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## Article

# American Trust Law in a Chinese Mirror

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### INTRODUCTION

American legal missionaries have left their mark on post-9/11 Afghanistan and Iraq.<sup>1</sup> Under the banner of democracy and the rule of law,<sup>2</sup> U.S. legal professionals of every stamp have launched an ambitious effort to transform the Afghan and

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1. See, e.g., Chuck Marsh, *Air Force 'Legal Eagles' Meet With Afghan Military Legal Leaders*, ARMED FORCES INFO. SERVICE, Aug. 23, 2006, <http://www.militaryconnection.com/news/august-2006/afghan-legal-leaders.html> (reporting that Lindsay Graham, South Carolina Senator and appellate judge in the Air Force Reserve, explained his goals for a two-day military law training seminar in Kabul thus: "The purpose behind my visit and this whole effort is to get the Afghan military to buy into the rule of law . . . . The military can (then) spread it to the country.").

2. See Jim Phipps et al., *Middle Eastern Law*, 38 INT'L LAW. 703, 704 (2004) (describing ABA Middle Eastern Law Committee members' assistance with "rule of law and judicial reform activities" in Afghanistan and Iraq); Carolee Walker, *Afghan Women Judges Pursue Legal Training in the United States*, AMERICA.GOV, June 23, 2006, <http://www.america.gov/st/washfile-english/2006/June/20060622183516bcrekaw0.424206.html> (quoting Ambassador Steve E. Steiner, chair of a roundtable discussion with Afghan judges, as stating that "[t]he United States remains firmly committed to assisting Afghanistan in its remarkable journey toward a strong democracy where all citizens enjoy equal rights and can aspire to economic prosperity"); see also Phipps et al., *supra*, at 712 (noting that "[t]his friendly advice" may have pragmatic objectives as well, and stating that "[t]he bottom line is that the New Iraq will pursue policies that are friendly to America and will remain amenable to American persuasion and influence in such areas as economics, trade, foreign affairs, and security, to name a few").

Iraqi legal landscapes.<sup>3</sup> American attorneys have served as pro bono legal advisors to the Karzai government's Afghanistan Commercial Law Project.<sup>4</sup> U.S. State Department personnel have worked with Afghan ministries to create a "holistic reform framework"<sup>5</sup> and have helped the Iraqi government to establish a criminal justice system.<sup>6</sup> American law professors have drafted constitutions for Afghanistan and Iraq<sup>7</sup> and have even given Iraqi lawyers "a crash course on international human rights law."<sup>8</sup> U.S. judges have shared their expertise with their Afghan and Iraqi counterparts in, for example, intensive training courses on "judicial ethics, relations with other branches of government, public access to the courts[,] and judicial independence."<sup>9</sup> American law school deans and faculty have targeted the legal education process. The University of Washington, for instance, has established the Afghanistan Legal Educators Program, which provides Afghan law professors postgraduate

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3. For discussions of other countries' legal assistance efforts for Afghanistan and Iraq, see PANOS KOUTRAKOS, *EU INTERNATIONAL RELATIONS LAW* 469 (2006) (reporting that in March 2005, the European Union established the EU Integrated Rule of Law Mission for Iraq to assist in "police, rule of law and civil administration matters"); Case Western Reserve University, *Case Law Professors Help Iraq Train New Judiciary* (June 4, 2004), <http://www.case.edu/news/2004/6-04/waters.htm> (stating that "international law experts from Canada, Ireland, Scotland, Egypt, and the United States" offered a training session in Dubai for forty-eight Iraqi defense attorneys). For a critical view of foreign reform efforts, see Faiz Ahmed, *Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT'L L. 269 (2007), available at <http://www.gonzagajil.org> (presenting a critical analysis of efforts to transplant Western legal models in Afghanistan).

4. See Phipps et al., *supra* note 2, at 705. In this capacity, they have drafted and reviewed legislation on such diverse topics as banking, hydrocarbons, and property. *Id.* at 705–08.

5. U.S. DEP'T OF STATE, *CIVILIAN POLICE AND RULE OF LAW PROGRAMS 1* (2008), <http://merln.ndu.edu/archivepdf/afghanistan/State/98167.pdf>.

6. *Id.* at 2 ("INL's Rule of Law Programs help the Government of Iraq establish a criminal justice system that is sufficiently effective and fair that Iraqi citizens will turn to it, rather than violent militias and other 'alternative' forms of justice, to resolve disputes and seek justice.").

7. See, e.g., *Constitutionalism and Emerging Democracies*, ISSUES OF DEMOCRACY, Mar. 2004, at 1, 5, <http://italy.usembassy.gov/pdf/ej/ijde0304.pdf> (stating that then-NYU (now Harvard) law professor Noah Feldman "participated in the creation of the new constitution in Afghanistan and has consulted in the development of Iraq's Transitional Administrative Law that was recently signed").

8. Case Western Reserve University, *supra* note 3.

9. Barbara Dillon Hillas, *Iraqi Judges Come to Prague*, FOREIGN SERVICE J., Mar. 2005, at 38, 40.

legal training, exposure to American law school teaching methods, and assistance with curriculum development.<sup>10</sup>

These reform efforts in Afghanistan and Iraq are only the latest incarnation of U.S. foreign legal assistance programs.<sup>11</sup> For decades, American legal professionals have exported or, in comparative law parlance,<sup>12</sup> “transplanted” American rules, institutions, procedures, and values to countries from Albania<sup>13</sup> to Zambia.<sup>14</sup> This practice has become so familiar that it has even penetrated American popular culture. In 2005, the denizens of NBC’s “West Wing” took time out of their busy schedules to discuss an American law professor’s draft constitution for Belarus.<sup>15</sup>

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10. U.S. DEPT OF STATE, *supra* note 5. For descriptions of the Afghanistan Legal Educators Program, see University of Washington Law School, Afghan Dean’s Conference and Grant Update, <http://www.law.washington.edu/news/ebriefs/sp06/afghangrant.html> (last visited Dec. 19, 2009); University of Washington School of Law, Afghan Legal Educator’s Project (2005–2011), <http://www.law.washington.edu/Asianlaw/Research/Projects/AfghanLegalEducatorsProject.pdf> (last visited Dec. 13, 2009); *see also* INT’L INST. OF HIGHER STUDIES IN CRIMINAL SCIENCES & INT’L HUMAN RIGHTS LAW INST., JUSTICE AND HUMAN RIGHTS: TECHNICAL ASSISTANCE PROJECTS IN AFGHANISTAN AND IRAQ ACTIVITIES 2003–2006, at 14–16 (2007), <http://www.isisc.org/public/BrocDesigned.pdf> (discussing the legal education reform project in Iraq carried out by DePaul University College of Law’s International Human Rights Law Institute in conjunction with the Italian International Institute of Higher Studies in Criminal Sciences).

11. Two prominent examples are the United States’ involvement in drafting the post-World War II Japanese Constitution and the United States law and development movements in Africa, Asia, and Latin America in the 1960s and 1970s. For a sampling of the extensive literature on these legal assistance precedents, see, for example, John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT’L L. 127 (2005); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement*, 1974 WIS. L. REV. 1062.

12. *See infra* Part I (discussing the origin of the term “legal transplants” and recent challenges to that term by comparative law scholars).

13. *See, e.g.*, CHEMONICS INT’L INC., ALBANIA ASSESSMENT AND ANALYSIS REPORT JUNE 29–JULY 11, 2003, at 1–24 (2003), [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/wid/pubs/wlr\\_albania\\_assessment\\_analysis.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/wid/pubs/wlr_albania_assessment_analysis.pdf) (summarizing efforts by the U.S. Agency for International Development and the ABA’s Central European and Eurasian Law Initiative “to promote rule of law issues in Albania”).

14. *See, e.g.*, J. Rich Leonard, *Zambian Trips Provide Judge with Adventures, Insights into Africa*, INT’L JUD. OBSERVER, Sept. 2006, at 3, 3 (reporting the experience of a U.S. judge who “act[ed] as a consultant to the Zambian judiciary” and “helped draft new rules of procedure for the Zambian courts”).

15. *The West Wing: The Wake Up Call* (NBC television broadcast Feb. 9, 2005).

The United States is not alone. Throughout history, nearly every nation in the world has participated in legal transplants.<sup>16</sup> 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.”<sup>17</sup> And, as Edward Rock and Michael Wachter have reminded us, legal transplants can occur—for better or worse—within as well as across national boundaries.<sup>18</sup>

Legal transplants have long attracted scholarly attention. Although Alan Watson “popularized”<sup>19</sup> the term “legal transplants” in 1974,<sup>20</sup> earlier scholars had identified this phenomenon. For example, in 1938, Roscoe Pound declared that the “history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.”<sup>21</sup> As Watson himself acknowledged, he was not even the first to use the term “transplant.” Indeed, a few months before Watson’s book appeared in print, Otto Kahn-Freund published an article Watson called “important and fascinating,”<sup>22</sup> which explicitly referred to

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16. One possible exception is Tristan da Cunha, an “isolated island communit[y]” that had “only sporadic communications with the outside world . . . [and] developed a unique legal system.” Walter O. Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* in *GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE* 11, 84 (Walter O. Weyrauch ed., 2001); see Walter O. Weyrauch, *The Law of Tristan da Cunha*, 2002 *JURID. REV.* 261, 261.

17. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95 (1974).

18. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 *NW. U. L. REV.* 651, 663 (2002) (discussing “interdoctrinal legal transplants,” namely, transplants from one doctrinal area to another, within the same national system” and concluding that “the fit is imperfect because the contexts are different”).

19. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT’L L.J.* 1, 29 (2004) (stating that “the metaphor of *legal transplant* [was] popularized by Alan Watson”); Julie Mertus & Elizabeth Breier-Sharlow, *Power, Legal Transplants and Harmonization*, 81 *U. DET. MERCY L. REV.* 477, 479 (2004) (stating that Watson “popularized the term” legal transplants).

20. WATSON, *supra* note 17.

21. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 94 (1938); see also WATSON, *supra* note 17, at 22 (quoting this statement by Roscoe Pound).

22. Alan Watson, *Legal Transplants and Law Reform*, 92 *LAW. Q. REV.* 79, 79 (1976).

“transplants” in presenting a critical analysis of transfers of legal rules and institutions.<sup>23</sup>

Scholars were not the only observers to draw on the transplant metaphor in their discussions of legal transfers. For instance, in a much-cited 1956 judicial opinion,<sup>24</sup> Lord Denning compared the English common law to an English oak tree and warned that “[y]ou cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending.”<sup>25</sup>

With the eventual fall of the Berlin Wall and the mass export of foreign legal models to former Soviet and Eastern European countries,<sup>26</sup> this attention to legal transplants only intensified. 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.<sup>27</sup> These scholars have engaged in often heated debate<sup>28</sup> over what caus-

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23. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974) (“[W]e cannot take for granted that rules or institutions are transplantable.”).

24. *Nyali, Ltd. v. Attorney-General*, (1956) 1 Q.B. 1 (Eng. A.C.). For examples of sources citing this opinion, see *Christian v. The Queen*, (2007) 2 A.C. 400 (Eng. P.C.); Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT’L L. & BUS. 95, 107 (2005); Richard G. Small, *Towards a Theory of Contextual Transplants*, 19 EMORY INT’L L. REV. 1431, 1433 (2005).

25. *Nyali, Ltd.*, 1 Q.B. at 16.

26. For a sampling of the literature, see, for example, Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 93 (1995) (asserting that post-communist Europe has been “a large-scale borrower of Western models”); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 179 (1999) (discussing Central and East European nations’ requests for “post-socialist constitution[s]”); Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT’L L.J. 95, 95 (2004) (discussing “the large-scale transfer of Western legal know-how to the post-socialist countries of Eastern Europe”).

27. See *infra* Part I.

28. See David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7, 7–15 (David Nelken & Johannes Feest eds., 2001) (discussing the “polemical” debate between “comparativists” and “sociologists of law” over legal transplants); Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 464 (2007) (referring to “a raging debate in the literature on whether ‘legal transplants’ can be engineered or not”); Small, *supra* note 24, at 1433–37 (discussing the “culturalist-transferist debate” over legal transplants and characterizing that debate as “arguably a ‘dialogue of the deaf’”); see also, e.g., Lawrence Fried-

es such transplants to thrive, perish, or turn “toxic”<sup>29</sup> in foreign soil.

Thus far, comparative law scholars have focused principally on legal transplants’ impact on the “recipient” country.<sup>30</sup> In so doing, those scholars have missed an equally important phenomenon—the impact of the process on the “donor” country.<sup>31</sup> 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.<sup>32</sup> 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”<sup>33</sup> concept of trust—

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man, *Some Comments on Cotterrell and Legal Transplants*, in ADAPTING LEGAL CULTURES, *supra*, at 93, 97–98 (stating that Alan Watson’s “premises are ludicrous . . . [and] the notions which Watson peddles are not helpful. He leads us down a blind alley”).

29. Rock & Wachter, *supra* note 18, at 673.

30. Scholars use inconsistent terms to refer to the countries or systems involved in the legal transplant process. Compare Hans W. Baade, *Transplants of Laws and of Lawyers*, in JUSTICE IN PARTICULAR: FESTSCHRIFT IN HONOUR OF PROFESSOR P.J. KOZYRIS (2007) (referring to “source” and “borrower” and “donor and donee”), with Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 199 (1994) (referring to “‘source’ body of law [and] . . . ‘host’ body of law”), and Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 845 (2003) (referring to “donor” and “recipient”).

31. See sources cited *supra* note 30 (discussing inconsistent terminology).

32. This Article focuses exclusively on English-language comparative law scholarship on legal transplants. In fact, however, an enormous foreign-language literature exists as well. For examples of such sources, see FA DE YIZHI YU FA DE BENTUHUA [TRANSPLANTATION OF LAW AND INDIGENIZATION OF LAW] (He Qinhua ed., 2001); Wang Yong, *Falu Yizhi Yanjiu Yu Dangdai Zhongguo de Falu Xiandaihua* [A Study of Legal Transplants and the Legal Modernization of China], FAZHI YU SHEHUI FAZHAN, no. 4, 149 (2008).

33. Chinese authors often describe the model for their trust law as “Anglo-American” [*ying mei*] law. See, e.g., Li Qunxing, *Xintuo de Falu Xingzhi Yu Jiben Linian* [The Legal Nature and the Basic Concept of the Trust], 22 FAXUE YANJIU, no. 3, 118, 118 (2000) (stating that the trust system “China is introducing . . . originated in Anglo-American law”); Zheng Ruikun, *Xintuo Fa Yu Wuquan Fa Ding Yuanze de Chongtu Ji Qi Jiejue* [The Theoretical Conflict Between the Trust Law and the Numerus Clausus Principle and its Resolution], 25 ZHENGFA LUNTAN, no. 4, 78 (2007) (“The trust is a legal concept that originated in Anglo-American law.”). Throughout this Article, the Chinese phrase *ying mei* is translated literally as “Anglo-American” to emphasize the relevance of Chinese commentary to American trust law.

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.

#### I. THE LIMITS OF COMPARATIVE LAW SCHOLARSHIP ON LEGAL TRANSPLANTS

In 1974, Professor Alan Watson made a major contribution to the field of comparative law by popularizing the term "legal transplant" and making it "the dominant metaphor for discussing transformative effects of legal borrowing."<sup>34</sup> In his landmark book *Legal Transplants: An Approach to Comparative Law*,<sup>35</sup> Professor Watson defined "legal transplants" as "the moving of a rule or a system of law from one country to another, or from one people to another."<sup>36</sup> Watson presented a sweep-

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34. Timothy Webster, Note, *Legal Excisions "Omissions Are Not Accidents,"* 39 CORNELL INT'L L.J. 435, 438 (2006); see *supra* notes 19–25 and accompanying text (noting that although Watson was not the first to identify the legal transplant phenomenon or to use the legal transplant metaphor, he popularized the term).

