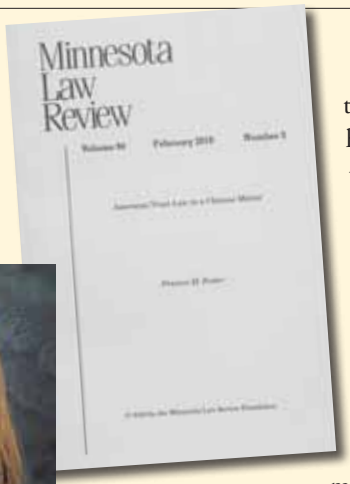
American Trust Law in a Chinese Mirror



AMERICAN LEGAL MISSIONARIES have left their mark on post-9/11 Afghanistan and Iraq. Under the banner of democracy and the rule of law, U.S. legal professionals of every stamp have launched an ambitious effort to transform the Afghan and Iraqi legal landscapes. …

For decades, American legal professionals have exported or, in comparative law parlance, "transplanted" American rules, institutions, procedures, and values to countries from Albania to Zambia. ... The United States is not alone. Throughout history, nearly every nation in the world has participated in "legal transplants." Indeed, the leading authority on legal transplants, Alan Watson, has concluded that legal transplants from abroad are so common that "[m]ost changes in most systems are the result of borrowing." …

Comparative law scholars have produced a vast literature documenting and analyzing legal transplants. They have offered a plethora of theoretical models to identify the basic features of and rationales for legal transplants. These scholars have engaged in often heated debate over what causes such transplants to thrive, perish, or turn "toxic" in foreign soil. Thus far, comparative law scholars have focused principally on legal transplants' impact on the "recipient" country. In so doing, those scholars have missed an equally important phenomenon—the impact of the process on the "donor" country. This article seeks to fill this gap in the literature. It argues that legal transplants can provide a mirror for donor countries to see flaws in their own systems and new directions for reform.

Part I presents a critical analysis of comparative law scholarship. It demonstrates that scholars have failed to recognize the significance of legal transplants for donor as well as recipient countries. The remainder of the article uses one example—China's 2001 import of the classic "Anglo-American" concept of trust—to illustrate the advantages of a more balanced study of legal transplants.

Part II describes the research base for this article. It shows that China has produced a voluminous and impressive comparative trust law literature. Comparative law research and analysis have played a prominent role in the design, dissemination, and improvement of China's first Trust Law. Part II demonstrates that China's comparative trust law literature is important for understanding the trust law model China transplanted as well as the legislative product of that transplant. Yet, because nearly all texts are available only in Chinese, these publications and the lessons they provide have been inaccessible to those who could most profit from them—trust law scholars and reformers in the United States.

Part III presents the first study of China's critique of American trust law. It shows that close analysis of Chinese commentary, legislative history, and statutory text exposes a systemic flaw that U.S. scholars and reformers should address: inadequate checks and balances on trustees.

The article concludes that this finding raises serious questions about the current direction of American trust law. Rather than strengthening the traditional legal and moral constraints on trustees, reformers are actually weakening those constraints. Thus, the mirror China provides should inspire reformers to see our trust system as it really is and to abandon their ill-advised reform agenda.

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THE CHINESE TRUST LAW literature paints a disturbing picture of an American trust system out of balance. This system favors trustees at the expense of settlors, beneficiaries, and third parties alike. Chinese critics trace this imbalance to three main factors: (1) the "negative attitude toward settlor rights," (2) insufficient protection of beneficiaries, and (3) secrecy of trusts.

In a Chinese mirror, American settlors are weak and ultimately irrelevant. Once settlors establish trusts, American trust law severs their ties to those trusts. Unless settlors had the foresight to reserve rights in the trust instrument or to name themselves trustees or beneficiaries, they "do not possess any rights whatsoever with respect to the trust property or trustee." Indeed, this separation of settlor from trust is so complete that American trust law denies settlors even the status of party to their own trusts. Under the American definition of the trust, where once there were three parties to a trust, now only two parties exist—the trustee and the beneficiary. The settlor becomes at best an interested bystander.

