applies only to nursing homes and not to doctors in general. HeimG § 1 (6) (exempting hospitals from the scope of the law). Doctors, however, are subject to the provisions of the Model Rules of Professional Conduct, which proscribe acceptance of gifts from patients if such gifts would interfere with independent (or create the impression of such interference) of their medical assessment. *See* Muster-Berufsordnung Ärzte (MBO) § 32.

This prohibition, which is part of the *Heimgesetz*, was recently challenged as a violation of testamentary freedom under German law,¹⁸⁶ as the German Basic Law (the *Grundgesetz*) guarantees not only the right of testamentary freedom through the basic freedom of "development of personality"¹⁸⁷ but also through the right of inheritance.¹⁸⁸ Section 2302 of the BGB further emphasizes the importance of testamentary freedom by providing that "a contract whereby a person binds himself to make or not to make, to revoke or not to revoke, a disposition in the event of death, is void."¹⁸⁹ In evaluating this challenge, the German Federal Constitutional Court, the *Bundesverfassungsgericht*, sustained the constitutionality of the prohibition only after carefully weighing the public benefits achieved by the prohibition. The court noted that the prohibition achieves three main goals: (1) protecting financial exploitation of old and vulnerable people; (2) protecting the nursing homes from the risk of disparate treatment of residents due to financial influences; and (3) protecting the testamentary freedom of residents.¹⁹⁰ The court noted that the protection granted to vulnerable home residents under Section 14 of the *Heimgesetz* has an even broader ambit than the general prohibition in Section 138 of the BGB, which exists only when there is coercive activity.¹⁹¹ In this context, the prohibition of testamentary gifts is an absolute and outright one.

In short, although both German law and French law fail to provide explicit equivalents of undue influence in American law, both do maintain restrictions associated with certain types of incapacities or prohibitions that prevent many of the same instances of undue influence. Without more, the ambit of the civilian prohibition, which so far has been shown only to apply in certain confidential, fiduciary, or coercive situations, would be of much less scope—although greater strength—than the American concept of undue influence. Although no American jurisdiction establishes the type of outright prohibition on gifts to those in certain fiduciary arrangements that the civil law

186. 1 BvR, July 3, 1998, Entscheidungen des Bundesverfassungsgerichts [BVerfG] [German Federal Constitutional Court] 1998, 2964.

187. Grundgesetz für die Bundesrepublik Deutschland (Basic Law) (GG) BGB1.I, art. 2, I. The constitutionally guaranteed right of an individual to pass property to his successors has been judicially recognized as well. See, e.g., 1 BvR, Apr. 19, 2005, BVerfG, Neue Juristische Wochenschrift [NJW] 2005, 1561.

188. GG art. 14. I.

189. BGB § 2302 (author's translation).

190. 1BvR, BVerfG, NJW 1998, 2964.

191. *Id.*

systems do, American undue influence covers some of the most common arrangements in which family members and strangers seek benefits under a will. To fully determine whether both traditions possess functionally equivalent restrictions, other potential prohibitions must be examined.

B. *Violence and Drohung*

Alongside the issue of undue influence, the concept of duress must be discussed. In fact, in the American law of wills, the concepts of duress and undue influence are so intertwined that several major Trusts and Estates textbooks omit discussion of duress altogether¹⁹² or explain the idea only in connection with undue influence.¹⁹³ Leading treatises explain that "duress is often classed under undue influence."¹⁹⁴ And, in the context of wills, it "may be defined as the use of coercion or force to such a degree that it destroys the free agency and willpower of the testator."¹⁹⁵ The Restatement is perhaps most helpful in distinguishing between duress and undue influence.¹⁹⁶ For an act to constitute duress under American law, it is clear that it must be a wrongful act that coerces the testator to make a disposition that he would not have otherwise made.¹⁹⁷ In defining the types of acts that are "wrongful," the Restatement provides that the act must be either "criminal or one that the wrongdoer had no right to do."¹⁹⁸ Undue influence, on the other hand, may exist even in face of a threat to do a perfectly valid legal act. Thus, "a threat to abandon an ill testator" would not constitute duress, but it certainly may constitute undue influence.¹⁹⁹

Although French law and German law both contain concepts similar to duress, neither system maintains an exact analogue. French

192. See generally DUKEMINIER ET AL., *supra* note 4; see also DOBRIS ET AL., *supra* note 111; EUGENE F. SCOLES, EDWARD C. HALBACH, JR., RONALD C. LINK & PATRICIA GILCHRIST ROBERTS, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS (6th ed. 2000).

193. LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS § 4-59 (4th ed. 2006) (discussing duress under a section entitled "Undue Influence/Duress").

194. PAGE, *supra* note 96, at 865.

195. *Id.* at 864.

196. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(b)-(c) (2003).

197. *Id.* § 8.3(c).

198. *Id.* § 8.3 cmt. (c)(i).

199. *Id.*

law maintains the idea that a will can be annulled for *violence*, but *violence* is broader than American duress.²⁰⁰ Some suggest that *violence* "should be thought of as 'undue pressure' rather than 'duress' given the very wide range of situations which it includes."²⁰¹ The French Civil Code defines violence as that which inspires in the reasonable person fear of considerable and present injury to his person or fortune.²⁰² The concept of violence includes, of course, physical violence against the testator and also threats against him, his property, or certain third parties (*violence morale*). Although physical violence directed toward a testator is rare for testaments by public act, the existence of moral violence may exist even in the presence of a notary and witnesses.²⁰³ "[C]ourts have taken a 'subjective view' to the question whether the fear which a threat causes is sufficient to satisfy violence, looking to see whether the particular person's consent was sufficiently affected by the legitimate threat, taking into account his or her 'force of character,' social position, age or sex."²⁰⁴

For a threatened act to constitute violence, the threat must itself be illegitimate, such as a threat to do a criminal act.²⁰⁵ Threats to take acts one is legally allowed to pursue do not constitute violence and thus do not serve as grounds for annulling a will or a contract.²⁰⁶ For example, a threat to seek recourse to justice unless another repairs the damage caused does not constitute violence.²⁰⁷ But the jurisprudence walks a fine line in this area because a threat to seek justice against a thief, unless he gives twice the value of the object, may be grounds for invalidating an agreement.²⁰⁸ Strictly speaking,

200. JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 320 (1998); see also Alain Levassuer, *Les Maux des Mots en Droit Compare: L'Avant-Projet de Réforme du Droit des Obligations en Anglais* at 31-33 (on file with author).

201. BELL ET AL., *supra* note 200, at 320.

202. C. CIV. art. 1112. Age, sex, and the condition of the person are considered in evaluating the reasonableness of the fear. See *id.*

203. Première chambre civil [Cass. 1e civ.] Apr. 13, 1956, Bull. Civ. I No. 153.

204. BELL ET AL., *supra* note 200, at 321 (emphasis omitted) (citing A. BÉNABENT, *OBLIGATIONS* 56 (4th ed., Paris, 1994); J. FLOUR AND J.-L. AUBERT, *ACTE JURIDIQUE* 157-58 (6th ed., Paris, 1994); F. TERRÉ ET AL., *DROIT CIVIL: LES OBLIGATIONS* 191 (5th ed., Paris, 1993)). See also C. CIV. art. 1112, ¶2.

205. ALAIN BÉNABENT, *DROIT CIVIL – LES OBLIGATIONS* 71 (10th ed. 2005).

206. PHILIPPE MALAURIE, LAURENT AYNÈS, & PHILIPPE STOFFEL-MUNCK, *DROIT CIVIL : LES OBLIGATIONS* 243 (2003).

207. *Id.*

208. *Id.* at 243 n.78. See also BELL ET AL., *supra* note 200, at 321 ("Here French law again relies on the idea of the 'abuse of rights,' so while in principle a threat to exercise a legal right is not violence, exceptions are made where either the means or the purpose of its exercise are

though, this kind of threat does not constitute violence, but rather abuse of right.²⁰⁹ In the words of the Cour de Cassation:

The threat of the use of a legal remedy does not constitute violence in the sense of Articles 1111 et seq. of the Civil Code unless there is abuse of this remedy, be it by diverting its purpose, or by using it to get a promise or advantage without a connection or out of proportion with the original.²¹⁰

In any case, nullification results if the disposition is inspired either by violence or abuse of right. These two ideas are so closely connected that the scope of their combined ambit precludes much of the unseemly conduct that the American concept of undue influence invalidates.

Although the French law of violence sees its greatest application in the contractual realm, the doctrine applies equally to wills because "a testament calls for the identical quality of consent as a contract."²¹¹ In fact, with regard to gratuitous dispositions such as inter vivos donations or wills, French law is more liberal in annulling dispositions from violence than in the context of onerous contracts, such as sales.²¹² Sometimes, "a simple threat to abandon" a weak testator may very well constitute violence under French law.²¹³ In the area of wills, the Cour de Cassation has decided that a will can be annulled when an old, weak, paralyzed testator is threatened that his care would not be continued unless a legacy is made to his caretaker.²¹⁴ Similarly, sustained pressure from a nurse on an aged and gravely ill testator, who lived in fear of abandonment, can constitute grounds for annulling a will.²¹⁵ Although reverential fear of a father, mother, or other ascendant, without more, is not enough to annul a testament,²¹⁶ "[i]f, however, reverential fear were joined with an intimidation resulting from threats, the contract would be susceptible of

improper, for example, where a person threatens to bring a vexatious law suit or where he uses his right to obtain more than his due.") (footnote omitted) (emphasis omitted).

209. VALÉRIE TOULET, *DROIT CIVIL – LES OBLIGATIONS* 49 (2007).

210. Troisième chambre civil [Cass. 3e civ.] Jan. 17, 1984, Bull. civ. III, No. 13.

211. CHRISTIAN JUBAULT, *DROIT CIVIL, LES SUCCESSIONS, LES LIBÉRALITÉS* 429 (2005).

212. MAULAURIE, *supra* note 134, at 148; GABRIEL MARTY & PIERRE RAYNAUD, *DROIT CIVIL: LES SUCCESSION ET LES LIBÉRALITÉS* no. 374, at 288 (1983); MAZEAUD ET AL., *supra* note 135, at 554.

213. MARTY & RAYNAUD, *supra* note 212, no. 374, at 288.

214. Cass. civ., Jan. 27, 1919, JP 1920, 198 (Fr.).

215. Cass. 1e civ., July 7, 1965, Bull. Civ. I No. 463 (Fr.).

216. C. CIV. art. 1114.

annulment even if the threats were not by themselves of a gravity sufficient to invalidate the consent. This would happen, for example, if a father, in order to compel the son to consent to a contract, threatened to dispose of all his property."²¹⁷ Just as the concepts of duress and undue influence often blend together in American law, so too the ideas of violence and captation are linked.²¹⁸

The above prohibitions are not the only devices in French law that prevent undue influence in testaments. French criminal law also has a role to play. In 2001, the French government enacted the crime of fraudulent abuse of weakness that protects the vulnerable from the psychological manipulation of others. Specifically, article 223-15-2 of the French Penal Code provides:

the fraudulent abuse of a state of ignorance or a situation of weakness of a minor, or of a person whose particular vulnerability, due to his age, sickness, infirmity, a physical or mental condition or to a pregnancy, which is apparent or known to the offender, or abuse of a person in a state of physical or psychological dependency resulting from the exercise of serious or repeated pressure or from techniques used to affect his judgment, in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him, is punished by three years' imprisonment and a fine of € 375, 000.²¹⁹

This law, commonly called the About-Picard law after the legislators who drafted it,²²⁰ was passed originally to apply to cults and to prevent brainwashing.²²¹ A recent decision of the Cour de Cassation, however, has expanded its scope. In 2005, the criminal chamber of the Cour de Cassation found that a wife who obtained a testamentary bequest, power of attorney, and other assets from her old and weak husband who suffered from mental trouble had violated article 223-15-2 of the Penal Code.²²² The court sentenced the wife to 12 months suspended imprisonment and a fine of € 3000.²²³ Given the

217. AUBRY & RAU, *supra* note 165, at 316.

218. MARTY & RAYNAUD, *supra* note 212, at 288; MAZEAUD ET AL., *supra* note 135, at 554.

219. Code Pénal [C. Pén.] art. 223-15-2 (author's translation).

220. Law No. 2002-504 of June 12, 2002, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2002, p. 9337.

221. *Id.* The title of the law indicates its purpose is to "reinforce the prevention and repression of sectarian movements that infringe on human rights and fundamental liberties." *Id.*

222. Chambre Criminelle [Cass. Crim.], Nov. 15, 2005, JCP 2006, II, No. 15, p. 10057; *See also* MALAURIE, *supra* note 134, at 155.

