

KILLING ME SOFTLY: A COMPARATIVE REVIEW OF CHINESE INHERITANCE LAW TO ADDRESS THE PROBLEM OF ELDER ABUSE AND NEGLECT IN THE UNITED STATES

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“Treat your elders as elders, and extend it to the elders of others; treat your young ones as young ones, and extend it to the young ones of others; then you can turn the whole world in the palm of your hand.”

—Mencius (391–308 B.C.E.)

I. INTRODUCTION

Estimates indicate that every year 2.1 million elderly Americans are victims of abuse or neglect.¹ For every case of elder abuse reported, authorities believe another five cases go unreported.² While this injustice continues, those same elders provide for their families through inheritance.³ Every state recognizes the ability of testators to pass property to a descendant⁴ when the descendant is named in a testamentary instrument;⁵ however, a problem arises when the descendant commits elder abuse or neglect but is still permitted to inherit under the will. Currently, a beneficiary’s bad conduct does not alter the

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1. *Elder Abuse and Neglect: In Search of Solutions*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/pi/aging/resources/guides/elder-abuse.aspx> (last visited Oct. 28, 2011) [hereinafter APA Elder Abuse] (discussing the overall problem of elder abuse and neglect).

2. *Id.*

3. See generally Sara Max, *What to Expect from Mom and Dad*, CNN MONEY (Dec. 2, 2003, 10:05 AM), <http://money.cnn.com/2003/11/25/retirement/inheritance/>.

4. E.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “descendant” as “[o]ne who follows in the bloodline of an ancestor, either lineally or collaterally”).

5. The Federal Constitution does not prohibit states from drafting rules of inheritance; thus, each individual state is permitted to promulgate its own rules for passing property upon death. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (“Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”).

testamentary distribution scheme after a testator's death.⁶

On August 13, 2007, philanthropist and socialite Brooke Astor passed away at age 105.⁷ She was survived by her only son, Anthony D. Marshall,⁸ and his son, Philip C. Marshall.⁹ A year before Brooke Astor's death, Philip filed a civil lawsuit against his father, the legal guardian of Brooke Astor. The lawsuit alleged that Anthony neglected to care for Mrs. Astor while profiting from the wealthy estate.¹⁰ Philip claimed that his father paid himself \$2.3 million a year for taking care of Mrs. Astor and that he should be removed as guardian.¹¹

Prior to this event, a number of changes in Mrs. Astor's estate plan were made. First, the original will from 1997 was revoked when another will was drafted in 2002.¹² Later, in 2003, \$3.4 million in securities and Mrs. Astor's home in Maine, valued at \$5.5 million, were all transferred to Anthony.¹³ Anthony also began taking a commission for selling his mother's works of art. Anthony transferred hundreds of thousands of dollars from Mrs. Astor to his theater company and funded his charities with assets from his mother's estate.¹⁴

A number of accusations that Anthony tampered with Mrs. Astor's 2002 will were made.¹⁵ Anthony allegedly prepared checks to himself totaling \$900,000.¹⁶ Ultimately, the probate estate¹⁷ of Mrs. Astor took years to complete, required weeks of litigation during the criminal trial of Anthony

6. Cf. Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401 (1995) (reviewing statistical analysis of the occurrence of family violence and recommending probate reform in instances of parental abuse).

7. Brooke Astor was the heiress of the wealthy Astor Foundation. Charities to which contributions were made include, *inter alia*, the New York Public Library and the Metropolitan Museum of Art. See generally MERYL GORDON, MRS. ASTOR REGRETS (2008).

8. James Barron, *New York Loses Consummate A-List Philanthropist*, N.Y. TIMES, Aug. 14, 2007, at B2 (stating Mr. Anthony Marshall is "a Broadway producer and former C.I.A. employee").

9. *Id.*

10. James Barron & Anemona Hartocollis, *As Mrs. Astor Slips, the Grandson Blames the Son*, N.Y. TIMES, July 27, 2006, at A1.

11. Mike McIntire, *The Fortune She Inherited and the Fortune She Gave to Philanthropy*, N.Y. TIMES, July 28, 2006, at B4.

12. Serge F. Kovaleski, *Astor's Mental State Questioned Before She Signed Final Will*, N.Y. TIMES, Sept. 10, 2007, at B1 (stating Anthony Marshall was a principal beneficiary of the 1997 will but stood to receive a greater amount of the Astor estate under the 2002 will).

13. Serge F. Kovaleski, *Son of Astor Is Said to Face Criminal Case*, N.Y. TIMES, Nov. 27, 2007, at A1.

14. *Id.*

15. Serge F. Kovaleski, *Astor's Mental State Questioned Before She Signed Final Will*, N.Y. TIMES, Sept. 10, 2007, at B1.

16. Serge F. Kovaleski & Mike McIntire, *A Former Astor Aide Tells How Spending Habits Changed*, N.Y. TIMES, Aug. 1, 2006, at B1.

17. The estate was estimated to be worth \$132 million, in addition to a trust valued at \$60 million. Barbara Whitaker, *Brooke Astor's Guardians and Son Battle Over Estate*, N.Y. TIMES, Aug. 23, 2007, at B4.

Marshall, and claimed thousands of dollars in attorney's fees.¹⁸ While the Astor probate estate concluded with a jury finding Anthony Marshall guilty of defrauding the estate, the concern remains that absent high-profile victims, cases of elder abuse or neglect will go unpunished.¹⁹

This Article raises the issue of whether testamentary beneficiaries should be allowed to inherit from a decedent if elder abuse or neglect occurs. Reviewing the Chinese inheritance system provides a different perspective for handling the problem of abusive beneficiaries. Probate reform is needed in the American inheritance system in order to provide a solution to the problem of caring for the elderly.

II. COMPARATIVE REVIEW: TWO INHERITANCE SYSTEMS THAT ARE WORLDS APART

While the United States and China have advanced along very different historical paths, they both now face the problem of how best to care for elderly individuals. Their inheritance systems developed under two different concepts of property rights. The many cultural distinctions between the two systems are most apparent when reviewing the People's Republic of China's (P.R.C.) civil code for disinheriting heirs based on their conduct toward a testator.

A. *The Chinese System and the Cultural Divide*

The most important distinction between the Chinese and American inheritance systems is that the Chinese system places significant emphasis on the family unit rather than on individuals. This feature has evolved throughout centuries and is highlighted by characteristics of traditional Confucian practices. Western influence in the twentieth century brought significant changes to Chinese society. By 1949, the P.R.C. began drafting statutory provisions recognizing an individual's right to inherit. Today, the P.R.C.'s civil code recognizes not only an individual's right to inherit, but also the individual's ability to limit or revoke that inheritance if it is determined that the beneficiary has failed to care for the elder family member.

18. *In re* Probate Proceeding for Letters of Admin., 863 N.Y.S.2d 568, 575-76 (N.Y. Sur. 2008) *aff'd sub nom.*, *In re* Astor, 879 N.Y.S.2d 560 (N.Y. App. Div. 2009) (ordering Anthony Marshall to produce discovery documents *in camera*).