35. WATSON, *supra* note 17.

36. *Id.* at 21.

ing historical survey<sup>37</sup> in which he emphasized the “longevity” and “frequency” of legal transplants.<sup>38</sup> He traced legal transplants to as early a source as the seventeenth-century B.C. Babylonian Code of Hammurabi.<sup>39</sup> Watson found legal transplants so “common”<sup>40</sup> throughout history that he made what was to become his most controversial claim<sup>41</sup>: “borrowing (with adaptation) has been the usual way of legal development.”<sup>42</sup>

Professor Watson recognized that legal transplants “come in all shapes and sizes,”<sup>43</sup> including “imposed reception, solicited imposition, penetration,”<sup>44</sup> and the like. Yet, he declined to present a systematic classification of such transfers<sup>45</sup> or an overarching theory of legal transplants.<sup>46</sup> He set a more modest goal for his study—to provide “individual instances”<sup>47</sup> of legal transplants and only “general reflections”<sup>48</sup> about the transplant process, its rationales, and its impact on recipient systems. He left to others<sup>49</sup> the task of “elaborat[ing] types of

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37. This survey included, *inter alia*, the influence of Greek law on Roman law, *id.* at 76–79, the reception of Roman law in Egypt, *id.* at 31–35, Scotland, *id.* at 36–56, and Holland, *id.* at 57, and the impact of English law on the Massachusetts Bay Colony, *id.* at 65–70, and New Zealand, *id.* at 71–74.

38. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 107, 112 (2d ed., University of Georgia Press 1993) (1974).

39. WATSON, *supra* note 17, at 23.

40. *Id.* at 95.

41. *See infra* notes 81–83 and accompanying text (discussing how Watson’s theory has sparked a contentious intellectual response). Watson himself later acknowledged that his “work has been regarded as subversive.” WATSON, *supra* note 38, at 107.

42. WATSON, *supra* note 17, at 7.

43. *Id.* at 30.

44. *Id.*

45. *See id.* (“There is, I suggest, no point in elaborating a detailed classification of borrowing . . .”).

46. *See* ALAN WATSON, *LEGAL ORIGINS AND LEGAL CHANGE* 90 (1991) (stating that in his earlier work on legal transplants he “did try to be as atheoretical as was consistent with the subject”).

47. WATSON, *supra* note 17, at 30.

48. *Id.* at 95.

49. *Id.* at 30. In subsequent work, however, Watson himself has attempted to develop such a theory. For examples of Watson’s books and articles discussing the relationship between law and society and the factors affecting legal change, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489, 489 n.1 (1995). Unfortunately, however, Watson “has presented his theory in a somewhat loose and intuitive fashion; he has, over time, and in different contexts, changed his formulations, sometimes claiming one thing and sometimes another, with the consequence that his theory has frequently been misunderstood.” *Id.* at 491.

transplantation”<sup>50</sup> and a theory of legal transplants.<sup>51</sup> As the next Section shows, comparative law scholars have accepted this invitation with alacrity.

#### A. CURRENT APPROACHES TO LEGAL TRANSPLANTS

Alan Watson’s book has left an indelible imprint on comparative law scholarship.<sup>52</sup> In both American and European academic circles, it has generated “explosive” interest in legal transplants.<sup>53</sup> For over three decades, established comparative law scholars and new voices in the field have applied, extended, and challenged Watson’s analysis and conclusions.

In a vast and ever-growing literature, numerous scholars have documented the spread of legal transplants across the globe—to countries as diverse as Argentina,<sup>54</sup> Indonesia,<sup>55</sup> Japan,<sup>56</sup> and the United States.<sup>57</sup> Several commentators have accepted Watson’s invitation to classify legal transplants. For instance, Daniel Berkowitz, Katharina Pistor, and Jean-Francois

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50. WATSON, *supra* note 17, at 30.

51. *Id.* As Professor Watson observed in later work, “build[ing] up a theory of borrowing . . . seems to be an extremely complex matter.” Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996); *see also* Ewald, *supra* note 49, at 509 (“[O]ne must be prepared for the possibility that . . . no satisfactory theory can be given: the phenomena may be too complex for a tidy description, even in principle.”).

52. *See* Ewald, *supra* note 49, at 490 (recognizing the “great importance” of Watson’s theory to the field of comparative law).

53. JAN SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM* 60 (Nicole Kornet trans., 2002) (“Since Alan Watson published his book ‘Legal Transplants’ in 1974, attention for this phenomenon has experienced an explosive growth in European and American legal literature.”).

54. *See, e.g.*, Miller, *supra* note 30 (noting different types of transplants found throughout Argentinean law).

55. *See, e.g.*, Jeremy J. Kingsley, *Legal Transplantation: Is This What the Doctor Ordered and Are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World—A Case Study of Corporate Governance in Indonesia*, 21 ARIZ. J. INT’L & COMP. L. 493, 506–10 (2004) (discussing the development of corporate governance law in Indonesia).

56. *See, e.g.*, Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 888 (2003) (analyzing the transplantation of the director’s duty of loyalty in Japanese corporate law); Salil K. Mehra, *Same Plant, Different Soil: Japan’s New Merger Guidelines*, 26 NW. J. INT’L L. & BUS. 515, 515–17 (2006) (examining the creation of merger guidelines in Japanese business law).

57. *See, e.g.*, Ngugi, *supra* note 28 (discussing the origins of the American concept of promissory estoppel).

Richard have concluded from their comprehensive empirical study of legal transplants that transplants fall into two broad categories: “receptive transplants” and “unreceptive transplants.”<sup>58</sup> Jonathan Miller has offered a more nuanced “typology” of legal transplants as “a start towards a systematization process.”<sup>59</sup> Using sociological methodology,<sup>60</sup> he identifies four types of legal transplants, each reflecting different factors that can “motivate”<sup>61</sup> a transplant: “i) the Cost-Saving Transplant; ii) the Externally-Dictated Transplant; iii) the Entrepreneurial Transplant; and iv) the Legitimacy-Generating Transplant.”<sup>62</sup>

Other commentators have presented updated and more detailed analyses of the transplant process. Some have focused principally on the participants in legal transplants—from local legislatures<sup>63</sup> to international development agencies.<sup>64</sup> Others, like Beverly Moran, have explored “[w]hat makes Western law attractive to non-Western lawmakers in the first place.”<sup>65</sup> A few scholars have called attention to geographical limitations in Watson’s analysis. Most notably, Máximo Langer has demonstrated that Watson’s traditional approach to legal transplants focuses too narrowly on transfers from the center (developed countries) to the periphery (developing countries).<sup>66</sup> Based on

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58. Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 179–80 (2003). For a critique of this classification as applied to Eastern Europe, see Markovits, *supra* note 26, at 97.

59. Miller, *supra* note 30, at 884.

60. *See id.* at 842 (“One tool used by a sociologists . . . is a typology.”).

61. *Id.*

62. *Id.*

63. *See* Daphne Barak-Erez, *An International Community of Legislatures?*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 532, 532 (Richard W. Bauman & Tsvi Kahana eds., 2006) (“[T]his chapter focuses on the role of legislatures in the adoption of models and ideas from foreign statutes.”).

64. *See* Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT’L L. 823, 831 (2006) (“The United States also exercises influence indirectly through international development agencies such as the International Monetary Fund (IMF) and World Bank, through international legal regimes such as the World Trade Organization and the UN human rights system, and through NGOs.”); *see also* deLisle, *supra* note 26 (presenting a comprehensive examination of foreign and international participants in legal exports, including international development agencies).

65. Beverly I. Moran, Essay, *Homogenized Law: Can the United States Learn from African Mistakes?*, 25 FORDHAM INT’L L.J. 361, 361 (2001) (detailing the development of legal standards in Eritrea).

66. *See* Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 620

his study of Latin American criminal procedure reforms, Professor Langer has argued that future analysis of legal transfers must consider “[d]iffusion of [l]egal [i]deas from the [p]eriphery” as well.<sup>67</sup> Gianmaria Ajani has gone further and called for a comprehensive “dynamic examination”<sup>68</sup> of the legal transplant process itself to identify and analyze “new factors . . . , both normative or scholarly,” that influence the process.<sup>69</sup>

Watson’s book has also ignited a firestorm of criticism. Some comparative law scholars have denied the very existence of legal transplants. Thus, Pierre Legrand has proclaimed: “[R]ules cannot travel. Accordingly, ‘legal transplants’ are impossible.”<sup>70</sup> Other commentators have challenged the transplant metaphor as “ambiguous”<sup>71</sup> and “misleading.”<sup>72</sup> David Nelken, for example, has observed that the term could refer to “plant and forestry transplanting, the transplantation of people or peoples, or the more recent . . . sense of the term used in talking about medical transplants.”<sup>73</sup> Other critics have argued

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(2007) (explaining how his analysis of “*diffusion from the periphery*” differs from the existing literature); see also Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in ADAPTING LEGAL CULTURES, *supra* note 28, at 241, 246 (“The importers and exporters and the academics who write about them tend to define transplants in terms of the centre moving into the periphery . . .”).

67. Langer, *supra* note 66, at 617.

68. Ajani, *supra* note 26, at 116.

69. *Id.*

70. Pierre Legrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES, *supra* note 28, at 55, 57; see also ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 29–36 (1978) (rejecting the argument that laws can be transferred between nations).

71. Nelken, *supra* note 28, at 17.

72. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998). For an example of the misleading effect of the term “legal transplant,” see Watson, *supra* note 51, at 340 (“In 1977 on his way to the airport, Dr. Carleton Chapman bought in New York a copy of Alan Watson’s, *Legal Transplants*, without much examination. Dr. Chapman was a physician who was interested in law, and thought the book was about the law relating to medical transplants.”).

73. Nelken, *supra* note 28, at 17–18 (footnote omitted). Randall Peerenboom also discusses the different emphases of legal transplant as a botanical and medical metaphor. Peerenboom, *supra* note 64, at 826. He states that “[t]he medical interpretation suggests the transplant will lead to discrete changes—replacement of one organ—without any overall systemic change; the recipient is still the same person. The botanical reading suggests the possibility of fundamental system alteration . . . .” *Id.* In addition, he explains that “[t]he risk of incompatibility is even clearer when *legal transplant* is understood as a medical rather than botanical metaphor. Just as some recipients of

that the metaphor, although “powerful,”<sup>74</sup> fails to capture the complexity of legal transfers. Inga Markovits has shown that the “horticultural language of transplants does not quite fit the innovations” in post-socialist Eastern Europe.<sup>75</sup> Professor Markovits states that those innovations “are not necessarily transplants from the West; they can also be homegrown breeds from the days of Socialism, now domesticated by rule of law constraints and reclaimed for post-socialist use.”<sup>76</sup> In response to the perceived flaws of the legal transplant metaphor, scholars have offered a “host of alternative metaphors and catchy phrases,”<sup>77</sup> including most recently “legal irritants,”<sup>78</sup> “legal formants,”<sup>79</sup> and “legal translation.”<sup>80</sup>

At the most extreme, critics, especially sociologists of law, have denounced Watson’s entire enterprise as subversive.<sup>81</sup> They claim that Watson’s exclusive focus on legal transplants devalues the role society plays in legal development.<sup>82</sup> These

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organ transplants may reject incompatible tissue, so too some systems may reject liberal democratic rule of law or more particular institutional reforms or practices.” *Id.*

74. Langer, *supra* note 19, at 30.

75. Markovits, *supra* note 26, at 103.

76. *Id.*

77. Peerenboom, *supra* note 64, at 825. For a detailed comparative analysis of these proposals, see *id.* at 825–27; Webster, *supra* note 34, at 438–40.

78. See Teubner, *supra* note 72, at 12 (stating that “legal irritants” serve as a more appropriate metaphor than “legal transplants” because the imposition of foreign rules “irritates law’s ‘binding arrangements’”).

79. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 1), 39 AM. J. COMP. L. 1, 26–34 (1991) (describing the development and important features of “legal formants”).

80. See Langer, *supra* note 19, at 32–35 (explaining how the metaphor of legal translation is a “superior heuristic device” to the metaphor of legal transplant).

81. See Nelken, *supra* note 28, at 13 (“For the purpose of undermining sociology of law Watson actually uses his many examples of legal transplants to show the ease and inevitability of legal transplants.”).

82. See, e.g., Friedman, *supra* note 28, at 93 (“Watson seems to feel, and quite strongly, that there is no particular relationship between law and society.”). Professor William Ewald has attempted to “reformulate and moderate” Watson’s controversial assertion that legal development is the product of legal transplants rather than societal forces. Nelken, *supra* note 28, at 8; see Ewald, *supra* note 49, at 491 (explaining that Watson’s theory “has been open to so much misinterpretation”). Professor Ewald argues that two Watsons exist—the “Strong Watson,” who “is a menace to himself and to others,” *id.* at 492, and the “Weak Watson,” who makes “a major theoretical advance [and] . . . opens the door to [a] new style of comparative law.” *Id.* at 491. Most notably, Ewald rejects Watson’s “strong” argument that law is insulated from society as “categorical and . . . one-dimensional.” *Id.* at 509. He identifies and praises the “weak version” of Watson’s argument, which only “attempt[s] to

scholars view Watson's work as nothing less than "an attack on the very possibility of sociology of law."<sup>83</sup>

Over the past three decades, one question, which Professor Watson largely ignored,<sup>84</sup> has dominated discussion of legal transplants: "Why do some legal transplants succeed while others fail?"<sup>85</sup> Recent efforts by Western governments, legal advisers, and international development agencies to spread the "rule of law"<sup>86</sup> worldwide<sup>87</sup> have given this question practical as well

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limit the link between law and society." *Id.* at 510.

The weak version, in contrast, opens the door to a view of law that is subtler and more nuanced than any of the theories that have hitherto prevailed. Watson has shown that law does not *reduce* to economics (or politics or philosophy or society); but . . . he need not claim that law is entirely *unrelated* to these subjects, and this means that he need not abandon altogether the insights of the great legal thinkers of the past. . . . But the point is that their ideas must now be coupled with a cautious awareness of the complexity of the relationship between law and society, and must be grounded in a deep investigation of the history of law.

*Id.* at 509.

83. Nelken, *supra* note 28, at 8. After publication of *Legal Transplants*, Professor Watson only added fuel to the fire with "unacceptably strong statement[s] of his position." Ewald, *supra* note 49, at 503; *see, e.g.*, ALAN WATSON, *THE EVOLUTION OF LAW* 117–18 (1985) (stating that "the direct link between a society and its law is tenuous" and "[l]aw . . . is above all and primarily the culture of lawyers and especially of the lawmakers"); Alan Watson, *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313, 315 (1978) ("[L]aw develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it."); Alan Watson, *From Legal Transplants to Legal Formants*, 43 *AM. J. COMP. L.* 469, 470 (1995) (expressly excluding from his discussion of the significance of legal culture "any of the common assumptions about a close connection between law and society").

84. *See* David Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 *WINDSOR Y.B. ACCESS TO JUST.* 349, 352 (2001) ("Watson is mainly concerned to show that law travels easily between very different contexts—whatever happens to it afterwards.").

85. Ngugi, *supra* note 28, at 495. This question so dominates the literature that scholars who explore other aspects of legal transplants often explicitly state that they are not considering the impact of transplants. *See, e.g.*, Kingsley, *supra* note 55, at 510 ("The purpose of this section is not to ascertain whether the legal transplantation of corporate governance has been successful . . ."); Moran, *supra* note 65, at 361 (stating that her "[e]ssay moves away from the question of why Western law fails to thrive in foreign soil and toward an earlier point in the law making process").

