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CHINA AND THE UNITED STATES: YIN AND YANG INTESTACY

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CHINA AND THE UNITED STATES: YIN AND YANG INTESTACY

*Andrew Watson Brown**

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I. INTRODUCTION

“To put the world in order, we must first put the nation in order; to put the nation in order, we must first put the family in order; to put the family in order, we must first cultivate our personal life.”¹

- Confucius

While Confucius was decidedly not commenting on the law of intestacy and succession, his words help frame an age-old debate about who should inherit wealth and for what purpose. A study of intestacy systems invariably exists at the intersection of the state, the family, and the individual. Naturally, review of such systems helps lay bare a society’s values and ambitions.

The law of succession often encompasses two interdependent, yet conflicting themes: the support function and testamentary freedom.² Broadly speaking, civil law inheritance schemes like China have opted to emphasize support provisions to ensure the welfare of their collective community.³ These provisions are meant to function on two fronts: to help support a surviving dependent at the decedent’s death and to help encourage support of the decedent during life.⁴

Conversely, common law jurisdictions like the United States stress testamentary freedom—the idea that each individual has the right to dispose of her property how she sees fit, at death.⁵ American courts will enforce the presumed intent of the individual testator, even if at odds with society’s notion of justice or commonsense.⁶ Like support, testamentary freedom also functions on two fronts. On one hand, rigid judicial interpretation of laws may prevent the passing of property to a deserving loved-one; on the other, too much judicial discretion may lead to the intestate hijacking of a decedent’s wealth.⁷

The battle lines are drawn on each side of the Pacific: collective socialism versus capitalistic individualism. But that would be an oversimplification of the debate. In fact, both systems, despite their vast differences, share the common goal of providing support for their

1. KATHLEEN TRACY, *THE LIFE AND TIMES OF CONFUCIUS* 4 (Mitchell Lane Publishers, Inc. 2005). Confucius was a philosopher, politician, and legalist of the Ming dynasty in China. He championed filial loyalty as an ideal and functional basis for society. *Id.*

2. *See infra* Sections III.A, III.D.

3. *See infra* Section III.D.

4. *See infra* Section III.D.

5. *See infra* Section III.A.

6. *See infra* Section III.A.

7. *See infra* Section III.A.

respective populations while ensuring testamentary freedom.⁸ Indeed, instead of battle lines, the relationship may be more accurately described as yin and yang. Or yin and yang, to borrow from the title of this Note. Ultimately, this debate is not about picking sides but about picking reforms. We can have our cake and eat it too.

This Note supports the contention that the United States can and should adopt more support-based measures without sacrificing testamentary freedom. Part II provides a brief background of Western intestacy law,⁹ while Part III analyzes in-depth the divide between American and Chinese intestacy law.¹⁰ Specifically, Part III examines the inherent status-based biases of the American system and the shortfalls of presumed majoritarian intent, ultimately leading to a discussion of unworthy heirs.¹¹ Then, it explores the complexities of China's behavior-based system, analyzing both forced heirship provisions and family maintenance schemes.¹² Finally, Part III reviews case law, first in China and then in the U.S.¹³ Part IV of this Note presents the issues facing American law today, including the lack of support, under-inclusive statutory language, perverse incentives for unworthy heirs and lack of judicial discretion.¹⁴ Lastly, Part V concludes that the benefits of the American system are outweighed by its human costs.¹⁵ I propose tipping the scale in favor of merit and need-based inheritance in the United States.

II. BACKGROUND

The law of succession dates back millennia.¹⁶ To avoid violent conflict for property after death, ancient laws of distribution were developed over time.¹⁷ As far back as Roman law, we see evidence of property schemes to ensure proper distribution of a decedent's estate, whereby succession might extend as far as the sixth collateral line.¹⁸

8. *See infra* Section III.D.

9. *See infra* Section II.

10. *See infra* Section III.

11. *See infra* Sections III.A, III.B, III.C.

12. *See infra* Sections III.D.

13. *See infra* Sections III.E, III.F, III.G, III.H, III.I.

14. *See infra* Section IV.

15. *See infra* Section V.

16. 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 11-12.

17. *Id.* at 4. Blackstone notes that the "good order of the world [would be] continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing." *Id.*

18. David V. DeRosa, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIAC PROB. L.J. 153, 155 (1997).

In the medieval Dark Ages of Europe, the practice of primogeniture¹⁹ took hold, thereby imposing a far stricter system on the passing of property. Whereas the Romans made no distinction of age or gender, medieval titleholders passed their property to first sons, at the exclusion of all younger siblings.²⁰ By limiting the pool of potential heirs, primogeniture led to the conception of escheat. In the event the property could not pass to a viable heir, the title would revert to the feudal lord.²¹ The rationale for escheat is simple and enduring. Where there is no heir, the state shall take possession of property to ensure peace, order, and efficiency.²² While primogeniture has dissipated into the annals of history, the English common law has retained the rule of escheat.²³

III. TESTAMENTARY FREEDOM OR SUPPORT?

A. American Inheritance Model

Western countries have long promoted freedom of testation.²⁴ The notion that it is an individual's birthright to determine the distribution of her property after death has drawn scholars since the passage of the Statute of Wills in sixteenth century England.²⁵ Natural rights proponents maintain that the creation of wealth entitles a person to freely distribute that property, while Bentham Utilitarians point to the incentives to create and save furnished by such a scheme.²⁶

Although testamentary freedom remains a fundamental tenant of American law and society, such a right has never been found in the federal Constitution.²⁷ Thus, the job of regulating inheritance has fallen to the states, which have a "broad authority to adjust the rules governing the descent and devise of property."²⁸ Despite this mandate, state

19. *Primogeniture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

20. DeRosa, *supra* note 18, at 155-56.

21. *Escheat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. 2 WILLIAMS BLACKSTONE, COMMENTARIES *10-11. Blackstone describes the state's interest: "In case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have the right to enter upon this vacant possession, in order to avoid the confusion which it's becoming again common would occasion." *Id.*

23. *E.g.*, UNIF. PROBATE CODE § 2-105 (2010).

24. Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 449 (2002).

25. *Id.*

26. *Id.*

27. See *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (finding that restrictions on inheritance did not implicate the Just Compensation Clause).

28. *Id.*

legislatures have been reluctant to restrict testamentary freedom, preferring instead to pass rigid laws promoting a “dead hand” rule.²⁹ Accordingly, distribution of any particular estate has been subject to inflexible rules of inheritance, which value family status over any objective assessment on merit or need of a beneficiary.³⁰

The rationale behind this rigid approach is one of predictability.³¹ By sticking fast to ironclad rules of succession, the mathematics of estate planning should theoretically be consistent over time, avoiding protracted litigation, unsettled law, and emotional hardship for surviving claimants.³² Moreover, the intestacy regime is supported by presumed majoritarian intent.³³ Essentially, the question being answered is, “[h]ow would most people like their estate distributed in default, in the unfortunate event of their death?”³⁴ Overwhelmingly, lawmakers in the United States believe that most individuals would want their property to pass to their surviving spouse, their issue, and finally their collateral, in that order.³⁵ If no viable heir can be determined, the property passes to the state, escheat representing the ultimate default.³⁶

But, is this truly the presumed American intent? A system eschewing the traditional, fixed-rule model may narrow the gap between presumed intent and actual intent by considering such things as past relationships and financial need, but at what cost to efficiency? Testamentary intent is a double-edged sword and ultimately, it is fundamentally restricted by the tyranny of majoritarian thinking.

B. The Family Paradigm

Some scholars have been quick to point out the inherent biases of the American system. Professor Lawrence Friedman observed that succession laws function as a “genetic code of society.”³⁷ Such laws may seek to maintain the status quo by ensuring that each generation replicates its predecessor.³⁸ Thus, the principle function of United States intestacy law is to “maintain and perpetuate the social unit that

29. Moskowitz, *supra* note 24, at 449.

30. *Id.* at 450. Generally, inheritance is restricted to the decedent’s closest relatives by blood or marriage.