19. *See, e.g.*, Donna Smith, *Mickey Rooney Tells Congress of Abuse*, REUTERS, Mar. 3, 2011, available at <http://www.reuters.com/article/2011/03/03/us-mickeyrooney-idUSTRE7217BX20110303> (reporting actor Mickey Rooney testified before the Senate Special Committee on Aging regarding years of physical abuse and financial exploitation at the hand of his stepson, Rooney stated, "I couldn't muster the courage to seek the help I knew I needed.").

1. History and Development of the Chinese Inheritance System

In China, caring for members of the family unit is a moral obligation. This concept dates back to the Eastern Zhou Dynasty (1045 to 256 B.C.) when Confucius wrote about the strong ties of family to the state.²⁰ Confucius wrote that in order to ensure peace, individuals must elevate their concept of both the family and the state.²¹ The moral concept of *li*—the belief that social order is created through education—governed conduct in order to maintain social order.²² A hierarchical order was required so that every individual knew his or her societal responsibility.²³ Various factors, such as gender and age, determined societal obligations.²⁴ Because *li* placed an obligation on the family unit, individuals were expected to follow this rigid hierarchical structure to maintain social order.²⁵

Importance of the family unit governed inheritance upon the death of a family member. Generations of family members lived together on communal property called *jia*.²⁶ A head member, typically the father or grandfather, governed each *jia*.²⁷ This patriarchy allowed only the head of the *jia* the right to dispose of the *jia* property.²⁸ Upon the death of the head of the *jia*, distribution of property was made in shares depending on gender, marital status, and family status.²⁹ In all circumstances, the family was required to stay together on the common property for three years after the death of the head of the *jia*.³⁰ Living together on communal land was a natural extension of the family-unit emphasis of ancient Chinese culture.

For centuries, Confucian principles heavily influenced Chinese feudal society. Membership in local family clans helped handle general disputes that arose between families.³¹ For example, clans resolved criminal disputes

20. See, e.g., JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 12 (2008) (discussing the five cardinal relations of men: “the relationship of ruler and minister; of father and son; of husband and wife; of elder brother and younger brother; and of friend and friend.”).

21. *Id.*

22. *Id.* at 11.

23. *Id.*

24. See, e.g., *id.* at 12 n.39 (“The father should be kind, the son filial, the elder brother affectionate, the younger brother respectful, the husband good-natured, the wife gentle, the mother-in-law kind, the daughter-in-law obedient – all in conformity to *li*.”).

25. *Id.* at 13 (“[T]he final goal of good government was the correct operation of hierarchical human relationships”).

26. See M. J. MEIJER, MARRIAGE LAW AND POLICY IN THE CHINESE PEOPLE’S REPUBLIC 9 (1971) (stating that it was common for several generations to live together on communal property).

27. *Id.* (stating the head of the *jia* was called the *jiazhang*).

28. *Id.* at 10.

29. See, e.g., *id.* at 12 (stating that children born out of wedlock would receive only half a share).

30. *Id.*

31. *Id.* at 20.

internally rather than through an outside public court system.³² The power of local clans was so strong that families were able to defend their own property from aggressors or even determine the punishment for clan members who broke clan rules.³³ Clans considered disobeying one's parents a disorderly act because "it disturbed the natural harmony in society."³⁴ Likewise, filial obligations were not to be ignored by clan members.³⁵ Confucian principles played a vital role until the age of modern China.

During the twentieth century, China went through significant social and political reform. Western economic influence helped spark a nationalist movement that called for one central government instead of rule by feudal lords.³⁶ By 1926, the Kuomintang (K.M.T.) unified China under a national government for the purpose of instituting democracy and economic development.³⁷ Interestingly, the K.M.T. wanted to abolish the Confucian principle of *li* because it undermined the concept of a nationalized government.³⁸ A modern, Western-style legal system replaced the traditional rule of *li*.³⁹ Those in the countryside, however, continued to follow traditional practices while ignoring the new Western system.⁴⁰

Throughout the reign of the K.M.T., Communists gained popularity among the rural areas of China.⁴¹ The Communists organized a revolution against the K.M.T.,⁴² and in 1949 won a bitter civil war against the K.M.T. under the leadership of Mao Zedong.⁴³ A new rule of law abolished capitalistic ideals and replaced them with communist principles.⁴⁴ Additionally, under the

32. *Id.*

33. *Id.*

34. *Id.* at 7.

35. See William Theodore De Bary, *The "Constitutional Tradition" in China*, 9 J. CHINESE L. 7, 12 (1995) (discussing that filial obligations were eventually codified into law during the Han dynasty); see also Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 416 (1994) (stating that Confucian principles heavily stressed, *inter alia*, filial obligations).

36. See MEIJER, *supra* note 26, at 21 (stating western economic penetration into China helped lead to the erosion of traditional concepts of Chinese society).

37. *Id.* at 24.

38. *Id.* at 25.

39. See *id.* (discussing the notion that the new K.M.T. law would "promote nationalism, democracy, and economic development with equitable distribution of wealth").

40. See *id.* at 26 (providing that the rural Chinese "continued to live according to their traditional ways").

41. See generally KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 9 (2006) (stating that rural resistance has occurred for thousands of years. "[N]o decade since the fall of the Qing Dynasty has been entirely free of rural unrest.").

42. MEIJER, *supra* note 26, at 30.

43. *Id.*

44. See *id.* at 30-31 (discussing the notion that the new communist law would focus on "protecting, strengthening and developing relationships and procedures suitable and beneficial to the workers").

new P.R.C. regime, the traditional concept of *li* was abandoned.⁴⁵

2. *The Chinese Inheritance System under the P.R.C.*

The P.R.C. explicitly recognizes the ability of individuals to inherit property from their family members. Specifically, Article 13 of the 2004 Chinese Constitution provides that “[t]he state protects by law the right of citizens to inherit private property,” and that “[t]he state protects the right of citizens to own [private] property.”⁴⁶

In 1985, the National People’s Congress codified the Law of Succession of the P.R.C.⁴⁷ The Law of Succession provides for two forms of inheritance for Chinese citizens: intestacy⁴⁸ or will instrument.⁴⁹ However, wills are permitted only so long as they do not conflict with public policy.⁵⁰ The Law of Succession provides that the scope of inheritable property includes, *inter alia*, a testator’s income, house, personal effects, livestock, property rights in a citizen’s copyrights and patents, and other lawful property.⁵¹ If a citizen elects to draft a will instrument, he or she may dispose of the property to anyone he or she chooses.⁵² If the citizen elects not to draft a will, the order of statutory inheritance will apply.⁵³

One feature that distinguishes the Chinese system from the American system is the ability of judges to include a citizen’s caretakers in the distribution of the property.⁵⁴ Article 14 of the Law of Succession provides that

45. *But see* Frances Hoar Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395, 396 (1982) (stating that in the post-Mao period the preferred method of government is for strong morals, *li*, rather than reliance on law, *fa*, because such reliance will lead a “morally bankrupt leadership”).

