

THE VAGARIES OF VAGUENESS:
AN ESSAY ON “CULTURAL” VS.
“INSTITUTIONAL” APPROACHES TO
JAPANESE LAW

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PROLOGUE

This essay grew out a presentation I gave, as one of several foreign legal academics working in Japan, on the theme “Key Words for Understanding Japanese Law.” Of course I recognized from the outset that reducing the essence of a legal system (or any other complex phenomenon) to a single “key word” would entail a loss of nuance. But I thought (and still think) the assigned theme was a fair and valuable one. After all, cartoons and caricatures can be illuminating. There’s nothing necessarily wrong with putting an equivocating academic’s feet to the fire and making him answer the question definitively, “What is it about Japanese law—if anything—that is so different?”

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What I did not foresee was that I would be one of the presenters foolhardy enough actually to accept the challenge of reducing Japanese law to a single word. The key word I chose was “Vagueness,” as you will see in more detail if you keep reading. What I also failed to anticipate was the controversy my presentation would arouse, at least among the foreigners in the audience. A quarter century’s absence from America – while living and working in Japan - had rendered me insensitive to the fact that making bold generalizations about cultures, bringing attention to cultural differences, is now dangerous territory in American academic circles. As I delivered my presentation, I saw foreigners in the audience shaking their heads and dropping their jaws in seeming disbelief, as if to say, “No, you can’t say that!” Meanwhile, the Japanese members of the audience seemed to be smiling in recognition, apparently unaware that cultural profiling these days is a breach of good manners outside Japan.

Japanese scholars and journalists, and the Japanese in general, have never been inhibited about exploring, explaining and celebrating cultural differences between themselves and foreigners. Japan continues to be conscious of, and proud of, its “Japanese-ness” and cultural “uniqueness,” just as it is unashamedly entertained by television documentaries showing the strange customs and eating habits of non-Japanese natives around the world. Against this background, it should come as no surprise that a branch of Japanese legal scholarship has been devoted to explaining a unique “Japanese legal consciousness” that fundamentally differs from “Western legal consciousness.”

During the century following the opening of Japan to the West, Western scholars and observers of Japan, from Lafcadio Hearn¹ to Ruth Benedict², also unselfconsciously explained and

1. Lafcadio Hearn (1850 – 1904), who lived in and wrote about Japan from 1890 until his death in 1904, describes Japanese culture as lacking the sense of individual consciousness and individual legal rights that are associated with the West.

2. Ruth Benedict (1887 – 1948), whose study of Japanese culture *The Chrysanthemum and the Sword* (1946) contrasts Western “guilt-based” mentalities with Japanese “shame based” mentalities.

affirmed sharp cultural dichotomies between Japan and the West. As regards Japanese law, Western observers of this period were consistent in their claim that the Japanese people, over a long and ancient history, have shown a weak to nonexistent sense of individual rights and the rule of law. Of greater importance under Japanese law are notions of family and public sentiment.³

However, by the time Japan emerged as a major economic power in the 1970's, and at the same time that foreign legal scholars began to take a more specialized interest in the Japanese legal system, the ideological and intellectual climate in academic circles outside Japan had changed. The main tendency of more recent Western scholarship on the Japanese legal system has been to de-bunk Japanese exceptionalism as “myth”⁴ or “urban legend”⁵ and to shy away from an anthropological approach altogether. In rough approximation, the more recent school of non-Japanese scholars of Japanese law seem to be saying that “people are people” everywhere, and that differences in behavior (such as tendencies to litigate or appoint outside directors) do not reflect innate culture, but rather reflect objective institutional and economic constraints to which all human beings respond universally in the same way.

3. See, e.g. LAFCADIO HEARN, *JAPAN: AN ATTEMPT AT INTERPRETATION* (1904) 353, 387:

The Anglo-Saxon idea of inflexible law is the idea of a justice impartial and pitiless as fire: whoever breaks the law must suffer the consequence, just as surely as the person who puts his hand into fire must experience pain. But in the administration of the old Japanese law, everything was taken into consideration: the condition of the offender, his intelligence, his degree of education, his previous conduct, his motives, suffering endured, provocation received, and so forth; and final judgment was decided by moral common sense rather than by legal enactment or precedent. . . . [T]he ordinary person would not dream of attempting to claim a legal right opposed to common opinion. Family and public sentiment are still more potent than law.

4. John O. Haley, *The Myth of the Reluctant Litigant*, 4 *Journal of Japanese Studies* 359 (1978).

5. YOSHIRO MIWA & J. MARK RAMSEYER, *THE FABLE OF THE KEIRETSU: URBAN LEGENDS OF THE JAPANESE ECONOMY* (2006). In a similar vein, see PETER N. DALE, *THE MYTH OF JAPANESE UNIQUENESS* (1986).

In the closing section of this essay I will offer a few comments on the political and ideological ironies of more recent Western academic writing on Japanese law. For now, suffice it to say that, in my view, scholarship in this vein is itself culture-bound: it exemplifies precisely the universalistic Judeo-Christian values (“God created all of his children equal”) to which well-meaning Western missionaries have failed to convert the pagan natives over the centuries.

I. VAGUENESS

As the foregoing prologue admits, I come to the task of defining “vagueness” fully aware that it is fraught with risk.

So here goes: For me, “vagueness” is as good a “key word” as any to suggest the essence of Japanese law. The Japanese conception of individual rights, both in relation to the state and other private individuals, is vague. The operative legal rules—what you may do, must do, may not do-- are intentionally vague. Enforcement of rules is weak and situational. Japanese judicial opinions are vague. The Japanese language, the medium through which the law operates, is itself inherently vague.⁶

As we know in the West, law is not supposed to be vague. Vagueness is antithetical to the proper function of law. Clear rights and the boundaries they entail are what protect an individual from tyranny and abuse by the state. Clear contract and property rights are the basic working components of a free market. Vague rules invite arbitrary enforcement by the authorities. When judges decide cases, legitimacy and due process demand a clear statement of reasons and consistency with existing rules and precedent.⁷ To the extent that law is

6. WILLIAM MCCLURE, USING JAPANESE: A GUIDE TO CONTEMPORARY USAGE 124 (2000), “Japanese is well-known for vague speech, and the language is full of expressions which allow explicit (and often difficult or awkward) details to be left unspoken.”

7. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690):

And therefore, whatever form the commonwealth is under, the ruling power ought to govern by *declared* and *received*

expressed in language, we value the English language's capacity for precision, fine distinctions and common sense reasoning.

Vagueness is not just a legal phenomenon in Japan. It is at the core of the way Japanese individuals live and think, and this has been so for centuries.⁸ We who live in Japan have all had the experience of seeing two Japanese individuals in conversation, or on the telephone, and the body language that goes with it—the imparting of information not in complete sentences or paragraphs, but in dribs and drabs, the nodding, the grunts and

laws, and not by extemporary dictates and undetermined resolutions: for then mankind will be in a far worse condition than in the state of nature, if they shall have armed one, or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts, or unrestrained, and till that moment unknown wills, without having any measures set down which may guide and justify their actions: for all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds, and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly. (alteration in original).

See also FREDRICH A. VON HAYEK, *THE CONSTITUTION OF LIBERTY*, THE DEFINITIVE EDITION (Malcolm Hamowy, ed) 315 (2011) (“The second chief attribute that must be required of true laws is that they be known and certain.”).

8. MURASAKI SHIKIBU, *THE TALE OF GENJI* 978 (Arthur Waley trans., 1929) (1021) For example the dialogue in *The Tale of Genji* (978?) is marked by constant indirection and ambiguity:

I could not pretend I had not heard. I had however no intention of prolonging my visit, particularly as the odour was now becoming definitely unpleasant, and looking cross I recited the acrostic “On this night marked by the strange behaviour of the spider, how foolish to bid me come back tomorrow” and calling over my shoulder “There is no excuse for you!” I ran out of the room. But she, following me, “If night by night and every night we met, in daytime too I should grow bold to meet you face to face.” Here in the second sentence she had cleverly concealed the meaning, “If I had had any reason to expect you, I should not have eaten garlic.

other sound effects, the constant feedback from the listener to the speaker confirming that the listener has understood and is on the same wave length at each download of a mini-packet of data along the way. You can spot two Japanese in conversation at fifty paces in O'Hare Airport or a restaurant in Paris and know immediately that they are Japanese.⁹

Why don't Japanese speak in complete sentences, much less complete paragraphs? Well, one part of it is that the Japanese language itself is inherently rather vague and can give rise to misunderstandings unless the speaker repeatedly confirms with the listener what he is actually trying to say or who he is talking about (as we know, definite articles don't exist, and subjects and objects of sentences are more often than not merely implied).¹⁰

But looming behind the language is Japanese culture itself, and the historical context from which both the language and culture emerge. Japanese have been conversing in the same tentative way for hundreds of years. They are conditioned not to take the risk of "coming out" with what they "really think" unless they can be sure it will be acceptable to their audience. The speaker doesn't want to offend or make an enemy or say the wrong thing. Japanese reveal their true meanings bit by bit, and in ways that are deliberately vague, to provide cover if it turns out they are veering into disagreement or other dangerous territory. The language is loaded with euphemisms, evasions and

9. EDWIN O. REISCHAUER & MARIUS B. JANSEN, *THE JAPANESE TODAY* 136 (1995):

To operate their group system successfully, the Japanese have found it advisable to avoid open confrontations. Varying positions are not sharply outlined and their differences analyzed and clarified. Instead each participant in a discussion feels his way cautiously, unfolding his own views only as he sees how others react to them. Much is suggested by indirection or vague implication. Thus any sharp conflict of views is avoided before it comes into the open.

10. TAKEYOSHI KAWASHIMA, *Ho-shakaigaku Jojetsu [Introduction to the Sociology of Law]*, in KAWASHIMA TAKEYOSHI CHOSAKU-SHU [COLLECTED WORKS OF TAKEYOSHI KAWASHIMA] (1982); TAKAYESHO KAWASHIMA, NIHONJIN NO GENGO ISHIKI TO HORITSU [LAW AND THE LINGUISTIC CONSCIOUSNESS OF THE JAPANESE] 382 (1979).

indirections. Statements are couched in conditional, tentative moods. Speakers are subtly pressured to shape their message to meet the expectations of their audience, to reach a fuzzy middle ground of consensus.¹¹ At some level the notion of “what I really think” or “what I really believe” is vague, contextual and negotiable for most Japanese.¹²

Japanese vagueness is a natural outgrowth and corollary of the way Japanese society has been organized for many centuries: a society based on tightly integrated hierarchical groups - families, villages, clans - that demanded near absolute loyalty, obedience and trust and the suppression of individuality, in exchange for identity and protection. Within the homogenous in-group to which one belongs, common understandings, assumptions and values are so deeply shared that they hardly need talking or thinking about. There is little self-reflection, “critical thinking,” or debate. Instead there is authority, status, kinship, tradition, custom. Conflicting interests, when they arise, are settled not by appeals to clearly articulated rules and principles, but by fuzzy compromise and consensus.¹³

11. REISCHAUER & JANSEN, *supra* note 9 at 381:

[T]he Japanese, who commonly seek a cautious approach to consensus rather than a sharp clarification of differences of opinion—‘Let’s get down to brass tacks’—are more likely to cultivate vagueness of expression.

12. See RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* 219-20 (First Mariner Books ed. 2005) (1946):

In Japan ‘respecting yourself’ is always to show yourself the careful player. It does not mean, as it does in English usage, consciously conforming to a worthy standard of conduct—not truckling to another, not lying, not giving false testimony It had no implication, as it would in the United States, that even if thoughts are dangerous a man’s self-respect requires that he think according to his own lights and his own conscience.

13. REISCHAUER & JANSEN, *supra* note 9 at 136:

Consensus is the goal—a general agreement as to the sense of the meeting, to which no one continues to hold strong objections. One-man decrees, regardless of that man’s authority, are resented, and even close majority decisions by vote leave the Japanese unsatisfied.