31. Thomas E. Simmons, *A Chinese Inheritance*, 30 QUINNIPIAC PROB. L.J., 124, 128 (2017).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. LAWRENCE M. FRIEDMAN, *THE LAW OF SUCCESSION IN SOCIAL PERSPECTIVE*, in *DEATH, TAXES AND FAMILY PROPERTY* 9, 14 (Edward C. Halbach Jr. ed. 1977).

38. *Id.*

Americans have traditionally deemed essential for a stable and productive society—the nuclear family unit.”³⁹ This inert focus on the immediate family may represent a failure of American lawmakers to adapt to the changing lifestyles of an increasingly diverse society. More than anything, the Family Paradigm⁴⁰ may be failing Americans in a vital function of intestacy: support.

Over the past thirty years, American legislators have proffered a vision of a public welfare system less reliant on the government and more reliant on private actors, specifically the family unit, as a mechanism for the support of dependents.⁴¹ In theory, American inheritance law performs this crucial welfare function by encouraging those with wealth to provide for their survivors.⁴² In practice, however, the rigid Family Paradigm may have caused more harm to dependents than advantage, such that “when support conflicts with family preservation, support yields.”⁴³

American law restricts succession to “the natural object of the decedent’s bounty.”⁴⁴ Such a maxim necessarily limits inheritance to filial sanguinity at the expense of any merit or support-based considerations. Thus, a decedent’s closest relatives automatically inherit, irrespective of their need or past relationship with the decedent.⁴⁵ Generally, this remains the case even if the heir abandoned or physically abused the decedent.⁴⁶ If no “close” family members exist, the law typically ignores extended family members, caregivers, long-term dependents and friends to confer a windfall on distant relatives.⁴⁷ Such heirs may have never met the decedent, and yet they are “laughing” all the way to the bank instead of the non-relative suffering a sense of loss and who may have supported the decedent for years.⁴⁸ Although the Uniform Probate Code (UPC) has sought to limit the issue of “laughing

39. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 204 (2001).

40. *Id.* Frances Foster asserts that the law of intestacy in the United States is primarily concerned with the preservation and perpetuation of the traditional American family unit at the expense of support-based functions and refers to this systemic injustice as the Family Paradigm. *Id.*

41. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996).

42. Foster, *supra* note 39, at 205.

43. *Id.*

44. *Id.* at 207.

45. *Id.* at 205.

46. *Id.* at 207.

47. *Id.* at 206–07.

48. DeRosa, *supra* note 18, at 158.

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heirs” by restricting inheritance to the second collateral line,⁴⁹ some jurisdictions remain steadfast to the common law.⁵⁰ The fact that “laughing heirs” somehow satisfy the “natural object of the decedent’s bounty” standard, while stepchildren or committed partners do not, is proof enough that the Family Paradigm needs rethinking.⁵¹ Nor is the bias confined to intestacy.

Indeed, donative freedom can be illusory even when opting out of the default majoritarian intestacy scheme.⁵² This issue is especially pronounced when the testator tries to leave property to those outside the immediate family through wills or will substitutes.⁵³ In theory, the guiding practice is testamentary intent, but in practice such intent quickly yields to the pressures of the Paradigm. The below examples illustrate this point.

1. Wrinkles in the Family Paradigm

a. Capacity

Courts often massage mental capacity doctrines such as “insane delusion” and “undue influence” to reach results consistent with society’s notion of the proper, traditional family.⁵⁴ For example, one of the prongs of mental capacity is that the testator knows the persons that are the “natural object[s] of his or her bounty.”⁵⁵ Thus, if the will omits or even misnames “natural objects”—essentially family members—it is likely to be denied probate on mental capacity grounds.⁵⁶

Furthermore, the support function is in fact chilled by such practices. Proof of long-term support and care of the decedent suggests that a “confidential relationship” exists between the decedent and her

49. UNIF. PROBATE CODE § 2-103 (2010). Under UPC 2-103(a)(4), the most remote heirs to the estate would be descendants of the decedent’s grandparents, including grandparents, aunts, uncles, and first cousins. No other remote heirs have claim to the estate, or standing to challenge a will. *Id.*

50. DeRosa, *supra* note 18, at 164.

51. See DeRosa, *supra* note 18; Foster, *supra* note 39, at 210.

52. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 276 (1999).

53. *Id.* Spitko explains that this bias “imperils any estate plan that disfavors the testator’s legal spouse or close blood relations in favor of non-family beneficiaries.” *Id.*

54. Foster, *supra* note 39, at 210; Spitko, *supra* note 52, at 283 (positing that such doctrines are “sufficiently nebulous that they enable the fact-finder to rewrite the testator’s estate plan in accordance with societal norms”).

55. Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 31 (2006).

56. Powell v. Conner, Case No. CA85-04-020, 1986 Ohio App. LEXIS 5241 (Jan. 13, 1986).

caregiver.⁵⁷ Evidence of a “confidential relationship” can lead to a presumption against the bequest, forcing the claimant to bear the burden of proving that the relationship was not exploitative of the indisposed testator.⁵⁸

b. Anti-Lapse Statutes

Common law lapse rules only further the biases of the system.⁵⁹ In the widespread situation whereby a decedent fails to update her will and consequently makes a bequest to an heir who predeceases her, that bequest will fail rather than passing to the heirs of the predeceased (unless explicitly stipulated in the will).⁶⁰ Such a result, in most cases, is wholly inconsistent with the presumed intent of the testator.⁶¹ While most jurisdictions have adopted anti-lapse provisions, consistent with the amended UPC, the exception only serves to reinforce the Family Paradigm.⁶² Anti-lapse laws substitute another taker for the predeceased, in effect saving the will, but only in cases where the predeceased was a blood relative, survived and represented by issue.⁶³ Once again, non-relatives and caretakers are out of luck.

c. Judicial Interpretation and Omitted Heirs

Moreover, despite the common refrain that courts want to avoid intestacy at all costs, judges usually employ rules of strict compliance to invalidate ambiguous or incomplete wills.⁶⁴ If a decedent fails to update a will after a marriage, divorce or the birth of a child, courts presume oversight and instead opt to funnel the bequest through the intestacy scheme.⁶⁵ Omitted spouse statutes reward post-will spouses with an intestacy share while pretermitted heir statutes reward post-will issue.⁶⁶ Even upon divorce, the law presumes severed ties and nullifies the will through revocation based on the idea that a divorced spouse is no longer a “natural object of the decedent’s bounty.”⁶⁷

57. Foster, *supra* note 39, at 212.

58. *Id.*

59. *Id.* at 213.

60. *Id.*

61. *Id.*

62. Foster, *supra* note 39, at 213-14.

63. *Id.*

64. *Id.* at 212-13.

65. *Id.* at 214.