46. XIANFA [Constitution of the People’s Republic of China] art. 13 (Dec. 4, 1982, revised Mar. 14, 2004).

47. Zhonghua Renmin Gongheguo Jicheng Fa (中华人民共和国继承法) [Law of Succession] (promulgated by Order No. 24 of the President of the People’s Republic of China, Apr. 10, 1985, effective Oct. 1, 1985) available at <http://www.lawinfochina.com/display.aspx?lib=law&id=56> [hereinafter Law of Succession].

48. *E.g.*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “intestacy” as “[t]he state or condition of a person’s having died without a valid will”).

49. Law of Succession, *supra* note 47, ch. 1, art. 5.

50. *See generally* Louis B. Schwartz, *The Inheritance Law of the People’s Republic of China*, 28 HARV. INT’L L.J. 433 (1987).

51. Law of Succession, *supra* note 47, ch. 1, art. 3(1)–(7); *see also* Louis B. Schwartz, *The Inheritance Law of the People’s Republic of China*, 28 HARV. INT’L L.J. 433, 440 (1987).

52. Law of Succession, *supra* note 47, ch. 3, art. 16.

53. *Id.* at ch. 2, art. 10 (providing that the property will be distributed to the first class—spouse, children, and parents—and then to the second class—brothers, sisters, paternal grandparents, and then maternal grandparents).

54. *See generally* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 182–89 (2008) (discussing the role of caregivers in the United States and noting the financial difficulties they endure in order to provide for their elder family member).

“[a]n appropriate share of the estate may be given to a person, other than a successor, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person . . . who was largely responsible for supporting the decedent.”⁵⁵ Interestingly, this feature creates an incentive for caretakers who are not already beneficiaries to provide additional support for the testator.⁵⁶

Other Chinese codes also expressly recognize the ability to inherit.⁵⁷ One of the earliest civil provisions enacted by the P.R.C. was the Marriage Law of 1950.⁵⁸ Most recently codified in 2001,⁵⁹ the law serves a dual function: it first acts as an instrument for the transformation of a new communist society; second, it regulates marriage by providing a framework for resolving disputes that arise between spouses.⁶⁰ Article 1 of the law recognizes the principle of family relations; Article 24 allows a husband and wife to inherit from each other.⁶¹

The Marriage Law of 2001 imposes certain moral obligations on Chinese citizens depending on their status in a family unit.⁶² These obligations and duties are placed on children, parents, and grandparents in order to maintain social welfare.⁶³ Article 21 is an important provision for purposes of this discussion because it provides that “children *shall* . . . be under the obligation of supporting their parents. Where any child fails to perform his or her

55. Law of Succession, *supra* note 47, ch. 2, art. 14.

56. See, e.g., Frances H. Foster, *Towards A Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 100 n.133 (1998) (citing a case where the decedent’s youngest son, who became the caregiver, was awarded 2,500 yuan, while his brothers received only 500 yuan).

57. See, e.g., Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People’s Republic of China] (promulgated by Order No. 37 of the president of the People’s Republic of China, Apr. 12, 1986, effective Jan. 1, 1987) ch. V, § 1, art. 76, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1165> [hereinafter General Principles Civil Law] (“Citizens shall have the right of inheritance under the law”).

58. See generally MEIJER, *supra* note 26, at 69–82 (discussing the background and significance of enacting the Marriage Law as one of “the instruments of change in rural China during the first few years of the new republic.”).

59. Zhonghua Renmin Gongheguo Hunyin Fa (中华人民共和国婚姻法) [Marriage Law of the People’s Republic of China] (promulgated by Order No. 9 of the Chairman of the Standing Committee of the National People’s Congress on Sept. 10, 1980, amended in accordance with the Decision on Amending the Marriage Law of the People’s Republic of China, adopted by the Standing Committee of the Ninth National People’s Congress, Apr. 28, 2001) available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1793> [hereinafter Marriage Law].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at ch. 3, art. 28 & 29 (“Grandparents . . . *shall* be under the obligation of upbringing the grandchildren . . . whose parents have deceased . . . Elder brothers or elder sisters *shall* be under the obligation of supporting their younger brothers and sisters . . . whose parents are incapable of supporting them.”) (emphasis added).

obligations, the parents thereof who are unable to work or who are living a difficult life shall be entitled to ask their child to pay aliments.”⁶⁴ The P.R.C. holds children liable if they fail to provide for elder parents who require care.⁶⁵

While the P.R.C. recognizes the ability to inherit property, it also limits that ability by giving discretion to the local judge to consider whether the successors fulfilled their family obligations to the testator.⁶⁶ Article 13 of the Law of Succession provides that “successors who had the ability and were in a position to maintain the decedent but failed to fulfil their duties shall be given no share or a smaller share of the estate.”⁶⁷ The provision acts as a deterrent to ensure that will beneficiaries meet their filial obligations to the testator so that society is not burdened by providing care. Moreover, the provision reflects the traditional practice of *li*.

Similarly, another provision that reflects the practice of *li* is Article 44 of the Marriage Law of 2001. It limits an individual’s right to inherit by stating:

Any member deserted by his or her family *shall* be entitled to make petitions, and the relevant urban residents’ committee, villagers’ committee or the entity where the victim is a staff member shall make dissuasions or mediations. Where any person deserted by his or her family makes a petition, the people’s court *shall* make a judgment concerning the payment of expenses for upbringing, supporting and maintenance.⁶⁸

The P.R.C. places emphasis on the family members functioning as a productive unit so that society is not burdened. Article 44 permits Chinese judges to disregard an heir’s inheritance when that individual failed to care for the decedent.⁶⁹

The overarching theme of the Chinese inheritance system places importance on the family unit rather than individual class members.⁷⁰ In Chinese courts, many factors are considered when determining the right of

64. *Id.* at ch. 3, art. 21.

65. *See, e.g.*, Foster, *supra* note 56, at 96 n.97 (citing an inheritance case where the testator’s two stepsons failed to provide care, and, as a result, the testator starved and froze to death. The Chinese court awarded no inheritance to the two stepsons).

66. *Id.* at 99-100 (citing an inheritance case where four children were supposed to inherit equally under the laws of intestacy, but because one of the sons moved away from the family village, and, thus, was unable to provide daily support, that son received a smaller inheritance share).

67. Law of Succession, *supra* note 47, ch. 2, art. 13.

68. Marriage Law, *supra* note 59, ch. 5, art. 44.

69. *See, e.g.*, Foster, *supra* note 56, at 96 n.99 (citing a case where the Chinese court found acts of abandonment by the testator’s grandson, and as a result limited his inheritance).