223. Cass. Crim., Nov. 15, 2005, JCP 2006, II, No. 15, p. 10057.

newness of this criminal prohibition, it is uncertain how broadly the courts will interpret it in the future. Recent jurisprudential decisions, however, suggest its scope extends outside its original purpose.

Similarly the German concept of *Drohung* "throws the net more widely" than the American concept of duress.²²⁴ The BGB provides that a testamentary disposition can be challenged if a testator makes a disposition because of threats (*Drohung*).²²⁵ As with *violence* in French law, most cases of *Drohung* occur in the contractual context, but the testamentary prohibition in 2078 of the BGB is the same as the general prohibition of *Drohung* in the contractual realm.²²⁶

Drohung under German law can exist in three different contexts. "A threat is unlawful if first, the means of threatening is illegitimate, or secondly the end (the desired result) is objectionable, or thirdly, the particular connection between means and end makes the threat appear unlawful."²²⁷ An example of an unlawful means (*Mittel*) is the classic case of a threat to do something prohibited by the criminal law, such as physical violence.²²⁸ Even the threat to breach a contract can be unlawful.²²⁹ An illegitimate end (*Zweck*) exists when the intended result of the threat is illegal.²³⁰ Thus, when a threat violates a statutory provision—in contravention of BGB § 134—or concerns an act contrary to good morals—in violation of BGB § 138, an illegal *Drohung* exists because its end is illegal.²³¹ Finally, an unlawful means-end relation (the *Mittel-Zweck Relation*), which has the most significance in succession law,²³² can occur when, for example, a housekeeper threatens to quit in order to provoke a testamentary disposition in her favor.²³³ In such a case, the relationship between the

224. See F. H. LAWSON, *THE RATIONAL STRENGTH OF ENGLISH LAW* 58 (1951) (comparing German and English law). See also Hadjiani, *supra* note 171, at 17 (also comparing German and English law).

225. BGB § 2078(2).

226. KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 1, 1544 (C.H. Beck 2003); MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 6, 1544 (C.H. Beck 1989); 3 FROMONT & RIEG, *supra* note 179, at 307.

227. SIR BASIL MARKESINIS, HANNES UNBERATH, & ANGUS JOHNSTON, *THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE* 317 (2d ed. 2006).

228. See *id.*

229. Hadjiani, *supra* note 171, at 11.

230. *Id.*

231. *Id.* The usefulness of this version of *Drohung* is unclear, as sections 134 and 138 already invalidate such a contract. See *id.*

232. MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 6, 1544 (C.H. Beck 1989).

233. FRANK, *supra* note 174, at 98.

means employed (i.e., the threat) and the end sought (i.e., the legacy), is illegitimate.²³⁴ "The general rule is that where the means of the threat and the end are intimately connected, the pressure is lawful; and where they are not related to each other, the pressure may be unlawful."²³⁵ While simple intrusive requests for a legacy are themselves not illegal,²³⁶ the exploitation of a testator's weakened will, such as a threat by a caregiver to abandon a needy testator, may violate the prohibition on *Drohung*.²³⁷

The reasons for the different scopes of the concepts of duress, *violenze*, and *Drohung* seem to be historical. Historically, "Common Law, in the narrower sense, treated as 'duress' only those cases in which a person made a promise under threats of physical violence or imprisonment. The concept of 'undue influence,' gradually developed by the Courts of Equity, is used for the cases which are dealt with under the concept of duress in the Continental civil codes."²³⁸ Although this has changed somewhat today, the purview of American undue influence still occupies much the same realm of the French concept of *violenze* and the German idea of *Drohung*.

C. Capacity

As previously discussed, the issues of undue influence and testamentary capacity are "inextricably linked."²³⁹ Medically speaking, "[t]he lower the capacity or cognitive status of an individual, the less influence would be required to determine that the individual was incapable or unduly influenced. Conversely, an individual with only mild impairment of cognitive function would have to be subjected to a severe level of influence to the point of coercion or containment before that influence would be considered undue."²⁴⁰ Courts take cognizance of this medical reality, and thus the nullifying ambit of undue influence is inversely related to the quality of testator's capacity. In fact, as argued above, given the minimal standards of

234. *Id.*

235. MARKESINIS ET AL., *supra* note 227, at 317.

236. BGH, RG Recht 1910, 1395; BGH, BWNotZ 1965, 348.

237. See THEODOR KIPP, ERBRECHT, 167-68 (1990) (citing a decision from the RG 27.10.1902). KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 1, 1544 (C.H. Beck 2003); MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 6, 1544 (C.H. Beck 1989); 3 FROMONT & RIEG, *supra* note 179, at 307.

238. ZWEIGERT & KÖTZ, *supra* note 131, at 428.

239. Shulman et al., *supra* note 2, at 722.

240. *Id.* at 723-24.

capacity to make a will, undue influence is often used to invalidate a will made by one who meets the low threshold of capacity but obviously is not sufficiently voluntarily disposing of his assets. Higher standards of testamentary capacity, as often exist in foreign systems, make the protective function of undue influence less necessary.

"In the [American] law of wills, the requirements for mental capacity are minimal,"²⁴¹ but capacity has both quantitative and qualitative elements. In quantitative terms, one must possess a certain quantity of years or reach a certain age before one is able to make a will. In almost all states the age necessary to make a will is 18.²⁴² Below that age, one is considered to be a minor and thus suffers from an incapacity due to minority.²⁴³ Irrespective of the quality of a minor's capacity, the quantitative lack of sufficient age makes one incapable of making a will.

Although the above quantitative requirement is a necessary element of capacity to make a will, it is not a sufficient one. In addition to the quantitative element, a qualitative requirement also exists. Sometimes the qualitative component of capacity to make a will is described as being of "sound mind."²⁴⁴ To be "of sound mind," a testator "must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these

241. *DUKEMINIER ET AL.*, *supra* note 4, at 141. In fact, some have characterized the allocation of the burden of proof on the issue of testamentary capacity as "a crazy quilt of apparently conflicting and confusing maxims and principles which vary from state to state in an astounding variety of verbal formulae." *ROSS & REED*, *supra* note 3, § 6:14 at 6-67.

242. *RESTATEMENT (THIRD) OF PROPERTY*, *supra* note 196, § 8.2(c) (2003) ("The age of majority is 18, unless an applicable statute provides otherwise."). *Id.* § 8.2 cmt. (b) (stating that "at common law the age of majority was 21," but most states have lowered the age to 18 by statute); *see also* *UNIF. PROBATE CODE* § 2-501 ("An individual 18 or more years of age who is of sound mind may make a will."); *DUKEMINIER ET AL.*, *supra* note 4, at 141 n.1 ("In almost all states the age of majority is 18."). Historically a male of 14 years of age or a female of 12 could make a will concerning personalty. *DECEDENTS' ESTATES*, *supra* note 76, at 11. "This limitation seems to have been derived from the canon law, which was natural, since ecclesiastical courts had jurisdiction in probate matters. . . ." *Id.* This rule was done away with in England in 1838 and an age limitation of 21 was imposed on all for the making of a will concerning either realty or personalty. *Id.*

243. *RESTATEMENT (THIRD) OF PROPERTY*, *supra* note 196, § 8.2 (c) ("A minor does not have capacity to make a will. A purported will made by a minor is void."). Although an emancipated minor may be able to make a will under the law of a particular state, the "law regarding emancipation is not uniform throughout the United States nor well-developed" and thus will not be discussed here as a general exception to the quantitative capacity requirement to make a will. *See id.* § 8.2 cmt. (i).

244. *UNIF. PROBATE CODE* § 2-501.

elements to one another and forming an orderly desire regarding the disposition of the property."²⁴⁵

"The statement is sometimes made that it takes less mental capacity to make a will than to enter into a contract. There is a semblance of truth in this declaration."²⁴⁶ Some suggest the reason for this differential is that it takes less mental fortitude to make a unilateral donative act than to engage in a bilateral one that requires bargaining and opposing points of view.²⁴⁷ Thus, in American law, "[a]n incapacity to contract may coexist with the capacity to make a will."²⁴⁸ Scholars have noted that testamentary capacity is "universally regarded in Anglo-American authorities as the lowest."²⁴⁹ In fact, one court has even noted that "[a] lunatic may draw a valid will."²⁵⁰

The above fact is somewhat surprising because the standard for contractual capacity is not a high one. In fact, capacity to contract is presumed, unless the party falls within the limited class of those designated as not having capacity.²⁵¹ The Restatement of Contracts makes the minimal standard quite clear: "A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated."²⁵²

Some commentators have criticized the comparison of contractual capacity with that of testamentary capacity because the two are "so different in their nature that it is impossible to use one as

245. RESTATEMENT (THIRD) OF PROPERTY, *supra* note 196, § 8.1(b).

246. ATKINSON, *supra* note 86, at 240 (citation omitted).

247. *See, e.g., id.*

248. GA. CODE ANN. § 53-4-11(b) (2008). *See also* 10 GA. JUR. DECEDENTS' ESTATES AND TRUSTS § 1:29 (1999) ("However, since the degree of mentality necessary to make a contract is higher than that necessary to make a will, a person with a mental capacity less than that required to make a contract may have the requisite degree of mental capacity to make a valid will."). Incapacity to contract requires that "there must be an entire loss of understanding. . . . For one who has not strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with an entire loss of understanding." *Higgins v. Trentham*, 197 S.E. 862, 865 (Ga. 1938). *See also* Lewis H. Parham, Jr. *Wills and Contracts—Degree of Mental Capacity Required for Each*, 34 N.C. L. REV. 155, 156 (1955) (stating that "[a] number of other courts have held that less mental faculty is required for making a will than for executing any other instrument").

249. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 82 (1978).

250. *Skelton v. Davis*, 133 So. 2d 432, 436 (Fla. Dist. Ct. App. 1961); *see also* Langbein, *supra* note 249, at 82-83.

251. 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:1 (4th ed. 2004).

252. RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981).

a test for measuring the other."²⁵³ Be that as it may, numerous court decisions in multiple jurisdictions state "that testamentary capacity requires a lower degree of mental capacity than contractual or business capacity."²⁵⁴ As difficult as it may be to compare the capacity standards for wills and contracts, the test for capacity in the making of wills is an issue to be decided by a jury. Despite the amorphous definition of testamentary capacity, it has been held that no error exists when the jury is told that a lower degree of mental capacity is necessary to make a will than to make a contract.²⁵⁵

Like the law of the United States, French law maintains both requirements of age and mental quality before one can execute a will. French law requires that one be of sound mind (*sain d'esprit*) before one can execute a testament²⁵⁶ but begins with a presumption that all persons, except those considered incapable, can dispose of property by testament.²⁵⁷ Unlike American law, which generally requires one to be 18 before being able to make a will, French law recognizes a limited capacity for unemancipated minors 16 years old to make wills that dispose of half the amount of their property that they could dispose as if they were of majority.²⁵⁸

In France, the qualitative aspect of capacity has historically been a complex one. Prior to the enactment of the French Civil Code, the *Coutume de Beauvaisis* in Northern France provided that "[n]o legacy is valid unless it is made by a person of sound mind and memory, and unless he says it aloud."²⁵⁹ Even in the eighteenth century it was clear that the capacity standard for making a will was greater than that

253. PAGE, *supra* note 96, § 12.20 at 674.

254. *Id.* at 672-73 (citing cases from Alabama, Georgia, Illinois, Iowa, Kentucky, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Virginia). In fact, some commentators have noted that jurisdictions, such as Connecticut, which require the same capacity to make a will as to make a contract, "demand much more from a testator than the majority of American jurisdictions." ROSS & REED, *supra* note 3, § 6.2, at 6-16 n.8.