For Chinese scholars, the very notion of cutting off settlors from their own trusts is perverse. … Moreover, the American approach misses another obvious point—the "constructive role" of settlors in enforcing their own trusts. Who better than settlors can determine whether the trust purposes, beneficiary rights, and trustee duties they themselves prescribed are "conscientiously fulfilled?" Yet, rather than promoting this beneficial,

even indispensable, function of settlors, American trust law actually impedes it. …

China's depiction of American beneficiaries is troubling. The Chinese trust law literature reveals beneficiaries our system has left behind—the young, the sick, the nameless, even the unborn. It shows that in the United States those most vulnerable to trustee abuse and neglect must fend for themselves. According to Chinese scholars, American trust law makes beneficiaries the principal, and often only, check on trustees. This model simply assumes that beneficiaries can defend their own rights and interests. Except in the charitable trust context, it provides no mechanism to protect those who cannot protect themselves. Yet, as Chinese commentators emphasize, these are precisely the beneficiaries for whom many settlors create trusts. …

Finally, the Chinese trust law literature exposes a third, equally disturbing source of imbalance in American trust law—invisible trusts. It reveals American trusts so secret that their very existence is known only to their settlors and trustees. To make matters worse, because trusts are "continuous in nature," those trusts may well survive their settlor's death. Thus, if the American settlor takes the secret to the grave, the trustee alone may know that the property she enjoys is not her own.

Chinese scholars point out that even if beneficiaries are aware that such a trust exists, rules that promote secrecy of trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts. Because no record exists of an invisible trust's purpose, property, parties, or fiduciary rights and duties, beneficiaries lack the information they need to monitor a trustee and hold that trustee accountable for any misconduct. Indeed, secrecy of trusts may effectively deny beneficiaries any claim whatsoever to trust property. …

The Chinese trust law literature shows that secrecy of trusts poses significant dangers as well for American third parties who have a "legal relationship" with the trustee. When trusts are secret, a third party has no way to "know the truth" about whether the party on the other side of the table is a trustee, the transaction violates the trust purpose, or the property at issue is in fact trust property. Chinese authors argue that the effect is to injure both the individual involved in the transaction with the trustee and the commercial system as a whole. Secrecy of trusts can cause third parties to "sustain unwarranted harm," and undermines the "security and efficiency" of commercial transactions.

Chinese commentators trace the invisible trust phenomenon to two flaws in American trust law. First, the U.S. system permits oral trusts. … Second, the U.S. system fail[s] to require registration of trusts except in the charitable trust context. They argue that "public notice of trusts" is essential to ensure that beneficiaries, third parties, and the general public can "easily look up the trust purpose," property, and parties' rights and duties. …

In the end, then, the Chinese trust law literature sends an unmistakable message to American and Chinese readers alike. The most effective, fair, and moral trust system is one that recognizes and balances the needs of all parties affected by trusts—settlors, beneficiaries, and third parties as well as trustees.

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COMPARATIVE LAW SCHOLARS define their central mission as to "render the foreign familiar." … This article has suggested a new mission for the comparative law field—to render the familiar foreign. It has demonstrated that study of a foreign system can provide invaluable perspectives for domestic legal scholars and reformers. Specifically, this article has examined China's recent experience with transplanting the American trust law model. It has shown that the most telling lessons may be found in what China rejected rather than what China adopted. …

The Chinese trust law literature reveals an American trust system out of balance, a system that favors trustees at the expense of settlors, beneficiaries, and third parties. This literature shows that American trust law cuts settlors off from their own trusts, leaves beneficiaries unprotected from trustee abuse, and denies trust parties and third parties alike knowledge of the terms, administration, and even the very existence of trusts. China's critique exposes the dangers of what both American and Chinese scholars have aptly called a system of "trusting trustees."

Ironically, the American trusts and estates field is not addressing this imbalance, but instead appears to be heading in precisely the opposite direction. Under the influence of law and economics theory, prominent scholars and reformers are rapidly dismantling the traditional legal and moral constraints on trustees. Trusts are becoming mere "contracts," and trust law nothing more than "default rules." "Efficiency" is triumphing over morality. In the law and economics universe of foresighted settlors, loyal trustees, informed beneficiaries, and sophisticated family and commercial creditors, trusting trustees may make sense. In the real world, however, it does not. A trust system that exalts trustee autonomy over accountability can and increasingly does impose significant human costs on all affected by trusts.

China's critique of American trust law challenges U.S. reformers to reconsider their current course. In a Chinese mirror, we can see that trusting trustees is the problem, not the solution. ||||

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