Of course Japan is not the only society to have been organized this way. The same patterns can be seen in many pre-modern, so-called “primitive” societies, which share with Japan “such institutional characteristics as weak government, ascription of rights on the basis of family membership and gift giving as a fundamental mode of exchange.”¹⁴ Japan’s distinctiveness, as elaborated in S. N. Eisenstadt’s masterful synthesis, “Japanese Civilization: A Comparative View”:

lies in its being the only non-Axial civilization that has maintained—throughout its history, up to the modern time—a history of its own, without in some way being marginalized by the Axial civilizations, China and Korea, Confucianism and Buddhism, with which it was in continuous contact.¹⁵

Or, as Lafcadio Hearn put it at the turn of the last century, “Japan offers us the living spectacle of conditions older, and psychologically much farther away from us, than those of any Greek period with which art and literature have made us closely acquainted.”¹⁶ Eisenstadt and Hearn both affirm a Japanese uniqueness that rests upon ancient ways of thinking and feeling that have survived into modern times, and which have survived despite Japan’s exposure to all manner of foreign influences over the centuries.

I have found Eisenstadt’s distinction between “Axial” and “non-Axial” civilizations, based on an idea originally developed by Karl Jaspers¹⁷, to be particularly helpful in characterizing the essential differences between Western and Japanese mentalities in general, and the key differences in their conceptions of law

14. RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 150 (1981).

15. S. N. EISENSTADT, *JAPANESE CIVILIZATION: A COMPARATIVE VIEW* 14 (1996). As articulated by Eisenstadt, and by German philosopher Karl Jaspers, the Axial Age – from roughly 800 to 200 BCE - represents a period of breakthrough intellectual thought, philosophy and religion, which, somehow, emerges nearly simultaneously in the Far East (China), the Near East (Persia and Israel), South Asia (India), and in the West (Greece).

16. HEARN, *supra* note 3, at 17.

17. KARL JASPERS, *THE ORIGIN AND GOAL OF HISTORY* 1953.

and rights in particular. As Eisenstadt explains it, Axial civilizations grew out of an intellectual breakthrough exemplified by: the Old Testament prophets; Socrates, Plato and Aristotle; and the teachings of Confucius, Buddha and Jesus Christ.

According to Eisenstadt, the essence of this phenomenon is attributable to major changes and transformations in human thinking, in the perceived relationship between cause and effect, in basic cultural conceptions of society and the individual self (i.e., whether the individual will be shaped primarily by the familial and societal environment or on the basis of the individual's own independent and autonomous ideas and beliefs), and in the development of revolutionary new theories of human life and existence - all of which produced profound intellectual breakthroughs which irrevocably changed the course of human history. The heart of the Axial "syndrome," according to Eisenstadt, was the interaction of two contrary "tendencies."

The first involved the manner in which nature and the possibilities of reality were to be understood (i.e., between mundane and transcendental dimensions, to use a controversial formulation), and the prodigious quantities of intellectual vigor and critical thinking that such sophisticated new ways of thinking required. This was coupled with an increasing focus on radical new insights about the cosmos and the nature of time, about the possibility of realities beyond the one into which we are born to live our brief lives, and about the complex relationship between the individual, the social order, and the infinite.

The second was the transformation of so many historical aspects of social activities and organizations arising from kinship and territorial units or frameworks; and the concomitant development of "free" resources which can be organized or mobilized in different directions, giving rise to more complex social systems - thereby creating challenges to almost all pre-existing institutional formations. However, these merging "tendencies" ultimately served to transform the nature of social organizations and of cultural orientations - as well as of individual thought - and it was their combination that created the

foundational possibility for the crystallization of the four main Axial Civilizations (i.e., China, India, Persia, and Greece), as well as for the global dissemination of their revolutionary insights (i.e., through the phenomena of: “reflexivity,” “disembeddment,” “ascriptive behavior,” “second order thinking,” and “problematization,” etc).¹⁸

At some point, the West underwent an intellectual revolution that Japan never did. The Old Testament vision that there is a “higher” law, a “higher” truth, “a world beyond our own” fed into Socrates (i.e., rationalism, science, truth for its own sake) and Jesus (i.e., everyone is your brother; your relationship to God is personal and individual; what profit is it to gain the whole world and yet lose your soul?). It was a mental leap that opened up possibilities beyond the immediate world as we know it, and it started the process of people thinking autonomously for themselves. It also led to dissatisfactions with the existing state of affairs - and to doubts about the legitimacy of the reigning political order, the social hierarchy, and received tradition and wisdom. By inviting people to ask “What if?” and “Why not?” it accelerated the process of innovation and change. Directly relevant to the theme of this essay, this new way of thinking also led to a type of discourse that few Japanese are comfortable with even today: the debating of ideas and propositions “on the merits,” against a higher standard of objective facts and logical consistency, and independent of the debaters’ status or immediate personal interests. The search for a higher truth epitomized by the Socratic dialogues required a deeper level of mental and verbal clarity and precision. These were critical turning points in Western intellectual history that never penetrated Japan.¹⁹

18. S. N. EISENSTADT, AXIAL VISIONS AND AXIAL CIVILIZATIONS: THE TRANSFORMATIONS OF WORLD HISTORIES BETWEEN EVOLUTIONARY TENDENCIES AND INSTITUTIONAL FORMATIONS 3 (2007), *available at* [www.humhonors.wiki.huji.ac.il/images/Axial_Age_\(final\)-86-1-.doc](http://www.humhonors.wiki.huji.ac.il/images/Axial_Age_(final)-86-1-.doc).

19. See Bjorn Wittrock, *The Meaning of the Axial Age in AXIAL CIVILIZATIONS AND WORLD HISTORY*, 78 (Johann P. Arnason, S. N. Eisenstadt & Bjorn Wittrock eds., 2005):

Contrast the Parable of the Good Samaritan with Lafcadio Hearn's description of Japanese attitudes towards strangers and banishment:

Under the feudal system there was incomparably less likelihood of sympathy for the stranger; and banishment signified hunger, solitude, and privation unspeakable. For be it remembered that the legal existence of the individual, at that period, ceased entirely outside of his relation to the family and to the commune. Everybody lived and worked for some household; every household for some clan; outside of the household, and the related aggregate of households, there was no life to be lived--except the life of criminals, beggars, and pariahs. . . . So the banished man was most often doomed to become a hinin,--one of that wretched class of wandering pariahs who were officially termed "not-men," and lived by beggary, or by the exercise of some vulgar profession, such as that of ambulant musician or mountebank. We can scarcely imagine to-day the conditions of such banishment: to find a Western parallel we must go back to ancient Greek and Roman times long preceding the Empire. Banishment then signified religious excommunication, and practically expulsion from all civilized society,--since there yet existed no idea of human brotherhood, no conception of any claim except of kinship.²⁰

The Parable of the Good Samaritan reflects a qualitatively different world view in which one is not only commanded to love one's neighbor as oneself, but instructed that everyone - not

[A] qualitative increase in reflexivity, historicity and agentiality is characteristic of the Axial Age and is the very premise for any reasoned distinction between political order and religious-cultural order and hence for the opening of the possibility of a challenge to cultural claims of legitimacy of political order. Once this possibility has been conceptually permitted, it is a potential that can never henceforth be "unthought," i.e. the potential of a fundamental challenge of established order can never again be permanently removed.