255. *Gable v. Rauch*, 27 S.E. 555, 558-59 (S.C. 1897).

256. C. CIV. art. 901. In addition, in 2006, the French amended the law of successions to make clear now that a donation or testament is also null when consent is vitiated by error, fraud, or violence. C. CIV. art. 901, *amended* by Law No. 2006-728 of June 23, 2006, J.O., June 24, 2006, art. 10 ("*Pour faire une libéralité, il faut être sain d'esprit. La libéralité est nulle lorsque le consentement a été vicié par l'erreur, le dol ou la violence.*").

257. C. CIV. art. 902.

258. *Id.* art. 904. Minors below the age of 16 can dispose of property only in favor of spouses and children. *See id.* arts. 903, 1095.

259. THE *COUTUMES DE BEAUVAISIS* OF PHILIPPE DE BEAUMANOIR No. 370 135 (F.R.P. Akehurst, trans., 1992). Although it is unclear whether the will or a mere statement of capacity had to be "sa[*id*] . . . aloud." *See id.* at 153 n.4.

necessary to enter an ordinary contract.²⁶⁰ D'Aguesseau's Ordinance on Wills provided that to make a will required "a wisdom less equivocal, a reason more clear, and will more firm that that necessary for a contract."²⁶¹

At the time of codification, it was somewhat surprising that a specific code article in the Title on Liberalities provided that to have capacity to make a gift or testament one had to be of sound mind.²⁶² Although the content of the rule was not surprising, the existence of the article was. After all, "Wasn't sound mind necessary for all acts?"²⁶³ Nonetheless, the article was approved because it is "especially for gratuitous dispositions that a freedom of mind and a plentitude of judgment are necessary."²⁶⁴ Moreover, during the last moments of life, when one often makes a testament, there is increased risk of sickness and greater danger of "traps on the part of those who surround" a testator.²⁶⁵

Even after codification, the testamentary capacity standard was not clear. The French scholar, Toullier, in his early work on the Civil Code, writes that sanity is always presumed and insanity is never presumed.²⁶⁶ Although the Code originally provided only that an individual must be "of sound mind" to execute a donation or will, some argued that the standard of capacity for donations was higher than the standard for onerous contracts.²⁶⁷ When the Cour de Cassation rejected this argument, it became clear that the mental

260. MALAURIE, *supra* note 134, at 146.

261. *Id.* at 146 n.1 (quoting d'Aguesseau).

262. 12 FENET, *supra* note 147, at 579-80.

263. *Id.* (author's translation) (stating "[c]et article a d'abord causé quelque surprise. Ne faut-il pas être sain d'esprit pour tous les actes?").

264. *Id.* (author's translation).

265. *Id.* (author's translation). In fact, historical evidence reveals that in the discussions of the Council of State on this general capacity article, there was concern about a proposed second part of this article 504, which provided that just as for contracts, attacks on a disposition after death could be made only in limited cases, namely, when the instrument evidence a mental problem or when an action was instituted during the life of the disposer or at least proceedings for guardianship were so initiated. *Id.* at 296-97. Although the ability to challenge wills after death was not clear even after codification, the Court of Cassation in 1810 eliminated all doubt that article 504 did not apply to testaments and thus they could be challenged without restriction after the death of the testator. *Id.* at 296-97. See also 3 C.-B.-M. TOULLIER, LE DROIT CIVIL FRANÇAIS § 56, 43-44 (1846).

266. 3 TOULLIER, *supra* note 265, § 56, at 44 (stating that advanced age of the donor, forgetting his family, the importance of the legacy, and the low quality of the legatee are not sufficient for the judge to determine that the testator did not have capacity).

267. Cass. Req. Feb. 12, 1886, 1886, 1, 389.

standard required for both types of acts was the same.²⁶⁸ Still, Planiol, writing in the early twentieth century, stated that although all legal acts require capacity, the standard for donations and wills "is particularly exacting."²⁶⁹ In 1968, however, the legislature ended all debate by enacting Article 489 of the Civil Code, which unequivocally stated that the standard necessary to enter into any legal act is that one be "of sound mind"—the very same standard necessary for the execution of a will.²⁷⁰

In France, proof of incapacity is left to the solemn discretion of the *juge du fond*. The heavy reliance on judges to ascertain capacity has been clear since the time of the enactment of the French Civil Code. In his presentation of the civil code to the legislative assembly, M. Bigot-Préameneu stated that "[i]t is sufficient to state the general principle [that sound mind is required to execute a will] and to leave great liberty to the judges in the application of this principle."²⁷¹

Similarly, the German requirements for testamentary capacity, as in France and unlike the United States, are equal to the standard necessary to contract, at least in terms of mental quality.²⁷² In terms of age, only those older than sixteen can make a will.²⁷³ "Before reaching this age, a minor cannot make a will even with the consent of his legal representative. On the other hand, once he has reached the age of 16, he can make a will without obtaining the consent of his legal representative."²⁷⁴ This relaxed quantitative requirement is limited by the rule that a minor, even one over 16, cannot make an

268. *Id.*

269. PLANIOL, *supra* note 139, No. 2872, at 409.

270. *See* C. CIV. arts. 489, 901. MALAURIE, *supra* note 134, at 146. For a historical overview of the issue of contractual and testamentary capacity in French law, see Odile Simon, *La Nullité des Actes Juridiques Pour Trouble Mental*, 73 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 707 (1974). Now the only distinction in terms of capacity is the ease in which donative transactions can be challenged after the death of the testator. *See* C. CIV. art. 489.

271. 12 FENET, *supra* note 147, at 518. *See also id.* at 580-81 (M. Jaubert, Communication Officielle au Tribunat) (stating that because it is impossible for the law to establish fixed and positive rules for all circumstances, the matter should be left to the discretion of the court).

272. GOTTWALD ET AL., *supra* note 176, at 126 (stating that the provision for testamentary capacity in § 2229(4) "corresponds to § 104 No. 2").

273. BGB § 2229. German wills are generally of two types: (1) self-made or (2) public wills. *See* BGB § 2231. Other exceptional types of emergency wills are allowable under German law. *See, e.g.*, BGB §§ 2249-2251. Self-made wills are those written, signed, and dated by the testator himself. *See* BGB § 2247. Minors may not make self-made wills. BGB § 2247(4).

274. Dennis Solomon, *The Law of Succession*, in INTRODUCTION TO GERMAN LAW 271, 280 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005) (citation omitted).

olographic will.²⁷⁵ Such a prohibition exists to eliminate the possibility of undue influence.²⁷⁶

Although a presumption of testamentary capacity exists in German law, the qualitative standard requires more than merely knowing of the existence of the will and its contents.²⁷⁷ The BGB, however, does not provide an affirmative definition of qualitative capacity. Instead, it must be inferred from the articles that provide for the absence of capacity.²⁷⁸ A person cannot make a will if "because of diseased defect of mental capacity, due to imbecility or impaired consciousness[, he] is incapable of realizing the significance of a declaration of intention made by him and of acting with this understanding"²⁷⁹ A testator must understand the scope and effect of the testament on the economic and personal circumstances of those receiving under it.²⁸⁰ Similarly, the standard for contractual capacity in Book I of the BGB is that a person is incompetent to enter into legal transactions who suffers from "a diseased disturbance of mental capacity preventing the free exercise of his will, unless the condition is by its nature a temporary one."²⁸¹ This rule of *Geschäftsfähigkeit* is the standard for both contractual and testamentary capacity. "Those who lack contractual legal capacity are also incapable of making a will."²⁸²

In conclusion, the American capacity standard for making a will is often characterized as lower than that for contracting, but the law in France and Germany requires a mental ability equal to that of contractual capacity to make a will. If the law on the books is to be believed, a number of people without contractual capacity who would be precluded from making wills in France and Germany are able to do so in America, although definitive proof of such a comparative observation is difficult indeed. The American doctrine of undue influence fills the void between contractual capacity and testamentary capacity. In the words of one scholar, "the lower the mental capacity of the testator, the easier it is to convince a jury or court of the

275. BGB § 2247(4).

276. KIPP, *supra* note 237, at 118.

277. Kammergericht [KG] [Provincial Court of Appeal for Berlin] Sept. 7, 1999, *Neue Juristische Wochenschrift* [NJW] 903, 2001 (F.R.G.).

278. NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 376-77 (3d ed. 2002).

279. BGB § 2229(4) (author's translation).

280. *Id.*

281. BGB § 104 (author's translation).

282. GOTTWALD ET AL., *supra* note 176, at 126.

existence of undue influence."²⁸³ Because the standard for testamentary capacity seems higher in France and Germany than it is in America, the need for a broad, flexible doctrine to prevent those of weakened mental constitution from making wills is not as important in those legal systems.

D. Family Protection Devices

"As American inheritance law embarks upon a new millennium, the scope offered for freedom of testation remains as broad as it has ever been, and it is now indeed a scope without parallel elsewhere in the western world. Here, and, here alone, a testator of sound mind can disinherit even minor children at will" ²⁸⁴ In the sense of limiting testamentary freedom, undue influence and family protective devices serve the same basic function. That is, forced heirship and systems of community marital property serve the same function as the undue influence of restricting excessive impecunious gifts outside the family and protecting the natural recipients of the testator's bounty. Some scholars have even noted that by virtue of America's broad concept of undue influence, the concept of testamentary freedom is a "myth[]." ²⁸⁵

For example, if *A* has an estate of \$10,000, and the applicable law mandates 50% of *A*'s estate devolve to his spouse and children, then a will leaving all of *A*'s assets to his mistress and none to his family is subject to challenge for violating the requisite family protective scheme. Family members entitled to a compulsory share are less likely to challenge the will for grounds such as undue influence because other legal devices already guarantee them a certain share of the estate. Without a family protective device and under a system of completely free testation, undue influence becomes one of the few ways in which a disappointed heir can challenge a will. In short, the greater and more significant the family protective scheme is, the less necessary a doctrine like undue influence will be.

283. Frolik, *supra* note 110, at 85.

284. Adam J. Hirsch, *American History of Inheritance Law*, in *ENCYCLOPEDIA OF LEGAL HISTORY* 23 (2008). Despite this ability to "disinherit" children, some studies indicate that a majority of Americans think that parents should not be able to "disinherit their children nor to discriminate among them." MARVIN B. SUSSMAN, JUDITH N. CATES, & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 206 (1970) (based on a survey of 860 adults in Nebraska).

285. *See, e.g.*, Madoff, *supra* note 101, at 629.