86. This is not meant to suggest that one definition of "rule of law" exists. As John Reitz has aptly observed, "[t]he rule of law is 'a notoriously contested concept,' and its precise meaning is subject to much debate." John C. Reitz, *Export of the Rule of Law*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 429, 435 (2003) (quoting Martin Krygier, *Marxism and the Rule of Law: Reflections Af-*

as theoretical significance. Yet, as Hideki Kanda and Curtis Milhaupt have observed, “[d]espite the importance of transplants to legal development around the world . . . there is little agreement among scholars on transplant feasibility and the conditions for successful transplants, or even how to define ‘success.’”<sup>88</sup>

Only compounding the problem is scholars’ disagreement as to when to measure a transplant’s success. For example, some scholars evaluate success at the initial stage of the process—when the transplant is first introduced—while other scholars focus instead on the later stage—when the transplant is integrated into the recipient legal culture.<sup>89</sup> As David Nelken has aptly noted, scholars may well reach different conclusions about a given transplant’s success depending on the time frame they use to assess success.<sup>90</sup>

Scholars have offered a wide variety of possible explanations for what makes “legal transplants work.”<sup>91</sup> For example, some authors have identified “prestige” of the donor and its model as the principal determinant of a transplant’s success or failure.<sup>92</sup> Other scholars, including Professors Kanda and Mil-

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*ter the Collapse of Communism*, 15 L. & SOC. INQUIRY 633, 640 (1990)). Nonetheless, “rule of law” has become the catchphrase of recent foreign legal assistance projects. For a superb, in-depth analysis of efforts to export the rule of law, see generally *id.*

87. See deLisle, *supra* note 26, at 180, for a comprehensive study of “contemporary United States efforts to export legal models and provide legal assistance abroad.” These efforts are often described as “the revival of law and development.” Dezalay & Garth, *supra* note 66, at 245; see Peerenboom, *supra* note 64, at 823 (“In the last 20 years, legal reforms and the establishment of rule of law have once again taken center stage as part of the new law and development movement.”).

88. Kanda & Milhaupt, *supra* note 56, at 887. Furthermore, “there is little analysis of how the success or failure of legal transplants relates to the achievement of larger goals, such as economic development.” *Id.*

89. Webster, *supra* note 34, at 440 (noting that scholars tend to focus either on the moment when a transplant is introduced or when the transplant is “consequent[ly] digest[ed] within the new state” and calling instead for an approach that “entertain[s] both aspects of the transplant phenomenon”).

90. See Nelken, *supra* note 84, at 353 (explaining that whether we are “concerned with how a legal adaptation *emerges*—the choice of law—or with the way it exerts its influence—the *results* of a given transfer” will affect “our assessment of what ‘success’ means”).

91. Berkowitz et al., *supra* note 58, at 165.

92. See, e.g., Ajani, *supra* note 26, at 115 (“Prestige and political opportunity together encourage the spread of models developed by the EU within the whole Central and Eastern Europe.”); Sacco, *supra* note 79, at 398 (“Usually, reception takes place because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as

haupt, have found the answer instead in the “fit” between the transplanted rule and the recipient country’s prevailing environment or reform agenda.<sup>93</sup>

Numerous authors have offered yet another possible explanation—process. For instance, Professors Berkowitz, Pistor, and Richard have argued that a transplant is less likely to be effective “where foreign law is imposed and legal evolution is external rather than internal.”<sup>94</sup> Other process-oriented commentators have focused specifically on the actors in legal transplants—both foreign purveyors of a legal model and local lawmakers and enforcement institutions. Jacques deLisle, for example, has linked a transplant’s success in part to foreign advisers’ knowledge of the recipient country’s language, law, politics, and culture, as well as “extensive and developed channels of communication and cooperation with recipient country institutions and individuals.”<sup>95</sup> Faiz Ahmed has underscored the need for local jurists’ participation in a legal transplant.<sup>96</sup> In support, he cites the Italian government’s unilateral effort to

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‘prestige.’”). The “prestige . . . of the local promoters who back the import” may also be a factor. Peerenboom, *supra* note 64, at 831 (emphasis omitted).

93. See deLisle, *supra* note 26, at 289 (“U.S. legal models are more likely to be emulated . . . when the substance of the U.S. prescriptions or American templates is relatively compatible with the recipient nation’s preexisting system or its agenda for legal reform.”); Kanda & Milhaupt, *supra* note 56, at 891 (“We believe that ‘fit’ between the imported rule and the host environment is crucial to the success of a transplant.”). *But see* Dezalay & Garth, *supra* note 66, at 253 (“[W]e do not believe it is helpful to ask whether the transplant fits or does not fit the culture.”); Nelken, *supra* note 28, at 47 (noting problems with the conventional approach of linking the “notion of success . . . to showing how the transferred law (also) fits its new environment”). This possible linkage to the recipient country’s reform agenda may make the timing of the transplant important. See Nelken, *supra* note 84, at 357 (“[I]n periods of political transition [local reformers] often consciously choose to borrow law from a very different kind of society.”).

94. Berkowitz et al., *supra* note 58, at 189; see Kingsley, *supra* note 55, at 511 (stating that transplants may be “undertaken voluntarily or under duress”); Small, *supra* note 24, at 1439 (stressing the difference between changes “driven by internal as opposed to external factors”). Critics have often characterized “imposed” transplants as a form of “legal imperialism.” See, e.g., JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980) (critiquing the history of American legal assistance to Latin America); Kingsley, *supra* note 55, at 521 (stating that the law and development movement in which Americans imposed laws was regarded “as an almost imperialistic venture”); Mertus & Breier-Sharlow, *supra* note 19, at 479 (describing efforts to impose international trade agreements as a “kind of legal imperialism”).

95. deLisle, *supra* note 26, at 302.

96. Ahmed, *supra* note 3, at 287–88 (discussing recent legal reform efforts in Afghanistan).

draft a criminal procedure code for Afghanistan “with little or no Afghan involvement . . . [which] has mired the reception of this attempted legal transplant.”<sup>97</sup> Based on his study of recent Latin American legal reforms, Jorge Esquirol has also emphasized the importance of local participation, but at a different stage—in subsequent implementation of a legal transplant.<sup>98</sup> Professor Esquirol has criticized U.S. advisers for “routinely disparag[ing]”<sup>99</sup> Latin American legal institutions, the very entities that determine the ultimate success or failure of a legal transplant.<sup>100</sup> The result, he concludes, “is like repeatedly attempting to build a new house while striking repeated blows at its foundations.”<sup>101</sup>

Finally, scholars have also suggested that the subject matter of a legal transplant may have an impact on that transplant’s viability. For example, authors have argued that certain “types of law”<sup>102</sup> (e.g., economic laws) may be more successfully transplanted than others (e.g., family and religious laws).<sup>103</sup> Some scholars have focused attention instead on the political content of transplanted doctrines and rules. They claim that legal transplants that involve “apolitical’ prescriptions”<sup>104</sup> are

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97. *Id.* at 287. For a more extended discussion, see Faiz Ahmed, *Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code*, 29 HASTINGS INT’L & COMP. L. REV. 93 (2005). Familiarity with the donor’s laws as well as local involvement in the transplant process may also be a factor. See Berkowitz et al., *supra* note 58, at 189 (suggesting that transplants are more likely to succeed where the recipient country’s “population is already familiar with the basic principles of these laws”).

98. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008); see also Markovits, *supra* note 26, at 99 (“Most law reform, [including legal transplants,] requires the cooperation of its citizenry to be effective.”).

99. Esquirol, *supra* note 98, at 124.

100. *Id.*

101. *Id.*

102. Nelken, *supra* note 84, at 356.

103. See *id.* (summarizing such arguments and noting that “more recent scholarship has complicated the picture by showing the possibility of using law to transform [private or religious] spheres”); see also deLisle, *supra* note 26, at 289 (stating as a “substantive lesson of the recent experience of U.S. legal assistance efforts and the export of U.S. legal ideals: compared to ‘private’ or ‘economic’ law, constitutions and ‘public’ or ‘political’ laws are . . . less readily transplanted or borrowed across legal systems”). But see Berkowitz et al., *supra* note 58, at 189 (arguing that “the process of lawmaking rather than the contents of legal rules determines the effectiveness of legal institutions,” including institutions introduced by legal transplants).

104. deLisle, *supra* note 26, at 302. Some commentators have suggested that a donor’s “apolitical intentions or analyses” may also be a factor. Kingsley, *supra* note 55, at 511.

more likely to be effective. Economically-minded authors, most notably Ugo Mattei,<sup>105</sup> have offered yet another perspective. They argue that “the most efficient legal doctrine[s]” and rules will survive a legal transplant.<sup>106</sup>

In sum, in the three decades since the publication of Alan Watson’s book, legal scholars have failed to reach consensus on the definition, desirability, or viability of legal transplants. Nonetheless, their work shares a common limitation: the existing literature has adopted a unidirectional approach, considering only the implications of a transfer on the recipient country.<sup>107</sup>

This limitation is not surprising. After all, the transplant metaphor that dominates scholarly debate—be it horticultural or medical—makes the very notion of a donor benefiting from a transplant implausible at best. Thus, it is time to go beyond metaphor to develop a more complete and nuanced theory of legal transplants.

## B. BEYOND METAPHOR

Comparative law scholars argue that “one of the greatest benefits of the study of foreign law is that it makes you rethink and understand better your own law.”<sup>108</sup> Yet, those scholars have missed a rich source of material that could inform that

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105. See, e.g., Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994).

106. *Id.* at 8. *But see* Kanda & Milhaupt, *supra* note 56, at 900 (challenging “Mattei’s efficiency perspective” and stating that “[w]hile efficient rules may indeed tend to survive and proliferate outside their home jurisdictions, this bare fact has little explanatory power in the absence of a fine-grained examination of how a specific rule fits into the existing legal infrastructure and political economy of a given system, and the alternatives available to relevant actors”).

107. It should be noted, however, that this literature considers both “the transformative effects a borrowed legal institution may have on the receiving country’s legal system” and the “role[s] that the recipient legal culture plays in adapting transplanted law.” Webster, *supra* note 34, at 439.

108. Sir Basil Markesinis, *Understanding American Law by Looking at It Through Foreign Eyes: Toward a Wider Theory for the Study and Use of Foreign Law*, 81 TUL. L. REV. 123, 124 (2006); accord WATSON, *supra* note 17, at 17 (stating that knowledge of a foreign legal system “will enable . . . [an individual] to understand his own system better . . . [and] can also be of the utmost practical value . . . to a law reformer seeking improvements for his own national system”); H. Patrick Glenn, *Aims of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 57, 63 (Jan M. Smits ed., 2006) (“Comparative law could continue to be an aid in simply understanding one’s own law. Domestic law is always in need of improvement, and comparative law can be useful in this constructive process.”).

understanding—the legal transplant process.

Two scholars, Henry Hansmann and Ugo Mattei, arguably have taken a first step in this direction. In an influential 1998 article, Professors Hansmann and Mattei noted that “[i]ncreasing numbers of civil law countries” had adopted common law “trust-like institutions.”<sup>109</sup> They contended that this importation of trusts<sup>110</sup> should inspire both common law and civil law observers to explore a fundamental question that had largely been ignored in the literature<sup>111</sup>: what are “the general economic functions served by a separate law of trusts?”<sup>112</sup> They then argued that a comparative functional study of trust law provided revealing insights into the new role of trusts in common law as well as civil law countries. According to Hansmann and Mattei, the private trust’s “historical role as a device for intrafamily wealth transfers . . . [has become] relatively trivial.”<sup>113</sup> In turn, they claimed that the trust now primarily “facilitates the partitioning of assets into bundles that can conveniently be pledged separately to different classes of creditors.”<sup>114</sup>

Professors Hansmann and Mattei presented a scathing critique of both U.S. academic literature and law school curricula for ignoring this change in the function of trusts.<sup>115</sup> They argued that American trust law scholars and teachers continue to focus on the historical function of the private trust in promoting intrafamily wealth transfers while neglecting the much more significant “role that private trusts have come to play in the American capital markets.”<sup>116</sup> The authors also attacked

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109. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 435 (1998).

110. Hansmann and Mattei also emphasized the historical differences in common law and civil law treatment of trusts: “In common law jurisdictions, the trust is among the most important creations of the law of equity . . . . In the civil law countries, in contrast, the private trust does not exist as a general form . . . .” *Id.* They further argued that “[t]he simultaneous existence of these contrasting regimes naturally raises some basic questions [like]: What is the role of the law of trusts?” *Id.*

111. *See id.*

112. *Id.* at 437.

113. *Id.* at 436.

114. *Id.* at 438. They also argued that “[o]f particular importance in this respect is the use of trust law to shield trust assets from claims of the trustee’s personal creditors.” *Id.*

115. *See id.* at 436.

116. *Id.*; *see also* Henry Hansmann & Ugo Mattei, *Trust Law in the United States. A Basic Study of Its Special Contribution*, 46 AM. J. COMP. L. 133, 133 (1998) (stating that this focus on the historical role of trusts is “a rather tech-

the vast American trust law literature for taking a narrow doctrinal approach to trusts rather than adopting a broader functional perspective.<sup>117</sup> They argued that comparative study of the economic functions of trusts would reveal that “the function of trust law that is the primary subject of the literature in the common law countries, namely the creation and enforcement of fiduciary duties . . . [is] a relatively unimportant reason for maintaining a separate law of trusts.”<sup>118</sup> The authors thus concluded that a better understanding of trust law functions would have significant benefits not only for Europeans importing (or considering importing) trusts, but also for American legal academics teaching and writing about trusts.<sup>119</sup>

Professors Hansmann and Mattei have advanced the comparative law literature on legal transplants by suggesting that such transplants can provide lessons for donors as well as recipients.<sup>120</sup> Their analysis has limitations, however. The authors focus exclusively on adoption of a foreign law, thus ignoring rejection.<sup>121</sup> They compound the problem by considering only the “general economic functions” of the transplanted law.<sup>122</sup> Finally, they identify just one community of the donor country—the academic community—that can benefit from study of a legal transplant.<sup>123</sup>

The remainder of this Article offers a very different vision of the transplant process. It shows that the most profound lessons for the donor come from identifying what the recipient *rejected* rather than *adopted* from the donor’s model. The Article demonstrates the advantages of a close analysis of the recipient’s specific critique of the donor’s system. The Article concludes that the legal transplant process can provide a new analytical framework or mirror for legal reformers from every walk of life—legislators, judges, practitioners, and scholars alike—to see concrete flaws in their own system and possible new directions for reform.

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nical and narrow ground to approach our topic”).

117. Hansmann & Mattei, *supra* note 109, at 435 (criticizing the “extensive legal literature on the institution of the trust [as] . . . tend[ing] to be doctrinal rather than broadly functional in perspective”).

118. *Id.* at 438.

119. *Id.* at 435–37 (discussing the benefits of a “better understanding of the functions of trust law”).

120. *See id.*

121. *See id.* at 435–36.

122. *Id.* at 437.

123. *See id.* at 435–36.

## II. THE CHINESE MIRROR: CHINA'S COMPARATIVE TRUST LAW LITERATURE

On April 28, 2001, the People's Republic of China (P.R.C.), a country with a socialist, civil law-based legal system, adopted that quintessential common law institution: the trust.<sup>124</sup> China's Trust Law came complete with provisions an American estate planner would recognize<sup>125</sup>—testamentary trusts,<sup>126</sup> cy pres,<sup>127</sup> spendthrift protections,<sup>128</sup> fiduciary commingling,<sup>129</sup> and self-dealing.<sup>130</sup> Chinese drafters and commentators openly acknowledge the law's foreign origins. The authors of the first annotated commentary on China's Trust Law expressed this view best in a horticultural metaphor all too familiar to comparative law scholars.<sup>131</sup> They described the law as a “‘fruit tree’ that has come across the ocean to another shore, [which] if altered to fit China's water and soil, can produce ‘clusters of fruit.’”<sup>132</sup>

The P.R.C. Trust Law has generated a vast Chinese-

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124. Xintuo Fa [Trust Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001) ST. COUNCIL GAZ., July 20, 2001, at 16 [hereinafter 2001 Trust Law]. For a superb overview of the Chinese Trust Law, see generally LUSINA HO, TRUST LAW IN CHINA (2003); see also Frances H. Foster, *The Dark Side of Trusts: Challenges to Chinese Inheritance Law*, 2 WASH. U. GLOBAL STUD. L. REV. 151, 154–56 (2003) (presenting a critical analysis of the Trust Law). Strictly speaking, China's legal system included limited provisions on trusts prior to the 2001 Trust Law. See Walter Hutchens, *The PRC's First Trust Law: Trusts Without Chinese Characteristics?*, CHINA L. & PRAC., June 2001, at 18, 18 (citing provisions on entrustment contracts in the 1999 Contract Law and regulations on financial trust companies). Yet, “no prior statute spelled out the basic parameters of trust relationships, and courts often struggled to determine the right standards to apply.” *Id.*

125. This is not meant to suggest, however, that the Chinese provisions are identical to their American counterparts. See, e.g., WANG QING & GUO CE, ZHONGHUA RENMIN GONGHEGUO XINTUO FA TIAOWEN QUANSHI [ANNOTATED ARTICLES OF THE TRUST LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 164–66 (2001) (discussing differences between the Chinese, Japanese, Korean, and Anglo-American versions of the “cy pres principle” for charitable trusts).