20. HEARN *supra* note 3, at 98.

just members of your immediate in-group - is your neighbor.²¹ (Interestingly, Jesus delivered the parable in response to a skeptical Pharisee who asked, "I know I am supposed to love my neighbor, but tell me just who is my neighbor?"—just the kind of adversarial discourse we identify with the Socratic method, and which the Japanese avoid at great pains.) In the parable are the seeds of what eventually became political liberalism—individuals as individuals, distinct and independent from status and tribe, as the building block - the atom - of society, politics and the market. The parable is a precursor of the universalism that animates political liberalism and the ideal of the Rule of Law—political equality and equal application of the laws.²²

As Hearn points out, terror of banishment is the flip-side of security in group identity. As they say in Japan, "*deru kui wa utareru*" (the nail that sticks out gets hammered down). The outspoken non-conformist, the questioner of received wisdom and authority, the voice crying in the wind, are typically shunned, cowed into silence, or expelled.²³ The contrast with Socrates and Jesus, prototypes of Axial ways of thinking, is striking. Socrates and Jesus were manifestly nails who stuck out in the societies in which they lived and got hammered down. Within the Axial context, the reason that Socrates and Jesus live on in collective memory is that their very martyrdom exposed the backwardness and illegitimacy of an older pre-Axial way of thinking that put them down, poisoned and crucified, respectively. In the Western mind they are heroes who represent our most fundamental values and ideals, including the very non-Japanese value that those who question convention and tradition, or at least exercise their right to question, deserve respect and protection. Proclaiming your unconventional beliefs in the face

21. *Luke* 10:25-37 (King James).

22. Ariel Knafo, et al., *Helping Strangers is Lower in Embedded Cultures*, 40 J. OF CROSS-CULTURAL PSYCHOL. 875-79 (2009), available at <http://jcc.sagepub.com/content/40/5/875>.

23. See generally ALAN S. MILLER & SATOSHI KANAZAWA, ACCIDENT BY ORDER: THE ORIGINS AND CONSEQUENCES OF CONFORMITY IN CONTEMPORARY JAPAN (2000).

of authority - risking martyrdom in the name of a higher truth - is not the Japanese way. Japanese equivalents of a Socrates or Jesus (or St. Joan of Arc, or Sir Thomas More, or Galileo) are hard to find.²⁴

If this contrast between the Axial West and non-Axial Japan is valid, it would be surprising if their ways of thinking about law, and the function of law in their respective societies, were not also fundamentally different in corresponding ways. It stands to reason that a society that thinks of hierarchical groups as the organic building block of society would tend to have a weaker sense of individual rights, and related concepts of equality and fairness. A community that thinks in terms of the immanent world of concrete here-and-now relationships and interests rather than transcendental “higher principles” and “higher truths” would tend to have a weaker reliance on what we call “rules” and “principles” in reaching legal decisions and resolving conflicts. A people for whom Socratic dialogue, debate and rhetoric are alien would tend to have a litigation style, judicial style, and legal academic style that are relatively less sophisticated (as it were) than those who have inherited Socratic traditions. Of course, this basic difference in orientation affects not only the Japanese legal system: it is endemic to all facets of life in Japan. It helps explain why, for example, Japanese politics are factional and largely non-ideological, why Japan has not produced a major figure in the realm of philosophy, and why a Japanese husband (or wife) tends to think about the problem of marital infidelity in a less principled and guilt-ridden way than a Christian.

24. BENEDICT, *supra* note 8:

In Japan ‘respecting yourself’ is always to show yourself the careful player. It does not mean, as it does in English usage, consciously conforming to a worthy standard of conduct—not truckling to another, not lying, not giving false testimony. . . . It had no implication, as it would in the United States, that even if thoughts are dangerous a man’s self-respect requires that he think according to his own lights and his own conscience.

My thesis is that vagueness is the common and recurrent medium through which Japan resolves the basic categories of relationships and conflicts that are typically addressed by a legal system. Vagueness softens the hard edges of transcendent rules, rights and principles and pressures people with conflicting interests to resolve them in the old-fashioned Japanese way—through the constant and ongoing dynamic of “human relationships,” compromise, consensus.²⁵ In this sense it is antithetical to the liberal vision of the Rule of Law. In what follows, I will offer illustrations of vagueness at work in the two basic subdivisions of law: (1) the concept and reality of rights as between citizens and the state in the realm of public law; and (2) contract and property rights between private actors in the market.

II. VAGUENESS IN THE REALMS OF PUBLIC AND PRIVATE LAW

A. Vague Boundaries between the State and Its Subjects

Our Western ideal of the Rule of Law is one in which the commands of the sovereign are expressed clearly in complete sentences and paragraphs, allowing citizens to plan their lives accordingly. As between the state and its citizens, we believe law ought to draw clear lines and boundaries. On one side, citizens may operate freely and without fear (i.e., you may burn the American flag with impunity, at least so long as you do not create a fire hazard). On the other, you act at your own risk and subject to conditions (i.e., if you drive you must wear a seat belt and not exceed the speed limit). If those boundaries are vague, the areas of life in which citizens can act freely and without fear are diminished. Vague boundaries put citizens in the position of having to obtain permission from the authorities before proceeding with a project or course of action, and invite arbitrary

25. See SHUSAKU ENDO, *Preface to SILENCE* at xv (William Johnston trans.)(1980). Shusaku Endo uses the metaphor of a “mudswamp” to describe collective Japanese consciousness, a wet environment in which Christianity and other Western ideologies quickly lose their shape and dissolve.

and discriminatory granting of permissions and enforcement actions by the state.²⁶

Conversely, clearly defined rights give individual citizens the ability to keep the state from intruding into protected areas of privacy, expression and autonomy. In this sense rights and individualism are closely linked, thematically and historically. Rights enable individuals to stand up in the face of authority, the majority, the community, the in-group-- and say "Hands off" (or less polite variants thereof). Clearly defined rights allow one to be the nail that sticks out and not fear the consequences. Rights are designed to make it safe to do something very un-Japanese.