1. Forced Heirship

First and perhaps most obviously, civil law systems have forced shares that prevent the total disinheritance of close relatives, such as children. "All modern legal systems in Europe attempt to balance the moral precept of family solidarity with the principle of freedom of testation."²⁸⁶ The protective role served by forced heirship achieves the same result as undue influence by preventing disinheritance of close relatives. In fact, in the 1990s when Louisiana curtailed its conception of forced heirship, the state legislature enacted for the first time the concept of undue influence as "necessary to protect those who had previously enjoyed the protection of forced heirship."²⁸⁷

Although the idea of forced heirship can be traced to Roman law, the law of the XII Tables provided individuals with almost unfettered testamentary freedom.²⁸⁸ While Roman law granted a testator the power to disinherit relatives, he had to disinherit certain relatives expressly, using the correct form.²⁸⁹ Forced heirship seems to have been originally an idea of the praetor who would grant *bonorum possessio* in spite of the provisions of the *ius civile* and in spite of a testator's failure to specifically institute certain relatives as heirs.²⁹⁰ As disinheritance became more popular in the late Republic, the *querela inofficiosi testamenti* developed whereby close relatives who were excluded by the will could challenge the will as undutiful. Thus, the passing over of nearby relatives in favor of farther away ones or mere friends was not looked upon favorably and was subject to challenge by the passed-over heir under the *querela*.²⁹¹ Over time, the *querela* was broadened and could be invoked by disappointed heirs not only for the total exclusion from a will but also for a testator's failure to leave an heir at least "a quarter of the estate under the will," as required by the *Lex Falcidia*.²⁹² Justinian, however, returned the

286. Reinhard Zimmermann, *Compulsory Heirship in Roman Law*, in *EXPLORING THE LAW OF SUCCESSION*, *supra* note 8, at 27.

287. Katherine Shaw Spaht, *The Aftermath of the "Revolution": 1990 Changes to the New Forced Heirship Law*, 51 *LA. L. REV.* 469, 487-88 (1991).

288. See XII Tables, Table V (c. 450 B.C.E.), in 1 *THE CIVIL LAW* 66, 66-67 (S. P. Scott ed. & trans., 1932). See also Zimmermann, *supra* note 286, at 30.

289. See G. INST. 2.123-124, in *THE CIVIL LAW* (S. P. Scott ed. & trans., 1932).

290. See DIG. 38.2.3.10 (Ulpian, Edict 41).

291. ALAN WATSON, *THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC* 62-63 (1971).

292. See DIG. 35.2.1.pr. (Paulus, On the *Lex Falcidia*).

querela to its old foundation and limited its application to only those who suffered total exclusion.²⁹³

The *querela* is sometimes characterized as a challenge for lack of sound mind, insofar as the testator must have been of unsound mind to exclude such relatives.²⁹⁴ In fact, Marcian, quoted in the Digest, states that the *querela inofficiosi testamenti* is brought on grounds that the testator was of "unsound mind," but by that it is not meant that the testator was a lunatic or without capacity but merely that the "will was correctly made but without due regard for natural claims."²⁹⁵ After all, "soundness of mind" was required for the making of a will and thus a will made by a party without capacity would be subject to challenge on that ground.²⁹⁶

In France, the Roman idea of the *pars legitima* or the legitime "was well established in most districts of southern France by the year 1100."²⁹⁷ And by the mid-sixteenth century the leading appellate court in northern France, the Parlement of Paris, "declared that the '*légitime*' had been accepted as a part of local usage and incorporated in the Custom of Paris."²⁹⁸ Although the laws regarding the legitime still varied among regions,²⁹⁹ at the time of codification "this form of limitation was accepted without question as part of the national heritage."³⁰⁰ The Roman approach was modified, however, insofar as

293. See J. INST. 2.18.3.

294. See J. INST. 2.18.pr.

295. DIG. 5.2.2 (Marcian, Institutes 4).

296. See DIG. 28.1.2 (Labeo, Posthumous Works, Epitomized by Javolenus, Book 1) ("In the case of someone who is making a will, at the time when he makes the will, soundness of mind is required, not health of body."); DIG. 5.2.2 (Marcian, Institutes 4). In early Roman law there was no mechanism to protect heirs against an individual making excessive gifts while alive and thus depleting his estate. "It was not until the end of the classical period that, by analogy with the *querela inofficiosi testamenti* . . . , the *querela inofficiosae donationis* . . . was formulated for the purpose of contesting the validity of excessive gifts." O. E. Tellegen-Couperus, *Some Remarks Concerning the Legal Consequences of the Querela Inofficiosae Donationis*, 26 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 399, 399 (1979).

297. JOHN P. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED 41 (1980). See also Joseph Dainow, *Forced Heirship in French Law*, 2 LA. L. REV. 669, 670 (1940) ("[I]n the country of the written law there existed the institution of the *légitime* in practically the same form as it had been known to the Romans.").

298. DAWSON, *supra* note 297, at 41. The *pays de droit coutumier* differed from the *pays de droit écrit* in at least two different ways: (1) the notion of family ownership of property and (2) the concern for "the nature and source of property." See Dainow, *supra* note 297, at 672.

299. 12 FENET, *supra* note 147, at 245 (Présentation au Corps Législatif et Exposé des Motifs, par M. Bigot-Prémeneu) ("*Il faut distinguer en France les pays de droit écrit et ceux de coutume.*").

300. DAWSON, *supra* note 297, at 42.

it provided a reserve of an individual's estate that the testator could not give away rather than a guaranteed share that the heirs must receive.³⁰¹ After much debate and discussion,³⁰² the final articles of the Civil Code provided that if a decedent died with children he could gratuitously dispose of one half of his property if he had only one legitimate child; one third, if two children; and only one-fourth, if three or more.³⁰³ If he died without children, but with ascendants, he could gratuitously dispose of only one-half of his property if he had ascendants in both the maternal and paternal lines, and three-fourths, if he had ascendants in one line only.³⁰⁴ Despite criticism of forced heirship,³⁰⁵ the institution remained virtually unchanged until 2006 when the French Civil Code was amended to eliminate ascendant forced heirship.³⁰⁶ The institution, however, is preserved for descendants.

Similarly, German law contains a system of forced heirship (*Pflichtteil*). Although the principle of freedom of testation is enshrined both in the German Civil Code and the German Constitution, limitations on free testation exist.³⁰⁷ "One of the most important limits to the testator's freedom is presented by the statutory forced share" of certain close relatives, who are entitled to a guaranteed minimum share of the decedent's estate.³⁰⁸ Under German law, a testator's descendants, parents, and spouse are entitled to a "compulsory portion" of the testator's estate, even if they are excluded from the testator's will.³⁰⁹ "Pursuant to §2309 BGB, however, descendants and parents do not receive a forced share if under the rules of intestate succession they would have been excluded

301. *Id.* at 47.

302. See generally 12 FENET, *supra* note 147 (Présentation au Corps Législatif et Exposé des Motifs, par M. Bigot-Préameneu); Dainow, *supra* note 297, at 679-82.

303. C. CIV. art. 913.

304. *Id.* art. 914.

305. 3 AMBROSE COLIN & HENRI CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS no. 930, 759-61 (1945). For a recent comparative assessment of forced heirship in the laws of France and Greece, see IOANNA KONDYLI, LA PROTECTION DE LA FAMILLE PAR LA RESERVE HÉRÉDITAIRE EN DROITS FRANÇAIS ET GREC COMPARÉS (1997).

306. Law No. 2006-728 of June 23, 2006, J.O., June 24, 2006, art. 12. For an overview of the changes in the recent revisions to the succession law of France, see generally *Législation Française: Réforme des Successions et des Libéralités*, 3 REVUE TRIMESTRIELLE DE DROIT CIVIL 612 (2006); ALAIN DELFOSSE & JEAN-FRANÇOIS PENIGUEL, LA RÉFORME DES SUCCESSIONS ET DES LIBÉRALITÉS (2006).

307. See, e.g., BGB § 2302.

308. Solomon, *supra* note 274, at 273.

309. BGB § 2303.

from inheriting because of the presence of closer relatives or relatives of a lower order."³¹⁰ Consequently, parents have no right to a forced share if children exist, and children also exclude claims of more remote descendants to the forced share.³¹¹ The compulsory portion for blood relatives and spouses "is supplemented by § 10 VI LPartG which grants a forced share also to the decedent's life partner."³¹²

A forced heir excluded from a will is not, per se, treated as an "heir," but is instead considered to be a creditor of the estate for the requisite amount of the inheritance pursuant to the law of obligations.³¹³ The amount of the compulsory portion is equal to half the intestate share that a relative would have received.³¹⁴ Thus, if *A* has two children, *B* and *C*, and *A*'s will leaves his \$100,000 estate to his friend, *X*, then *B* and *C* collectively have a claim to their compulsory share of \$50,000, or half their intestate share.³¹⁵ "Where such a person is not entirely disinherited by the testator, but appointed as heir with a testamentary share lower than the forced share, he may claim a 'supplementary' forced share (*Zusatzpflichtteil*) under § 2305 BGB."³¹⁶

The German commitment to a forced share is strong. Not only are preferred heirs guaranteed a share of the decedent's property at death, but if the decedent attempts to frustrate the statutory forced share by transferring assets out of his estate prior to death, the law allows the forced heirs to recapture their value. That is, "§ 2325 BGB grants the right to an augmented forced share (*Pflichtteilsergänzungsanspruch*) where the testator ha[s] made gifts to third persons within the last ten years before his death."³¹⁷ Although German courts have softened the application of the *Pflichtteil* in some cases,³¹⁸ the Constitutional Court has been clear

310. Solomon, *supra* note 274, at 290. See also BGB § 2309 ("*Entferntere Abkömmlinge und die Eltern des Erblassers sind insoweit nicht pflichtteilsberechtigt, als ein Abkömmling, der sie im Falle der gesetzlichen Erbfolge ausschließen würde, den Pflichtteil verlangen kann oder das ihm Hinterlassene annimmt.*").

311. See Solomon, *supra* note 274, at 290.

312. *Id.*

313. *Id.* See also GOTTWALD ET AL., *supra* note 176, at 137.

314. See GOTTWALD ET AL., *supra* note 176, at 138.

315. See BGB § 2303(1).

316. Solomon, *supra* note 274, at 290.

317. *Id.*

318. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 24, 2005, 23 Neue Juristische Wochenschrift [NJW] 1650 (1651), 2005 (F.R.G.) (holding that a son who beat and killed his mother could legally be deprived of his compulsory share, despite being found not guilty by reason of insanity). See also Thomas Rauscher, *Recent Developments in German Succession*

that mere "estrangement" of a child and his parent is not sufficient grounds to deprive him of his compulsory share.³¹⁹

Recently, the German Federal Cabinet proposed revisions to the compulsory share in German law that would strengthen testamentary freedom. For purposes of this article, the main revisions are broadened allowances for disinheritance of forced heirs and a new calculation that reduces the amount of donations made during a decedent's life that are added back.³²⁰ Be that as it may, the German commitment to the forced share still stands, albeit in a more measured form.

2. Community Property

While "[t]he institution of forced heirship provide[s] descendants with some protection against total disinheritance at the whim of the parent, . . . the spouse [i]s offered protection by community property . . ." ³²¹ In fact, some have referred to such spousal rights under matrimonial property law as "*Ersatz*" or "substitute" inheritance laws.³²² Although perhaps an overstatement insofar as community property laws are not mandatory requirements, community property laws do "encourage the performance of a spouse's social duty to protect financially his surviving spouse after he dies by allowing a surviving spouse to claim a fraction of property acquired during the marriage. . . . This encouragement takes the

Law 4-5, report at the 17th Congress of the International Academy of Comparative Law, Utrecht (July 16-22, 2006), <http://www2.law.uu.nl/priv/aide/PDF%20files/IIA1/IIA1%20-%20Germany.pdf>.

319. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 11, 2005, 37 Neue Juristische Wochenschrift [NJW] 2691 (2691), 2005 (F.R.G.). See also Rauscher, *supra* note 318, at 5.

320. Press Release, Bundesministerium der Justiz, *Pflichtteilsrecht soll reformiert werden*, Mar. 16, 2007, available at <http://www.bmj.bund.de/>.

321. Katherine Shaw Spaht, Kathryn Venturatos Lorio, Cythina Picou, Cynthia Samuel, & Frederick W. Swaim, Jr., *The New Forced Heirship Legislation: A Regrettable "Revolution"*, 50 LA. L. REV. 409, 453 (1990).