66. *Id.*

67. *Peevy v. Mutual Servs. Cas. Ins. Co.*, 346 N.W.2d 120, 123 (1984) (where an ex-wife lost entitlement to support because of a determination that most ex-wives would not be a “natural object of decedent’s bounty”); the Uniform Probate Code also revokes “any disposition or appointment created by law or in a governing instrument to a relative of the

Generally, as evidenced by the above examples, American courts provide little latitude in determining what is “natural” when it comes to probating wills. As a result, “the sacred canon of will construction, the ‘presumption against intestacy,’ is effectively nullified by the ‘equally potent’ presumption that an intestate heir can be disinherited only by plain words.”⁶⁸

d. “Natural” Relationships

A necessary implication of the American inheritance system is that some human relationships are not on equal footing with others—that only some associations matter.⁶⁹ By promulgating the traditional American family, the system “declares ‘unnatural’ the very relationships that many people, but most frequently ethnic and cultural minorities often experience as ‘natural’—caring relationships with extended family members, nonmarital partners, close friends and nonrelated caregivers.”⁷⁰ Extended care systems have long been a cultural norm for numerous minority communities within the United States.⁷¹ By choice or necessity, many children are now raised by extended family members or other non-legal caregivers.⁷² Such relationships are not recognized under American intestacy law, which effectively subordinates ethnic differences and promotes the traditional American family, at the expense of care and support.⁷³

While the Paradigm seeks to promote support within the immediate family through a presumed majoritarian intent, a considerable portion of the population is excluded from the pool of potential heirs. Such a result is difficult to reconcile from both a moral and economic standpoint. Instead of incentivizing good behavior, the Family Paradigm sanctions inheritance by “unworthy heirs.”⁷⁴

divorced individual’s former spouse.” UNIF. PROBATE CODE § 2-804(b)(1)(A) (amended 2010).

68. Foster, *supra* note 39, at 213.

69. Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 694 (arguing that the non-traditional family is no different from the traditional family and questioning why some non-traditional relationships, based on sexual status or human rights status are not considered “natural” or legal).

70. Foster, *supra* note 39, at 245.

71. *Id.*

72. *Id.* at 246.

73. *Id.*

74. See Moskowitz, *supra* note 24, at 401 (relating “the bitterness of abandonment” experienced by indigent parents at the whims of adult children).

C. Unworthy Heirs

Like the meek, the undeserving often inherit the earth, at least in the United States.⁷⁵ There is only one widespread exception to inheritance by “unworthy heirs:” the Slayer Rule.⁷⁶ Under Slayer Statutes, if an heir kills the decedent, the heir’s status as taker is extinguished.⁷⁷ The Uniform Probate Code formulates the Slayer Rule as follows:

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, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent’s intestate estate passes as if the killer disclaimed his [or her] intestate share.⁷⁸

The forfeiture of inheritance under the Slayer Rule may, at first glance, come across as punishment for the killer’s wrongful conduct. This was the case at common law, where judges applied the underlying notion that wrongdoers should not be allowed to profit from their wrongdoing.⁷⁹ However, modern scholars largely recognize that Slayer Statutes are “designed to preserve the integrity of [the] property-transfer system by preventing a person from altering, by means of a wrongful slaying, the course of property succession as intended by the source of the property.”⁸⁰ Thus, the Slayer exception does not exist for punitive purposes in discouraging “unworthy heirs,” but merely serves to effect the decedent’s presumed intent.

As it exists, the Slayer exception is very narrow, only covering intentional killings.⁸¹ Indeed, the heir who abandoned, ridiculed, libeled, abused, or even tortured the decedent could still inherit, so long as the heir was not a direct cause of the decedent’s death.⁸² Accordingly, many reformers recommend expanding the unworthy heir doctrine to penalize

75. *Matthew* 5:5 (King James). “Blessed *are* the meek: for they shall inherit the earth.” *Id.*

76. Simmons, *supra* note 31, at 129.

77. *Id.*

78. UNIF. PROBATE CODE § 2-803(b) (2010).

79. Richard Lewis Brown, *Undeserving Heirs?—The Case of the “Terminated” Parent*, 40 U. RICH. L. REV. 547, 558 (2006). The Slayer Rule first appeared as the application of the equitable maxim *nullus commodum capere potest de injuria sua propria* (“no one shall take advantage of his own wrong”). *Id.*

80. *Id.* at 559.

81. Simmons, *supra* note 31, at 129.

82. *Id.*

not only “slayers,” but also heirs that inadequately supported the decedent.⁸³

The human costs of this strict, status-based scheme are readily apparent. A system that prizes blood above need, affection, or conduct may intrinsically result in injustice.⁸⁴ Unworthy heirs can, and do, inherit.⁸⁵ Such a paradigm allows a son to inherit from a father he has ignored for thirty years; it allows a daughter to inherit from a mother who she has refused to provide care for in her parent’s struggle with a terminal illness; it paints sympathetic and supportive neighbors as swindlers and exploitation artists.⁸⁶ Assuredly, a father could even inherit insurance payouts or wrongful death claims from a deceased daughter he sexually abused.⁸⁷ Surely, society can do better than allowing wrongdoers to inherit from their victims. Is expanding the “unworthy heirs” doctrine enough to deter misconduct and encourage support? Or must we overhaul the entire Family Paradigm?

Some reformers advocate the “behavior-based model of succession,” in which courts are permitted to deviate from strict status-based definitions in cases of good and bad behavior.⁸⁸ Contingent on conduct, a judge has the power to deny inheritance rights to even the closest relative.⁸⁹ For those reformers, China represents a more ideal model of intestacy, where support functions and conduct are linked with inheritance.

D. China’s Behavior-Based Model

China’s legal history dates back thousands of years to a time when the country was ruled by “ethics based law that blended dynastic codes with Confucian principles.”⁹⁰ Confucian law developed around two principles: belief in the nobleman (*jūn zǐ*) and the formation of a well-ordered society.⁹¹ Traditionally, the term “*jūn zǐ*” referred to men of noble birth.⁹² Confucius, however, reformulated the notion of a nobleman, asserting that such nobility was achieved through merit, not

83. Foster, *supra* note 39, at 230, 234.

84. See Foster, *supra* note 39.

85. *Id.* at 240.

86. *Id.*

87. Paula Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 260 (1994); Foster, *supra* note 39, at 240.

88. See *id.*

89. Foster, *supra* note 39, at 230-31.

90. Simmons, *supra* note 31, at 124.

91. Aris Teon, *Law in Imperial China—Confucianism and Legalism*, GREATER CHINA J. (May 7, 2016), <https://china-journal.org/2016/05/07/law-in-imperial-china-confucianism-legalism/>.

92. *Id.*

birth.⁹³ A nobleman exhibits humanity, virtue, and righteousness.⁹⁴ Perhaps most importantly, in order to establish a “well-ordered society,” a nobleman must practice filial piety.⁹⁵ Indeed, most of Confucian law was not codified but was instead ritualistic, practiced ideally through the five human relationships of father-son, husband-wife, sibling-sibling, friend-friend, and ultimately, ruler-subject.⁹⁶ Without codified laws, a ruler led his people with virtue, creating a sense of shame to prevent unwanted conduct.⁹⁷

The contemporary laws of inheritance, in contrast, are quite fresh. Roy Girasa provides a brief history:

From 1949 to 1957, after abolishing all laws enacted by the [nationalist] government, a few laws were passed dealing with law reform, marriage and trade unions. Judges had to decide cases in accordance with governmental policy . . . Anarchy reigned during the Cultural Revolution in the late 1960s and early 1970s. The death of Mao in 1976 led to significant reforms . . . Legislation was drafted and enacted that lent some credibility to the rule of law within China.⁹⁸

China opened to the world in 1979,⁹⁹ followed by the adoption of a new constitution in 1982¹⁰⁰ and the contemporary Law of Succession in 1985.¹⁰¹ China’s engagement with the world has led to substantial changes to and experimentation with the law of succession within the country.¹⁰² Despite the passage of time, however, it remains evident that China’s Confucian past shapes its present, as the government looks to establish a “well-ordered society” through intestacy.¹⁰³

Over the past thirty years, both China and the United States have engaged in striking overhauls of their welfare and support networks.¹⁰⁴ Surprisingly, in its drive to modernize, China seems to share a common

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. TUNG-TSU CHU, *LAW AND SOCIETY IN TRADITIONAL CHINA* 280 (1965).

98. Roy J. Girasa, *Legal Aspects of Doing Business in China*, 20 WESTCHESTER B.J. 305, 305 (1993).

99. Simmons, *supra* note 31, at 125.

100. *Id.*

101. *Id.*

102. *See id.*

103. *See* Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199, 1202 (1999) [hereinafter *Linking Support and Inheritance*].