In the Western liberal model, constitutionally protected individual rights, enforced by an independent judiciary, are supposed to be the first line of defense protecting individual citizens from the state. In sharp contrast to the U.S., constitutional law, litigation and jurisprudence in Japan have never had a meaningful impact on any aspect of Japanese civic or social life. Not only has Japan's Supreme Court famously hesitated to overturn statutes or other state action on constitutional grounds, but more fundamentally it has persistently avoided articulating constitutional *rights* as such.²⁷

26. VON HAYEK, *supra* note 7, at 199-214.

27. See David S. Law, *Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1547 (2009):

Since its creation in 1947, the court known in Japanese as the Saikō Saibansho has struck down only eight statutes on constitutional grounds The majority of the SCJ's rulings of unconstitutionality have, moreover, been less than momentous. Among the rare and often obscure legislative provisions that the Court has struck down are a law punishing patricide more severely than other forms of homicide, a law restricting the ability of pharmacies to operate within close physical proximity of one another, a rule limiting the liability of the postal service for the loss of registered mail, a law restricting the ability of co-owners of forest land to subdivide their property, and, most recently, a statutory provision that distinguished for purposes of citizenship eligibility between illegitimate children of Japanese fathers who acknowledged paternity prior to birth and those whose fathers acknowledged paternity only subsequent to birth (footnote omitted).

In the Western liberal tradition, “balancing tests” and sliding scales of “scrutiny” aside, rights have a supra-political, non-negotiable, absolute quality. By contrast, in Japanese constitutional jurisprudence, rights are typically conceived from the start in relative terms.

The long line of Japanese electoral district apportionment cases illustrates the point. Migration from rural to urban areas has created sharp disparities, in favor of the rural areas, between population and the number of seats assigned to Japanese electoral districts for both houses of the Diet. Since the 1960s, voters from underrepresented urban districts have brought constitutional challenges to malapportionment under Article 14, the Japanese equivalent of the equal protection clause.

The U.S. Supreme Court had no difficulty finding an effectively absolute right to “one man-one vote” in the Equal Protection Clause: “The Equal Protection Clause requires that a State make an honest and good faith to construct districts, in both houses of its legislature, as nearly of equal population as possible.”²⁸ Based on this clear principle U.S. courts have flatly invalidated all but very minor (i.e., one or two percentage points) and temporary deviations from the one man-one vote ideal. The constitutional requirement is simple and does not demand extended contemplation: “equal” means “equal.”

The Japanese Supreme Court, on the other hand, has struggled mightily, by means of vague, evolving and relativistic doctrines, to prevent a one man-one vote *right* from coming into existence. Initially, in the 1960’s, the Supreme Court invoked something resembling the “political question” doctrine and declared that apportionment was categorically within the discretion of the Diet.²⁹ However, in the 1970s, as the degree of disparity between rural and urban districts widened, the Court reassessed its earlier position and stated that disparities could

28. Reynolds v. Sims, 377 U.S. 533 (1964).

29. Saikō Saibansho [Sup. Ct.] Feb. 5, 1964, no. 18 Saikō Saibansho Minji Hanreishū [Minshū] 270 (Japan).

indeed violate Article 14 if they were overly “extreme.”³⁰ The Court suggested that, depending on whether the upper house or lower house were involved, a discrepancy in voting power of somewhere between 3:1 and 6:1 would be “extreme” and therefore unconstitutional. At the same time the Court said that it did not have the power to overturn the results of past elections, meaning the newly recognized constitutional right (i.e., one man-at least 1/6 to 1/3 of a full vote) effectively lacked a remedy. The Supreme Court has inconclusively meandered on the apportionment problem to the present day.

The Court’s handling of the apportionment problem illustrates the Japanese proclivity to blur and render relative what we would view as categorical. The “political question” doctrine, which the Court initially invoked to avoid resolving the apportionment problem, is itself categorical: a defined category of legislative action (e.g., apportionment of electoral districts) either is or is not subject to second-guessing by the judiciary. The “one man-one vote” principle is also categorical: there is no middle ground, either votes are equal or they are not. The Japanese Supreme Court, however, treats both as matters of degree somehow to be traded off against one another:

The equality of the value of votes should be understood to be achieved in harmony with other policy goals and grounds such as the uniqueness of the Upper House which Parliament may legitimately take into consideration. Therefore, insofar as a specific decision of Parliament is justifiable as a reasonable exercise of its discretionary power, even if the equality of the value of the vote is affected by this, it is not unconstitutional.³¹

One strongly suspects that the Japanese courts, from the beginning, treated the apportionment problem not as a straight

30. Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, Showa 79 (gyo-tsu) no. 75, 30 Saikō Saibansho Minji Hanreishū [Minshū] 223, <http://www.courts.go.jp> (Japan).

31. Saikō Saibansho [Sup. Ct.], Oct. 17, 2012, Heisei 23 (gyo-tsu) no. 51, 66 Saikō Saibansho Minji Hanreishū [Minshū] 10, <http://www.courts.go.jp> (Japan).

constitutional question but as a political one, to be solved incrementally, with the Court itself serving as one of the parties sitting at a larger table of interests. One also senses the Supreme Court (reflecting the man in the street) was not overly concerned about preserving the categorical principle of individual equality underlying (and logically requiring) one man-one vote. The issue was instead viewed in terms of group interests: urban vs. rural districts, the ruling Liberal Democratic Party (“LDP”) (the prime beneficiary of skewed representation in favor of rural districts) vs. the left-leaning political parties supported by urban constituencies. The Supreme Court’s apportionment cases are models of muddy jurisprudence and strategic vagueness that have had the effect of nudging the LDP over time to reapportion electoral seats in a way that has kept discrepancies in voting power from becoming too outrageous. In Japan, constitutional adjudication often looks and feels a lot like more like ad hoc conciliation than a principled determination of rights and wrongs on the merits.