322. van Erp, *supra* note 8, at 11 (citing Maria Puelinckx-Coene, Possible Follow-Up to the Conference by the Committee of Experts on Family Law, ¶ 5, delivered to the Sixth European Conference on Family Law, Doc. No. CONF/FA (2002) RAP GEN (Oct. 15, 2002), available at http://www.coe.int/t/e/legal_affairs/legal_co%20operation/family_law_and_children%27s_right_s/conferences/2ConfFam6th.asp).

form . . . of decreased transaction costs."³²³ The transaction costs are obvious by virtue of the need to affirmatively opt out of a community regime if one seeks to avoid its rules. "That is, a community property regime, along with its ancillary spousal protection, exists by virtue of marriage, without need for further documentation or legal proceedings. Those electing to avoid their social duties must incur the increased transaction costs involved in varying from the default rule and in choosing a separate property regime."³²⁴

All but nine states in the United States have regimes of separate property that do not afford spouses the protection of community property regimes.³²⁵ In fact, the common law tradition is generally not accustomed to the community property regime.³²⁶ Many of the nine states in the United States that maintain a form of community property trace their origins to the civil law. In the other 41 states, however, marriage, in terms of property ownership, produces much the "the same [effect] as if they were not married at all."³²⁷

The origins of community property systems are obscure. Historically, "[t]he community property system originated in continental Europe in countries where both spouses worked together in tandem—either in warrior tribes, like the Visigoths (in which the husbands conquered enemies and the wives stripped them of the spoils of war) or as farmers and herders (in which both spouses worked to raise crops and animals)."³²⁸ In other words, community property regimes implement a "partnership" theory of marriage and thus provide a way to recognize the contribution of both spouses to the success of the family unit.

323. Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 198-99 (2006).

324. *Id.* at 199.

325. See Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 1 n.3 (2007) ("Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have long been community property states. . . Wisconsin became the last American state to adopt a marital property regime that is considered 'community' with its enactment of the Wisconsin Marital Property Act—heavily based on the Uniform Marital Property Act—in 1986."). This is not to suggest that spouses in the United States receive no protection against disinheritance. For further development of this point, see *infra* note 361.

326. Alain Verbeke et al., *Current Developments: European Marital Property Law Survey 1988-1994*, 3 EUR. REV. OF PRIVATE LAW 445, 447-48 (1995).

327. *Id.*

328. Cynthia A. Samuel & Katherine S. Spaht, *Fixing What's Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant's Spouse*, 35 FAM. L.Q. 425, 428 (2001) (footnote omitted).

In France, a community property regime is standard, although the ability to elect a designated property regime is great.³²⁹ The Civil Code "sets out a number of standard regimes, which may be adopted as drafted or adapted to individual circumstances, including separation of property, deferred community of property, universal community of property and community of after-acquired property."³³⁰ The community regime of after-acquired property is the "legal regime (*régime legal*) and "applies automatically to a marriage unless the spouses opt for different arrangements in a formal marriage contract drawn up and authenticated by a notary (*notaire*)."³³¹ Under this regime, all property acquired during the marriage is owned jointly by both spouses in the marriage, irrespective of in whose name the property is titled.³³² As a consequence of joint ownership during life, at the death of one spouse, the surviving one has an automatic right to one-half of the community property acquired during marriage, with the other half belonging to the decedent and thus passing to his heirs. Some have described the foundation of French community property as one based on "collaboration" and an "association of interests" rooted in the idea of family harmony³³³ and thus not strikingly different from the American [community property] approach . . . "³³⁴ In France, it is estimated that only about 10% of spouses opt out of the standard legal regime of community property by virtue of a pre-nuptial agreement and usually only when "large and important assets are involved."³³⁵

The French regime of separate property is also much like the separate property regime that prevails in most of the United States. Each spouse owns and administers his own property and is

329. For an overview of French marital property law, see A. Colomer, *The Modern French Law*, in *COMPARATIVE LAW OF MATRIMONIAL PROPERTY: A SYMPOSIUM AT THE INTERNATIONAL FACULTY OF COMPARATIVE LAW AT LUXEMBOURG ON THE LAWS OF BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY, AND THE NETHERLANDS* 80 (Albert Kiralfy ed., 1972); ANDRÉ COLOMER, *DROIT CIVIL: RÉGIMES MATRIMONIAUX* (5th ed. 1992); RÉMY CABRILLAC, *DROIT CIVIL: LES RÉGIMES MATRIMONIAUX* (6th ed. 2007).

330. BELL ET AL., *supra* note 200, at 254.

331. *Id.* (internal quotation marks omitted).

332. *Id.* at 255. Gifts and inheritances to one spouse, however, remain separate. *Id.*

333. Michael McAuley, *The Wanting of Community Property*, 20 TUL. EUR. & CIV. L.F. 57, 68 (2005).

334. *Id.* at 69.

335. Veronique Chauveau & Alain Cornec, *France*, in *FAMILY LAW IN EUROPE* 251, 261 (Carolyn Hamilton & Alison Perry eds., 2d ed. 2002). See also CABRILLAC, *supra* note 329, at 113 n.1 (estimating that 83% of couples do not have a marriage contract). See also *id.* at 273 n.5

responsible only to his own creditors, not those of his spouse.³³⁶ At the death of one spouse or upon civil dissolution of the marriage, only property titled in the name of each spouse belongs to him separately and passes to his heirs. Thus, the death of an income-earning spouse under a regime of separate property threatens to leave the surviving spouse in a financially difficult position.

In an attempt to ameliorate the precarious position of the surviving spouse in a separate property regime, French law maintains a number of spousal protection devices. Article 767 of the Code Civil provides that "[t]he succession of the predeceased spouse owes support to the surviving spouse entitled to succeed who is in need."³³⁷ After the death of one spouse, this support is owed by all heirs, and even in some cases by particular legatees.³³⁸ Although Article 767 is new,³³⁹ prior law provided the same rights.³⁴⁰

Unlike in the United States, French courts have historically taken a flexible approach to the kind of compensation owed to a non-income earning spouse married under a regime of separate property. In different contexts, courts have used the concepts of unjust enrichment, formation of a business association, and denial of revocation of a donation as ways to compensate a non-income earning spouse who worked in the home or in the other spouse's business.³⁴¹ Although election of a separate property regime is not common, when spouses enter a prenuptial agreement, they choose a separate property regime over 60 percent of the time.³⁴² The other types of standard and individualized regimes are outside the context of this article and are generally not relevant in the practical application of marital property law.³⁴³ Collectively, they are "little used"; the "deferred community" arrangement, for example, is used only in "3 per cent of marriage contracts."³⁴⁴ In short, the standard legal regime—the one that applies to "all but a few"—is that of a community of after-acquired property.

336. BELL ET AL., *supra* note 200, at 255.

337. C. CIV. art. 767 (author's translation).

338. *Id.*

339. See Law No. 2001-1135 of Dec. 3, 2001, J.O., Dec. 4, 2001, p. 19279.

340. PIERRE MURAT, DROIT DE LA FAMILLE 895 (2008) ("*Cette pension existait déjà auparavant à l'article 207-1 du Code civil.*").

341. BELL ET AL., *supra* note 200, at 255-56.

342. *Id.* at 255.

343. For further detailed discussion of the remaining types of matrimonial property regimes in France, see COLOMER, DROIT CIVIL, *supra* note 329, at 511-607.

344. BELL ET AL., *supra* note 200, at 256.

Similarly, three different marital property regimes are available in Germany. Although spouses are generally free to choose either a separate (*Gütertrennung*) or community (*Gütergemeinschaft*) property regime, the standard de fault regime is one of community of accrued gains (*Zugewinnngemeinschaft*).³⁴⁵ Under the first regime, spouses can decide, via a notarized agreement, to preserve the individual separate status of property owned and acquired during marriage.³⁴⁶ Under this regime, each spouse owns and manages his own property.³⁴⁷ Pensions, however, will still be split, unless it is expressly agreed otherwise.³⁴⁸ Second, spouses can contract for a community regime in which all property owned or acquired during the existence of the marriage is owned jointly by the spouses.³⁴⁹ As a result spouses must generally concur in the management and alienation of community assets.³⁵⁰ Although the regime of community property does not include a spouse's separate property or his nontransferable rights (i.e., *Sondergut* or special property), it does encompass property owned by the spouses at the time the community regime is created.³⁵¹ Finally, "[w]here—as in the majority of cases—no such agreement is made, the statutory regime of community of accrued gains . . . will apply, as well as pension splitting."³⁵² Despite its name, the "community of accrued gains" regime actually preserves the separation of spouses' property during marriage. The importance of this regime, however, is that it limits one spouse's power to dispose of certain assets during the marriage.³⁵³ Moreover, at the dissolution of the marriage either through divorce or death, an equalization of assets must occur.³⁵⁴ The exact amount of the equalization depends upon what other relations of the deceased exist. If children exist, the spouse is entitled to a forced statutory share of one quarter and an additional one-quarter of the estate as equalization of accrued gains.³⁵⁵ On the other hand, if the decedent's parents rather than

345. See GOTTWALD ET AL., *supra* note 176, at 107. For an overview of the marital property system in Germany, see FOSTER & SULE, *supra* note 278, at 467-68.

346. BGB § 1414.

347. See GOTTWALD ET AL., *supra* note 176, at 108.

348. *Id.*

349. BGB § 1416.

350. *Id.* §§ 1423, 1427, 1450, 1455.

351. *Id.* §§ 1416-1418.

352. See GOTTWALD ET AL., *supra* note 176, at 107.

353. BGB §§ 1365-1369.

354. *Id.* §§ 1363, 1371-1372.

355. *Id.* §§ 1371(1), 1931(1).

children survive, the surviving spouse is entitled to three-fourths of the estate.³⁵⁶ Although the German system, like the French, presents spouses with a number of different matrimonial property regimes, the community of accrued gains, which affords spousal protection, is the most common.

As different as the general approach of French and German law is from the American marital property system, American law has made strides in recent times toward spousal protection in an effort to duplicate the treatment that the surviving spouse receives under a community regime. Although historically the protection for the surviving spouse was minimal,³⁵⁷ today all but one of the separate property states in the United States maintain an elective or forced share provision, which allows an omitted or disinherited spouse to claim against a will and receive a portion of the decedent's property.³⁵⁸ Although the kinds of rights granted to a surviving spouse differ greatly by state,³⁵⁹ the most recent revision to the Uniform Probate Code, which has been adopted in many states, grants an escalating percentage interest of ownership to the surviving spouse in the

356. *Id.* §§ 1371(1), 1931(2).

357. At common law, a surviving spouse had either a right of dower, if a widow, or curtesy, if a widower, which granted to the spouse either a life estate in one-third of the husband's land or possession of the wife's land provided a child was born of the marriage, respectively. ATKINSON, *supra* note 86, at 105-06. As late as 1953, Atkinson writes that "[d]ower [and to some extent curtesy] as essentially at common law exist[] in a substantial number of American jurisdictions." *Id.* at 107.

358. Georgia is the lone exception. Even Georgia, however, grants the surviving spouse and children a right of support and maintenance for one year after the deceased spouse's death. *See* GA. CODE ANN. §§ 53-3-1 - 53-3-5 (1996 & Supp. 2005). As salutary a protective measure as elective share statutes are, the protection afforded by elective share provisions has historically been an inadequate representation of the protective measure of community property regimes. Elective-share statutes have also been roundly criticized as inadequate protective devices in other contexts. *See, e.g.,* Samuel & Spaht, *supra* note 328, at 429-30. Professors Samuel and Spaht argue that

[t]he greatest failure of full implementation of the partnership theory . . . occurs upon the death of the non-earning spouse . . . who outside of the community property states is not an owner of the acquisitions accumulated during the marriage by her supposed partner [and therefore] has no interest in the marital property to dispose of to her legatees or heirs. If she dies before the earning spouse does, she has nothing to show for her years of devoted service to the economic partnership. Only community property consistently recognizes marriage as a true economic partnership from creation to its termination whether at divorce or at death.