126. 2001 Trust Law, *supra* note 124, art. 13.

127. *Id.* art. 72.

128. *Id.* arts. 47–48.

129. *Id.* art. 29.

130. *Id.* art. 28.

131. WANG QING & GUO CE, *supra* note 125, at 1 (internal quotation marks omitted).

132. *Id.* See also *supra* Part I, for a broader discussion of how the transplant metaphor is used in comparative law literature.

language literature.<sup>133</sup> These materials constitute the principal research base for this Article's examination of China's critique of American trust law. Part II.A presents an overview of the Chinese trust law literature. It shows that Chinese authors have relied heavily on foreign texts and commentary. They have produced a voluminous and sophisticated comparative law literature that provides Chinese and foreign scholars invaluable insights into China's transplantation and adaptation of foreign trust law.

#### A. SOURCES FOR STUDYING CHINA'S LEGAL TRANSPLANT

Chinese lawmakers and commentators have produced a broad array of materials on the P.R.C. Trust Law. These sources run the gamut from official statutory texts and legislative history<sup>134</sup> to online discussions of the law.<sup>135</sup> Chinese scholars have published scores of books,<sup>136</sup> law review articles,<sup>137</sup>

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133. Chinese publications with both Chinese-language text and English-language translations include, for example, ZHONGGUO XINTUO FA—QI CAO ZILIAO HUIBIAN [THE CHINESE TRUST LAW—MATERIALS ON THE DRAFTING PROCESS] (Zhu Shaoping & Ge Yi eds., 2002) [hereinafter MATERIALS ON THE DRAFTING PROCESS] (publishing both Chinese-language and English-language versions of papers and documents discussed at a 2000 international symposium in Chengdu, China on the draft Chinese Trust Law); Bian Yaowu, *Zhongguo Xintuo Falu Zhidu* [The Trust Legal System of China], ZHONGGUO FALU, Apr. 2003, at 4–7 (providing article in original Chinese); *id.* at 53–58 (providing English translation of article). A few purely English-language sources exist as well. For examples of such works by Chinese and foreign scholars, see LUSINA HO, *supra* note 124, at 1; Foster, *supra* note 124, at 152; Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 REAL PROP. PROB. & TR. J. 345, 345 (2003); Zhenting Tan, *The Chinese Law of Trusts: A Compromise Between Two Legal Systems*, 13 BOND L. REV. 224, 224 (2001).

134. See, e.g., 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 307–25 (publishing the 2001 text of the Chinese Trust Law and documents on the trust law drafting process).

135. See, e.g., Richard Qiang Guo, *A Look at China's New Trust Law*, CHINA ONLINE, Aug. 17, 2001 (on file with author). Numerous commentaries appear in the print media as well. See, e.g., Zhang Xiaocai, *Bu Liaojie Xin Xintuo Ni Hui Sunshi Hen Duo* [If You Do Not Understand the New Trusts You Stand to Lose a Lot], RENMIN RIBAO, May 27, 2001, <http://www.peopledaily.com.cn/GB/jinji/34/168/20010527/475481.html>.

136. See, e.g., CHEN XIANGCONG, XINTUO FALU ZHIDU YANJIU [RESEARCH ON THE TRUST LEGAL SYSTEM] (2007) (providing an overview of legal theory and practice on trusts); SHI TIANAO & YU WENRAN, XINTUO FA [TRUST LAW] (1999) (providing a comparative analysis of Anglo-American, Chinese, Japanese, Korean, and Taiwanese trust law).

137. See, e.g., Lusina Ho, *Xintuo Lifa Bu Yi Cao Zhi Guoji* [Trust Legislation Should Not Be Acted Upon in Undue Haste], 1 BEIDA FALU PINGLUN 618 (1998); Geng Lihang, *Xintuo Caichan Wei Zhongguo Xintuo Fa* [Trust Property

conference papers,<sup>138</sup> and even doctoral dissertations<sup>139</sup> on trust law topics. These works include both general discussions of the origins, development, and basic features of trusts<sup>140</sup> and in-depth studies of specific aspects of trust law, such as the trustee's duty of prudent investment,<sup>141</sup> contractual trusts,<sup>142</sup> definitions of trust property,<sup>143</sup> and modification and termination of trusts.<sup>144</sup>

For the foreign observer, the most striking feature of the Chinese literature is its extensive reference to foreign law texts, theory, and practice.<sup>145</sup> Chinese authors have drawn on a

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and *China's Trust Law*], MIN SHANG FAXUE, no. 5, 2 (2004).

138. See, e.g., MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 259–61; Zhou Xiaoming, Partner, Beijing Jun Ze Jun Law Firm, Presentation at the 2001 China Trust Forum: Corporate Governance in Trust Industry (Sept. 8, 2001) (on file with author).

139. See, e.g., ZHANG TIANMAN, SHIQU HENGPING FA DE XINTUO [TRUSTS WITHOUT EQUITY] (2004); ZHOU XIAOMING, XINTUO ZHIDU DE BIJIAO FA YANJIU [COMPARATIVE LAW RESEARCH OF TRUST SYSTEMS] (1996) (providing analysis based on the author's doctoral dissertation of basic principles of trust law and the role of trusts in both society and culture); Zhenting Tan, Perfecting the Chinese Law of Trusts: Critical and Comparative Study of the Australian and Chinese Law of Trusts (2005) (unpublished Ph.D. dissertation, Bond University) (on file with Bond University), available at <http://epublications.bond.edu.au/theses/tan> (identifying deficiencies in Chinese trust law through a comparative analysis of Chinese trust law and Australian trust law).

140. See, e.g., Li Qunxing, *supra* note 33, at 118; Luo Dajun, *Xintuo Falu Guanxi Tanxi* [An Inquiry and Analysis of the Trust Legal Relationship], ZHENGFA LUNTAN, Apr. 2001, at 70 (providing an inquiry into the nature of trust law).

141. See, e.g., Huang Suping, *Lun Xintuo Shoutuoren de Jinshen Touzi Yiwu—Yi Meiguo "Tongyi Jinshen Touzi Ren Fa" Wei Shijiao* [On the Trustee's Duty of Prudent Investment—From the Perspective of the American "Uniform Prudent Investor Act"], ZHENGZHI YU FALU, no. 9 (2008); Zhou Yi, *Lun Xintuo Shoutuoren de Jinshen Touzi Yiwu* [Discussing the Trustee's Duty of Prudent Investment], ZHANGZHOU SHIFANG XUEYUAN XUEBAO, no. 2 (2002) (on file with author).

142. See, e.g., Zhang Chun, *Xintuo Hetong Lun* [On Trust Contracts], ZHONGGUO FAXUE, no. 3, 93 (2004).

143. See, e.g., Geng Lihang, *supra* note 137; Li Qunxing, *Lun Xintuo Caichan* [On Trust Property], FAXUE PINGLUN, no. 1, 77, 77 (2000); Zhong Ruidong, *Xintuo Caichan Quan, Xintuo Fa Yu Minfa Dian* [Trust Property Rights, Trust Law and Civil Code], GANSU ZHENGFA XUEYUAN XUEBAO, Mar. 2007, at 71, 71.

144. See, e.g., Xu Wei, *Woguo "Xintuo Fa" Di Wu Zhang Ruogan Quexian Xin Kui* [A New View of Certain Defects in Chapter 5 of the Chinese "Trust Law"], ZHENGFA LUN CONG, June 10, 2006, at 47, 47.

145. See, e.g., HUO YUFEN, XINTUO FA YAO LUN [ESSENTIALS OF TRUST LAW] 3–27, 278–306 (2003) (discussing English, American, Japanese, and Korean trust laws with an appendix of Chinese translations of Japanese and Korean trust laws); YU WEIMING, XINTUO SHOUTUOREN YANJIU [RESEARCH ON

wide variety of foreign legal primary and secondary sources. Apparently, no country's trust materials are off-limits. Even Taiwanese texts and commentaries are discussed at length in the P.R.C. literature.<sup>146</sup> Chinese authors cite, often with approval, statutory provisions from Taiwan's 1996 Trust Law.<sup>147</sup> Moreover, in what one Chinese drafter aptly proclaimed "a very significant event,"<sup>148</sup> a P.R.C. press actually republished on the Mainland a book on Taiwan's Trust Law authored by two Taiwanese scholars.<sup>149</sup>

Chinese studies of American trust law illustrate the extraordinary range of materials used by Chinese scholars. Authors cite U.S. federal<sup>150</sup> and state<sup>151</sup> legislation and model codes, including the Uniform Probate Code,<sup>152</sup> Uniform Trust Code,<sup>153</sup> and Uniform Prudent Investor Act.<sup>154</sup> They discuss

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THE TRUSTEE] 1–5 (2007) (discussing the concept of trust in England, the United States, Japan, Korea, Taiwan, France, and Germany); ZHONG RUIDONG & CHEN XIANGCONG, XINTUO FA [TRUST LAW] 44 (2004) (discussing and citing materials on English, French, and German law); "ZHONGHUA RENMIN GONGHEGUO XINTUO FA" TIAOWEN SHIYI [EXPLANATION OF THE ARTICLES OF THE "TRUST LAW OF THE PEOPLE'S REPUBLIC OF CHINA"] 209 (Hu Jihua & Zhang Guilong eds., 2001) [hereinafter EXPLANATION OF THE ARTICLES] (contrasting the definitions of "charitable purpose" in American, English, Japanese, and Korean trust laws).

146. P.R.C. authors often refer to Taiwan as a "region" of China rather than a separate country. See, e.g., WANG QING & GUO CE, *supra* note 125, at 54 (referring to "Article 32 of the 'Trust Law' of China's Taiwan region").

147. See, e.g., CHEN XIANGCONG, *supra* note 136, at 163 (discussing Taiwan's provision on "trust supervisors").

148. Preface to LAI YUANHE & WANG ZHICHENG, XIANDAI XINTUO FA LUN [A DISCUSSION OF CURRENT TRUST LAW] 1 (2002) [hereinafter Preface to LAI YUANHE & WANG ZHICHENG].

149. LAI YUANHE & WANG ZHICHENG, *supra* note 148. This book has been cited by Chinese scholars. See, e.g., CHEN XIANGCONG, *supra* note 136, at 31 nn.1–3 (citing LAI YUANHE & WANG ZHICHENG, *supra*).

150. See, e.g., ZHANG TIANMAN, *supra* note 139, at 213–19, 309 (discussing provisions from the Internal Revenue Code and Employee Retirement Income Security Act).

151. See, e.g., SHI Tiantao & YU WENRAN, *supra* note 136, at 178, 187 (citing Alabama and Washington legislation); Zhou Yi, *supra* note 141, at 31 (citing Arizona legislation).

152. See, e.g., ZHOU XIAOMING, *supra* note 139, at 90 (discussing model codes, including the Uniform Probate Code).

153. See, e.g., Dong Xinzong, *Shi Lun Xintuo Shoutuoren Jinshen Yiwu de Biaozhun* [An Examination of the Standard of a Trustee's Duty of Prudence], 23 ZHONGBEI DAXUE XUEBAO (SHEHUI KEXUE BAN), no. 1, 20, 21 (2007) (discussing section 804 of the Uniform Trust Code and accompanying comment); Zhang Junjian, *Xintuo Fa Zhong Dui Di San Ren de Zeren Zhi Yanjiu* [A Study of Liability to Third Parties Under the Trust Law], 4 JINAN XUEBAO (ZHEXUE SHEHUI KEXUE BAN) 80, 81 (2007) (citing section 816 of the UNIFORM

such classic U.S. trust cases as *Harvard College v. Amory*.<sup>155</sup> For background material, they draw heavily on Restatements of Trusts,<sup>156</sup> treatises by leading trust scholars,<sup>157</sup> American law school casebooks,<sup>158</sup> and *Corpus Juris Secundum*.<sup>159</sup> They turn to *Black's Law Dictionary* for the definitions of American legal terms.<sup>160</sup> Chinese authors demonstrate familiarity with American legal scholarship as well. For example, recently they have addressed numerous articles by Professor John Langbein<sup>161</sup> and the very article discussed above<sup>162</sup>—Henry Hans-

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TRUST CODE).

154. See, e.g., ZHANG TIANMAN, *supra* note 139, at 89 (citing section 1(6) of the UNIFORM PRUDENT INVESTOR ACT); Huang Suping, *supra* note 141 (discussing at length the American Uniform Prudent Investor Act).

155. See YU WEIMING, *supra* note 145, at 153 (discussing *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830)); Zhou Yi, *supra* note 141, at 23 (same); ZHANG TIANMAN, *supra* note 139, at 228–41 (discussing major U.S. cases on offshore asset protection trusts, including *Portnoy v. Marine Midland Bank (In re Portnoy)*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); *Fed. Trade Comm'n v. Affordable Media, LLC (Anderson)*, 179 F.3d 1228 (9th Cir. 1999); and *Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d 1294 (11th Cir. 2002)).

156. See, e.g., EXPLANATION OF THE ARTICLES, *supra* note 145, at 209 (discussing section 368 of the Restatement (Second) of Trusts); ZHANG TIANMAN, *supra* note 139, at 89 (citing section 228 of the RESTATEMENT (THIRD) OF TRUSTS: the “Prudent Investor Rule”); Geng Lihang, *supra* note 137, at 9 (citing sections 17, 177, 178, 222 of the RESTATEMENT (SECOND) OF TRUSTS).

157. See, e.g., SHI Tiantao & YU WENRAN, *supra* note 136, at 125 nn.1–2 (citing GEORGE T. BOGERT, TRUSTS 304, 343 (6th ed. 1987)); ZHANG TIANMAN, *supra* note 139, at 45 n.1, 395 n.3 (citing PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS, AND ADMINISTRATION 353 (2d ed. 1994) and AUSTIN W. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS 612–13 (1960)); Li Qunxing, *supra* note 33, at 119 (citing EDWARD C. HALBACH, JR., TRUSTS 1 (1990)); Zhang Chun, *Woguo Xintuo Fa Zhong de Guize Chongtu Ji Qi Jiaozheng [Conflicts Among Regulations in the Chinese Trust Law and Addressing Them]*, SHEHUI KEXUE YANJIU, no. 5, 77, 79 (2008) (citing ROGER W. ANDERSON, UNDERSTANDING TRUSTS AND ESTATES 83 (3d ed. 2003)).

158. See, e.g., ZHOU XIAOMING, *supra* note 139, at 110 n.3 (citing EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 300–70 (3d ed. 1981)).

159. Li Qunxing, *supra* note 143, at 78 n.7 (citing 90 C.J.S. *Trusts* § 180); Zhang Chun, *supra* note 142, at 95 n.2 (citing 89 C.J.S. *Trusts* § 93-d).

160. See, e.g., ZHANG TIANMAN, *supra* note 139, at 220 n.1 (citing BLACK'S LAW DICTIONARY 594–95 (5th ed. 1979)); Zhang Chun, *Woguo Xintuo Caichan Suoyou Quan Guishu de Taidu Ji Qi Fali Shenshi [The Chinese Approach to Ownership Rights in Trust Property and the Jurisprudential View of that Approach]*, 9 GANSU ZHENGFA XUEYUAN XUEBAO 7, 8 (2007) (citing BLACK'S LAW DICTIONARY 1313 (5th ed. 1979)).