The Japanese Supreme Court’s Establishment Clause cases evince the same tendency to treat rights as floating targets that move relative to political context. The Japanese Supreme Court essentially imported the already vague “purpose and effect” test of *Lemon v. Kurtzman*³² from the United States and proceeded to apply an even vaguer version on an ad hoc basis to a variety of factual situations in which the government or its representatives were arguably promoting religion.³³ The decisions, individually and collectively, fail to articulate any convincing or consistent standard. The absence of a standard, in turn, facilitates an implicit balancing of interests by the court in a way that usually

32. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (Holding that a U.S. law must have a legitimate secular purpose - and must not have the primary effect of either advancing or inhibiting religion or of fostering an excessive entanglement of government and religion - in order to be a constitutionally permissible law under the Establishment Clause of the First Amendment to the U.S. Constitution).

33. Saikō Saibansho [Sup. Ct], July 13, 1977, (gyo-tsu) No. 69, 31-34 Saikō Saibansho Minji Hanreishū [Minshū] 533, <http://www.courts.go.jp> (Japan).

produces a cautious ratification of the government's action.³⁴ The Court's refusal to articulate a standard allows it to finesse an awkward reality, namely that the parties to the lawsuits (like most Japanese) are apathetic about religion and religious issues as such and are merely using the Establishment Clause (lifted as-is from the U.S. Constitution and imposed on Japan by the Occupation) to score political points.

In many cases, issues that would, outside of Japan, be fraught with constitutional significance are resolved entirely out of court through negotiation and consensus among affected interest groups. Take pornography. Obviously, defining pornography is a slippery topic, and the boundaries are inherently murky, not just in Japan but universally. In Japan, the boundary has been defined not in the way we would expect under a conventional Rule of Law regime—by the legislature or by the Supreme Court—but in a series of negotiations between the police and the publishing industry. In 1991, on the occasion of the publication of a collection of nude photographs of Kanako Higuchi under the title “Water Fruit,” the police and the publishing industry reached an informal accord that female pubic hair, but not more, would be the working dividing line.³⁵ As such, the pubic hair standard is not particularly vague. But it does not constitute a formal legal right; the police are always theoretically free to revise what they will enforce. What does remain vague is how far beyond that line one could go and still be protected under Article 21 of the Constitution. It is hard to imagine a Japanese Larry Flynt pushing the constitutional envelope by daring the authorities to

34. For a review of the Japanese Establishment Clause cases see Brent T. White, *Re-Examining Separation: The Construction of Separation of Religion and State in Post-War Japan*, 22 UCLA PAC BASIN L.J. 29 (2004).

35. SATOSHI MISHIMA, SEI HYOGEN NO KEIJI KISEI-AMERIKA GASSHUKOKU NI OKERU KISEI NO REKISHITEKI KOUSATSU (The Criminal Regulation of Sexual Expression—A Consideration of the Historical Background of Regulation in America) 183-84 (2007). An account of the proceedings is reported in the September 19, 1993 *Sandai Mainichi* magazine.

arrest and prosecute him. It is not the Japanese way and would not turn out well.³⁶

In a separate realm, the relationship between regulatory agencies of the government and the subjects of regulation is delineated by a combination of fuzzy rules, on the one hand, and painfully detailed but hard-to-understand regulations, on the other, that encourage the regulated to consult with the authorities on an ongoing basis. The regulated ignore unsolicited “administrative guidance” at their own risk, for the authorities have multiple means of recourse and influence beyond the official sanctions contained in statutes and published regulations.³⁷ The regulated are in a “long term” relationship

36. It is true that the dividing line between obscenity and “mere” indecency is universally difficult to draw and the US Supreme Court has struggled over the years to define the precise dividing line. The significant difference between the US and Japanese approaches to pornography is not in the dividing line itself, but in the nature of the larger doctrinal framework and methodology. In the US, the constitutionality of regulating obscenity is part of an overarching doctrine that divides the universe of expression into “core” protected areas and others, including obscenity, that are accorded a lower level of protection. Regulation of “core” speech must pass a series of interrelated hurdles, e.g. that the regulation serve a “compelling” state interest, that it be “content neutral,” neither “over” nor “under-inclusive;” and that it be “narrowly tailored” to achieve the asserted state interest. The US Supreme Court, despite the inherent murkiness of the dividing line, has tried the articulate standards that are as precise as the material will allow: “The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). The Supreme Court has also addressed issues such as whether the relevant standard should be a national or local one, and the separation of powers consequences were the Court to abdicate its role as arbiter of what constitutes obscenity. By comparison, the larger framework of First Amendment doctrine in Japan is starkly primitive. Further, the specific issue of pornography has been resolved wholly outside the courts without the benefit of any doctrinal analysis.

37. The *Lions Sekiyuu* incident, in which the Ministry of International Trade and Industry (MITI) used “administrative guidance” to shut down otherwise legal imports of cheap imported petro-fuels by a maverick importer

with their regulators, with debits and credits, favors given and received, misdeeds punished and overlooked, totaled up and reckoned over the years. The practice of *amakudari*, sinecures for post-retirement government officials in private companies, further blurs the line between the roles and interests of regulators and the regulated. Uncertainty over rules and boundaries encourages companies in regulated industries to maintain formal and informal industry associations through which they exchange information and otherwise obtain the benefit of safety in numbers – a practical arrangement which often appears far more important than actual compliance with the law. Relying on the law and lawyers to navigate the regulatory thicket is a futile enterprise. It is no accident that the Japanese equivalent of the Washington-style “regulatory lawyer” has never developed, except perhaps to serve foreign businesses unable to play the game by the local rules. More often than not, the foreigners discover that their Japanese regulatory lawyers cannot give reliable advice without first placing a telephone call or making a visit to the agency in question (i.e., what is paramount is not so much what the law itself actually states, but rather what the regulator states).

In this humid regulatory environment, consistency in the application of rules takes a backseat to ongoing interest group accommodation. Take pachinko. Gambling is illegal in Japan (subject to specifically legislated exceptions such as the national lottery and government-operated race tracks).³⁸ Pachinko enjoys no legislative exemption, but in fact about 12,000 pachinko parlors are openly and notoriously in operation in Japan, seeming to indicate that pachinko is legal. Pachinko is *de facto* legal—but not so legal that the Financial Services Agency will allow pachinko operators to issue securities in the Japanese market (based merely on unwritten policy). You will have a hard time obtaining a legal opinion from a reputable law firm vouching

are emblematic of the extra-legal nature of “administrative guidance.” See Nihon Keizai Shimbun, December 31, 1984; Nikkei Sangyo Shimbun, January 11, 1985.