70. *See* M. H. Van Der Valk, *China*, in *THE LAW OF INHERITANCE IN EASTERN EUROPE AND IN THE PEOPLE’S REPUBLIC OF CHINA* 297, 317 (1961) (stating that the principles of determining inheritance in the Chinese system are to guarantee “harmony within the family”).

succession.⁷¹ Even though an heir may be in line to inherit, a court may consider other factors in order to determine the distribution of property.⁷² These factors include the descendant's family and marital status, actual state of the property, influences made on the decedent, and conduct in caring for the decedent.⁷³ Chinese courts place greater importance on the family unit rather than an individual's statutory right to inherit, which is the position of American probate courts.

B. American System of Inheritance

The American inheritance system is distinguishable from the Chinese model because it provides separate jurisdictions the ability to grant property rights to individuals in the probate process. The system is founded upon centuries of jurisprudence that protect the testator's intent.⁷⁴ The theory is that the right to pass property at death is neither a natural right nor a constitutionally protected right.⁷⁵ The effect of the American probate process is to provide for the testator's heirs according to the scheme drafted by the will instrument.⁷⁶ This also includes the ability to disinherit family members if the testator wishes.⁷⁷ It is important to note that each individual state governs the probate process, thus allowing some jurisdictions to be more progressive than others in

71. See, e.g., Law of Succession, *supra* note 47, ch. 4 (providing that the probate judge is permitted to consider the rights of creditors, payment of taxes, rights under divorce support agreements, and rights of unborn children).

72. See, e.g., MEIJER, *supra* note 26, at 257 n.32 ("When adjudicating actual cases of inheritance, we must start from the spirit of strengthening the mutual aid within the group, which is advantageous for socialist construction and socialist transformation. As far as problems are concerned which have already been solved or abandoned, we must exert persuasion on the parties to the fullest extent so as to discourage them from fighting again. The courts should not handle such problems again, in order to avoid an increase of quarrels on inheritance in society.").

73. See, e.g., Law of Succession, *supra* note 47, ch. 5, art. 35 (providing that local nationalities may provide additional factors to the Law of Succession so long as they do not conflict with the requirements of the code provision).

74. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

75. See generally 2 WILLIAM BLACKSTONE, COMMENTARIES *10–13 ("[R]ights of inheritance . . . are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments.").

76. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1(b), (1999) (providing that the "estate passes to the decedent's heirs or devisees by intestate or testate succession").

77. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. f, (1999) (recognizing the ability of the testator to disinherit a line of descendants).

their inheritance schemes.⁷⁸

1. *The American Testamentary Scheme*

The American inheritance system was originally imported from the English system; testamentary freedom emerged from the original shadow of primogeniture.⁷⁹ The system allowed testators to pass property of the estate freely to any child through an instrument that was drafted *inter vivos*.⁸⁰ An elder was allowed to provide for not just the eldest son, but for the family as a whole. This testamentary scheme fits a republican society better than primogeniture, which parallels the scheme of authority in a monarchy.⁸¹

The testator's ability to name beneficiaries also provides the ability to disinherit.⁸² Traditionally, the American legal system respects the wishes of an individual when passing along his or her property at the time of death.⁸³ These benefits allow the testator to have control over his or her actions taken at death.⁸⁴ While rigid, the use of testamentary intent respects the wishes of the testator's distribution scheme in the probate process.⁸⁵

Each jurisdiction requires certain formalities when a will instrument is executed. So long as the will is executed properly and does not violate public policy, the testator's intent takes precedent. However, there are some limitations to the testator's wishes.

78. See *Hall v. Vallandigham*, 540 A.2d 1162, 1164 (Md. Ct. Spec. App. 1988) ("The right to receive property by devise or descent is not a natural right but a *privilege granted by the State.*") (emphasis added).

79. The original English system automatically permitted the eldest son to take the entire ancestor's estate, no matter the presence of a will. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "primogeniture" as "[t]he common-law right of the firstborn son to inherit his ancestor's estate, usu. to the exclusion of younger siblings").

80. *Id.* (defining "inter vivos" as "relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime").

81. See *Tate*, *supra* note 54, at 154 (discussing the history of the English system of primogeniture).

82. The right to exclude is a consistent theme among other areas of American jurisprudence. *Cf.* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1404 (2009) (discussing alienability and the ability to exclude under property law).

83. See *Tate*, *supra* note 54, at 159 (discussing the idea of American individualism and how this concept plays into the ability to freely disinherit any person).

84. This control is often referred to as the "dead hand" because it allows the testator to influence with wealth the conduct of friends and family after death, and is often seen by many scholars as a system that needs more flexibility. See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 615-16 (2009) (discussing the problem of the dead hand control).

85. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. g, (1999) ("To be a will, the document must be executed by the decedent with testamentary intent, *i.e.*, the decedent must intend the document to be a will or to become operative at the decedent's death").

2. *Limits on Disinheriting Children*

When a testator wishes to disinherit a child, he or she may do so at any time.⁸⁶ Many limits are placed on the testator in order to protect the financial interests of the children.⁸⁷ In this sense, the policy behind the American model does consider the interest of family support in limited situations over that of the testator's desires.⁸⁸ Courts will ensure that, if a parent testator has a familial obligation to provide for a child, the child is provided for despite the testator's failure to provide for the child in the will instrument.⁸⁹ The most common example occurs when the testator has a physically or mentally disabled child.⁹⁰ Once the will instrument is admitted to the probate court, courts will not consider whether an elder testator was provided for during their elderly years by beneficiaries.

Another example of limiting the testator's distribution scheme occurs when the descendant murders the testator.⁹¹ The slayer rule bars a will beneficiary from collecting under the will instrument.⁹² The theory behind the slayer rule is to prohibit a will beneficiary from becoming unjustly enriched through committing a criminal act.⁹³ Therefore, probate courts will prohibit an individual from inheriting under a testator's will instrument in limited circumstances because of certain bad acts performed against the testator.

86. See, e.g., UNIF. PROBATE CODE § 2-507(a)(1)–(2) (amended 1993) (providing that a will may be revoked either by executing a subsequent will that revokes a previous will, or by “performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will”).

87. See, e.g., UNIF. PROBATE CODE § 2-302(a) (amended 1993) (“If a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate”).

88. See Pamela R. Champine, *Dealing With Mental Disability At Non-Institutional Mental Disability Law Through The Sanism Filter*, 22 N.Y.L. SCH. J. INT’L & COMP. L. 177, 187–88 (2003) (discussing the importance of providing for family protection in limited circumstances of mental disease).

89. See, e.g., 42 U.S.C. § 667(a) (2011) (“Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State.”).

90. See, e.g., CAL. FAM. CODE § 3910(a) (West 2011) (“The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.”).

91. See generally Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 844–52 (1993) (reviewing the overall scheme of the American rule prohibiting will beneficiaries from collecting if they murdered the decedent).

92. See UNIF. PROBATE CODE § 2-803(b) (amended 1997) (“An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share . . .”).