104. *Id.*; *see also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (containing extensive enforcement measures of child support obligations and referencing the responsibility of the able-bodied to work and the prudence of the poor to not give birth to children they cannot support).

goal with its capitalist rival across the Pacific Ocean in pushing for reform.¹⁰⁵ Both countries are theoretically attempting to shift the burden of welfare from government to the private sector, specifically targeting the family as a mechanism for support of dependents.¹⁰⁶ Essentially, China and the United States alike seek to promote individual responsibility and dispel any notion of a legal right to cradle-to-grave public welfare.¹⁰⁷ The means taken to achieve this goal, however, diverge starkly.¹⁰⁸ In its reform effort, China has turned to the tool of succession law to activate private support of dependents by linking inheritance with merit.¹⁰⁹

In contrast to American succession law, China recognizes “dependence as the gravamen of inheritance,” where the passing of property operates through need rather than entitlement.¹¹⁰ If an individual dies intestate, courts (representing the decedent) have considerable discretion in allocating property according to her actual intent, not some imagined majoritarian fiction.¹¹¹ Whereas an American testator can “pauperize” his dependents, a Chinese court will invalidate such disinheritance, utilizing its substantial powers in equity.¹¹²

Nonetheless, a testator in China is afforded considerable latitude in distributing her estate testate.¹¹³ The “behavior-based model” explicitly extends support to any dependent outside the decedent’s immediate family.¹¹⁴ So, while an empowered court in equity may serve to limit testamentary freedom, the non-relative provisions under Chinese statute compensate the testator, ultimately ensuring a closer approximation of her actual intent. Thus, China’s scheme is one of flexibility, where successions of estates are tailored according to merit and need.¹¹⁵ This is accomplished in two ways: forced heirship provisions and family maintenance schemes.¹¹⁶

105. *Linking Support and Inheritance*, *supra* note 103, at 1201.

106. *Id.* at 1200.

107. *Id.*

108. *Id.* at 1202.

109. *Id.* at 1203.

110. *Id.* at 1217.

111. Simmons, *supra* note 31, at 126.

112. *Linking Support and Inheritance*, *supra* note 103, at 1217-21 (citing Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559 (1928)).

113. *See Linking Support and Inheritance*, *supra* note 103, at 1217.

114. *Id.*

115. *Id.*

116. *Id.* at 1210.

1. *Forced Heirship Provisions*

Forced heirship provisions set aside fixed portions of the decedent's estate for qualifying relationships, usually children.¹¹⁷ Shares are awarded exclusively on the basis of familial status.¹¹⁸ While automatic shares by definition cannot take into account need or merit, such a scheme prevents against unjust disinheritance, protecting a vital family support function at the expense of testamentary freedom. Proponents view forced heirship as a fix for the disintegrating family in that it binds inheritance and family support mechanisms.¹¹⁹ Critics view its "fickle fractions" as arbitrary and too rigid to achieve its support objectives.¹²⁰

Forced heirship models are common to civil law countries.¹²¹ One American commentator notes, "most of the civilized countries in the world provide direct protection from disinheritance to children of a testator."¹²² The United States, then, does not qualify as a "civilized country," as forced heirship provisions have been rejected in forty-nine of fifty states.¹²³ In contrast, China has followed the lead of civil law countries by enacting a mandatory share.¹²⁴

Article 19 of the People's Republic of China (P.R.C.) Inheritance Law provides what is referred to as a "necessary portion" to heirs of an estate, as long as they are "unable to work" *and* "have no source of income." (emphasis added).¹²⁵ According to the guidelines of the Supreme People's Court, Article 19 has three basic characteristics.¹²⁶ First, any heir entitled to inherit under intestacy can qualify, so long as they are unable to work and have no source of income.¹²⁷ As such, all

117. *Id.*

118. *Linking Support and Inheritance*, *supra* note 103, at 1211.

119. *Id.* at 1212.

120. *Id.* at 1213.

121. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 117 (1994).

122. *Id.* Just a few of the numerous countries around the world to protect children from complete disinheritance include Argentina, Austria, Belgium, Brazil, France, Germany, Japan, Sweden, and Switzerland. *Id.* at 117 n.111.

123. Louisiana, a product of the Napoleonic Codes, is the only civil law jurisdiction in the nation. The mandatory nature of the share was significantly decreased in the late 1980s, and now only provides for children under the age of twenty-four. Each child under the age of twenty-four receives a twenty-five percent mandatory share of the estate. Michael W. Gilligan, 'Forced Heirship' in the United States of America, with Particular Reference to New York State, 22 TRUST & TRUSTEES, [https://www.phillipsnizer.com/pdf/Article-Trusts_Trustees%20-%20Forced%20heirship%20in%20the%20United%20States%20-%20Galligan%20\(2016\).pdf](https://www.phillipsnizer.com/pdf/Article-Trusts_Trustees%20-%20Forced%20heirship%20in%20the%20United%20States%20-%20Galligan%20(2016).pdf).

124. Ya-Hui Hsu, *Should China Adopt Taiwan's Mandatory Share Doctrine?*, 29 PENN ST. INT'L L. REV. 289, 291 (2010).

125. *Id.* at 291-92.

126. *Id.* at 295.

127. *Id.*

intestate heirs are covered, not merely the decedent's children and issue.¹²⁸ Article 19 also encompasses spouses, grandparents, siblings, needy parents, step relatives, and widowed sons and daughters-in-law.¹²⁹

Second, if a potential heir qualifies, such that she is unable to work and without income, there are two prescribed remedies:¹³⁰ (i) if the estate is so small that it cannot be split up, the qualifying heir is given the entirety of the estate and the testator's contrary bequest is void;¹³¹ or (ii) if the estate is large enough to split up, a qualifying heir under Article 19 must receive his mandatory share first before the testator's bequest to other legatees is given effect.¹³²

Finally, the court makes Article 19 determinations at the time the will becomes effective, not its date of execution.¹³³ In order to qualify as unable to work and without income, thereby receiving a "necessary portion," a potential heir must maintain these conditions through the death of the testator.¹³⁴ Likewise, if an heir does not qualify for a share at the time of execution of the will or will substitute, she may still be able to meet the requirements upon the testator's death.¹³⁵

Accordingly, China's forced heirship provision, Article 19, explicitly replaces status with need as the ultimate determination in any succession of property.¹³⁶ Such a scheme allows for the support of the indigent-dependent and generally prohibits unjust disinheritances. Additionally, as most potential heirs are either able to work or have an income, Article 19 is muted in its impact on testamentary freedom.¹³⁷

2. *Family Maintenance Schemes*

Perhaps the most startling thing about Chinese inheritance law is its willingness to invoke judicial review of an intestate heir's conduct in distributing an estate.¹³⁸ The family maintenance model allows judges, on a case-by-case basis, to assess the relative merits of a decedent's testamentary bequest and the challenges to that disposition brought by survivors.¹³⁹ Take note: the scheme does not apply automatically but

128. *Linking Support and Inheritance*, *supra* note 103, at 1222.

129. *Id.*

130. Hsu, *supra* note 124, at 295.

131. *Id.*

132. *Id.* at 295-96.

133. *Id.* at 296.

134. *Id.* at 297.