161. See, e.g., ZHANG TIANMAN, *supra* note 139, at 282 n.1 (discussing and citing John H. Langbein, *The Secret Life of the Trust: Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997)); Geng Lihang, *supra* note 137, at 13 n.1 (discussing and citing John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 642 (1995)).

mann's and Ugo Mattei's 1998 comparative study of the economic functions of trusts.<sup>163</sup>

Chinese trust law scholars have stressed the importance of combining theoretical study with field research abroad. For example, a Chinese doctoral student reported that in order to understand "the role of trusts and their relationship to society and culture"<sup>164</sup> he traveled to "Japan, Hong Kong, and America and other nations and regions"<sup>165</sup> to observe, firsthand, foreign trust law in action. A few scholars have expanded their knowledge of foreign trust systems through graduate study abroad.<sup>166</sup>

Chinese trust law specialists have also acquired knowledge of other countries' trust systems through direct contacts with foreign colleagues. For example, in 2000, the Financial and Economic Committee of the National People's Congress (N.P.C.)<sup>167</sup> co-sponsored<sup>168</sup> an international symposium that brought together trust law experts from Mainland China, Hong Kong, Australia, France, and Germany.<sup>169</sup> Similarly, a Chinese drafter and scholar revealed that he had "consulted [his] Taiwanese colleagues" because trust law drafters on "the two shores of the [Taiwan] Strait . . . were confronting questions that were fundamentally the same."<sup>170</sup>

#### B. THE ROLE OF COMPARATIVE LAW RESEARCH IN THE EVOLUTION OF CHINESE TRUST LAW

The Chinese trust law literature offers invaluable insights

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162. See *supra* notes 109–23 and accompanying text.

163. See, e.g., Zhou Yi, *supra* note 141, at 1, 5 (discussing and citing Hansmann & Mattei, *supra* note 109). See also Geng Lihang, *supra* note 137, at 14 (listing Hansmann & Mattei, *supra*, in the bibliography).

164. ZHOU XIAOMING, *supra* note 139, at 1.

165. *Id.* The author also conducted field research in China. He went to "various areas like Shenzhen, Hainan Island, Shandong, and Shanghai and investigated the trust industry there." *Id.*

166. See, e.g., Zhenting Tan, *supra* note 139. This dissertation was written by Zhenting Tan, who was awarded a Ph.D. from Bond University in Australia.

167. The National People's Congress is China's national legislature.

168. The N.P.C.'s Financial and Economic Committee cosponsored the symposium with "the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (German Technical Co operation [sic] Corporation, GTZ), acting on behalf of the German Federal Ministry of Economic Co-operation and Development." Zhu Shaoping, Immanuel Gebhardt & Holger Hanisch, *Preface to MATERIALS ON THE DRAFTING PROCESS*, *supra* note 133, at 259, 259.

169. See MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 622–27 (listing "Resumes of the Contributors to the Symposium").

170. *Preface* to LAI YUANHE & WANG ZHICHENG, *supra* note 148, at 1.

into a legal transplant in action—China’s efforts to transplant foreign trust law. That literature provides a research base to study the two stages identified by comparative law scholars of legal transplants: (1) the initial process of selecting and introducing a foreign model and (2) the subsequent process of adapting and integrating the model.<sup>171</sup> This Section shows that in both stages, Chinese participants in the transplant process have drawn extensively on comparative law research and analysis of foreign trust law sources.

### 1. Impact on the Drafting Process

The Chinese trust law literature confirms the claim of comparative law scholars that the “borrowing” of foreign legal institutions and rules can be a fertile source of legal development.<sup>172</sup> From the start, foreign texts and commentaries have been an integral part of China’s efforts to draft its first trust law. Indeed, in August 1993, the N.P.C. launched the process with a “draft workshop,”<sup>173</sup> in which participants “translated and collated a large amount of material on the trust systems and legislation of relevant countries.”<sup>174</sup> The impetus and goals for the P.R.C. Trust Law also reflected this foreign influence. According to Chinese drafters and scholars, the initial impetus for the legislation was the urgent need to promote China’s accession to the World Trade Organization<sup>175</sup> and to address China’s troubled financial sector<sup>176</sup> by adopting “an important pil-

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171. See *supra* notes 89–90 and accompanying text.

172. See *supra* notes 17, 21, 35–42 and accompanying text (providing examples of this claim by legal scholars).

173. Fin. & Econ. Comm. of the Nat’l People’s Congress, *Xinxi Beijing Ji Zhuyao Taolun Wenti* [Background Information and Main Issues for Discussion], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 175, 176 [hereinafter *Background Information*].

174. EXPLANATION OF THE ARTICLES, *supra* note 145, at 2.

175. See, e.g., LUSINA HO, *supra* note 124, at 1 n.1 (“[In] June 2000 . . . the draft law was submitted to the [National People’s] Congress . . . as part of China’s efforts to establish modern legal and financial infrastructures in anticipation of its entry into the World Trade Organization.”); *Preface* to LAI YUANHE & WANG ZHICHENG, *supra* note 148, at 1 (stating that the Trust Law was adopted “for the purpose of joining the WTO”).

176. Wang Lianzhou, *Xintuo Fa Chutai, Buyi Zai Tou* [The Trust Law Should Not Be Delayed Any Longer], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 17 (stating that the enactment of the Trust Law is “absolutely essential in order to create an effective legal basis and sound legislative environment to guide the liquidation and rectification of trust and investment companies”); see also LUSINA HO, *supra* note 124, at 3 (“In particular, the primary motivation that initiated the drafting process in 1993 was to

lar of the modern financing industry in developed countries,” the trust.<sup>177</sup> Chinese authors cite other, less immediate goals as well, again drawn from their familiarity with foreign experiences. They point out that the trust is such a “flexible”<sup>178</sup> device overseas that it promises to respond to the increasing wealth of Chinese citizens,<sup>179</sup> promote “family responsibility,”<sup>180</sup> and expand the charitable sector.<sup>181</sup>

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use the Trust Law to regulate China’s trust and investment companies . . . .”); *Preface* to LAI YUANHE & WANG ZHICHENG, *supra* note 148, at 1 (stating that the principal goal for the Trust Law was “to regulate commercial trusts’ activities”). For extended discussion of the multitude of problems that plagued China’s trust industry, see LUSINA HO, *supra* note 124, at 3–14; Wang Qiao, *Xintuo Ye Huhuan Xintuo Lifa* [*Trust Industry Is Calling for Trust Legislation*], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 59.

177. Wang Lianzhou, *supra* note 176, at 15.

178. WANG QING & GUO CE, *supra* note 125, at 1 (“Because the flexibility of the trust for management of property is without parallel in other legal systems, Japan, Korea, and other countries with the civil law system have also introduced it and enacted trust laws.”); Li Qunxing, *supra* note 33, at 118 (“[F]lexibility . . . has made the trust system a worldwide trend.”).

179. Luo Dajun, *supra* note 140, at 70 (“Trust law is an important constituent part of the legal systems of many countries in the world. It is an essential prerequisite for societies’ legal systems to promote increasing the wealth of society . . . .”); Wang Lianzhou, *supra* note 176, at 15 (noting the need for a trust law to respond to the “increase in individuals’ income”); *see also* Bian Yaowu, *The Trust Legal System*, ZHONGGUO FALU, no. 2, 53, 53 (2003) (stating that “the establishment of the Chinese trust legal system,” promulgated by the recent enactment of the Trust Law, “has met the needs of the society and individuals for property management with growing wealth”). Two German experts who were consulted in the drafting process report that “[t]he second field for which trusts are used elsewhere in the world, namely creating a legal possibility for well off citizens to perpetuate their ideas of how their assets should be managed and used . . . increasingly moved into the spotlight the longer the drafting process continued” in part because “the re-emergence of private fortunes in the PRC is giving rise to the wish for more flexible possibilities for the management and inheritance of these fortunes.” Immanuel Gebhardt & Holger Hanisch, *Development of the Chinese Trust Law—an Overview*, in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 262, 268.

180. *Guanyu Zhongguo Renmin Gongheguo Xintuo Fa Caoan Yantao Hui Zongjie* [*Summary Report of the Symposium on the Draft Trust Law of the People’s Republic of China*], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 169, 169 [hereinafter *Summary Report*] (stating that China needs a trust law in part because “the trust is an ideal mechanism to promote family responsibility”).

181. CHEN XIANGCONG, *supra* note 136, at 303 (stating that the Trust Law, specifically its provision for a supervisor of charitable trusts, “promot[es] the healthy development of charitable work”); Zhang Xiao, *Xintuo Lifa Guocheng de Beijing Jieshao* [*Background Information on the Drafting Process*], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 11, 11 (“[A] trust system . . . is of great significance for . . . developing social organizations that benefit the public through poverty relief, education, public health[,] etc. . . .”).

Chinese access to foreign trust law materials and experts also played a prominent role in the drafting process. Drafters carefully evaluated common law and civil law legislation and commentary, both European and Asian. For instance, Professor Jiang Ping reported that he had examined and discussed with his fellow drafters the trust law systems of Japan, the United States, and Hong Kong.<sup>182</sup>

Foreign trust law specialists were among the cast of thousands involved in writing, reviewing, and revising the P.R.C. Trust Law.<sup>183</sup> German law professor Stefan Grundmann is a prime example. He provided drafters an overview of German trust law and practice;<sup>184</sup> a critical analysis of draft Chinese provisions on trust property, charitable trusts, and trust companies;<sup>185</sup> and a Model Trust Law, complete with annotated commentary.<sup>186</sup>

In addition, Chinese debates over Trust Law provisions often referenced foreign models. The debate over whether Chinese legislation should include specific provisions on settlers' rights is illustrative. During the process of "soliciting opinions"<sup>187</sup> on early drafts of the Trust Law, considerable disa-

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182. Jiang Ping, *Foreword to ZHOU XIAOMING, supra note 139, at 2; see* Zhenting Tan, *supra note 133, para. 10* ("During the second stage of making the Chinese law of trusts, the [N.P.C.] Legal Committee adopted the experiences of Japan and Taiwan, which had legislated their law of trusts and law of trust businesses respectively.")

183. EXPLANATION OF THE ARTICLES, *supra note 145, at 60* (reporting that drafters consulted scholars from the United States, England, and Japan in drafting Article 2 of the Trust Law, the provision that defines "trust"); *Background Information, supra note 173, at 180* (stating that drafters "discussed [the draft Trust Law] many times with foreign trust law experts").

184. Stefan Grundmann, *Overview on German Trust Industry and Trust Law, in MATERIALS ON THE DRAFTING PROCESS, supra note 133, at 394.*

185. Stefan Grundmann, *Comments on Chapter III—Trust Property, in MATERIALS ON THE DRAFTING PROCESS, supra note 133, at 462; Stefan Grundmann, Comments on Chapter VI—Special Provisions for Trusts for Public Beneficiaries, in MATERIALS ON THE DRAFTING PROCESS, supra note 133, at 490.*

186. Stefan Grundmann, *Model Trust Law, in MATERIALS ON THE DRAFTING PROCESS, supra note 133, at 570.*

187. ZHONG RUIDONG & CHEN XIANGCONG, *supra note 145, at 89.* Drafters solicited opinions from a wide range of organizations and institutions. See Zhang Xuwu, *Quanguo Ren Da Falu Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Xintuo Fa (Caoan)" Shenyi Jieguo de Baogao [Report on the Results of the Examination of the "(Draft) Trust Law of the People's Republic of China" by the Legal Committee of the National People's Congress]* (Apr. 24, 2001) [hereinafter *Examination Report*], in 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 323, 323–25 (reporting that the N.P.C. Legal Committee solicited the views of "different regions, governmental departments, related

greement arose as to whether China should follow the lead of common law countries and limit a settlor's rights after establishment of a trust or, instead, adopt the approach of "civil law countries' trust laws [, which] . . . recognize that the settlor has a series of [such] rights"<sup>188</sup> even after establishment of a trust. As will be discussed below,<sup>189</sup> China ultimately chose and extended the latter approach.

Finally, throughout the drafting process, Chinese commentators used foreign experience to identify the potential legal and practical challenges China faces in introducing and implementing a trust system. Several Chinese authors emphasized potential conflicts between the draft Trust Law and other Chinese legislation or legal concepts. For example, Hong Kong University professor Lusina Ho raised the issue of whether Marriage Law provisions on jointly owned marital property "include property one spouse owns as a trustee" or beneficiary.<sup>190</sup> Drawing on Louisiana precedent,<sup>191</sup> she predicted that "lengthy litigation"<sup>192</sup> could ensue if China does not resolve this question.<sup>193</sup> Other commentators called attention to likely enforcement problems China faces in introducing a foreign trust system. For instance, in his 1996 doctoral dissertation, a Trust Law drafter, Zhou Xiaoming, stressed the dominant role of the judiciary in common law trust systems.<sup>194</sup> He contrasted that approach with the practical reality that "because China has on-

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research institutions, departments of trust organizations, . . . financial institutions, . . . legal specialists [and] N.P.C. Standing Committee members").

188. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 88–89. For examples of other debates, see ZHOU XIAOMING, *supra* note 139, at 203–04 (discussing the debate over whether China's trust law should cover both "corporate and non-corporate trusts"); see also *Examination Report*, *supra* note 187, at 323–25 (providing numerous examples of debates over the scope, goals, and wording of the Trust Law).

189. See *infra* Part III.A.

190. Lusina Ho, *supra* note 137, at 634.

191. *Id.*

192. *Id.*

193. See *id.* There are other possible conflicts. See *id.* at 633–35 (discussing conflicts with, *inter alia*, the Chinese Civil Code, Inheritance Law, and Company Law); Zhenting Tan, *supra* note 133, para. 59 ("[C]onflicts between the two laws [the Law of Donation to Charitable Businesses and the Trust Law] will be unavoidable in judicial practice. Therefore, how to reconcile the two laws will be hard work to do in the future."); Zhao Ming, *Woguo Xintuo Zhidu de Jianli Yu Xibu Da Kaifa* [*Establishment of a Trust System in China and the Development of the West*], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 43, 47 (discussing conflicts between the Trust Law and civil and commercial regulations).

194. See ZHOU XIAOMING, *supra* note 139, at 204.

ly recently adopted the rule of law, the prestige of [Chinese] judges is relatively low.”<sup>195</sup> Finally, commentators on Chinese Trust Law drafts warned of possible problems that could arise due to inconsistencies between foreign-derived statutory provisions and Chinese cultural tradition. Indeed, some authors concluded that the very concept of the trust may be fundamentally incompatible with China’s “cultural emphasis on the collective” rather than “individual freedom.”<sup>196</sup>

In sum, the Chinese trust law literature shows that the 2001 P.R.C. Trust Law was first and foremost a legal transplant. Chinese scholars and lawmakers consulted foreign precedent, texts, commentaries, and experts both in their original decision to introduce the foreign trust model and in their subsequent design of legislative provisions.<sup>197</sup> In documenting this initial stage of China’s legal transplant process, the literature also provides some preliminary answers to questions raised in the comparative law scholarship on legal transplants.<sup>198</sup>

For example, the Chinese experience offers insights into what makes a Western model attractive to non-Western lawmakers in the first place.<sup>199</sup> The Chinese literature suggests that P.R.C. drafters turned to the Western trust law model for two main reasons. First, that model appeared consistent with many of China’s key reform objectives.<sup>200</sup> Most notably, Chinese scholars and lawmakers argued that adoption of a trust law could promote WTO accession, regulate China’s failing financial institutions, and provide a property management mechanism for an increasingly wealthy Chinese population.<sup>201</sup>

Second, the trust law literature also indicates that Chinese

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195. *Id.*; see also Richard Qiang Guo, *supra* note 135 (“The politically dependent judiciaries and historically weak legal enforcement may compound the difficulties in implementation of the novel concept of fiduciary duty.”). A related problem is the lack of familiarity with trust law. *E.g.*, Jiang Ping, *supra* note 182, at 1 (“Many people have either no knowledge of the trust law system, or little knowledge, or erroneous knowledge.”).

196. SHI TIANAO & YU WENRAN, *supra* note 136, at 54; see also ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 89 (“In the process of soliciting opinions [on the draft Trust Law], many people argued that if the settlor lost the related rights after transferring his property to the trust, this would not conform to Eastern cultural traditions and customs.”).

197. See *supra* notes 150–70, 172–74, 182–88 and accompanying text.

198. For extended discussion of this literature, see *supra* Part I.

199. *Cf.* Moran, *supra* note 65, at 361 (posing this question).