93. See, e.g., *In re Estate of Mahoney*, 126 Vt. 31, 33 (1966) (“[N]o one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime.”).

Similar to the slayer rule, California limits the ability of a beneficiary to inherit under the will instrument when acts of elder abuse are committed. In California, a descendant is prohibited from collecting if it is proven that elder abuse occurred at the hands of a descendant.⁹⁴ A probate judge in California will limit the inheritance due to a beneficiary who is found to have committed elder abuse against the decedent.⁹⁵ Disinheritance will occur only if a separate investigation and criminal case is conducted to find that the will or trust beneficiary did in fact commit elder abuse.⁹⁶ While California is making progress in curbing the occurrence of elder abuse and neglect by limiting the inheritance of family members, it is the only jurisdiction in the United States fighting these problems through limiting a beneficiary's inheritance.

Most jurisdictions will not alter a will in the event that the child beneficiary's actions constituted neglect of the decedent.⁹⁷ There is a strong interest in keeping the testator's intent as part of the will distribution scheme.⁹⁸ Once the testator is deceased, it is difficult to raise the issue of whether the decedent would want to amend the will instrument. Courts could always admit evidence extrinsic to the will in an attempt to show that the beneficiary neglected the elderly testator.⁹⁹ Courts permit evidence to be presented outside the four corners of a will instrument only in limited situations, such as to provide clarity to ambiguous provisions or to prove fraud, undue influence, or lack of mental capacity.¹⁰⁰

Finally, it is important to note that American courts do not consider actions taken by the testator's non-family caregivers upon distribution of the probate estate.¹⁰¹ This includes those who provide both financial support and care leading up to the testator's death. If a caregiver is not expressly provided

94. See CAL. PROB. CODE § 259(a)(1)–(4) (West 2011) (providing that any person is deemed to have predeceased a decedent where it is proven that the person is liable for physical abuse of the elder adult).

95. See, e.g., *In re Estate of Lowrie*, 118 Cal. App. 4th 220, 222–25 (Cal. Ct. App. 2004) (holding that the trust beneficiary was precluded from inheriting after the beneficiary was found guilty of committing elder abuse against the decedent).

96. See CAL. PROB. CODE § 259(b) (West 2011).

97. See Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1387 (2008) (noting that most courts do not have the flexibility to adjust inheritance rights to reflect neglect).

98. See *id.* at 1388–89 (discussing the testamentary intent approach).

99. This assertion would be an expansion of the extrinsic evidence rule. The current rule would not allow this type of evidence because it is typically limited to situations of fraud, lack of mental capacity, and mistake. See, e.g., UNIF. PROBATE CODE § 2-302(c) (amended 1993) (stating that extrinsic evidence to provide for a child can be admitted when the testator mistakenly believes the child to be dead).

100. See JESSE DUKEMINIER ET AL, *WILLS, TRUSTS, AND ESTATES* 372 (7th ed. 2005) (outlining the instances when extrinsic evidence is used to cure defective wills).

101. See, e.g., CAL. PROB. CODE § 21350(a)(6) (West 2004) (stating that care custodians are disqualified from being beneficiaries of testamentary transfers from dependent adults for whom they provide care).

for in the will, legislatures in the United States are hesitant to wedge the caregiver into the distribution scheme.¹⁰² This is in stark contrast to a number of other Western countries, which award a caregiver some portion of the estate because of his or her service to the testator.¹⁰³

3. *Support Trusts Provide Extra Financial Support for the Elderly*

Trusts have different benefits over will instruments when attempting to provide for family.¹⁰⁴ Specifically, a trust allows more flexibility because a trustee is appointed to manage trust property—usually in the form of financial investments—while owing a fiduciary duty to the settlor¹⁰⁵ and to the trust beneficiaries.¹⁰⁶ The trustee holds legal title to the trust property, while the trust beneficiary holds equitable title.¹⁰⁷ Trusts take different forms depending on the wishes of the person setting up the trust.¹⁰⁸ Because a settler cannot always foresee problems that may arise, discretionary support trusts offer flexibility to provide financially for any healthcare or general maintenance needs.¹⁰⁹ Although a trust may not be as effective as having a child beneficiary provide care on a daily basis, it does supplement financial needs that an elder parent may need while the child beneficiary is away.¹¹⁰

III. ANALYSIS: INSTANCES OF ELDER ABUSE OR NEGLECT BY BENEFICIARY SHOULD LIMIT INHERITANCE

This section highlights two problems with the inheritance systems of both

102. See, e.g., Kirsten M. Kwasneski, *The Danger of a Label: How the Legal Interpretation of “Care Custodian” Can Frustrate a Testator’s Wish to Make a Gift to a Personal Friend*, 36 GOLDEN GATE U. L. REV. 269, 287-90 (2006) (discussing the gift limit that testators can make to caregivers because of the concern of undue influence).

103. See generally Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents’ Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282 (1955) (discussing the law in Austria, Mexico, and New Zealand as providing a family maintenance system, which bends testamentary intent to allow the probate judge flexibility in distributing property).

104. See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (discussing the overall development and use of trusts in American society).

105. E.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “settlor” as “[a] person who makes a settlement of property; esp., one who sets up a trust”).

106. See RESTATEMENT (THIRD) OF TRUSTS § 32 cmt. b (2003) (imposing the role of the trustee to act as a fiduciary).

107. See *id.* § 40 cmt. b (stating that the trust beneficiaries hold equitable title while the trustee holds legal title to the trust property).

108. See *id.* § 1 (discussing three different types of trusts that may be used for the beneficiaries’ use).

109. See Evelyn Ginsberg Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273, 301 (1983) (describing the overall benefits of a trust for providing support to family members).

110. See *id.*

the United States and China. The current system in the United States is inadequate to meet the needs of a family unit because it fails to consider the possibility of elder abuse or neglect.¹¹¹ A different problem in China arises as the rapid pace of a modernizing economy continues to change traditional cultural norms.¹¹² As Chinese citizens migrate from the countryside into metropolitan cities, they may leave behind family obligations without ensuring necessary care and support for elderly family members.¹¹³ The Chinese government will need a way to provide for its elderly citizens as its economy continues to modernize.

A. Problems in the American Inheritance System

It is estimated that in 2003 between one and two million Americans over the age of sixty-five were injured or mistreated by someone they depended on for care and protection.¹¹⁴ Experts believe that for every case of elder abuse and neglect that is reported, another five go unreported.¹¹⁵ Some data suggests that only one in fourteen incidents comes to the attention of authorities.¹¹⁶ In addition, some experts believe that five million cases of financial exploitation of the elderly occur each year.¹¹⁷ There is no doubt that elder abuse and neglect occur in the shadows of American society.

Currently in the United States, the large and quickly aging baby boom generation presents young Americans with the challenge of providing adequate care for their parents.¹¹⁸ In addition, individuals are living longer than ever before thanks to advances in medical technology.¹¹⁹ Therefore, more elderly

111. See Jane Gross, *Forensic Skills Seek to Uncover Hidden Patterns of Elder Abuse*, N.Y. TIMES, Sept. 27, 2006, at A1 (reporting that in California alone during 2003, 100,000 reports were filed claiming incidents of elder abuse).