135. Hsu, *supra* note 124, at 297.

136. *Id.*

137. *Id.*

138. Simmons, *supra* note 31, at 125-26.

139. *Linking Support and Inheritance*, *supra* note 103, at 1214.

rather is only deployed to provide remedies for “qualifying, aggrieved claimants.”¹⁴⁰

This sort of judicial discretion has generated impassioned debate among American intestacy scholars.¹⁴¹ Proponents find a strong moral appeal in embedding a legal principle that “familial responsibility does not terminate at death.”¹⁴² They also cite the privatization of social welfare as a substantial benefit.¹⁴³ Critics contend that the family maintenance model introduces unnecessary complexity and inconsistency into the probate system, thereby promoting litigation, increasing costs and depleting estates.¹⁴⁴ Crucially, detractors claim that making powerful rules of equity available to judges is incompatible with American notions of testamentary freedom.¹⁴⁵

As referenced above,¹⁴⁶ Article 19 of the P.R.C. Inheritance Law provides qualifying heirs with a “necessary portion” of the estate, but neither the Chinese legislature nor the judiciary has defined the term.¹⁴⁷ Rather, the term has taken shape through past decisions.¹⁴⁸ Courts have determined a “necessary portion” to mean “the amount needed to meet a qualified heir’s ‘fundamental needs.’”¹⁴⁹ While this logically should be interpreted as reasonable living expense, courts instead look to the size of the estate and the qualified heir’s subjective standard of living to determine a distribution.¹⁵⁰

Only increasing the discretionary capabilities of Chinese courts is Article 14 of the P.R.C. Inheritance Law, which extends Article 19 relief to all of the decedent’s dependents, irrespective of family status.¹⁵¹ In addition to Article 19’s dual standard of inability to work with no income, Article 14 imposes an additional burden on the potential heir: it requires that claimants must have “relied on the decedent’s support.”¹⁵²

140. *Id.*

141. *Id.* at 1213.

142. *Id.* at 1214.

143. *Id.*

144. *Linking Support and Inheritance*, *supra* note 103, at 1215.

145. *Id.*

146. *See supra* Section III.D.1.

147. Hsu, *supra* note 124, at 296.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Linking Support and Inheritance*, *supra* note 103, at 1226-27. Foster asserts, “[t]o protect more distant family and nonrelated dependents from disinheritance, China supplements its forced share scheme with a second, equitable redistribution technique.” *Id.* at 1227; Law of Succession of the People’s Republic of China, 1 October 1985, Article 14 [hereinafter P.R.C. Succession Law].

152. *Linking Support and Inheritance*, *supra* note 103, at 1227; P.R.C. Succession Law Art. 14.

Unlike Article 19, Article 14 does not represent a mandatory share but merely provides a path for aggrieved dependents to claim an “appropriate” share.¹⁵³

Once again, the term “appropriate” has necessarily been formulated by courts on a case-by-case basis, at the behest of the highest court in the land, the Supreme People’s Court.¹⁵⁴ Judges have read Article 14’s provisions expansively, qualifying not only siblings and distant relatives but also friends, neighbors and colleagues.¹⁵⁵ Essentially, courts are invited to adjust award valves depending on whether an individual supported the decedent (merit) or relied on the decedent for support (need).¹⁵⁶

Accordingly, the Chinese family maintenance model recognizes both support situations and provides awards for the truly deserving or the truly needy through heightened judicial discretion. This ability of the court to “place its finger on the scale of intestacy” and consider “support provided to or received by the decedent,”¹⁵⁷ coupled with Article 19’s forced share provisions, constitutes a powerful model, whereby China can protect all of a decedent’s dependents, irrespective of family status.¹⁵⁸ The following cases serve to reinforce the support benefits of such a system, thereby highlighting deficiencies in the American scheme.

E. Estate of Zhang

Zhang, the decedent, left no statutory heirs, and thus his estate was in danger of escheat.¹⁵⁹ He had previously been married to Ms. Xu, however, the union only lasted ten years. The marriage produced no children but while this was Zhang’s first marriage, it was not Xu’s, who had mothered a son in her previous marriage, Hua Xu. Under Article 10 of the P.R.C. Inheritance Law, stepparents, stepchildren, and step-siblings are elevated to first-order heirs so long as they had a “support relationship” with the decedent.¹⁶⁰ Here, the court reasoned that Hua Xu did not qualify as an automatic intestate heir since his status was

153. *Linking Support and Inheritance*, *supra* note 103, at 1228; P.R.C. Succession Law Art. 14.

154. *Linking Support and Inheritance*, *supra* note 103, at 1229. In a broad ruling, the Court found that an Article 14 claimant “can receive more or less than an intestate share when the estate is distributed, depending on the specific circumstances.” *Id.*

155. *Id.* at 1228.

156. Simmons, *supra* note 31, at 140.

157. *Id.* at 126.

158. *Linking Support and Inheritance*, *supra* note 103, at 1222.

159. Simmons, *supra* note 31, at 141-42; Case No. 02053 (Beijing First Intermediate People’s Court, Apr. 20, 2015).

160. P.R.C. Succession Law Art. 10.

terminated upon the divorce of his mother and the decedent.¹⁶¹ Therefore, his claim of succession rights was entirely contingent on whether a support relationship existed between him and Zhang, his ex-stepfather.

Hua Xu was twenty-six years old when his mother married Zhang, yet he continued to live under their roof. Following the couple's divorce, the claimant remained closely associated with the decedent, visiting him and providing emotional support until his death. When Zhang died, it was Hua Xu who settled his accounts and made funeral arrangements. Since Hua Xu had lost his heirship status under Article 19, the Beijing First Intermediate People's Court was compelled to exploit the elasticity of Article 14, ultimately finding that the claimant deserved an "appropriate" share.¹⁶²

The facts of this case exist in somewhat of a vacuum, considering that the estate was destined to escheat.¹⁶³ Rarely are circumstances so straightforward in Chinese intestacy. Still, *Zhang* serves to highlight the discretion of the P.R.C. Inheritance Law regime. Essentially, there exist two nets of equity that courts can deploy to catch needy dependents that fall through the cracks. Having made the determination that Zhang's divorce terminated Hua Xu's Article 19 rights as a stepchild heir, the court moved on to Article 14, finding that the claimant was "unable to work," "without income," and "dependent on the decedent's support."¹⁶⁴ While it is not quite clear what compelled the court to find an inability to work on the part of the claimant, it is likely they applied their equitable discretion to ensure that the estate would not pass escheat.¹⁶⁵ The court's final calculation of an "appropriate share" resulted in the passage of the entire estate to Hua Xu. In American courts, such an allocation for an ex-stepson is unheard of.¹⁶⁶ Indeed, an ex-stepson claimant would not even have standing to challenge the succession.¹⁶⁷

161. The question of whether divorce or death terminates the status of stepchildren has led to inconsistent results in the Chinese system. Case No. 00590 (Second Mid. People's Ct., Beijing, Feb. 11, 2015) (China) (where the judge found the stepchild status of the claimant was not terminated by his mother's death).

162. *Id.*

163. Simmons, *supra* note 31, at 141.

164. *See id.*; P.R.C. Succession Law Art. 14, 19.

165. Simmons, *supra* note 31, at 142. American courts also have a strong distaste for escheat, choosing to "enforce it only as a last resort." *See* Bd. of Educ. of Montgomery City v. Browning 635 A.2d 373, 381 (Md. 1994) (Eldridge, J., dissenting).

166. Foster, *supra* note 39, at 207.

167. *Id.* (standing being limited to potential heirs and potential heirs being limited to "natural objects of a decedent's bounty").