38. KEIHŌ [KEIHŌ] [PEN C.] art. 185-187 (Japan).

that it is legal. Pachinko's legality depends on a flimsy legal fiction that requires the steel balls to be traded for trinkets in the parlor itself, and the trinkets to be traded for cash at a separate window in the dark alley behind the parlor. The fiction is that it's not "illegal gambling" because nothing of economic value is being given in the parlor itself, but only in the dark alley behind the parlor. The fiction is not written officially anywhere, does not constitute a formal legal right of any kind; it is simply an understanding between the police and the pachinko industry, just like the understanding between the police and the publishing industry on pubic hair. The fact that former policemen typically own and operate the back alley cash windows, and the pachinko industry's historical connections with the domestic Korean community and the underworld, are additional factors in the accommodation that has formed organically over the years. Like much else, pachinko's legality is a matter of degree.

Western casino companies eager to introduce Las Vegas-style casino to Japan have sometimes naively asked whether the same legal fiction that makes pachinko possible could be applied it in a broader and more general way. What if we limited prizes in casinos to plastic poker chips that could be traded for cash at a separate window in the back alley? If the fiction works for pachinko, it should work for roulette and black jack as well, right? Answer: No. There is no legally satisfying reason for this answer. As a matter of fact and practice it is very clear the police will shut down a casino even if it employs the same fiction used in the pachinko industry. The casino industry has not yet cut its deal with the police or other institutions and interests with a say in the matter.

The quasi-legal status of pachinko echoes the accommodation Japan has made with organized crime. The paradoxical legal status of the yakuza is enshrined in the Organized Crime Countermeasures Law³⁹, enacted in 1991, which requires criminal organizations that are engaged in specified illegal acts

39. Bōryokudan-in ni yoru Futō na Kōi no Bōshi Tō ni kansuru Hōritsu [Law to Prevent Illegal Activities by Members of Criminal Organizations], Law No. 77 of 1991 (Japan).

of violence and intimidation formally to register with the authorities. The law has the perverse effect of formally recognizing, almost licensing, organized criminal organizations which, by the very act of registering, admit they are chronically guilty of violent crimes while being allowed to continue in existence. The authorities have never tried to shut down organized crime, the shadow of which touches large areas of everyday economic and social life. At best the authorities try to keep organized crime “under control,” within “reasonable bounds” by means of episodic crackdowns. Organized crime thrives where the official legal system is weak, and people need “private enforcement” of promises and “private protection” of physical security that the official system is failing to provide. Is organized crime in Japan legal? Like pachinko, it is a matter of degree.

The related prosecutions of Yoshiaki Murakami (for insider trading) and Takafumi Horie (for securities fraud) in 2007 illustrate in yet another context the elevation of vague consensus over a more explicit, “disembedded” application of articulated rules. Japanese prosecutors arrested and prosecuted Murakami and Horie in order to nip in the bud American-style corporate raiding techniques that the two threatened to introduce in Japan. The Japanese corporate establishment collectively panicked at the prospect of hostile takeovers by foreign funds and domestic upstarts like Murakami and Horie, which in turn set in motion a counter-reaction within all three branches of the government to “do something” to shut down the threat.⁴⁰

The Murakami and Horie prosecutions were the result, not of an independent prosecutorial decision to go after wrong-doers for specific criminal infractions that were clear and serious in and of themselves, but a collective decision to send a message for perceived reasons of policy. One imagines a series of

40. For a detailed account of the background to the Murakami and Horie prosecutions see Stephen Givens, *Looking Through the Wrong End of the Telescope: The Japanese Response to Steel Partners, Murakami and Horie*, 88 WASH. U. L. REV. 1571 (2011).

meetings and conversations between and among bureaucrats and company executives in the period 2005 – 2007 in and around Kasumigaseki in which the implicit conclusion is reached that “Horie and Murakami are bad people and bad for the country.” This consensus led, in one direction, to informal cooperation between the bureaucracy and courts to send a green light to the corporate establishment to adopt defensive “poison pills,” despite the fact that the technical legal basis for poison pills under Japanese law was dubious and remains so today.

On the prosecutorial front, lost in the shuffle and haste was a reasoned analysis of what was offensively criminal about the defendants actual conduct or who had actually been harmed. Unable to find any basis to indict Horie for his attempt to acquire the shares of Nippon Broadcasting, the activity that most upset the corporate establishment, the prosecutors dug further back in history and indicted him for misleading accounting in the financial statements of his company, Livedoor. Without going into details here, the accounting transgression was highly technical in nature and one that had been blessed by Livedoor’s accounting firm. It is difficult to avoid the impression that the prosecutors, intent on putting Horie out of business, kept digging until they found something.

Murakami inadvertently tripped over the insider trading statute when he encouraged Horie to launch a hostile bid against Nippon Broadcasting, got a positive response from Horie, and continued trading Nippon Broadcasting stock after he had a pretty good idea Horie was going to initiate a tender offer: the insider trading statute prohibits trading by a person who has knowledge that a third party is about to launch a tender offer bid (“TOB”). Murakami’s trading may have violated the literal words of the statute, but anyone who understood the actual business context could see that no one was harmed by Murakami’s trading. Nippon Broadcasting’s stock had already been pushed up by Murakami’s own highly public accumulation of a large stake in the company and the common knowledge that someone—Nippon Broadcasting’s majority owner Fuji Television being a likely candidate—was likely to launch a takeover bid any day.

Like the legality of pachinko, pornography and organized crime, the criminal guilt of Murakami and Horie was also a matter of degree. Murakami and Horie may arguably have been guilty of technical violations of the criminal statutes under which they were charged, but those infractions were convenient pretexts, and not the real reason they were indicted and put out of business.