112. See generally MAURICE MEISNER, *MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC* 415 (3d ed. 1999) (stating that industrial production by 1977 in China was the most ever achieved by a country during any period in history).

113. See Foster, *supra* note 56, at 123–24 (discussing the problem of the inheritance system as more economic growth continues to modernize China).

114. NAT'L CTR. ON ELDER ABUSE, *ELDER ABUSE PREVALENCE AND INCIDENCE 1* (2005), available at http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf.

115. *Id.*

116. *Id.*

117. *Id.*

118. See DEP'T OF HEALTH & HUMAN SERV., *PROJECTED FUTURE GROWTH OF THE OLDER POPULATION*, http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx (last modified June 23, 2010) (stating that by 2030 there will be more than 70,000,000 Americans age sixty-five or older, which is double the total number of Americans over the age of sixty-five in 2000).

119. See, e.g., Elizabeth Arias, *United States Life Tables, 2001*, 52 NAT'L VITAL STAT. REP., No. 14 at 33 (2004), available at http://cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_14.pdf (stating

individuals will need additional medical care and attention for a longer period of time. When family members fail to provide basic care for elders, the burden is passed on to American society through the increased medical care costs paid by Medicaid.

1. *Cases of Elder Neglect*¹²⁰

Elder neglect can lead to health concerns such as malnutrition and dehydration.¹²¹ The elderly require extra attention because of typical problems associated with aging such as dysphagia,¹²² movement disorders, and gastroesophageal disorders.¹²³ Moreover, financial constraints increase as more medical demands are placed on the elderly individual.¹²⁴ Daily attention is needed in order to assist the family elder in achieving a basic quality of life.¹²⁵ Inadequate care may even hasten death.¹²⁶

While a child may be aware of his or her own obligations to an elderly family member, career and societal demands may compete with the attention that the elderly individual requires. Many changes in modern American society over the past century have permitted individuals to become more mobile.¹²⁷ As a nomadic society, individuals are now, more than ever before, able to pick up their roots and start a new life in an unfamiliar part of the country or world.¹²⁸ The evolution of the modern American transportation system—specifically automobile and commercial air travel—allows people to leave behind their

that the average life expectancy at birth increased from 68.2 years in 1950 to 77.2 years in 2001).

120. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "neglect" as "[t]he omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding" and "[t]he failure to give proper attention, supervision, or necessities . . . to such an extent that harm results or is likely to result").

121. *See* FRANK GLENDENNING & PAUL KINGSTON, ELDER ABUSE AND NEGLECT IN RESIDENTIAL SETTINGS 106 (1999) (discussing a direct correlation between under-nutrition, starvation, and dehydration as causes of death to the neglected elderly).

122. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008) (defining "dysphagia" as a condition that results in the elder individual having a difficult time swallowing food or water).

123. GLENDENNING & KINGSTON, *supra* note 121, at 93–97.

124. *Id.* at 100.

125. *Id.* at 106.

126. *Id.* at 110.

127. *See* Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L.J. 159, 169 (2009) (discussing the increased mobility that allows more Americans to explore different segments of society).

128. *See* Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1 n.215 (2000) (quoting Elliot Currie stating employers praise "flexibility, from the point of view of the employer translates into *rootlessness* for individuals and families and atomization for communities.") (emphasis added).

families in search of economic opportunity.¹²⁹ When this occurs, they may also leave behind family obligations.

The concern arises when those individuals are willed into the testator's estate, but then fail to care for family members left behind.¹³⁰ This result forces a family unit to supplement care for the testator while the child beneficiary is still able to collect from the estate upon death.¹³¹

Elder neglect may also occur when a child descendant has every intention of providing care for the elderly testator, but for whatever reason, fails to perform.¹³² Here, the child beneficiary is acting negligently. As in the first instance, the result will force the family unit to supplement care for the elder family member despite the testator financially providing for the child beneficiary.

2. Cases of Elder Abuse¹³³

Even more disturbing than elder neglect are cases of elder abuse, especially when they occur at the hand of family members. It is estimated that millions of elderly Americans fall victim to abuse every year.¹³⁴ When the abuser is a family member, the elder victim is often unlikely to report the abuse.¹³⁵ Any collected data that attempts to quantify the cases of elder abuse

129. See Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 563 (2009) (discussing the increase in opportunities as American society becomes more mobile).

130. See *Jacobs v. Newton*, 768 N.Y.S.2d 94, 100 (N.Y. Civ. Ct. 2003) (stating a child who assumes responsibility for the care of a parent who is limited by age or illness, or both, owes a duty to the parent to use reasonable care, and will be liable for harm caused by the failure to use reasonable care by affirmative act or omission).

131. See Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV. 311, 319 (1998) (discussing that eighty percent of long-term care is provided for by the elderly person's family).

132. See Laura Watts & Leah Sandhu, *The 51st State – The “State of Denial”: A Comparative Exploration of Penal Statutory Responses to “Criminal” Elder Abuse in Canada and the United States*, 14 ELDER L.J. 207, 221 (2006) (stating that historically children are the wrongdoers of neglect cases).

133. E.g., BLACK'S LAW DICTIONARY (9th ed. 2009) (defining “abuse of the elderly” as “abuse of a senior citizen . . . by a caregiver,” which may occur when an elderly person is “deprive[d] of food or medication, beatings, oral assaults, and isolation”). See also Margaret F. Hudson, *Elder Mistreatment: Taxonomy with Definitions by Delphi*, 3 J. OF ELDER ABUSE & NEGLECT 1, 2 (1991) (defining “elder abuse” as “the intentional or unintentional abuse (commission) . . . of an older adult by a person in a personal, social, professional or business relationship that results in physical, psychological, social, or financial consequences”).

134. APA Elder Abuse, *supra* note 1.

135. ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 325 (1994) (discussing that elder abuse most often occurs in the form of emotional, physical, and even sexual maltreatment at the hands of an abusive family member, and that the victim usually feels reluctant to report the abuse because the abuser is usually a family member).

for statistical analysis is likely inaccurate as a result. Therefore, cases of elder abuse could be two or three times more frequent than the current data suggests.¹³⁶

Elder abuse is just one area of elder law that is often ignored and overlooked by American society. Of even more concern is whether the current legal system is prepared to handle the inevitable increase in elder abuse as the baby boom generation continues to age. If the legal system does not provide adequate deterrence in preventing elder abuse, the burden will be placed on government programs such as Medicaid.