F. Estate of Wang/Estate of Huaan

In 1991, the decedent, Wang Weifa, died of cancer, leaving four first-order heirs: his wife, his ten-year-old daughter, and his parents.¹⁶⁸ First-order heirs are covered under Article Thirteen of the P.R.C. Inheritance Law:

Successors same in order shall, in general, inherit in equal shares. At the time of distributing the estate, due consideration shall be given to successors who are unable to work and have special financial difficulties . . . [S]uccessors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share . . . [S]uccessors who had the ability and were in a position to maintain the decedent but failed to fulfill their duties shall be given no share or a smaller share of the estate.¹⁶⁹

Here, the decedent's parents were elderly, infirm, and without income.¹⁷⁰ Likewise, the daughter was without income and unable to work, as she was school-aged.¹⁷¹ Pursuant to its equitable powers under Article 13, the court gave "due consideration" to the especially desperate circumstances and awarded the daughter and both parents larger than intestate shares, at the expense of the healthy spouse's portion.¹⁷² The judge explained that Article 13 "reflects our country's inheritance system's basic principle of supporting the elderly and raising the young."¹⁷³

This result is common in the Chinese system, as courts regularly cite Article 13 to reapportion shares to the neediest heirs.¹⁷⁴ In marked contrast, the U.S. system only makes definitive provision for the surviving spouse, in the case of Wang, the individual who was most able to take care of herself.¹⁷⁵ American jurisdictions do not recognize parental rights to an intestate share unless there is no surviving spouse

168. *Linking Support and Inheritance*, *supra* note 103, at 1231; ZHONGHUA RENMIN GONGHEGUO JICHENG FA QUANSHI [ANNOTATED P.R.C. INHERITANCE LAW] 94-95 (Zhou Xianqi ed., 1995) [hereinafter ANNOTATED INHERITANCE LAW].

169. P.R.C. Succession Law Art. 13.

170. *Linking Support and Inheritance*, *supra* note 103, at 1231; ANNOTATED INHERITANCE LAW, *supra* note 168.

171. *Id.*

172. *Linking Support and Inheritance*, *supra* note 103, at 1232.

173. *Id.*

174. *Id.* at 1231.

175. *Id.*

and no issue.¹⁷⁶ Remarkably, the ten-year-old daughter would not even receive a share under the UPC's "conduit theory."¹⁷⁷

In a similar Article 13 ruling, a Guangdong court considered the estate of Cen Huaan, the owner of a furniture store, who died intestate with four first-order heirs.¹⁷⁸ Huaan was survived by his wife, his five-year-old boy, and his parents. Instead of distributing the estate equally four ways, the court made a careful determination about the relative need of the heirs: "[Decedent's parents] currently have several fishponds under contract and they are relatively well-to-do; [decedent's spouse] is in the prime of her life and is able to work . . . [Decedent's son] is only five years old and is not yet able to work."¹⁷⁹ Citing Article 13, the court reapportioned the estate, supporting the minor child with almost seventy-five percent of the estate.¹⁸⁰

While Articles 10 and 12 of the P.R.C. Inheritance Law elevate extended family members (such as stepchildren, stepparents, and widowed sons- and daughters-in-law) to direct heirs, Chinese courts have also granted judicial remedies for non-heir dependents outside of the immediate or extended family.¹⁸¹ As defined above,¹⁸² such protections are extended through Article 14's "appropriate share" provisions.¹⁸³

G. Estate of Ping

The decedent, Yu Ping, died intestate survived by two heirs: his elderly spouse and his able-bodied son.¹⁸⁴ Yu became aware of the circumstances of an impoverished old man in the countryside and for more than a decade had voluntarily donated ten Yuan per month to the

176. *E.g.*, UNIF. PROBATE CODE § 2-102 (2010).

177. *Id.* The "conduit theory" justifies allocation of the entire estate to a surviving spouse in the event that any existing issue of the decedent are also issue of the spouse. In these circumstances, it is thought that the spouse can be relied upon as a "conduit" to pass inherited wealth to the children upon his or her own death. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1078 (1999).

178. *Linking Support and Inheritance*, *supra* note 103, at 1233. *See* Case No. 430, MIN SHANG FA XIN LEIXING ANLI JINGXI [Essential Analysis of New Types of Civil and Commercial Law Cases] 1216, 1216 (Liu Zhixin et al. eds., 1996).

179. *Id.*

180. *Id.*

181. *Linking Support and Inheritance*, *supra* note 103, at 1237.

182. *See supra* Section III.D.2.

183. P.R.C. Succession Law Art. 14.

184. *Linking Support and Inheritance*, *supra* note 103, at 1238. *See* Yu Hu v. Wang Chunlan, JICHENG FA ANLI XIANGJIE [Detailed Explanation of Inheritance Cases] 220 (Cui Qinglan & Tang Jing eds., 1990) [hereinafter Detailed Explanation of Inheritance Cases].

old man's cause.¹⁸⁵ The court was able to exercise its substantial discretion and award shares to all. Applying Article 10, the judge was able to reallocate the two heirs' half portions to reflect the needs of the parties.¹⁸⁶ As a result, the elderly widow's share was substantially increased at the expense of the able-bodied son.¹⁸⁷ The court then applied Article 14, granting intestate rights to the old man based on his inability to work, lack of income, and reliance on the decedent's support.¹⁸⁸ Despite his non-heir status, the old man was rescued from certain financial disaster by the court, which granted him a five hundred Yuan cash legacy.¹⁸⁹

Here, the court found an Article 14-mandated "support relationship" in financial assistance and was therefore able to assign a cash award to the old man.¹⁹⁰ In practice, Chinese courts have wide latitude to infer support relationships in a variety of contexts, including the rearing of a child, physical and emotional care, and cohabitation.¹⁹¹ Foster states,

[u]nlike their U.S. counterparts, Chinese courts are not 'handcuffed' by rigid intestacy rules. They have the flexibility to determine on a case-by-case basis the distribution that best reflects the individual needs of the claimant, circumstances of intestate heirs, overall nature and size of the estate, and actual services rendered by the decedent.¹⁹²

Indeed, an American Court would be forced to ignore relative circumstances and apply rigid, status-based rules resulting in a formulaic distribution.¹⁹³ This result would leave the old man out in the cold, ultimately to be supported by state welfare.¹⁹⁴

H. The Shortcomings of Stare Decisis

Indisputably, "Chinese courts are more concerned with substantive justice than with consistent results."¹⁹⁵ That consistency, however, is the

185. *Linking Support and Inheritance*, *supra* note 103, at 1238. See Detailed Explanation of Inheritance Cases, *supra* note 184.

186. *Linking Support and Inheritance*, *supra* note 103, at 1239.

187. *Id.*

188. *See id.*

189. *Id.*; see Detailed Explanation of Inheritance Cases, *supra* note 184.

190. *Linking Support and Inheritance*, *supra* note 103, at 1239.

191. *Id.* at 1238.

192. *Id.*

193. *Id.*

194. *Id.*

195. Simmons, *supra* note 31, at 147 (citing John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 473 (2012)).

very hallmark of the American legal system.¹⁹⁶ The principle that binds judges to precedent is known as *stare decisis*.¹⁹⁷ Common law systems, like the United States emphasize the concept of *stare decisis* to ensure consistent application of rules, whereby similar facts yield similar outcomes.¹⁹⁸

For proponents of the American system, Chinese judicial discretion represents a “terrible price” to pay for improved support provisions.¹⁹⁹ Such redistribution schemes are complex, unpredictable, and perhaps even fundamentally unsuited to the United States environment.²⁰⁰ They would encourage litigation, increase costs, and pose a threat to family amity by incentivizing the airing of a family’s “dirty laundry” in court.²⁰¹ Essential to critics’ analysis of the Chinese system, judicial discretion is a direct assault on the “cherished notions of testamentary freedom” and *stare decisis*.²⁰² The traditional and peculiar distrust that many Americans have for government has led to a wholesale suspicion of both courts and the practice of “legislating from the bench.”²⁰³ But courts can do just as much harm through inaction.²⁰⁴ That *stare decisis* does, in fact, impede equity and justice can be seen in the application of a statutory intestacy-adjustment formula in the following case.²⁰⁵

I. Estate of Moyer

Moyer concerns the regrettable death of a toddler in a car accident.²⁰⁶ An emotional legal battle ensued between the child’s mother and his grandmother.²⁰⁷ For all intents and purposes, the mother had abandoned the child.²⁰⁸ Consequently, the grandmother claimed that such dereliction of family duty should result in the mother’s disinheritance.²⁰⁹ As is typical of American courts, the trial judge expressed ostensible regret at the ruling but insisted that precedent bound its ruling.²¹⁰ The decision read: “if this court were free to base its

196. *Id.*

197. *Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

198. *See id.*

199. *Linking Support and Inheritance*, *supra* note 103, at 1214.

