

Mirror, Mirror on the Wall, Is China's Trust the Fairest of All?

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Frances Foster, *American Trust Law in a Chinese Mirror*, 94 *Minn. L. Rev.* 602 (2010).



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The People's Republic of China officially adopted the Western notion of a trust on April 28, 2001, and scholars are now pondering the likely long-term impact on individuals, institutions, and cultural norms in that ancestor-venerating, socialist, civil-law system. Most of the scholarship is coming from inside China, of course, and the common theme is the need to "nativize" the transplanted trust in order for it to thrive, or at least do no harm, in its new environment. One Chinese scholar has described the process as "absorbing what is useful and discarding what is not."

In *American Trust Law in a Chinese Mirror*, Professor Frances Foster combines impressive trust-law credentials with fluency in Chinese language to unveil and explain a robust and intelligent critique of the so-called American trust. What makes this article particularly fascinating is Professor Foster's focus on the implications of this critique to the evolution of trust law in the United States. As she explains, "legal transplants can provide a mirror for donor countries to see flaws in their own systems and new directions for reform."

According to Foster, the Chinese trust law literature paints "a disturbing picture of an American trust system out of balance." Settlers are marginalized, beneficiaries left to fend for themselves, and trustees blindly trusted because of senseless secrecy laws.

Chinese scholars evidently see settlers in the United States as "weak and ultimately irrelevant." Unless a settlor knows how to retain rights when establishing the trust, for example, that settlor immediately gets relegated to nothing more than "an interested bystander," with no ability to monitor the trustee, protect beneficiaries, or enforce the trust's terms. These critics argue that settlers in China should always have ready access to trust information, the legal ability to hold trustees accountable, and an on-going power to modify administrative provisions without court involvement. Furthermore, the settlor's powerful role should survive the settlor's death, by passing automatically to the settlor's heirs.

Chinese literature is equally critical of trust law's treatment of beneficiaries, contending that "the young, the sick, the nameless, even the unborn" get left behind. It's viewed as ironic that trusts are supposed to serve the most vulnerable, yet American trust law ultimately requires beneficiaries to "fend for themselves." Chinese scholars suggest an improvement borrowed from the civil law tradition: a trust supervisor system: "This system empowers third parties designated by the settlor or appointed by the court to monitor whether the trustee is administering the trust in the best interests of the beneficiary and to represent the beneficiary in litigation and other trust matters."

The Chinese are particularly troubled by the level of secrecy permitted—protected even—by American trust law: “If the American settlor takes the secret to the grave, the trustee alone may know that the property she enjoys is not her own. 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.” They attribute the secrecy primarily to laws in the United States that permit oral trusts and do not require the registration of every trust. Chinese scholars see this last items as particularly odd: “Even in the birthplace of trusts—England—all trust must be registered.”

Professor Foster summarizes China’s criticism of American trust law as being “too trusting of trustees,” and as needing “better balance.” Readers are left with the impression that China is quite likely soon to modify the American trust in ways that will achieve or at least move in the direction of the balance sought by the critics.

Professor Foster considers it both ironic and disappointing that the American trusts and estates field is not evolving in ways that would reflect China’s critique. In fact, the U.S. “appears to be heading in precisely the opposite direction,” according to Professor Foster. She attributes this to the influence of law and economics theory, which is “rapidly dismantling the traditional legal and moral constraints on trustees.” She adds,

Trusts are becoming mere “contracts” ..., trust law nothing more than “default rules” ..., “efficiency” is triumphing over morality. In the law and economics universe of foresighted settlors, loyal trustees, informed beneficiaries, and sophisticated family and commercial creditors, trusting trustees may make sense. In the real world, however, it does not. A trust system that exalts trustee autonomy over accountability can and increasingly does impose significant human costs on all affected by trusts.

This article is a must-read for academics and policy makers in the U.S., precisely because the perspective is so alien. Whether readers like the image in this mirror hardly matters. What does matter is the clever way it forces even expert readers—particularly the experts—to view a trusty old friend with fresh eyes, uninhibited by personal values and cultural biases.

Perhaps because Professor Foster focuses exclusively in this article on China’s critique of American trust law, readers might get a wrong impression or two about trusts in the United States. For example, settlors here have the legal ability to retain all the powers that the Chinese literature describes as missing. It’s true that many such powers are often not retained, but that is usually because of tax, creditor-protection, or other good reasons. Also, settlors who choose not to trust the trustee completely and want added protection for beneficiaries can always appoint trust advisers and/or protectors, and in most jurisdictions there are ways to make the trust a matter of public record.

Professor Foster ends the article noting, “In a Chinese mirror, we can see that trusting trustees is the problem, not the solution.” I loved this article, but I prefer the Russian proverb, “Trust, but verify.”

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