B. Different Problems for the Chinese Model

Modernization is rapidly changing China.¹³⁷ Similar to the United States in the years following the Industrial Revolution, China is quickly becoming more mobile.¹³⁸ Currently, demand for automobiles and commercial airlines is at an all-time high in China.¹³⁹ In addition, massive construction projects are underway to build roads and basic infrastructure.¹⁴⁰ The question is not if, but when, Chinese society will become more nomadic like its American counterpart.¹⁴¹ The main concern for China is how best to adapt ancient principles and ideas of family to a modern industrialized nation of 1.3 billion

136. APA Elder Abuse, *supra* note 1 (estimating that for every one case of elder abuse there are five cases that go unreported).

137. China's "economic growth has averaged 9½ per cent over the last two decades." ORG. FOR ECON. CO-OPERATION & DEV., ECONOMIC SURVEY OF CHINA, 2005 1 (Sept. 2005), available at <http://www.oecd.org/dataoecd/10/25/35294862.pdf>. While this economic prosperity has no doubt pulled some citizens out of poverty and increased the average lifespan, problems continue to exist providing healthcare to China's aging population in rural areas. See Randall Peerenboom, *Human Rights in China*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 413, 433-34 (Randall Peerenboom et al. eds., 2006) (discussing the problem of providing adequate healthcare to those in the countryside).

138. See, e.g., Andrew P. Morriss, *The Next Generation of Mobile Source Regulation*, 17 N.Y.U. ENVTL. L.J. 325, 328 (2008) (stating that China had the same number of cars per 1,000 population in 1994 as the United States did in 1911, and by 2005, China had the equivalent number of cars per 1,000 population as the United States did in 1915).

139. See Nicola Clark, *Heavy Orders for Airbus and Boeing Raise Backlog Questions*, N.Y. TIMES, Jan. 15, 2008, at C4 (reporting that air traffic in China has nearly doubled the pace of anticipated economic growth).

140. See Keith Bradsher, *China's Route Forward*, N.Y. TIMES, Jan. 23, 2009, at B1 (stating China plans to spend "hundreds of billions of dollars on new highways, railroads and other infrastructure projects").

141. Cf. Israel Doron & Tal Golan, *Aging, Globalization, and the Legal Construction of "Residence": The Case of Old-Age Pensions in Israel*, 15 ELDER L.J. 1, 9-11 (2007) (discussing the effect that globalization has on migration and its impact on the elderly).

people.¹⁴² As traditional concepts of the family unit evolve with modernization, the Chinese inheritance system must also adapt to these changes in its culture.

As China continues to grow economically, more citizens are likely to move from rural areas to cities.¹⁴³ Cars will replace bicycles,¹⁴⁴ leading Chinese citizens to explore all parts of a vast country that boasts an impressive 9,596,961 square kilometers.¹⁴⁵ This result will cause a depression effect in these small rural communities as younger Chinese citizens leave for cities such as Beijing or Shanghai.¹⁴⁶ The family unit will likely be forced to make up for the care and support needed from its younger members.¹⁴⁷ The question then becomes, to what extent will Chinese citizens be punished for leaving behind a rural upbringing in search of work?

The Chinese government needs to consider how best to provide for its overwhelming elder population.¹⁴⁸ Recent reports indicate that by 2010 China will have more than 174 million senior citizens.¹⁴⁹ Other estimates have placed China's elder population at 439 million by 2050.¹⁵⁰ If no family support exists, these retirees will be forced to receive welfare benefits from the national government.¹⁵¹ The Chinese government already appears to have taken note of the problem by implementing the "one-child policy" in order to curb its ballooning population.¹⁵² Unfortunately, this policy will have no direct impact on improving the quality of life for senior citizens who require extra care or

142. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated Jan. 4, 2012) [hereinafter WORLD FACTBOOK].

143. Peerenboom, *supra* note 137, at 433 (discussing how modernization will change the landscape of rural China).

144. See Keith Bradsher, *Digging a Hole Through China*, N.Y. TIMES, Mar. 27, 2009, at B1 (stating that automobile sales have "soared ninefold since 2000" in China).

145. WORLD FACTBOOK, *supra* note 142.

146. See Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J. 1083, 1088 (2009) ("[R]ural workers in cities increased from less than two million in the early 1980s to eighty million in 1995.").

147. See Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 371 (2007) (discussing the American principle of providing care for the elderly and disabled).

148. Cf. I. K. Gujral, *Global Aging, Depopulation and Virtual Work*, 18 NEW PERSP. Q., no. 2, Spring 2001, available at http://www.digitalnpq.org/archive/2001_spring/global.html (describing the massive increase of senior citizens in industrialized countries as a global crisis that is unprecedented).

149. *Nation's one-child policy 'will not change'*, CHINA DAILY, Sept. 30, 2006, http://www.chinadaily.com.cn/china/2006-09/30/content_700203.htm.

150. Amy Hampton, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 321, 349 (2003).

151. See Peerenboom, *supra* note 137, at 433 (stating that 29.33 million retirees were covered by welfare in 2003, which was a forty-one percent increase from 2002).

152. Cf. Ying Chen, *China's One-Child Policy and its Violations of Women's and Children's Rights*, 22 N.Y. INT'L L. REV. 1, 145 (2009) (recommending that China should be focusing more on improving human rights and less on population control efforts).

financial assistance because it attempts only to decrease the size of future generations rather than solve the current problem of an aging elder class.¹⁵³

IV. RECOMMENDATIONS: BENEFITING FROM A COMPARATIVE REVIEW IN ORDER TO FIND SOLUTIONS TO PROBLEMS IN THE INHERITANCE SYSTEMS

A. *Recommendations for the Chinese Inheritance System*

While citizens should maintain their caregiving obligations to the elderly if possible, young Chinese should not be kept from their inheritance because they are in search of a better life. Chinese inheritance law needs to keep up with the rapidly changing characteristics of both families and its economy. Social welfare policies need to be enacted for the benefit of those elderly living outside major cities.

1. *Social Welfare Program for China's Elderly*

The Chinese government should consider adopting a national retirement pension plan for its elderly citizens.¹⁵⁴ As younger Chinese citizens flock to economic zones in search of prosperity, there must be a safety net to catch those individuals who may fail to receive care from the family unit. While the Chinese Constitution does establish a social security system, it does not provide benefits to all elderly retirees.¹⁵⁵ Social Security in the United States, while not perfect, does maintain a basic standard of living for elder retirees.¹⁵⁶ A similar system in China, while costly, will help provide elders the basic financial assistance they require.

153. See Hampton, *supra* note 150, at 350-51 (discussing the bleak state of elder care in China, and stating an increase of elderly citizens is now on the horizon). The one-child policy has also created a shortage of children to serve as caretakers for the elderly.

154. See *id.* at 352-53 (recommending that China implement a national social security system for retirees).

155. See XIANFA art. 14 (Dec. 4, 1982, revised Mar. 14, 2004) (China) (providing that the government “establishes and improves the social security system fitting in with the level of economic development”).

156. Cf. Sarah Richelson, Note, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT’L & COMP. L. 857, 888-89 (2008) (stating that citizens in Brazil who are not on social security fail to improve their standard of living).