200. See *supra* notes 175–81 and accompanying text.

201. See *supra* notes 175–77, 179 and accompanying text.

lawmakers sought to join a “worldwide trend.”<sup>202</sup> Commentators emphasized that, although the trust concept originated in medieval England, it has since been accepted by all major economically developed countries,<sup>203</sup> including China’s Asian neighbors, Japan, Korea, and Taiwan.<sup>204</sup> Moreover, they suggested that trust law is no longer simply a matter of domestic concern; with globalization, trust law is rapidly becoming a “global legal system.”<sup>205</sup>

Similarly, the Chinese trust law literature may help address the dominant question in the comparative law scholarship on legal transplants: What makes a transplant succeed?<sup>206</sup> Although it would be premature at this point to assess the success of China’s trust law transplant, close analysis of the Chinese literature reveals that several of the factors comparative law scholars have identified as indicators of a successful transplant were in fact present at the first stage of China’s transplant process.<sup>207</sup> For instance, as discussed above,<sup>208</sup> Chinese commentators made a persuasive case that introduction of the trust law model “fit” China’s reform agenda of the time.<sup>209</sup> In addition, they approached trust law as principally economic in nature.<sup>210</sup> Although some authors expressed concerns about

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202. Li Qunxing, *supra* note 33, at 118.

203. Zhou Xiaoming, *Queli Xintuo Zhidu de Xianshi Yiyi [The Practical Significance of Establishing a Trust System]*, in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 21, 21; *see also* Luo Dajun, *supra* note 140, at 71 (“Over the past few decades, the trust system has been rapidly developed in all countries that are economically developed.”).

204. *See supra* notes 145–49, 178 (citing Chinese sources discussing the trust laws of Japan, Korea, and Taiwan).

205. Li Qunxing, *supra* note 33, at 118 (“Increasingly, [the trust system] is becoming a global legal system.”); *see also* François Barriere, *Does China Currently Need a Trust Law?*, in MATERIALS ON THE DRAFTING PROCESS, *supra* note 133, at 442, 442 (statement by a French participant in a Chinese symposium on the draft Trust Law that “[a]s globalization goes forward, it is desirable to ensure that the Chinese trust legal framework be adapted to the needs of the economic competition”).

206. *See supra* note 85 and accompanying text (discussing this dominant question in comparative law literature on legal transplants).

207. *See supra* notes 91–106 and accompanying text (discussing scholars’ possible explanations for what makes a legal transplant succeed).

208. *See supra* notes 175–81 and accompanying text (summarizing Chinese commentators’ views regarding the impetus for drafting trust legislation).

209. *See supra* note 93 and accompanying text (discussing comparative law scholars’ arguments about the need for a transplant to fit the recipient’s reform agenda).

210. *See, e.g.,* SHI Tiantao & Yu Wenran, *supra* note 136, at 1 (“A trust, putting it as simply as possible, is a mechanism for administering property on

trust law's possible tensions with Chinese cultural tradition,<sup>211</sup> commentators seemed to regard introduction of the trust law model as an "apolitical" transplant, one that largely avoided such sensitive areas as constitutional, family, or religious law or practice.<sup>212</sup> Finally, the Chinese trust law literature documents extensive and active involvement in the transplant process by Chinese participants, including legislators, academics, government officials, lawyers, court personnel, and representatives of Chinese trust and investment companies.<sup>213</sup> In so doing, that literature provides evidence that trust law was a "voluntary" rather than "imposed" transplant.<sup>214</sup>

As the next Subsection discusses, the Chinese trust law literature also provides invaluable information on the second stage of the legal transplant process—the still ongoing efforts to integrate the trust law model and adapt that model to fit China's specific national conditions. Here too the literature shows that Chinese lawmakers and scholars are making extensive use of foreign trust law sources.

## 2. Continuing Influences

Chinese commentators acknowledge that their Trust Law is an "imported item"<sup>215</sup> from abroad. Thus, not surprisingly, comparative law research and analysis have continued to play a prominent role since enactment of the Trust Law. This is particularly true in Chinese explanations of Trust Law provisions. As Wang Qing and Guo Ce put it: "Our aim is to expand the understanding of China's Trust Law articles by using the

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behalf of another person. In its essence, it is a plan or arrangement for the transfer and administration of property."); *see also Background Information*, *supra* note 173, at 179–80 (emphasizing the economic functions of trust law and the trust system).

211. *See supra* note 196 and accompanying text (discussing concerns regarding the possible inconsistencies between trust law and Chinese cultural tradition).

212. *See supra* notes 102–04 and accompanying text (discussing comparative law scholarship and emphasizing the importance of the "apolitical" subject matter of legal transplants).

213. *See EXPLANATION OF THE ARTICLES*, *supra* note 145, at 2 (detailing the work of Chinese organizations in a trust law draft workshop); *supra* note 187 (describing the participation of a variety of Chinese organizations and institutions in the drafting process).

214. *See supra* note 94 and accompanying text (discussing comparative law literature on voluntary and imposed transplants).

215. WANG QING & GUO CE, *supra* note 125, at 1.

source of trust law—Anglo-American law—as the starting point.”<sup>216</sup>

Even in works intended for a lay audience, Chinese authors have relied heavily on foreign materials from civil law and common law trust systems. A prime illustration is the 2001 book jointly compiled by members of the N.P.C. drafting group and academics involved in the drafting process.<sup>217</sup> The stated goal of the book was to help Chinese citizens and organizations “study” a law that was admittedly “difficult to understand.”<sup>218</sup> To make the Trust Law more accessible, the authors presented detailed annotated commentary on every Trust Law provision.<sup>219</sup> These discussions were notable for their emphasis on foreign law and practice. For example, the commentary on Article 2, the provision that defines “trust,”<sup>220</sup> opened with a section titled “Foreign and Taiwanese<sup>221</sup> Provisions on the Definition of Trust.”<sup>222</sup> The authors began the section by advising the reader that “in order to make it easier to study and apply” Article 2, they would “first introduce foreign and Taiwanese provisions on the definition of trust” and only then explain the Chinese provision.<sup>223</sup>

Chinese commentators have also used foreign texts to highlight Chinese trust law innovations. For example, in their commentary on Article 21 of the Trust Law, the provision that gives a trust settlor the right to require a trustee to change the method for managing trust property,<sup>224</sup> Wang Qing and Guo Ce began with a survey of American, English, Japanese, Korean, and Taiwanese provisions on modification of trusts.<sup>225</sup> The authors concluded that Article 21’s approach of allowing the settlor to “exercise this right directly” rather than “requir[ing] application to a court . . . is a special feature of China’s Trust Law

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216. *Id.* at 2.

217. See EXPLANATION OF THE ARTICLES, *supra* note 145, at preface.

218. *Id.*

219. See *id.* The book also contained a detailed summary of the drafting process and key “legislative background materials,” including Trust Law drafts and N.P.C. committee reports and amendments. *Id.* at 1–6, 239–332.

220. 2001 Trust Law, *supra* note 124, art. 2.

221. The authors followed the practice discussed above, see *supra* note 146, of referring to Taiwan as a part of China rather than a separate country. The original Chinese-language text reads: *Woguo Taiwan* [*Our Country’s Taiwan*]. EXPLANATION OF THE ARTICLES, *supra* note 145, at 18.

222. *Id.*

223. *Id.*

224. 2001 Trust Law, *supra* note 124, art. 21.

225. WANG QING & GUO CE, *supra* note 125, at 56.

provisions.”<sup>226</sup> Similarly, another author emphasized key differences between common law and Chinese definitions of charitable trusts.<sup>227</sup> He pointed out that all common law countries divide such trusts into four categories: trusts for “the relief of poverty; the advancement of education; the advancement of religion and other purposes beneficial to the community.”<sup>228</sup> He noted that China, in contrast, has excluded trusts for the advancement of religion “[b]ecause China is a socialist country.”<sup>229</sup> Moreover, to respond to the “practical situation”<sup>230</sup> in China today, China has added new, distinctive categories of charitable trusts, including trusts for “the relief of the disabled and victims of natural calamities, the advancement of medical and hygienic business and protection of ecological environment.”<sup>231</sup>

Finally, Chinese commentators have drawn on foreign examples to identify flaws in P.R.C. Trust Law provisions and to offer proposals for future study and amendments. For example, based on her study of the U.S. Restatement of Trusts,<sup>232</sup> Chen Xiangcong identified problems in the Chinese Trust Law provisions regarding when a settlor or a trustee can be the sole beneficiary of a trust.<sup>233</sup> She concluded that the Restatement “provisions . . . are consistent with Chinese trust law. However, American law expresses it more clearly.”<sup>234</sup> Similarly, drawing on a comparative analysis of English, American, Japanese, Korean, and Taiwanese trust legislation,<sup>235</sup> Dong Xinzong revealed a gap in the Chinese Trust Law—inadequate coverage of the trustee’s duty of prudence—and proposed statutory amendments to address this issue.<sup>236</sup>

A consistent theme in the Chinese literature both before and after enactment of the Trust Law is the need to “nativ-

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226. *Id.*

227. Zhenting Tan, *supra* note 133, para. 56.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* For a comprehensive discussion of Chinese innovations, see generally ZHANG TIANMAN, *supra* note 139, at 313–403.

232. CHEN XIANGCONG, *supra* note 136, at 163 (discussing section 115 of the Restatement of Trusts).

233. *Id.* at 162–63 (discussing Article 43 of the Chinese Trust Law).

234. *Id.* at 163.

235. Dong Xinzong, *supra* note 153, at 21–22.

236. *Id.* at 22–23. *See also* Huang Suping, *supra* note 141 (drawing on U.S. precedent to recommend introduction of the trustee’s duty of prudent investment into Chinese trust law).

ize”<sup>237</sup> a foreign trust system. As one Chinese drafter observed, “regardless of whether the system is transplanted or adopted by another nation, it must go through a process of nativization and integration with the particular features of its host nation. These national features consist of . . . the legal customs and norms . . . [and] the societal, economic, and cultural environment.”<sup>238</sup> Chinese authors have discussed at length the changes European and Asian civil law countries have made to the common law system they transplanted.<sup>239</sup> They have pointed out that even a common law country, the United States, adapted the original English model to fit its distinctive national conditions and traditions.<sup>240</sup>

One Chinese commentator harkened back to a bygone era to remind readers that transplants of all stripes—legal or otherwise—have a long history in China. Echoing the words of nineteenth-century Chinese reformers,<sup>241</sup> Zhao Ming stated that

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237. See, e.g., SHI Tiantao & Yu Wenran, *supra* note 136, at 51–55 (discussing the need to “nativize” [*bentuhua*] the Anglo-American trust system and stating that, “[i]n order to be successful, the ‘nativization’ of the trust system must also coordinate with cultural, socio-economic, and other factors. All receptions of legal systems must undergo a process of ‘nativization.’”).

238. Zhou Xiaoming, *supra* note 139, at 108–09.

239. See, e.g., Chen Xiangcong, *supra* note 136, at 4 (discussing the spread of the Anglo-American trust system to civil law countries and the change in the definition of trust to reflect the different civil law concept of property ownership). Japanese trust law has received particular attention. See, e.g., Bijiao Fa Yanjiu, no. 5, 153 (2008) (publishing a translation of a Japanese article on the 2006 Japanese Trust Law); Cong Xiaoyan, *Dalu Faxi Guojia Dui Ying Mei Fa Xintuo de Yinjin He Liyong: Yi Riben Wei Li* [*Civil Law Countries’ Introduction and Use of the Anglo-American Law Trust: Japan as an Example*], 10 Liaoning Xingzheng Xueyuan Xuebao, no. 7 (2008). Both annotated commentaries, published in 2001, draw heavily on civil law trust legislation and concepts. See *EXPLANATION OF THE ARTICLES*, *supra* note 145; Wang Qing & Guo Ce, *supra* note 125, at 1, 2. As the authors of one of these books stated, “in every article annotation we compare analogous provisions in civil law countries’ trust laws and in Anglo-American law countries’ trust laws.” *Id.* at 2.

240. Shi Tiantao & Yu Wenran, *supra* note 136, at 53; see also Huo Yufen, *supra* note 145, at 9–10 (discussing how Americans have “gone a step further” in their use of trusts than the English); Dong Xinzong, *supra* note 153, at 21–22 (contrasting American and English approaches to the trustee’s duty of prudent investment).

241. See David M. Lampton, *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM* 159 (2001) (referring to “China’s century-old tradition of ‘self-strengthening,’ the notion that China could absorb what is useful from the outside world while rejecting what it deemed harmful”). Variations of this phrase have entered the modern lexicon as well. Mao Zedong and even martial arts star Bruce Lee have used versions of this phrase. See Davis Miller, *THE TAO OF BRUCE LEE* 133 (2000).

in looking to foreign trust models, China was “absorbing what is useful and discarding what is not.”<sup>242</sup>

The remainder of this Article will consider what China discarded from the Anglo-American model it transplanted.

### III. THE AMERICAN REFLECTION: CHINA’S IMAGE OF AMERICAN TRUST LAW

Part II showed that comparative law research and analysis have played a significant role in China’s reception of foreign trust law. This work has influenced the design, dissemination, and “perfection”<sup>243</sup> of Chinese trust legislation. This Part demonstrates that the Chinese literature has another benefit as well. That literature offers American trust law specialists a unique opportunity to view our own system critically from an outsider’s perspective. Close analysis of China’s critique of American trust law<sup>244</sup> exposes a systemic flaw American reformers need to address: inadequate constraints on trustees.

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,”<sup>245</sup> (2) insufficient protection of beneficiaries, and (3) secrecy of trusts.

#### A. POWERLESS SETTLORS

In a Chinese mirror, American settlors are weak and ultimately irrelevant. Once settlors establish trusts, American trust law severs their ties to those trusts.<sup>246</sup> Unless settlors had

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(“Lee . . . adapted at least one of Mao Tse-tung’s credos. ‘Absorb what is useful; reject what is useless,’ Mao said. Lee expanded this to include, ‘Add specifically what is your own.’”).

242. Zhao Ming, *supra* note 193, at 46.

243. Zhenting Tan, *supra* note 139 (beginning the title of his dissertation “Perfecting the Chinese Law of Trusts”); see Luo Dajun, *supra* note 140, at 70 (discussing the need for trust law research to, *inter alia*, “perfect[] trust legislation”).

244. This Chinese critique does not always focus exclusively on flaws in the American trust system. Often it is framed more generally as an attack on the “Anglo-American” model. See *supra* note 33 and accompanying text (discussing and citing examples of Chinese use of term “Anglo-American”).

245. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 90.

246. WANG QING & GUO CE, *supra* note 125, at 39 (“According to Anglo-American law provisions, once the establishment of the trust is effective, the settlor’s ties with the trust are severed.”); see Wen Xiaofang, *Woguo “Xintuo*

the foresight to reserve rights in the trust instrument or to name themselves trustees or beneficiaries,<sup>247</sup> they “do[] not possess any rights whatsoever with respect to the trust property or trustee.”<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> The settlor becomes at best an interested bystander.<sup>251</sup>

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*Fa” Xintuo Jiancha Ren Zhidu Zhi Buzheng Sikao [Reflections on the Trust Supervisor System in Our Country’s “Trust Law” and Its Improvement]*, SHIDAI JINRONG, no. 6 (2008) (“In the Anglo-American system, once the trust is established, the settlor is removed from the trust relationship.”).

247. WANG QING & GUO CE, *supra* note 125, at 126 (“In . . . Anglo-American law countries, after the settlor establishes the trust, he generally does not possess any substantive rights in the trust if he is not a beneficiary and has not reserved pertinent rights in the trust instrument.”); ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 87 (“[I]f the settlor wants to possess these [trust] rights, he must adopt one of two methods: first, when he establishes the trust he must expressly reserve these rights for himself; or, second, when he establishes the trust, he must name himself as one of the trustees.”). Zhang Tianman mentions an additional method by which the settlor can reserve rights—in a contract. ZHANG TIANMAN, *supra* note 139, at 342.

248. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 86; *see also* ZHOU XIAOMING, *supra* note 139, at 148 (“Under Anglo-American law, if the settlor has not reserved in the trust instrument the rights to modify, terminate, or revoke the trust, then after the trust is established . . . [t]here is no relationship of rights and duties between the settlor and the trustee.”).

249. *See* ZHANG TIANMAN, *supra* note 139, at 342 (stating that unless the settlor reserves rights, he “does not have any legal relationship whatsoever with the trust [and] . . . loses his status in the trust”); Zhenting Tan, *supra* note 133, para. 46 (“In common law countries, the settlor, after creation of the trust, has nothing to do with it if he does not reserve any rights for himself in the trust instrument. . . . [A]nd the settlor is hardly a party to the trust though he/she is a party to the creation of the trust.”).

250. *See* CHEN XIANGCONG, *supra* note 136, at 4 (“Anglo-American law legal scholars’ definition of the trust, in contrast, recognizes only the relationship between the trustee and the beneficiary.”); Wen Xiaofang, *supra* note 246 (“Once the trust is established . . . [t]he trust relationship is between only the trustee and the beneficiary.”).

251. *Compare* WANG QING & GUO CE, *supra* note 125, at 56 (“In Anglo-American law countries, under general circumstances, only if at the time the trust is established the settlor reserved in the trust instrument the right to adjust the method for managing trust property can the settlor do so. Otherwise he cannot interfere in the trustee’s management of trust property.”), *with* ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 90 (noting one “exception to Anglo-American trust laws’ negative attitude toward settlor rights”). They state that “all countries’ trust laws stipulate that the settlor has the right to require the trustee to adjust the method for managing trust property.” *Id.* Even American trust law “recognize[s] that the settlor possesses this

For Chinese scholars, the very notion of cutting off settlors from their own trusts is perverse. As Zhong Ruidong and Chen Xiangcong put it: “[T]he trust relationship, after all, is established by the settlor.”<sup>252</sup> Moreover, the American approach misses another obvious point—the “constructive role”<sup>253</sup> 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?”<sup>254</sup> Yet, rather than promoting this beneficial, even indispensable, function of settlors, American trust law actually impedes it.

One example the Chinese literature commonly cites is the negative American attitude toward settlors’ rights to information.<sup>255</sup> Unlike nearly all trust systems worldwide,<sup>256</sup> the U.S. system denies settlors what they need most to supervise trusts and protect beneficiaries: “the right to be informed and monitor whether the trustee manages and disposes of [trust] property in accordance with [the settlor’s] intent and trust purpose.”<sup>257</sup> Instead, American trust law relies on those who are often less likely to understand, demand, and act on trust information—beneficiaries.<sup>258</sup> Beneficiary age, incompetence, and inexpe-

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right [and] . . . adopts this favorable attitude.” *Id.*

252. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 91.

253. *Id.* at 89.

254. *Id.* (stating that extending rights to the settlor “helps trust parties supervise and encourage the trustee to fulfill his duties conscientiously, ensures that the trust purpose is realized, etc.”); see CHEN XIANGCONG, *supra* note 136, at 183 (“[P]roviding the settlor so many rights is a beneficial tool . . . . It increases the settlor’s power to supervise the trustee’s management and disposition of trust property . . . . [I]t is beneficial for protecting the beneficiary’s interests.”); WANG QING & GUO CE, *supra* note 125, at 54 (reporting that civil law countries extended rights to the settlor “out of concern for supervision of trusts and also for ensuring the accomplishment of the trust purpose”).

255. See, e.g., WANG QING & GUO CE, *supra* note 125, at 54 (discussing the fact that “[w]ith respect to the settlor’s information rights, Anglo-American law countries generally do not have any provisions”).

256. For discussions and analyses of civil law trust law provisions on settlors’ rights to information, see EXPLANATION OF THE ARTICLES, *supra* note 145, at 102; SHI TIANTAO & YU WENRAN, *supra* note 136, at 108–09; WANG QING & GUO CE, *supra* note 125, at 54.

257. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 89.

258. See *infra* Part III.B (discussing “defenseless beneficiaries”). Chinese commentators and drafters recognize that settlors too may lack the expertise to understand trust documents. As a result, the Chinese Trust Law includes a provision that allows the settlor to require the trustee to provide explanations of trust administrative matters. See ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 89 (providing annotated commentary to Article 20 of the

rience may well render these rights meaningless.<sup>259</sup>

Chinese scholars and drafters have categorically rejected the U.S. approach to the status of settlors.<sup>260</sup> Instead, as Wang Qing and Guo Ce have aptly observed, Chinese trust law “gives prominent emphasis to the settlor’s rights and interests.”<sup>261</sup> This view pervades both the Chinese trust law literature and legislation. Chinese scholars reconnect settlors to trusts. Drawing on civil law precedent, they define the trust from beginning to end as a relationship among three parties: the settlor, the trustee, and the beneficiary.<sup>262</sup> Indeed, according to Chinese authors, this three-party relationship even survives the settlor’s death. The settlor’s heirs assume the settlor’s status, rights, and duties.<sup>263</sup>

The Chinese trust law literature and the Trust Law itself consistently “stress the settlor’s status and rights.”<sup>264</sup> The goal is to strengthen the position of the settlor to ensure the optimal balance between settlor and trustee rights.<sup>265</sup> As a Chinese

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Trust Law).

The settlor is in a passive position. Some settlors may lack the appropriate business knowledge. As a result, the settlor can require that the trustee provide an explanation of management and distribution of trust property and the details of revenue and expenditures, especially when the settlor has suspicions or problems arise. The trustee must provide answers.

*Id.*

259. See Wen Xiaofang, *supra* note 246 (setting out types of beneficiaries who may be unable to exercise their statutory rights under the Trust Law).

260. See, e.g., WANG QING & GUO CE, *supra* note 125, at 54 (discussing Chinese Trust Law provisions that reject the Anglo-American approach to settlors’ rights in favor of the civil law model); ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 88 (rejecting the Anglo-American view that a settlor loses ownership rights after transferring property to a trust and the requirement that a settlor must petition a court for modification of a trust).

261. WANG QING & GUO CE, *supra* note 125, at 62.

262. CHEN XIANGCONG, *supra* note 136, at 4 (“Civil law countries’ definition of the trust recognizes that the trust relationship involves three parties: the settlor, trustee, and beneficiary.”); Bian Yaowu, *supra* note 133, at 54 (stating that in China “a trust . . . has three parties, including the grantor, trustee, and beneficiary”).

263. See SHI Tiantao & Yu Wenran, *supra* note 136, at 108 (stating that “[t]he settlor (including the settlor’s heirs)” have rights to information); Zhou Xiaoming, *supra* note 139, at 101 (stating that under the Japanese and Korean trust laws the settlor’s heirs take over the settlor’s rights).

264. WANG QING & GUO CE, *supra* note 125, at 126 (“China’s Trust Law stresses the settlor’s status and rights.”); see also Zhenting Tan, *supra* note 133, para. 47 (“The Chinese Law of Trusts lays particular emphasis on the intention of the settlor . . .”).

265. See CHEN XIANGCONG, *supra* note 136, at 183 (describing China’s ex-

lawyer explained in an early analysis of the P.R.C. Trust Law, this balance “gives the creator of the trust the ability to control the trustee’s activity in managing the trust while providing the trustee with the necessary autonomy.”<sup>266</sup> To achieve this balance, Chinese drafters rejected this portion of the American model in no uncertain terms. Chapter IV of the Chinese Trust Law provides settlors extensive rights to monitor and enforce their own trusts.<sup>267</sup> These range from rights to review, transcribe, and copy trust documents,<sup>268</sup> to rights to revoke improper trustee transactions<sup>269</sup> and sue trustees for malfeasance and mismanagement.<sup>270</sup> In fact, some Chinese scholars have

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tensive settlor rights as an “equalization of parties’ rights”); WANG QING & GUO CE, *supra* note 125, at 55 (“By balancing the settlor’s and the trustee’s rights, the beneficiary’s interests and the trust purpose are accomplished. . .”).

266. Richard Qiang Guo, *supra* note 135.

267. For summaries and analyses of settlors’ statutory rights and their limits, see, for example, EXPLANATION OF THE ARTICLES, *supra* note 145, at 88–109; WANG QING & GUO CE, *supra* note 125, at 53–63; ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 86–97. Chinese scholars recognize the dangers as well as the benefits of expansive settlor rights:

On the other hand, as far as the trustee is concerned, providing the settlor so many rights can cause the settlor to have excessive control of trust property. This inevitably has an impact on the efficiency and initiative of the trustee’s management. As far as the beneficiary is concerned, if the settlor enjoys so many rights, then to a certain degree this means a reduction in the beneficiary’s rights and greater limits on the beneficiary’s freedom. Moreover, it could make the beneficiary’s interest more undefined. As far as the trust system is concerned, the significance of the trust is not the same as giving the settlor the greatest advantage but consists of recognizing the trustee as a person with property rights. With respect to management and disposition of trust property, basically there should not be settlor interference. Moreover, providing the settlor with so many rights could make confusing the difference between the trust system and an entrustment agency.

CHEN XIANGCONG, *supra* note 136, at 183–84; see also Wen Xiaofang, *supra* note 246 (arguing that by providing extensive rights to the settlor China’s Trust Law has made “it easier for the beneficiary’s interests to be infringed” and emphasizing that “the beneficiary’s interests can be infringed by the settlor and also by the trustee”).

268. 2001 Trust Law, *supra* note 124, art. 20.

269. *Id.* art. 22.

270. See *id.* The Trust Law also provides settlors rights to respond to beneficiary as well as trustee misconduct. *Id.* art. 51 (permitting the settlor to modify or revoke a beneficiary’s rights where that beneficiary has “grossly infringed” the rights of the settlor or other beneficiaries). As I have discussed elsewhere, this is consistent with China’s “behavior-based model of inheritance.” Foster, *supra* note 124, at 162; see also Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998) (discussing China’s behavior-based model of inheritance).

claimed that these statutory provisions are so expansive that they “blaze[] a new trail”<sup>271</sup> in their recognition of settlors’ rights. In support, they cite the fact that China’s Trust Law is the only legislation in the world that allows settlors to modify trust administrative terms and to dismiss trustees without any court involvement.<sup>272</sup>

In the final analysis, the Chinese settlor bears little resemblance to its American prototype. Chinese scholars and drafters found the American settlor so flawed that they designed their own version—a settlor who would remain a force to be reckoned with throughout the life of the trust. As the next Section shows, China’s vision of the American beneficiary reveals equally problematic features.

#### B. DEFENSELESS BENEFICIARIES

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.<sup>273</sup> 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

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271. CHEN XIANGCONG, *supra* note 136, at 183.

272. See WANG QING & GUO CE, *supra* note 125, at 56, 62 (citing Articles 21 and 23 of the Trust Law as distinctive provisions of Chinese trust law); ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 91 (explaining why China departed from foreign precedent and gave the settlor (and beneficiary) the direct right to require the trustee to change methods for administering the trust rather than requiring court approval). The authors stress both practical and theoretical reasons. They argue that “if the method for managing trust property requires change, this should be done quickly. There should not be any delay. Thus, allowing the settlor and the beneficiary directly to require the trustee to make changes can avoid a complex court process, which is beneficial for implementing the trust.” *Id.* In addition, they contend that because the settlor created the trust, “unless exceptional circumstances occur, the settlor should be allowed directly to require the trustee to change management methods without going to court.” *Id.*

273. Chinese authors have identified a variety of beneficiaries American trust law fails to protect—beneficiaries who are minors, lack or have limited legal and mental capacity, are indefinite (because designated only by a class label rather than by individual names), or are “not yet in existence.” Wen Xiaofang, *supra* note 246; see also ZHOU XIAOMING, *supra* note 139, at 102 (stating that “[i]n contrast to Anglo-American law,” Japanese and Korean trust laws protect beneficiaries whose “rights and interests are without question threatened,” beneficiaries who are not yet born, or are members of classes). For a discussion of the status of unborn children as trust beneficiaries and heirs, see ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 132.

beneficiaries the principal, and often only, check on trustees.<sup>274</sup> 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.<sup>275</sup> Yet, as Chinese commentators emphasize, these are precisely the beneficiaries for whom many settlors create trusts. Indeed, in their 1999 treatise on trust law, Shi Tiantao and Yu Wenran cited as their very first example of a trust the trust that a deceased parent could use to “leave his property to his children . . . [who] might be too young and might not be capable of managing property.”<sup>276</sup>

Chinese authors argue that the American approach stands in marked contrast to that used in civil law countries, especially Japan, Korea, and Taiwan.<sup>277</sup> They show that, unlike the United States, these countries are not insensitive to the needs of vulnerable beneficiaries. Instead, civil law countries recognize that there are “circumstances [in which] beneficiaries have no way to protect their rights.”<sup>278</sup> Rather than leaving vulnerable beneficiaries defenseless, civil law trust laws have established both external and internal mechanisms<sup>279</sup> to “provide

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274. See, e.g., ZHANG TIANMAN, *supra* note 139, at 256 (stating in a summary of American trust law that, “[t]he standard provision of trust law is that the beneficiary has the right to compel the trustee to fulfill his duties. The traditional rule holds that otherwise, there would be no person who has the power and capability to restrain the trustee”); see also EXPLANATION OF THE ARTICLES, *supra* note 145, at 17 (stating that in American law it is the beneficiary who has the right to examine trust documents and accounts related to property revenue and expenditures and the right to bring action for removal of the trustee when the beneficiary thinks his rights have been harmed).

275. See Wen Xiaofang, *supra* note 246 (“Beneficiaries themselves should protect their interests. This is a general rule of trust law. Therefore, in Anglo-American trust law, except in the case of charitable trusts, there is no special trust supervisor scheme.”).

276. SHI TIANTAO & YU WENRAN, *supra* note 136, at 1; see Zhou Xiaoming, *supra* note 203, at 21, 22 (“[T]he trust is very suitable for people who for whatever reason (be it lack of time, mental or other incapacity, legal constraints, etc.) are unable to manage property themselves.”).

277. See, e.g., ZHOU XIAOMING, *supra* note 139, at 102 (contrasting the Anglo-American approach to that in Japan and Korea); Wen Xiaofang, *supra* note 246 (contrasting the Anglo-American approach with Japanese, Korean, and Taiwanese trust law provisions and quoting those provisions).

278. ZHOU XIAOMING, *supra* note 139, at 102.

279. See Wen Xiaofang, *supra* note 246 (“[C]ivil law countries’ trust laws clearly stipulate external as well as internal mechanisms for supervising trusts. For civil trusts, the external supervision mechanism is the court. For charitable trusts, the supervision mechanism generally is an agency for administering charitable affairs. For commercial trusts, supervision generally is carried out by an entity responsible for commercial matters.”). The internal

special increased protection for beneficiaries.”<sup>280</sup> Chinese scholars have called particular attention to one such mechanism, the “trust supervisor” system.<sup>281</sup> This system empowers third parties designated by the settlor or appointed by the court<sup>282</sup> to “monitor whether the trustee is administering the trust in the best interests of the beneficiary”<sup>283</sup> and to represent the beneficiary in litigation and other trust matters.<sup>284</sup> Chinese proponents conclude that the trust supervisor system is an essential scheme to achieve the two fundamental goals of trust law. It helps “to balance parties’ rights and interests and protect beneficiaries’ interests.”<sup>285</sup>

Interestingly, Chinese drafters by oversight or design followed the American approach to beneficiaries. The Chinese Trust Law provides beneficiaries sweeping rights to monitor and enforce trusts,<sup>286</sup> but mentions third-party representation

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mechanisms include trust supervisors and settlors. *See infra* notes 281–85 and accompanying text (discussing trust supervisors); *supra* Part III.A (discussing the role of settlors); *see also* Wen Xiaofang, *supra* note 246 (stating that in civil law countries the “principal function of the settlor is to protect the beneficiary’s interests”).

280. ZHOU XIAOMING, *supra* note 139, at 102.

281. Some civil law countries use the term “trust managers” rather than “trust supervisors.” *See* CHEN XIANGCONG, *supra* note 136, at 163 (“The Japanese and Korean ‘Trust Laws’ call these ‘trust managers’ and the Taiwanese ‘Trust Law’ calls them ‘trust supervisors.’”).