Id. at 430.

359. Although some states grant a full 50% ownership interest in the decedent's property to the surviving spouse, others grant only a life estate in one-third of the decedent's property. *See, e.g.,* CONN. GEN. STAT. ANN. §45a-436(a) (West 2004).

decedent's property that equals 50% after 15 years.³⁶⁰ Thus, after fifteen years, a surviving spouse in a separate property state will have elective share rights that match the property interest of a surviving spouse in a community property state. The rationale for the revised elective share approach is that the efforts of each spouse contributed to the success of the other and thus each is entitled to economic rights—as a partner—in the property of the other.³⁶¹

In short, the protective roles of community property and forced heirship are important ones. While neither forced heirship nor community property is designed primarily to protect a testator from improvident dispositions of his property, by restricting testamentary freedom, both achieve that ancillary effect. Restrictions on testamentary freedom necessarily mean that the decedent has less property of which he can dispose. Thus, the incentive to influence a testator unduly is reduced.

IV. COMPARATIVE LESSONS

After having evaluated the history, role, and problems of undue influence and the corresponding institutions in the civil law that achieve similar functions, the comparative lessons derived from the above must now be examined. In this modest contribution, the suggested lessons are of two types.

First, in any comparative analysis, there are lessons to be learned not only about the substance of the analysis, such as the intricacies of undue influence, but also about the method of the analysis itself. That is, the first comparative observation is one about the importance of the methodology of comparative law, which is often criticized for being nonexistent, lacking sufficient structure, or for remaining an "unanswered" question.³⁶² Second, the comparative exercise is useful

360. UNIF. PROBATE CODE §§ 2-202 & 2-203 (amended 2006).

361. *See id.* art. II, pt. 2, general cmt. Other, less significant, protections for the surviving spouse exist as well. For example, almost all estates allow a surviving spouse and any children to be awarded the family home and a certain portion of the decedent's tangible personal property. *DUKEMINIER ET AL.*, *supra* note 4, 476-77. All states also have "statute[s] authorizing the probate court to award a family allowance for maintenance and support" for a fixed period of time. *Id.* at 477. Federal Social Security benefits and private pensions governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001-1461 (1998), also either mandate payment to the surviving spouse at the death of the other spouse or strongly encourage survivorship rights for the decedent's spouse, as in the case of ERISA-governed pensions. *See generally* *DUKEMINIER ET AL.*, *supra* note 4, at 473-75.

362. *See* ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 1 (1974).

for an obvious reason: in studying one's own law along with the laws of other jurisdictions, one learns not only about foreign law but "gains valuable insights into his own law."³⁶³

A. Lessons for Comparative Law

In an attempt to ascertain what lessons the above analysis offers for the methodology of comparative law, it is important to bear in mind that the degree to which the substantive rules of different systems achieve the same result is sometimes overstated. Finding differences in approach can sometimes be just as important as finding similarities.³⁶⁴ As Alan Watson has stated, "Comparative Law cannot be primarily a matter of drawing comparisons."³⁶⁵ Instead, "Comparative Law is about the nature of law, and especially about the nature of legal development."³⁶⁶ The nature of law and the nature of legal development have repeatedly shown themselves to be connected intimately with procedure. "By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure."³⁶⁷ Some have even suggested that "the outcome of cases . . . is in practice more likely to be affected by procedural rules than by any niceties of substantive law."³⁶⁸

Although the importance of procedure is an obvious historical point, its role is sometimes overlooked in the comparative analysis involving substantive legal institutions and rules. The reason is perhaps obvious: procedural law is often "[p]erceived as painstaking, ministerial, and ultimately boring."³⁶⁹ Its technical nature makes it an "unattractive candidate for comparative study" and seems to be

363. Lord Bingham, *Foreword to MARKESINIS*, *supra* note 227, at v.

364. See Dannemann, *supra* note 132, at 418 ("Those engaged in comparative enquires are generally well advised to look for both difference and similarity. The purpose of the enquiry will be the most important factor in determining where one should primarily look for difference, where for similarity, and where for both in equal measure.").

365. WATSON, *supra* note 362, at 4.

366. *Id.* at 7.

367. Reitz, *supra* note 132, at 621-22.

368. Jeremy Lever, *Why Procedure is More Important than Substantive Law*, 48 INT'L & COMP. L.Q. 285, 285 (1999).

369. Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 8, at 1327, 1328.

"dreaded by students and avoided by professors who had higher aspirations."³⁷⁰ However, the risk of ignoring procedural law is great. Considering substantive legal institutions in a procedural vacuum runs the risk of underappreciating the importance, or lack thereof, of the substantive institution itself.

The cognitive separation between substantive law and procedural law is most obviously a concern for the continental lawyer where, in France for example, there is a *Code civil* for substantive law and a separate *Code de procédure civile* for procedural law.³⁷¹ Similarly, in Germany, there is a *Zivilprozessordnung* for the adjectival law and a *Bürgerliches Gesetzbuch* for German substantive law.³⁷² Although substance and procedure were intimately joined in the classical Roman legal mind,³⁷³ today, "[c]ivil-law countries are familiar with a clear-cut distinction between substantive rules and the forms of process."³⁷⁴

The common law, however, is a law of remedies. And a law of remedies is, or at least was, a law of procedure. Historically, procedural and substantive law were so intertwined in English law that it was difficult to study and understand the one without the other. In the time of the early common law, for a plaintiff to succeed on his substantive claim, he had to select the appropriate procedural form of action that would merit the issuance of a writ, first "directed to the sheriff"³⁷⁵ and then to a royal court to institute judicial proceedings to investigate and resolve the matter. The wrong procedural writ meant that the case could be dismissed. In fact, "right up to the nineteenth century the English common was still administered in the framework of the ancient writs."³⁷⁶ Patrick Glenn summarizes the importance of studying common-law procedure even today: "[Y]ou can't really understand a common law tradition without understanding the[] broad outlines and function [of the writ system].

370. *Id.*

371. R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE* 48 (2002).

372. *Id.*

373. On the importance of *legis actiones*, which entailed selecting the right of action before the praetor with ultimate resolution of the issue before a iudex, see PETER STEIN, *LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENTS* 25-30 (1984).

374. VAN CAENEGEM, *supra* note 371, at 48.

375. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 356 (5th ed. 1956).

376. VAN CAENEGEM, *supra* note 371, at 50.

They were all there was; outside the writs, there was no common law, no way to state a case or get before a judge."³⁷⁷

The importance of the procedural law is not merely historical, and in modern times the role of procedural or adjectival law is essential in any comparative analysis. Although the above discussion has proceeded with only a minimal discussion of procedure, the reasons are ones of style and clarity of presentation. The issue of undue influence is as connected with procedural rules as are other branches of the substantive law. Two aspects of procedural law in particular—one in civil law and other in common law—merit discussion.

First, one important procedural device that exists in civil law systems but not—at least not to the same extent—in common law ones is the existence of the civil law notary. The civil law notary is an office, largely unknown to the common law, whose notaries are "frail imitation[s] of [their] European counterpart[s]."³⁷⁸ European notaries hold public offices;³⁷⁹ their numbers are regulated by law;³⁸⁰ and they require extensive legal education, rigorous examination, and specialized training.³⁸¹ French notaries must generally obtain a *maîtrise en droit*, a one year *Diplôme d'études supérieures spécialisées de droit notarial*, and two years of apprenticeship.³⁸² In Germany, the office of notary is obtained only after an extensive training period of three years as an assistant notary (*Notarassessor*).³⁸³

377. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 229-30 (3d ed. 2007).

378. Langbein, *supra* note 249, at 70. For more on the differences between American and civil law notaries, see RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG, & EDWARD M. WISE, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 21-26 (6th ed. 1998).

379. Ordinance No. 45-2590 of Nov. 2, 1945, J.O., Nov. 3, 1945, p. 7160, art. 1; Bundesnotarordnung [BNotO] [Federal Act on Notary Publics] Feb. 13, 1937, 195, as amended, § 1. The Federal Constitutional Court of Germany has recently reaffirmed the public nature of the notarial office in a decision that entertained complaints to the application procedure. Bundesverfassungsgericht [BverfG], Sept. 20, 2002, docket number 1 BvR, 819/01, available at <http://www.beck-online.de>.

380. BNotO § 4. See also L. Neville Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60, 62 (1953).

381. See Reina, *supra* note 93, at 441-42. See also Brown, *supra* note 380, at 62; JEAN YAIGRE & JEAN-FRANÇOIS PILLEBOUT, *DROIT PROFESSIONNEL NOTARIAL* 165-66 (3d ed. 1991) (stating that notaries in Germany serve the same function in their country as notaries in France).

382. See BELL ET AL., *supra* note 200, at 73. See also YAIGRE & PILLEBOUT, *supra* note 381, at 25-30.

383. FOSTER & SULE, *supra* note 278, at 98. For background on the German notary, see Christian R. Wolf, *Notaries in Germany*, in *KEY ASPECTS OF GERMAN BUSINESS LAW: A PRACTICE MANUAL* 277-86 (Michael Wendler et al. eds., 3d ed. 2006). See also BNotO §§ 3, 5,

Moreover, civil law notaries serve a variety of legal functions including drafting and authenticating documents and providing legal advice.³⁸⁴ Notaries provide important procedural protections in the drafting of some wills, which must be done before a notary to be valid. Although many wills are holographic and thus are valid even without the imprimatur of a notary, the will authenticated by a civil-law notary benefits from an "extremely strong (although nominally rebuttable) presumption of validity" and is thus very difficult to challenge.³⁸⁵ Professor Langbein has noted the importance of the notary in ensuring testamentary capacity, and this role is equally important in protecting against undue influence.³⁸⁶ Without overstating the role of the notary, it should be kept in mind that the notary "is a legally qualified and experienced officer of the state who is obliged to satisfy himself of the testator's capacity [and free consent] as . . . precondition[s] for receiving or transcribing the testament."³⁸⁷

Far from merely validating signatures, a French notary must not only authenticate documents but also serve as a "disinterested counselor" of the parties.³⁸⁸ Similarly, German notaries must "provide independent and impartial counsel to the concerned persons,"³⁸⁹ which includes an "obligation to examine the motives of the parties, clearly explain the facts of the matter to them, inform them of the legal ramifications of their desired transaction and, upon having done

7. In instances in which the office of notary and lawyer are combined, five years as an attorney is required. *Id.*

384. Reina, *supra* note 93, at 436-41.

385. Langbein, *supra* note 249, at 65-66, 70. Under French law, a notarial testament has the probative force of an authentic act. MALAURIE, *supra* note 134, at 250. Under the French Civil Code, an authentic act constitutes "full proof" ("*pleine foi*") of its contents. C. CIV. art. 1319. Similarly, under German law, public wills are those made by "notarial writing by which the testator declares to the notary his last will or hands over to him a document with a declaration that the writing contains his last will." BGB § 2232. Such wills, when opened and read by the probate court, constitute "total proof of the transactions documented." German Code of Civil Procedure § 415(1), *in* GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 299 (Charles E. Stewart trans., 2001) [hereinafter German Code of Civil Procedure]. For the procedure of the opening and reading of the will in court, see BGB § 2260. They are "presumed to be genuine" and the party seeking to attack them bears the burden of proof. German Code of Civil Procedure, *supra*, § 437(1), at 303.

386. See Langbein, *supra* note 249, at 65. See also Kipp, *supra* note 237, at 120 (citing Beurkundungsgesetz [BeurkG] [Notarial Authentication Act] Aug. 28, 1969, BGBl. I at 1513, § 28 (F.R.G.)).