2. Increased Use of Support Trusts will Help Provide Extra Financial Support for the Elderly

The P.R.C. codified its trust law on April 28, 2001.¹⁵⁷ The concept is very new and will require education and training for attorneys and the general public in China.¹⁵⁸ Because of the flexibility that a discretionary trust provides, the model is favored in China as a way to provide for elder citizens who require financial support. It does not appear, however, that Chinese citizens are using trusts.¹⁵⁹ A number of uniform measures to the Chinese banking industry are necessary if trusts are to take off as they have in the United States.¹⁶⁰ More frequent use of trusts could be one way that families provide financial support to elderly family members.

B. Adopting Provisions of the Chinese Model as Guidance for American Courts

Probate reform is needed in order to reduce elder abuse and neglect.¹⁶¹ The problem is foreseeable: the aging baby boom generation will place strains on the healthcare industry to levels previously unseen by Americans. Up to this point, the solution has been to allow nursing homes to supplement the day-to-day needs of the elderly.¹⁶² While this is a solution for some, not all families are

157. Zhonghua Renmin Gongheguo Xintuo Fa (中华人民共和国信托法) [Trust Law of the People's Republic of China] (promulgated by the Ninth National People's Congress, Apr. 28, 2001, effective Oct. 1, 2001) available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1800>.

158. See generally Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 REAL PROP. PROB. & TR. J. 345, 346–48 (2003) (discussing the background and concepts of which the trust law was enacted).

159. See Karla W. Simon, *Regulation of Civil Society in China: Necessary Changes After the Olympic Games and the Sichuan Earthquake*, 32 FORDHAM INT'L L.J. 943, 960 (2009) (stating that Chinese law professors do not believe trusts are being used).

160. But see Zongguo Yinjianhui Guanyu Yinfa "Xingtuo Gongsi Siren Guquan Touzi Xintuo Yewu Caozuo Zhiyin" de Tongzhi (中国银监会关于印发《信托公司私人股权投资信托业务操作指引》的通知) [Notice of China Banking Regulatory Commission on Issuing the Guidelines for Trust Companies to Operate the Trust Private Equity Investment Business] (June 25, 2008), <http://www.lawinfochina.com/display.aspx?lib=law&id=7069> (providing recent reforms to the banking industry's use of trusts).

161. Cf. Watts & Sandhu, *supra* note 132, at 228 (recommending reform in Canada to prevent cases of elder abuse).

162. See CTR. FOR DISEASE CONTROL AND PREVENTION, NURSING HOME CURRENT RESIDENTS, tbl. 8 (revised Nov. 5, 2010), http://www.cdc.gov/nchs/data/nnhhs/Estimates/nnhs/Estimates_PaymentSource_Tables.pdf (estimating 1.5 million Americans were placed in nursing homes in 2004).

able to afford the monthly payment for these institutions.¹⁶³ The recommendations made here are addressed specifically to those families who provide day-to-day care for their elder family members in addition to managing a career and other family obligations.

1. Reduce Inheritance of Beneficiaries Responsible for Elder Abuse and Neglect

The Chinese system preserves and strengthens the family unit by holding members accountable for their actions. U.S. probate courts should consider the recommendations made by Francis H. Foster,¹⁶⁴ and reduce the inheritance of will beneficiaries if it is determined that elder abuse or neglect occurred. Limiting a beneficiary's testamentary distribution could act as a deterrent in preventing future elder abuse. Americans must be held accountable for the needs of their elder family members. If they are not, society will pay for the ignored family obligation. Probate courts and state legislatures alike should take notice of this growing problem in order to find creative solutions for the elder abuse and neglect problems.

2. Reward Caregivers who Provide Support to Neglected Elderly Testators

American jurisdictions should reward caregivers who provide both out-of-pocket financial and medical support to an elder.¹⁶⁵ This would require amending the elder's intentions for property distribution, but would encourage beneficiaries to provide adequate care.¹⁶⁶ Similar to the Chinese system, if the beneficiary fails to provide adequate support, then those who supplement care will be both reimbursed and rewarded for their assistance.¹⁶⁷ Moreover, rewarding caregivers could reduce the burden on society by reducing costs associated with Medicaid.

163. See SHEEL PANDYA, AARP PUB. POL'Y INST., NURSING HOMES (Feb. 2001), available at <http://www.aarp.org/home-garden/livable-communities/info-2001/aresearch-import-669-FS10R.html> (estimating the average annual cost of a nursing home in 1998 was \$56,000).

164. See Foster, *supra* note 56, at 94-95 (recommending that U.S. probate courts have flexibility in deciding whether unworthy heirs should inherit).

165. *Id.* at 103 (discussing how Chinese courts will reward good conduct by increasing inheritance for a caretaker during the probate process).

166. See, e.g., *id.* at n.149 (citing a Chinese inheritance case where the testator's daughter was awarded additional inheritance because she was the sole financial provider).

167. See, e.g., *id.* at n.171 (citing an inheritance case where the testator's stepsons provided full support and were awarded the majority of the testator's estate for providing financial, physical, and emotional needs).

3. *Problems with Adopting the Chinese Method of Inheritance*

It should be noted that the Chinese method of considering actions by the beneficiary before inheritance is not a perfect system and could go against local jurisprudence in many American states. First, implementation of the above recommendations from the Chinese system vastly expands the discretion held by probate judges. While there are already limited situations for allowing judicial discretion,¹⁶⁸ the recommendations here would go against the broad authority of considering the testator's intent. Second, if the recommendations were accepted, the effect would expand the type of evidence admitted extrinsically to the testator's will. Specifically, admitting evidence to determine cases of elder neglect and abuse may conflict with a jurisdiction's rule on when to admit extrinsic evidence. Finally, allowing a court to amend the testator's will distribution scheme could possibly encourage a fellow sibling or family member to make false allegations in order to gain a larger inheritance.

V. CONCLUSION

The current probate system in the United States, while placing heavy emphasis on the testator's intent, should be reformed in order to deter cases of elder abuse and neglect. One cannot help but wonder if the son of Brooke Astor would have made different decisions knowing that his inheritance would be significantly limited when looking out for his own interests rather than his mother's. Cases like these are likely to increase as the number of elders continues to rise exponentially with the aging of the baby boom generation. Reviewing the Chinese system of inheritance, which restricts or even prohibits beneficiaries from receiving property if they failed to fulfill their filial obligations, provides a possible solution to these problems. Similar to the United States, China is undergoing rapid economic and cultural change, which is likely to impact support for Chinese elders. Recommendations are made for both nations to consider adopting reform to increase the quality of elder care while at the same time decreasing cases of elder abuse and neglect. The law in both countries must adapt to cultural changes in order to protect American and Chinese elders alike.

168. See, e.g., ALA. CODE § 43-8-91(a) (LexisNexis 2011) (allowing a probate judge to provide for a child who is unintentionally left out of a testator's will so that the child will receive an intestate share of the estate).