200. *Id.* at 1215.

201. *Id.*

202. *Id.*

203. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 185 (2007).

204. *See* Simmons, *supra* note 31, at 147.

205. *Id.*

206. *In re Estate of Moyer*, 758 A.2d 206, 207 (Pa. Super. Ct. 2000).

207. *Id.* at 206-07.

208. *See id.* at 209-10.

209. *Id.* at 207.

210. *Id.* at 210.

decision on fairness and common sense rather than appellant precedent, we would sign a forfeiture order as soon as it could be prepared.”²¹¹ Ultimately, the court interpreted the statutory phrase “failed to provide any duty of support” in a stringently literal manner, and found for the mother, acknowledging “any crumb a parent [threw] in front of [the] child.”²¹²

The outcome in *Moyer* serves to remind us of the dire consequences that unchecked *stare decisis* can have on our intestacy system. A fixed system of formulas can never provide the requisite human element necessary to ensure simple common sense results in inheritance battles.²¹³ Note that in this case, the rigid application of the statutory formula actually flew in the face of presumed testamentary intent.²¹⁴ Though a toddler’s mind remains a mysterious thing, the court found it exceedingly likely that the boy would have wanted his loving grandmother to inherit the estate rather than the mother he never knew.²¹⁵ Thus, the inelastic nature of *stare decisis* creates perverse outcomes where the unworthy can, and do, inherit through statutory loopholes.

IV. ANALYSIS

The status quo of American intestacy law is insufficient to provide broad support to the population and therefore fails its modern directive of replacing the social welfare system.²¹⁶ Reforms to the system have been trivial at best and have not reached the root of the problem—the inherent bias in favor of the traditional American family, which places undue value on family status while disregarding support for the marginalized.²¹⁷ Fundamentally, the law has failed to “adapt to the changing American family” and the very real relationships underpinning it.²¹⁸

Intestacy rules are formulaic and one-size-fits-all, where presumed majoritarian intent preys upon actual testamentary intent.²¹⁹ Lawmakers have determined that most Americans would prefer their estate to pass only to immediate family members in an ordered rubric, but such a notion may be a relic from the past.²²⁰ By limiting intestate heirs to

211. *Moyer*, 758 A.2d at 210.

212. *Id.*

213. *See Foster*, *supra* note 39.

214. *See Moyer*, 758 A.2d at 210.

215. *See id.*

216. *See Foster*, *supra* note 39, at 271.

217. *Id.* at 204.

218. *Id.* at 201.

219. *Simmons*, *supra* note 31, at 127-28.

220. *Id.* at 128.

“natural objects of the decedent’s bounty,” courts and legislatures alike have funneled the benefits of the intestacy scheme to an ever-dwindling portion of the population.²²¹ As such, the Family Paradigm itself represents a form of judicial discretion in favor of the traditional American family unit.

The UPC admittedly made strides in recognizing “kindred of half-blood”²²² and adopted children²²³ but regrettably, only a handful of states have passed laws of their own to that effect.²²⁴ Accordingly, our definition of children for intestacy purposes remains outdated.²²⁵ Even those states that have adopted UPC provisions still do not recognize non-marital children, children of unmarried cohabitants, or any non-related individuals in a child-parent relationship with the decedent.²²⁶ The definition of spouse also remains woefully outmoded.²²⁷ Commentators have called for the inclusion of committed partners and even non-blood relatives,²²⁸ and many wish to expand the boundaries of the traditional family paradigm altogether to provide for the decedent’s close family and friends, like in China.²²⁹

Such rigid classifications provide opportunities for unworthy heirs to slip through the cracks and inherit windfalls. Allowing a wrongdoer to profit from wrongdoing effectively dismisses the most important societal purpose of intestacy, that of support.²³⁰ Linking support with inheritance can only benefit the decedent and the survivor by incentivizing a two-way support system. Progress in America has been slow on this front, apart from Slayer Statutes.²³¹ But even Slayer rules are too inflexible to be practical, as many states restrict their application to cases in which the killing is felonious and intentional.²³² Thus, many statutes do not apply to those who commit abuse, neglect, or

221. See Foster, *supra* note 39, at 271.

222. UNIF. PROBATE CODE § 2-107 (2010).

223. *Id.* § 2-114 (2010).

224. *Uniform Law Commission: The National Conference of Commissioners on Uniform State Laws*, UNIFORMLAWS.COM, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited Jan. 31, 2018).

225. Foster, *supra* note 39, at 228.

226. See *id.* at 228-29.

227. See *id.* at 229.

228. See Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 787 (2012).

229. See *id.*

230. See Brown, *supra* note 79.

231. *Id.* at 558.

232. Laurel Sevier, *Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California’s Mentally Ill Slayers*, 47 SANTA CLARA L. REV. 379, 387 (2007).

exploitation, so long as the killing was not intentional.²³³ With reports of escalating elder abuse and neglect within the American family,²³⁴ such statutes are wholly under-inclusive.²³⁵

Some progress has been made in other areas of the unworthy heir doctrine, but successes are few and far between. North Carolina has attempted to link inheritance with support and merit in the area of child abandonment.²³⁶ Section 31A-2 of the General Statutes of North Carolina bars a parent from inheriting through intestacy or sharing in a wrongful death claim if he abandons the child.²³⁷ California law deals with the issue of “deadbeat dads” through its UPC provision:

If a child is born out of wedlock, . . . a natural parent . . . [does not inherit] from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

- (a) The parent or relative of the parent acknowledged the child.
- (b) The parent or relative of the parent contributed to the support or the care of the child.²³⁸

These examples remain the exception, not the norm. Finally, the issue of “laughing heirs” remains a substantial problem.²³⁹ Claimants who may not have even met the decedent receiving awards at the expense of loyal caregivers does not satisfy our aim of justice. Scholars agree that intestate laws should limit succession at the second collateral line.²⁴⁰ Unfortunately, many states still have not adopted the UPC recommendation in their codes.²⁴¹

Professor Friedman sums up the state of U.S. intestacy appropriately:

It does not matter . . . whether one [heir] is rich and another poor; one a minor, one not; one blind and destitute, another not—they

233. Linda K. Kisabeth, *Slayer Statutes and Elder Abuse: Good Intentions, Right Results? Does Michigan's Amended Slayer Statute Do Enough to Protect the Elderly?*, 26 QUINNIPIAC PROB. L.J. 373, 374 (2013) (analyzing Washington, Michigan, and Kentucky jurisdictions that did add such language).

234. Foster, *supra* note 39, at 230.

235. *Id.*

236. Heyward D. Armstrong, *In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act*, 81 N.C. L. REV. 1149, 1150 (2003).

237. *Id.* at 1149-50.

238. Monopoli, *supra* note 87, at 263.

239. *See generally* DeRosa, *supra* note 18, at 153.

240. *Id.* at 161.

241. *Uniform Law Commission: The National Conference of Commissioners on Uniform State Laws*, UNIFORMLAWS.COM, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited Jan. 31, 2018).

share equally in the estate. No discretion to alter the scheme is vested in the probate court or in any other legal agency.²⁴²

Support of dependents is not only dismissed; it is discouraged.²⁴³ Where courts have no power to decide personal matters of intestacy according to individual need and merit, unjust results will continue to transpire.