387. Langbein, *supra* note 249, at 65.

388. Law of Mar. 16, 1803, J.O., Aug. 20, 1944, p. 137.

389. BNotO § 14(1).

so, to protocol their statements clearly and unambiguously.³⁹⁰ French and German notaries must also make sure that the parties avoid mistakes as to the significance of the transaction and to "make sure that inexperienced and/or unsophisticated parties are not disadvantaged."³⁹¹ False certification of documents by notaries is a violation of the criminal law.³⁹² Although notaries in Germany are generally not allowed to refuse their services to anyone with a "valid reason,"³⁹³ a notary shall not participate in a transaction, such as a will, that requires certification of his own affairs or that of spouses or close relatives.³⁹⁴ Similarly, in France, notaries may not receive acts, such as wills, that involve certain close relatives or those that involve dispositions in their favor.³⁹⁵

On the other hand, American law generally requires a witness to a will, but there is no requirement that a will be notarized. To create an effective will under American law, there generally must merely be a signed writing that is witnessed by at least two competent individuals.³⁹⁶ Although the Uniform Probate Code did spur the creation of "self-proved" wills, which do require some notarization, the significance of the notarization differs from the civil law requirement. First, although a testator may in some states execute a combined attestation clause and self-proving affidavit,³⁹⁷ more states allow the notarized self-proving affidavit to be executed only *after* the will is signed and witnessed.³⁹⁸ The goal of this self-proving procedure is not to prevent fraud and undue influence but primarily to prevent

390. Wolf, *supra* note 383, at 279. See also BeurkG § 17(1). See generally BUNDESNOTARKAMMER, *Public Notaries in Europe—Bearers of Public Office* (2001); ROLF GAUPP, THE SIGNIFICANCE OF THE NOTARIAL CODE OF PROFESSIONAL CONDUCT FOR CLIENTS, COLLEAGUES, AND THE STATES 120-47, available at http://www.bnotk.de/_PDF-Dateien/22.UINLKongress1998Baire s/Congress_Buenos_Aires_1998_englisch.pdf.

391. Wolf, *supra* note 383, at 279. See also BeurkG § 17(1); Brown, *supra* note 380, at 69 (referring to the French notary as "the protector of the interests of the inexperienced and legally incapable").

392. Strafgesetzbuch [StGB] [Penal Code] May 15, 1871, § 348. See also Oberlandesgericht [OLG] [Trial Court for Selected Criminal Matters and Court of Appeals] June 16, 2003, 40 Neue Juristische Wochenschrift [NJW] 2912, 2004 (F.R.G.).

393. BNotO § 15(1).

394. BeurkG § 3.

395. Decree No. 71-941 of Nov. 26, 1971, J.O., Dec. 3, 1971.

396. UNIF. PROBATE CODE § 2-502. Of course, holographic wills in the testator's own handwriting are also generally allowed and do not require witnesses. See *id.* § 2-503.

397. See *id.* § 2-504(a).

398. See *id.* § 2-504(b). See also DUKEMINIER ET AL., *supra* note 4, at 245.

challenges to the will based on the signature requirement.³⁹⁹ Compliance with the execution requirements other than the signature is only "presumed subject to rebuttal without the testimony of any witness."⁴⁰⁰ Also, by contrast to the substantive role played by his civil law counterpart, the notary in the United States serves only an almost perfunctory administrative function.⁴⁰¹ In fact, ethical rules preclude the notary from acting otherwise. Guiding Principle VI of the Notary Public Code of Professional Responsibility specifically states that "[t]he Notary shall act as a ministerial officer and not provide unauthorized advice or services."⁴⁰²

Furthermore, the witness requirement for American wills does not serve the same function as the notarial requirement in the civil law. Although notarization by an interested notary in the civil law would be unthinkable, under American law, "[t]he signing of a will by an interested witness does not invalidate the will or any provision of it."⁴⁰³ The comments to the Uniform Probate Code make clear that "[i]nterest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will."⁴⁰⁴ The Uniform Probate Code claims that the allowance of interested witnesses "does not increase appreciably the opportunity for fraud or undue influence" because a substantial legacy to a witness would presumably be a "suspicious circumstance" that would give rise to an undue influence suit.⁴⁰⁵ Moreover, the comments acknowledge the cleverness of undue influencers who usually exercise such influence and then procure disinterested individuals to sign as witnesses.⁴⁰⁶ Although interested witnesses are allowed, it is generally the rule that the lawyer who drafted the will cannot be a legatee, except in special circumstances. Rule 1.8 (c) of the Model Rules of Professional Conduct provides that

399. See UNIF. PROBATE CODE § 3-406(b), § 3-406 cmt. ("If the will is self-proved, compliance with signature requirements for execution is conclusively presumed. . .").

400. *Id.* § 3-406(b).

401. *Bernal v. Fainter*, 467 U.S. 216, 225 (1984) (holding that a Texas statute that prohibited aliens from becoming notaries violated the Fourteenth Amendment). In *Bernal*, the Court stated that "[w]e recognize the critical need for a notary's duties to be carried out correctly and with integrity. But a notary's duties, important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial." *Id.*

402. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Princ. VI (Nat'l Notary Ass'n, 1998).

403. UNIF. PROBATE CODE § 2-505.

404. *Id.* § 2-505 cmt.

405. *Id.*

406. *Id.*

"[a] lawyer shall not . . . prepare . . . an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client."⁴⁰⁷

Second, the existence of a number of American procedural mechanisms creates incentives for undue influence suits in the United States, which do not exist in the civil law. It is somewhat surprising to learn that despite the frequency of allegations of undue influence, statistical evidence indicates that challenges to wills on grounds of undue influence are "consistently rejected" by courts.⁴⁰⁸ Logically, the failure rate of most "undue influence" suits should serve as a deterrent to the filing of a suit, given the cost of doing so and the low probability of success. This disincentive also exists in English law, which maintains a doctrine of probate undue influence similar to the American concept of undue influence and permits challenges to wills based upon suspicious circumstances. There, the disincentive has successfully served to preclude suits, as "the probate version of undue influence has been accurately described as a 'dead letter,'"⁴⁰⁹ and challenges to wills based on suspicious circumstances "seem[] to have generated few reported cases in recent years."⁴¹⁰

Given the similarity in English and American common law systems, one would expect to find a similarly sparse number of undue influence claims in America, but such is not the case. In the United States, undue influence remains *the* most common ground for attacking a will.⁴¹¹ The most likely reason is that a number of incentives for suing exist in American law outside of the merits of the litigation itself. As demonstrated above, issues of capacity and undue influence are inextricably intertwined. In fact, many claims for undue

407. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (6th ed. 2007). Violation of this rule, however, does not automatically invalidate the will, although a challenge for undue influence is likely. Instead, it merely subjects the lawyer to sanctions for ethical violations. *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-5 (prohibiting lawyers from naming themselves as legatees, except in exceptional circumstances); RESTATEMENT OF LAW GOVERNING LAWYERS §208(2) (prohibiting such conduct except when "[t]he lawyer is a relative of the client and a natural object of the client's generosity"). For further elaboration on this issue, see William M. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 REAL PROP. PROB. & TR. J. 643 (1994).

408. Schoenblum, *supra* note 3, at 647.

409. Pauline Ridge, *Equitable Undue Influence and Wills*, 120 L.Q. REV. 617, 622 (2004).

410. Roger Kerridge, *Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator*, 59 CAMBRIDGE L. J. 310, 310 (2000). *But see Inheritance Disputes: Where There's a Will There's a War*, TELEGRAPH, Aug. 20, 2008 (U.K.) (suggesting that inheritance disputes are common in England).

411. ROSS & REED, *supra* note 3, § 7.21 at 7-109.

influence are accompanied by allegations of lack of capacity and vice versa. This kind of capacity and undue influence litigation is generally "directed towards provoking pretrial settlements,"⁴¹² not necessarily because of the likelihood of success on the merits but sometimes because of risk that "a skilled plaintiff's lawyer will present evidence . . . at a public trial touching every eccentricity that might cast doubt upon the testator's condition . . . threatening to besmirch [the testator's] name."⁴¹³

Moreover, the availability of trial by jury, rather than only by judge, may serve to increase a litigant's desire to proceed to trial in America rather than settle. Because the issue of undue influence is largely a factual one that is dependent upon circumstantial evidence, it is an issue to be assessed by a jury, "which may be more disposed to work equity for the disinherited than to obey the directions of an eccentric decedent who is in any event beyond suffering."⁴¹⁴ Some courts have even recognized as much and criticized parties in undue influence cases for presenting facts that "were well calculated to excite in the jury disgust and abhorrence and to lead them off from the true points of the case to the consideration" of the alleged influencer's unworthiness.⁴¹⁵

Finally, even the small number of cases that are fully litigated to a jury are not accompanied by significant disincentives for the risk of losing. In the United States, where each side pays its own attorneys' fees, the cost of trial is capped at the cost of one's attorney. On the other hand, both France and Germany maintain fee-shifting rules that impose the attorneys' fees of the winner on the loser.⁴¹⁶ The French Code of Civil Procedure requires that the unsuccessful party "pay to the other party the amount . . . of the sums outlayed and not included in costs."⁴¹⁷ Similarly, German law provides that the loser be assessed "statutory fees and expenses of the attorney for the successful party."⁴¹⁸ The absence of a fee shifting procedure in America makes the penalty for unsuccessful suits minimal. Thus, "the American rule

412. Langbein, *supra* note 249, at 66; DUKEMINIER ET AL., *supra* note 4, at 157.

413. DUKEMINIER ET AL., *supra* note 4, at 157.

414. Langbein, *supra* note 249, at 65.

415. See O'Neill v. Farr, 30 S.C.L. 80 (1 Rich.).

416. Nouveau Code de Procédure Civile [N.C.P.C.] art. 696 (Fr.); Astrid Stadler & Wolfgang Hau, *The Law of Civil Procedure*, in GERMAN LAW, *supra* note 274, at 377. See generally NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 48-50 (Tony Weir trans., 1982).

417. N.C.P.C. art. 700.

418. German Code of Civil Procedure, *supra* note 385, § 91(2) at 211.

diminishes the magnitude of a contestant's potential loss, which diminishes his disincentive to litigate an improbable claim."⁴¹⁹

B. Lessons About our Own Legal Systems

In pursuit of the lessons that the above comparative analysis has to offer to national legal systems, the question must be bifurcated and separately examined to discover what the common law with its strong and historically-rooted concept of undue influence can learn from the civil law, and what the civil law with its absence of an explicit concept of undue influence can learn from the common law.

1. Lessons for the Common Law: Mitigating Overstatement

It has been said that "the common law is best understood as a system for promoting economic efficiency."⁴²⁰ In that vein, some have observed that "individualism and liberty . . . are two of the most characteristic aspects of the Common law."⁴²¹ In fact, the American penchant for freedom of testation is just one example of the overriding commitment of the common law to individual liberty. Although the stated preference is strong and the doctrine of undue influence in theory helps further that goal by ensuring testamentary dispositions are free, the availability of undue influence is more than just a check on unfree dispositions. In fact, it is clear that the American doctrine of undue influence, which purports to preserve freedom and individuality, serves many of the same functions as devices that restrict individual freedom in the civil law.

For example, although undue influence in general terms merely sets a threshold protection against the overpowering of the will, courts have adopted surrogate tests, such as abnormal dispositions to those outside the natural objects of the testator's bounty, to help judge instances of undue influence. Forced heirship and community property systems in civil law systems provide the very same protection against disinheritance of spouses and close relatives, even when a testator freely disposes of his property to those outside his

419. Langbein, *supra* note 249, at 65.

420. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 264 (6th ed. 2003).