282. *See id.* at 164 (“Japanese, Korean, and Taiwanese ‘Trust Laws’ provide that . . . the court can, either upon petition by an interested party or on its own motion, appoint a person or persons to serve as supervisor. However, this will not apply if the trust [supervisor] or selection method is designated in the trust instrument.”); Wen Xiaofang, *supra* note 246 (“[A]ppointment of a trust supervisor . . . first should be done in accordance with directions in the trust instrument. If the trust instrument does not contain any such provisions or the person named in the trust instrument is unwilling to serve as the trust supervisor, the court can appoint a trust supervisor upon petition by an injured party.”).

283. CHEN XIANGCONG, *supra* note 136, at 163.

284. *See* ZHOU XIAOMING, *supra* note 139, at 102 (noting that under Japanese and Korean trust laws, “[t]his third party should for the sake of the beneficiary . . . see to all litigation and other related matters”).

285. Wen Xiaofang, *supra* note 246.

286. The Chinese Trust Law extends to the beneficiary all rights the settlor possesses under Articles 20–23. 2001 Trust Law, *supra* note 124, art. 49. Those rights include rights to receive information, *id.* art. 20, to change administrative terms, *id.* art. 21, to sue the trustee for malfeasance or negligence, *id.* art. 22, and to remove the trustee, *id.* art. 23. For summaries of beneficiary rights, *see, for example,* HUO YUFEN, *supra* note 145, at 92; WANG QING & GUO CE, *supra* note 125, at 124–25; ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 135–38.

of beneficiaries only in the charitable trust context.<sup>287</sup> This failure to extend a trust supervisor scheme to private trusts has received sharp criticism from Chinese authors. In a 2008 article, one critic went so far as to denounce this omission as “a significant defect” caused in part by the “influence of Anglo-American trust law.”<sup>288</sup> Thus, introduction of a comprehensive trust supervisor system may well be in China’s future.<sup>289</sup>

Even under the current scheme, however flawed, Chinese beneficiaries fare better than their American counterparts. As the previous Section showed,<sup>290</sup> Chinese beneficiaries have what American beneficiaries do not—settlers with the power to speak for them and defend their interests.

### C. INVISIBLE 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 settlers and trustees.<sup>291</sup> To make matters worse, because trusts are “continuous in nature,”<sup>292</sup> 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

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287. See CHEN XIANGCONG, *supra* note 136, at 164 (“The Chinese ‘Trust Law’ only provides in Article 64 that a charitable trust supervisor must be established by a charitable trust. It does not yet contain any provisions regarding whether a trust supervisor can be designated for a private trust.”). For discussions of the Chinese Trust Law’s provisions on charitable trust supervisors, see, for example, EXPLANATION OF THE ARTICLES, *supra* note 145, at 218–21; WANG QING & GUO CE, *supra* note 125, at 152–56.

288. Wen Xiaofang, *supra* note 246.

289. For example, in her 2007 book, Chen Xiangcong noted that this issue merits further “elaboration” and “discussion.” CHEN XIANGCONG, *supra* note 136, at 164.

290. See *supra* Part III.A.

291. If the settlor creates an oral, declared trust naming herself trustee, only one person might know the trust exists. See *infra* notes 303–06 and accompanying text. A trust known to only two trust parties (or potentially one settlor/trustee) is problematic because trusts involve many parties—“settlers, trustees, beneficiaries, and numerous other civil law subjects”—and “the legal relationships among them are quite complex.” EXPLANATION OF THE ARTICLES, *supra* note 145, at 44.

292. WANG QING & GUO CE, *supra* note 125, at 19 (“A trust is a process for managing property or distributing property. It is continuous in nature.”).

trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts.<sup>293</sup> 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. As Zhong Ruidong and Chen Xiangcong observed, "[i]f the trust is not established in writing, after a considerable period of time, when the beneficiary asserts his beneficial rights, no evidence [of those rights] will exist."<sup>294</sup> To Chinese authors, the inevitable result is conflict<sup>295</sup> and uncertainty.<sup>296</sup>

The Chinese trust law literature shows that secrecy of trusts poses significant dangers as well for American third parties who have a "legal relationship"<sup>297</sup> with the trustee.<sup>298</sup> When trusts are secret, a third party has no way to "know the truth"<sup>299</sup> 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

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293. See *supra* note 274 and accompanying text (discussing the enforcement role of beneficiaries).

294. ZHONG RUIDONG & CHEN XIANGCONG, *supra* note 145, at 55.

295. See *id.* (stating that having no existing evidence of beneficiary rights "will create conflicts").

296. See ZHOU XIAOMING, *supra* note 139, at 204 (arguing that if China permitted oral, declared trusts "there would surely be unpredictable risks").

297. Gu Dongwei & Sun Qiufang, *Xintuo Fa Zhong Shoutuoren de Xiangdui Ren Liyi Baohu Yanjiu* [On the Trust Law's Protection of the Interests of a Person with Rights Against a Trustee], 10 FAZHI WEI SHEHUI 280, 280 (2007) (focusing on this "legal relationship" rather than all trust relationships).

298. Chinese authors recognize that third parties may have problems with settlors and beneficiaries as well. See, e.g., EXPLANATION OF THE ARTICLES, *supra* note 145, at 60 (stating that it is important to "separate trust property from the settlor's, trustee's, and beneficiary's property and to indicate that control of trust property has been transferred to the trustee"). Nonetheless, their principal emphasis is on the relationship between trustees and third parties. See Gu Dongwei & Sun Qiufang, *supra* note 297, at 280 ("[W]e only address the third party's legal relationship with the trustee.").

299. ZHOU XIAOMING, *supra* note 139, at 150 ("If there is no mechanism to make a trust public, the third party will not know the truth that said property has already become trust property."); see also WANG QING & GUO CE, *supra* note 125, at 24 ("If there is not a definite scheme for making trusts public, a third party will have no way to know whether given property is trust property.").

a whole.<sup>300</sup> Secrecy of trusts can cause third parties to “sustain unwarranted harm,”<sup>301</sup> and undermines the “security and efficiency”<sup>302</sup> 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.<sup>303</sup> Chinese authors have singled out one form of oral trust for particular criticism, the so-called declared trust.<sup>304</sup> They emphasize that, unlike civil law countries, the United States allows a property owner to establish a valid trust without any transfer of title to the property or written record of the trust and its terms.<sup>305</sup> All American trust law requires is that the property owner make an oral statement that she is trustee of the property for the benefit of others.<sup>306</sup> The settlor/trustee is then free to administer the property in accordance with fiduciary rights and duties that only she herself

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300. See, e.g., Geng Lihang, *supra* note 137, at 11, 14 (arguing that publicity is necessary to protect general creditors' interests).

301. *Id.* at 11.

302. CHEN XIANGCONG, *supra* note 136, at 114; see also WANG QING & GUO CE, *supra* note 125, at 24 (stating that if no system exists for making trusts public, “[t]his harms commercial transactions”).

303. See YU WEIMING, *supra* note 145, at 119 (noting that “in Anglo-American countries’ trust laws,” trusts can be established orally); Zhu Yong & Li Xuefeng, *Ying Mei Fa Wei Yong Qiyue Jieyue Xintuo Falu Guanxi de Yuanyin Jixi* [An Analysis of the Reason Why Anglo-American Law Does Not Use Contracts to Terminate Trust Law Relationships], 29 SHANGCHANG XIANDAIHUA (2007) (“[O]ral trust is among the methods by which trusts are established under Anglo-American trust law.”).

304. For discussions of declared trusts, see, for example, EXPLANATION OF THE ARTICLES, *supra* note 145, at 12; ZHOU XIAOMING, *supra* note 139, at 204.

305. See Zhu Yong & Li Xuefeng, *supra* note 303 (stating that under Anglo-American trust law, a property owner can orally declare himself trustee and “[t]he special feature of this method of establishing a trust is that it does not involve transfer of property ownership rights”). According to Chinese commentators, this lack of a transfer requirement is why civil law countries rejected declared trusts. See HUO YUFEN, *supra* note 145, at 81 (“Because establishment of declared trusts does not require transfer of property, Korea, Japan, and other countries’ current trust laws do not recognize the effectiveness of declared trusts.”).

306. See CHEN XIANGCONG, *supra* note 136, at 108 (“In an oral trust, the settlor declares a trust of property in which he has legal ownership rights or an equitable interest and names himself the trustee. Because the settlor declares himself the trustee of said property and holds said property for the beneficiary’s benefit, he does not have to transfer the property and can declare that he has established an inter vivos trust.”); SHI Tiantao & Yu Wenran, *supra* note 136, at 30 (defining a declared trust as one in which “the settlor . . . declares that he possesses, administers, or distributes part of his property as trust property and gives the right to benefit from said property to another person (the beneficiary)”).

knows.

Second, Chinese authors identify another flaw that promotes secrecy of trusts—the U.S. system’s failure to require registration of trusts except in the charitable trust context.<sup>307</sup> They argue that “public notice of trusts”<sup>308</sup> is essential to ensure that beneficiaries, third parties, and the general public can “easily look up the trust purpose,”<sup>309</sup> property, and parties’ rights and duties. They emphasize that American trust law diverges from international practice.<sup>310</sup> Even in the birthplace of trusts—England—“all trusts must be registered.”<sup>311</sup>

Chinese authors have consistently warned of the dangers of the American approach. They argue that secrecy of trusts leaves beneficiaries and third parties dependent on the “utmost honesty”<sup>312</sup> of trustees. In the wrong hands, invisible trusts can become traps for the unwary and, as Yu Weiming put it, “instrument[s] for fraud.”<sup>313</sup> Chinese drafters as well as scholars decided that these risks are unacceptable.

The Chinese Trust Law codifies China’s rejection of the U.S. model. Article 8 mandates that all trusts must be in writing.<sup>314</sup> A drafter explained the rationale for this requirement: “The legislative purpose of the written form condition for the

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307. See CHEN XIANGCONG, *supra* note 136, at 114 (“In Anglo-American law systems, trust registration is a requirement only for establishing charitable trusts. For the vast majority of private trusts, however, the Anglo-American law system provides no rules for public notice of trusts.”). Chinese authors recognize that “Anglo-American law countries’ laws . . . require that certain types of property be registered by relevant government bodies.” *Id.* However, they emphasize that the U.S. system does not have a comprehensive “scheme for public notice of trusts.” ZHOU XIAOMING, *supra* note 139, at 150–51.

308. WANG QING & GUO CE, *supra* note 125, at 23 (explaining the term “public notice of trusts” and noting its use in the trust laws of Japan, Korea, and Taiwan); ZHOU XIAOMING, *supra* note 139, at 150 (“So-called public notice of trusts means that when a trust has been established the relevant property must go through certain procedures to make the trust known to the general public.”).

309. Gu Dongwei & Sun Qiufang, *supra* note 297, at 281.

310. See, e.g., ZHOU XIAOMING, *supra* note 139, at 150 (stating that the U.S. approach to public notice of trusts is “an important difference” from the civil law approach, with particular focus on the laws of Japan and Korea).

311. EXPLANATION OF THE ARTICLES, *supra* note 145, at 60.

312. YU WEIMING, *supra* note 145, at 121. According to Yu Weiming, the very reason China had to establish strict requirements for establishing trusts was concern regarding the low “degree of honesty currently in our country.” *Id.*

313. *Id.*

314. 2001 Trust Law, *supra* note 124, art. 8 (providing that trusts must be established in written form).

creation of a trust is to strengthen the definitiveness of the trust purpose and rights and obligations of the trust parties so as to reduce disputes or facilitate the settlement of disputes.”<sup>315</sup> In fact, some Chinese commentators have claimed that China has adopted the most stringent requirements in the world for creating trusts.<sup>316</sup>

Article 10 further repudiates the U.S. model by requiring registration of trusts.<sup>317</sup> According to authors of annotated commentary on the P.R.C. Trust Law, the principal goals of this provision were “to make clear the legal status of trust property and to protect the interests of third parties.”<sup>318</sup> If Chinese reformers have their way, China’s trust registration scheme soon may be strengthened even more “to create a balanced relationship between trust parties . . . [and] outside creditors.”<sup>319</sup>

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—settlers, beneficiaries, and third parties as well as trustees.

## CONCLUSION

Comparative law scholars define their central mission as to “render the foreign familiar.”<sup>320</sup> Drawing on their linguistic expertise, interdisciplinary training, and cultural sensitivity, comparativists make even the most foreign legal systems ac-

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315. Bian Yaowu, *supra* note 133, at 54.

316. See YU WEIMING, *supra* note 145, at 121 (“Looking worldwide, our country has the most demanding requirements with respect to the forms for establishing trusts.”); cf. Zhenting Tan, *supra* note 133, paras. 29–30 (stating that the Chinese rule that trusts be created in writing “provides for a much more stringent requirement” than common law countries’ trust laws).

317. 2001 Trust Law, *supra* note 124, art. 10 (providing that when trust property is required by relevant laws and administrative regulations to be registered, it must go through trust registration procedures when a trust is established). This provision also requires retroactive registration of trust property that was not properly registered when the trust was established and declares that “failure to do so will result in the trust being void.” *Id.*

318. WANG QING & GUO CE, *supra* note 125, at 24.

319. Geng Lihang, *supra* note 137, at 13–14.

320. I borrow this phrase from Vincent Crapanzano’s *Hermes’ Dilemma: The Masking of Subversion in Ethnographic Description*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 51, 52 (James Clifford & George E. Marcus eds., 1986).

cessible to a domestic audience. Nowhere is this more evident than in the scholarship on legal transplants. A vast and ever-growing literature has provided comprehensive analyses of the features, functions, and impact of legal transplants.<sup>321</sup>

This Article has suggested a new mission for the comparative law field—to render the familiar foreign.<sup>322</sup> It has demonstrated that study of a foreign system can provide invaluable perspectives for domestic legal scholars and reformers.<sup>323</sup> Specifically, this Article has examined China’s recent experience with transplanting the American trust law model.<sup>324</sup> It has shown that the most telling lessons may be found in what China rejected rather than what China adopted. China’s critique of American trust law provides a mirror for us to see our own system more clearly. And, as is so often true in life, the image in the mirror turns out to be less attractive than expected.

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.<sup>325</sup> This literature shows that American trust law cuts settlors off from their own trusts,<sup>326</sup> leaves beneficiaries unprotected from trustee abuse,<sup>327</sup> and denies trust parties and third parties alike knowledge of the terms, administration,<sup>328</sup> and even the very existence of trusts.<sup>329</sup> China’s critique exposes the dangers of what both American and Chinese scholars have aptly called a system of “trusting trustees.”<sup>330</sup>

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

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321. See *supra* Part I.A.

322. Cf. Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923, 992 (1997) (suggesting that “[c]omparative law translation of methodology” could make a similar contribution).

323. See *supra* Part I.B.

324. See *supra* Part II.

325. See *supra* Part III.

326. See *supra* Part III.A.

327. See *supra* Part III.B.

328. See *supra* notes 255–57 and accompanying text (discussing settlors’ lack of access to information regarding administration of their own trusts).

329. See *supra* Part III.C.

330. See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 67 (2005) (using the phrase “trusting trustees”); Zhenting Tan, *supra* note 133, para. 31 (using a slight variant of that phrase—“trusting a trustee”).

economics theory, prominent scholars and reformers are rapidly dismantling the traditional legal and moral constraints on trustees.<sup>331</sup> Trusts are becoming mere “contracts,” and trust law nothing more than “default rules.”<sup>332</sup> “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.<sup>333</sup>

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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331. For an outstanding critical analysis of recent trust law scholarship and reform, see Leslie, *supra* note 330; see also Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor Langbein*, 47 WM. & MARY L. REV. 541, 550–67 (2005) (criticizing Langbein’s proposal to eliminate the trust law’s no further inquiry rule, which serves to protect beneficiaries from trustee abuse).

332. Leslie, *supra* note 330, at 68.

333. For examples of those human costs, see Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 584–612 (2008).