V. PROPOSAL

The intestacy status quo is not only unreasonable, it is economically unsustainable in the long-term.²⁴⁴ As a country of immigrants, we can no longer afford our narrow and overly formalistic definition of family that excludes such a large portion of our populace from intestate succession.²⁴⁵

I propose adopting support-based reforms to help situate America more in line with the civil law tradition. The UPC represents a marked improvement from common law, in that it dramatically expands the definition of family and prevents laughing heirs. However, it has only been adopted in seventeen states.²⁴⁶ If we truly want consistency, the Uniform Probate Code must be uniform. That would mean larger states, such as California, New York, and Texas, substantially adopting the provisions to lend legitimacy to the scheme.

Furthermore, the UPC support provisions must be expanded, using what some have referred to as a “functional approach,” whereby the rigid Family Paradigm is appended with a scheme that focuses on the quality of the relationship, instead of categorical status.²⁴⁷ We can use the functional approach to expand the scope of the unworthy heir doctrine beyond merely slayers. The California “deadbeat dad” statute referenced above serves to illustrate this approach.²⁴⁸ By coupling the “act of becoming a parent” (birth or adoption) with “the act of being a parent” (care and nurturing), we can tie inheritance to merit and curb child abandonment.²⁴⁹

242. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession and Society*, 1966 WIS. L. REV. 340, 354 (1966) (describing situations in which a decedent dies intestate survived by only his siblings).

243. See Foster, *supra* note 39, at 204.

244. See *Linking Support and Inheritance*, *supra* note 103.

245. See *id.*

246. *Uniform Law Commission: The National Conference of Commissioners on Uniform State Laws*, UNIFORMLAWS.COM, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited Jan. 31, 2018).

247. Foster, *supra* note 39, at 232.

248. Monopoli, *supra* note 87, at 263.

249. See Foster, *supra* note 39, at 232.

Similarly, the United States system could extend this thinking to the issue of elderly dependents. No longer would neglectful and abusive children get to inherit for their misdeeds.²⁵⁰ These reforms would incentivize the support of the decedent by forcing caregivers into submission for fear of disinheritance. Such reforms would also encourage support of the dependent survivors, by allowing for a functional, relationship-based approach in determining qualifying heirs. Perhaps most importantly, this approach allows America to retain its common law tradition. Rather than overhauling the American system to fit a foreign model, it should acknowledge the centrality of the traditional—American family—while also recognizing that additional deserving recipients of the decedent’s estate might exist.²⁵¹

Additionally, instead of a mandatory share for heirs in the mold of Article 19 of the P.R.C. Inheritance Law, America should attempt to replicate Article 14, its corollary, by extending inheritance to non-family heirs. Unlike Article 19, Article 14 merely provides a forum for heirs and non-heirs alike to make a claim for an intestate share.²⁵² No shares are forced upon the decedent; therefore her testamentary freedom is preserved while ensuring a hearing in equity to resolve disputes.²⁵³ Courts could expand their narrow definition of a “natural” recipient and develop a “support relationship with decedent” standard, much like Article 14.²⁵⁴ This new judicial principle would bolster support to both the decedent during her lifetime and to her needy survivors.²⁵⁵

Finally, caregivers could be regarded as “natural objects of a decedent’s bounty.”²⁵⁶ The idea being an expansion of the pool of potential heirs, so Americans may more fully realize testamentary freedom. A testator’s attempt to reward good behavior would no longer be perceived as a coerced act.²⁵⁷ Removing the presumption in favor of undue influence might strip the Family Paradigm of its bias and ultimately restore genuine donative freedom.²⁵⁸ Finally, the United States should introduce automatic forfeiture provisions to induce care of the decedent by the heir.²⁵⁹ Examples include if the heir was a slayer, if

250. See Moskowitz, *supra* note 24, at 452-53.

251. Foster, *supra* note 39, at 256.

252. *Linking Support and Inheritance*, *supra* note 103, at 1228.

253. Hsu, *supra* note 124, at 308.

254. Foster, *supra* note 39, at 255; P.R.C. Succession Law Art. 14.

255. Foster, *supra* note 39, at 255.

256. *Id.* at 253.

257. See *id.* at 256.

258. *Id.*

259. See Hsu, *supra* note 124, at 331 (representing Taiwan’s mandatory share doctrine as an interesting alternative to China’s in that parents are allowed to disinherit their children if any of the automatic forfeiture provisions are violated).

the heir committed fraud in wills proceedings, if the heir forged or destroyed decedent's will, and if the heir seriously abused or humiliated the decedent and has been forbidden from inheriting.²⁶⁰

Ultimately, a pure mandatory share is unworkable, such that many scholars now question the efficacy of China's Article 19 scheme.²⁶¹ China claims that its mandatory share triggers support functions but such a claim is questionable at best.²⁶² First, meeting both burdens of "unable to work" and "no income" is rarely done.²⁶³ Second, if an heir does not meet both burdens, the testator is free to disinherit.²⁶⁴ Third, Article 19's "necessary portion" only takes into account ability to work and income, disregarding the actual poverty of a potential heir.²⁶⁵ Accordingly, the current provisions may be contrary to family support by providing insufficient protections to needy heirs, leaving society to carry the burden.²⁶⁶ Indeed, many decedents often leave their estates to non-family heirs.²⁶⁷

Finally, despite the "frightening" prospect of a judicial discretion scheme in the United States,²⁶⁸ such a system represents an eminently plausible way of ensuring social support functions through private actors. An American family maintenance model would allow for equitable distribution of an estate on a case-by-case basis.²⁶⁹ Critics point to an assault on testamentary freedom,²⁷⁰ but the majoritarian intent of the testator is ultimately better realized when a court can remedy common sense injustices and provide for the public welfare.

It should be noted that this scheme does not apply automatically and is only administered upon petition by qualifying claimants.²⁷¹ Furthermore, a testator is always free to opt out of the default scheme and make her bequest by will.²⁷² Indeed, in a case upholding the validity of a duly executed will, the Chinese legal analysis states, "[i]t should be made clear that even if an heir performed duties toward the decedent, the decedent can, nonetheless, make a will leaving his or her estate to

260. *Id.* at 312-13.

261. *Id.* at 308.

262. *See id.* at 304.

263. *See id.*

264. *See id.*

265. *See Hsu, supra* note 124, at 304.

266. Hsu, *supra* note 124, at 323.

267. *Id.* at 322.

268. *Linking Support and Inheritance, supra* note 103, at 1215.

269. *Id.* at 1214.

270. *Id.* at 1215.

271. *Id.* at 1214.

272. Foster, *supra* note 39, at 206. The accepted orthodoxy of intestate succession generally paints the system as one of default. *See Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 2.1 cmt. c (1999).

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another person. To be effective, the will need only conform with the requirements stipulated in the Inheritance Law.”²⁷³ Thus, the available opt-out sufficiently protects a decedent’s interests, especially in relation to the increased ability of courts on the other hand to provide for the public welfare.

VI. CONCLUSION

Chinese inheritance law is a complicated convergence of its Confucian past, socialist present, and increasingly capitalist future. Despite the passage of time, the notion of family and support have remained paramount in Chinese society. Such notions exist in America, only they are manifested in a slightly different manner. Whereas China emphasizes need and community support, America stresses status and individual testamentary freedom. Indeed, these concepts do not exist in isolation but are rather two sides of the same coin, helping to expose our respective societies’ values and biases.

Over the next few decades each country will face a stiff test of providing support for their aging populations. China’s system is considerably more flexible, responsive, and better equipped to deal with the changing nature of its population in the twenty-first century. China’s support provisions appear surprisingly practical, indicating that the costs of unpredictability and postmortem chaos are offset by the benefits of the scheme’s dual support outcomes.²⁷⁴ Ultimately, it is the human component that differentiates the yin from the yank, helping us to “recognize that the ties of human affection do not run solely along family lines.”²⁷⁵

273. *Id.* at 1249-50.

274. Simmons, *supra* note 31, at 148.

275. Foster, *supra* note 39, at 273.