421. A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought*, *CAMBRIAN L. REV.* 11, 15 (1978), reprinted in *COMPARATIVE LEGAL CULTURES* 83, 87 (Csaba Varga ed., 1992). See also 1 FREDERICK HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 94 (1973) ("[T]he ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated.").

natural bounty. Moreover, the presumptions of undue influence that exist when a testator disposes of his property in a suspicious way to those in relationships of confidence closely mirrors the French conclusive presumption of captation to those similarly situated and the German prohibition in § 138 of exploiting those in weaker positions. In short, despite a wide gulf that at first appears to exist between common law systems oriented toward free testation and civil law systems concerned with family protection, the two traditions are much closer than they appear to be, and, in fact, the American commitment to freedom of testation is overstated and perhaps even a "myth."⁴²²

2. Lessons for the Civil Law: The Evolving Landscape

As the civil law institutions that are "functionally equivalent" to undue influence in the common law begin to erode, the need and frequency of challenges based on undue influence, or immorality of a will in Germany, are likely to increase. Scholars have observed that "[t]here is a tendency towards reducing [the] class of heirs entitled to a forced heirship"⁴²³ even in systems with historically solid conceptions of forced heirship. For example, the new Dutch civil code now limits a descendant's forced heirship claim significantly.⁴²⁴ Whereas prior Dutch law considered all gifts made by the deceased over his lifetime, Article 67 of the new code limits the calculation of the statutory share to only certain gifts made within five years of the decedent's death.⁴²⁵ In Louisiana, a jurisdiction that traditionally maintained a strong concept of forced heirship, the institution now applies only to a limited class of dependent descendants who are either "twenty-three years of age or younger" or those "incapable of taking care of their persons or administering their estates."⁴²⁶ Moreover, in a recent report on Succession Law, the Scottish Law Commission noted that "compulsory share for adult children is being

422. See Leslie, *supra* note 93, at 273.

423. Alain Verbeke and Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, in TOWARDS A EUROPEAN CIVIL CODE 173, 180 (Arthur Hartkamp et al. eds., 2d rev. ed. 1998).

424. See F.A.A. Duynstee & K.M.F.J. Houben, *The Netherlands*, in EUROPEAN SUCCESSION LAWS 393-94 (David Hayton ed., 2d ed. 2002).

425. *Id.* at 394. See also IAN SUMNER & HANS WARENDORF, INHERITANCE LAW LEGISLATION OF THE NETHERLANDS: A TRANSLATION OF BOOK 4 OF THE DUTCH CIVIL CODE, PROCEDURAL PROVISIONS AND PRIVATE INTERNATIONAL LAW LEGISLATION 33 (2005) (English translation of bk. 4, art. 67(e)).

426. LA. CIV. CODE ANN. art. 1493 (2000).

increasingly called into question even in civil law jurisdictions."⁴²⁷ In fact, the Commission issued a preliminary, tentative recommendation that in Scottish law the "legitim should cease to be available to adult children Inheritance from a parent should no longer be viewed as a right."⁴²⁸ Even France and Germany, the classic examples of civil law systems,⁴²⁹ have begun to reduce the class of relations protected by forced heirship. Although descendants are still generally considered forced heirs, the inclusion of ascendants is waning. In Germany, only parents are included in ascendant forced heirship.⁴³⁰ The recent revision to the French law of successions has completely eliminated ascendant forced heirship.⁴³¹

With the decline in forced heirship, it is not surprising to see a corresponding upsurge in the number of jurisdictions that allow claims for undue influence. Here, the experience of mixed jurisdictions is also insightful. Mixed jurisdictions are traditionally described as those "that have been influenced significantly by the civil law and common law families."⁴³² They are fruitful laboratories for comparative purposes because they serve as examples of jurisdictions influenced substantially by both civil and common law and thus are most able to borrow or transplant beneficial devices from either one of its two main influential traditions. Since 1996, Louisiana, with its mixture of American common law and French civil law, provides that "[a] donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the

427. SCOTTISH LAW COMM'N, DISCUSSION PAPER ON SUCCESSION NO. 136, at 66 (2007).

428. *Id.* at 66-67.

429. Although other divisions or groupings of civil law families exist, the traditional division is between the Germanic legal family and the Romanist legal family (i.e., France and the jurisdictions adopting the French Civil Code). *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 131, at 69; 1 PIERRE ARMINJON, BORIS NOLDE, & MARTIN WOLFF, TRAITÉ DE DROIT COMPARÉ 42-53 (1950).

430. BGB § 2303(2); *see also* Verbeke and Leleu, *supra* note 423, at 181 n.27 (noting that Belgium completely excludes ascendants from the category of forced heirs).

431. Law No. 2006-728 of June 23, 2006, J.O., June 24, 2006.

432. Jacques du Plessis, *Comparative Study and the Study of Mixed Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 8, at 477, 484. For a discussion of certain minimum criteria necessary to be considered a mixed jurisdiction, see Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 7-10 (Vernon Valentine Palmer ed., 2001).

volition of the donee or other person for the volition of the donor."⁴³³ In Scotland, which arguably is the oldest mixed jurisdiction and blends English common law and Roman civil law, "[a] will is . . . reducible . . . if [a testator was] subjected to force and fear, or to undue influence in relation to the will by a person in whom he reposed trust and who exercised a dominating influence."⁴³⁴ Finally, South Africa, which combines English common law and Roman-Dutch civil law, recognizes undue influence as a ground for invalidating a will, but "[m]ere flattery, extraordinary affection shown to the testator, accusations made against proposed beneficiaries and even direct requests and other *artes captatoriae* will not necessarily constitute undue influence."⁴³⁵ "In order to do so they must result in the substitution of the wishes of another for the wishes of the testator."⁴³⁶ Thus, as the landscape of succession laws continues to change, solutions and lessons learned in one system or tradition can be borrowed by others facing the same or similar problems.⁴³⁷

CONCLUSION

In conclusion, although the doctrine of testamentary undue influence appears to be without significant presence in modern civil law, there are a number of functional equivalents in the civil law. The civilian systems contain analogues that do much the same work as the common law doctrine of undue influence even though they are not precisely identical in name or function. Explicit prohibitions on captation and dispositions *contra bonos mores*, broad conceptions of

433. LA CIV. CODE ANN. art. 1479 (2000). The burden of proof rests on the party challenging the donation but the standard differs depending upon the relationship of the parties. *See id.* art. 1483.

434. DAVID M. WALKER, *PRINCIPLES OF SCOTTISH PRIVATE LAW* 155-56 (4th ed. 1989).

435. M. M. CORBETT ET AL., *THE LAW OF SUCCESSION IN SOUTH AFRICA* 86 (1980). A testator's mental state and ability to resist are important considerations, as is the relationship between the parties, such as when "a request by the one party to the other might be regarded by the latter as a command which must be obeyed." *Id.* *See also* M.J. DE WAAL & M.C. SCHOEMAN-MALAN, *INTRODUCTION TO THE LAW OF SUCCESSION* 40-41 (3d ed. 2003).

436. CORBETT ET AL., *supra* note 435, at 86. *See also* DE WAAL & SCHOEMAN-MALAN, *supra* note 435, at 40-41. Nevertheless, particular types of relationships do not give rise to presumptions of undue influence; the substitution of one's volition for another must be proven. CORBETT ET AL., *supra* note 435, at 86.

437. The new Dutch law of inheritance, effective January 1, 2003, adopts a conservative approach to the use of undue influence. Although undue influence is a grounds for nullifying juridical acts, it generally may not be raised in connection with wills. *See* Burgerlijk Wetboek (Civil Code) [BW], bk. 4, art. 43(1) (Neth.), *in* SUMNER & WARENDORF, *supra* note 425, at 25 ("A testamentary disposition may not nullified on the ground that it was effected by an abuse of circumstances."); *see also id.* bk. 4, art. 43(2); *id.* bk. 4, art. 57 at 29-30.

violence and *Drohung*, heightened standards of testamentary capacity, and an assortment of family protection devices are only some examples of such analogues. The conclusion that the two traditions have much common ground on the issue of undue influence is somewhat surprising given the absence of academic harmonization efforts—efforts which are pervasive in the fields of torts and contracts—and the lack of interest from political unification forces such as the European Union.⁴³⁸ Nonetheless, the two traditions, in actuality, appear much closer in substance than they at first appeared to be.

The similarities, however, should not be overstated. Despite the similarity in outcome of cases, differences in fundamental approach between the common law and civil law remain. The laws of France and Germany are still motivated by beliefs in equal treatment of children and familial conceptions of property ownership, while robust notions of individualism and resistance to governmental intrusion still pervade the United States.⁴³⁹ Moreover, procedural incentives toward litigation in the United States, such as trials by juries and the lack of fee-shifting mechanisms, and institutional safeguards in the civil law, such as highly-trained notaries before whom wills may be executed, serve to widen the chasm between the two traditions.

But this chasm between the law in practice in the two traditions might be bridged as the cultural values underlying the law continue to evolve. To the extent that individualism and concepts of free testation increase and ideas of communal identity and forced heirship decrease,⁴⁴⁰ the laws will likely change to reflect these new cultural attitudes. Some slight movement in this direction has recently occurred in France and Germany. The declining use of notarial wills and the contemplated changes in civil procedure mechanisms⁴⁴¹ further serve to eliminate hurdles to harmonization. Some have even

438. *But see Commission Green Paper on Successions and Wills*, COM (2005) 65 final (Mar. 1, 2005).

439. *See generally* JENS BECKERT, *INHERITED WEALTH* 21-82 (Thomas Dunlap trans., 2004).

440. *See* Basil Markesinis, *Learning from Europe and Learning in Europe*, in *THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES AND ENGLISH LAW ON THE EVE OF THE 21st CENTURY* 1, 31 (Basil Markesinis ed., 1994).

441. *See, e.g.*, Winand Emons, *Conditional Versus Contingent Fees*, 59 *OXFORD ECON. PAPERS* 89, 89-101 (2007) (discussing the rise in Europe of conditional fees, which award lawyers a premium for winning a case).

observed that the litigious nature of Americans in contrast to their European brethren is overstated.⁴⁴²

Furthermore, the harmonization in successions law has never been more important than it is now. The growing mobility of people and the increasing tendency for marriage or similar unions without respect to national borders has caused an increase in the amount of cross-border property acquisition.⁴⁴³ Correspondingly, the number of transnational successions has also increased, which are frequently complicated by property holdings in various nations.⁴⁴⁴ In the European Union alone, "between 50,000 and 100,000 transnational successions are opened every year."⁴⁴⁵

Despite the need for such harmonization, many feel that "full harmonisation of the rules of substantive law [of successions] . . . is inconceivable" at this time,⁴⁴⁶ perhaps because "the law of succession is embedded more deeply than other areas of the law" in the various national cultures and histories.⁴⁴⁷ Moreover, almost all of the modest international efforts concerning succession law have focused on procedural issues such as private international law or conflicts of laws.⁴⁴⁸ Even then, those efforts have met with limited success.⁴⁴⁹ Whether or not harmonization of the substantive law of succession is possible or even desirable is not a question that can be easily answered. To do so requires a careful examination of not only the substantive laws each jurisdiction but also their procedural rules and the underlying values and mores. In that vein, this article has attempted to begin that examination and, at a minimum, show that the two traditions have much that can be learned from each other.

442. Basil S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 CAMBRIDGE L.J. 233, 274-75 (1990) ("[O]verall volumes of litigation do not appear to be significantly different in [England, Germany, and the U.S.]"). See also P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, DUKE L.J. 1002, 1018-44 (1987) (suggesting the differences in American and English tort litigation can be explained in terms of procedural and institutional incentives, rather than increased litigiousness).

443. *Commission Green Paper on Successions and Wills*, *supra* note 438, at 3.

444. *Id.*

445. Turner, *supra* note 8, at 149.

446. *Commission Green Paper on Successions and Wills*, *supra* note 438, at 3.

447. Turner, *supra* note 8, at 158.

448. For an overview of the various international conventions on successions, see *id.* at 152-57.

449. *Id.* at 157.