The Japanese aversion to settling conflicts on the legal merits, as opposed to a foggier give-and-take among the interests seated at the table, often works the other way and keeps the state from taking action clearly within its legal authority. Take the government's weak and indecisive efforts to acquire the land to build Narita International Airport. The government reluctantly invoked its powers of eminent domain⁴¹ only after years of inconclusive negotiation with local farmers, and promptly foreswore ever again to exercise eminent domain in Narita when formal eminent domain proceedings led to further local protest. The authorities' hesitation to remove encroachments on public property and other forms of public nuisances - encampments of the homeless in public parks, or of anti-nuclear activists in Kasumigaseki; loudspeaker trucks, illegal parking, real estate and escort service ads plastered on telephone poles - arises from the same mentality: wherever possible, conflicts should be resolved not by invocation of rights and rules but face-to-face, case-by-case, give-and-take among the parties in interest. This works reasonably well when the parties in interest are "good" people receptive to unwritten social expectations. One of the side effects, however, is to give disproportionate power to recalcitrant minorities, hold-outs, gangsters and other "bad" people less driven by the good opinion of others.

41. Article 29, paragraph 3 of the Japanese Constitution provides: "Private property may be taken for public use upon just compensation therefor." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 29, para. 2 (Japan).

B. Vagueness in the Realm of Contract and other Private Rights

The Japanese tendency to subordinate formal rights to the practical calculus of “human relationships” naturally and seamlessly extends to private transactions and conflicts. Takeyoshi Kawashima, Japan’s best-known scholar of Japanese “legal consciousness,” illustrates the point with a story about a farmer who agrees to set aside some potatoes for a resident of a neighboring village.⁴² When the “promisee” arrives to buy the potatoes, the farmer sadly informs him that he has sold the potatoes to someone from his own village who needed them more. In the farmer’s mind this is a more than sufficient justification for his “breach of contract,” because his moral obligations to members of his own village trump the “contract rights” of a relative outsider. Kawashima goes on to explain this outcome in sociological terms that are consistent with my earlier evocation of Japan as a non-Axial civilization. The Western concept of contract, he explains, reflecting the universalistic tendencies of Western thinking in general, assumes that autonomous and equal individuals, disconnected from their social status and relationship, are the parties to a contract. In the Western mind, contracts and contract rights are an “all or nothing” matter; contract rights either exist, or don’t, and if they exist are enforced in accordance with their terms. In Japan, on the other hand, contract rights are not viewed in isolation as absolute and fixed, but are viewed in relative terms against a larger context of multiple interests, relationships and circumstances. This sociological interpretation of Japanese contract rights is commonplace and uncontroversial within the Japanese academic community.

The Japanese prefer their contracts short and vague.⁴³ To a Westerner the whole point of a contract is to “lock in” a set of

42. NIHONJIN NO HO ISHIKI, *supra* note 10, at 296-297.

43. Mark Ramseyer and Minoru Nakazato take seeming exception to this banal assertion: “Their contracts are not necessarily vague. Neither are they necessarily short.” They go on to argue that if Japanese commercial contracts

outcomes against future risks and contingencies, to define up front who bears the cost and burden when things go wrong down the line. This concept of contract is antithetical to Japanese instincts. The Japanese strongly prefer to postpone the question of who bears the burden, and to resolve the question through “consultation” and “good faith negotiation” if and when the future contingency actually occurs. Vagueness hard-wired into contracts dilutes vested rights and throws the parties back to the evolving context of their relationships. This works well enough when the contract parties are tied into long term relationships and share a common world-view, as is almost always the case when the contract parties are both Japanese. It works out less reliably when one of the contract parties is foreign and therefore less susceptible to the full range of extra-contractual moral and commercial pressures and obligations (i.e., *giri*) that help determine the outcome of these “consultations.” Requiring a foundation of pre-existing trust between the parties before engaging in a transaction beneficially reduces the need to rely on contracts; the unfortunate corollary for Japanese businesses in a global economy is that making trust a precondition to entering into a transaction radically limits the universe of available transaction parties, essentially to other like-minded Japanese businesses.⁴⁴

are indeed shorter, it is because the Japanese judicial system is more professional than its counterpart in the US and therefore more predictable; not because Japanese companies tend to work things out in the context of long term relationships. Their use of the word “necessarily” and the follow-up explanation of why Japanese commercial contracts are shorter and vaguer (as to which I will not comment here) seem to concede the point however. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 61 (1999).

44. See HEARN, *supra* note 3, at 392-2:

Thus, in every direction, the individual finds himself confronted by the despotism of collective opinion: it is impossible for him to act with safety except as one unit a combination. The first kind of pressure deprives him of moral freedom, exacting unlimited obedience to orders; the second kind of pressure denies him the right to use his best faculties in the best way for his own advantage (that is to say, denies him the right of free competition); the third kind of pressure

Japanese civil litigation behavior has been at the center of the effort by Western (mainly American) legal scholars to debunk cultural explanations of the Japanese legal system, and so warrants careful attention. I will address continuing reaction within the small world of foreign scholars of Japanese law against anthropology and history in favor of “institutional” explanations for Japanese behavior in the final section of this essay. For the time being, I will briefly describe how vagueness operates in the context of Japanese civil litigation.

Litigation is where law hits the pavement (or plows into a telephone pole). As I have argued, Japanese law itself is vague, in the sense that rights and rules tend to be defined in a fuzzy, relativistic way. Because judicial decisions are low in volume (reflecting low litigation volume) and typically short on explicit legal reasoning, a reading of the relevant statutes and case law will not generate enough information cleanly to resolve the legal positions of parties in the context of a given set of litigation facts. In many fact-specific cases (and most cases are highly fact-dependent) Japanese law is “gray.” Of course, the law is “gray” outside of Japan as well; lawyers and litigation exist precisely because of the “gray” areas. The scale and granularity of the gray areas, and how they are argued and resolved, however, are very different across jurisdictions.

Here is a real world example: A component supplied by an insured manufacturer under a standard General Liability Policy is incorporated into a larger piece of equipment manufactured by

compels him, in directing the actions of others, to follow tradition, to forbear innovations, to avoid making any changes, however beneficial, which do not find willing acceptance on the part of his inferiors. These are the social conditions, which, under normal circumstances, make for stability, for conservation; and they represent the will of the dead. They are inevitable to a militant state; they make the strength of that state; they render facile the creation and maintenance of formidable armies. But they are not conditions favorable to success in the future international competition,—in the industrial struggle for existence against societies incomparably more plastic, and of higher mental energy.

the insured's customer. The component malfunctions and has to be replaced. It is feasible to repair and replace the component, but cheaper simply to scrap the larger piece of equipment (including the bad component) and start from scratch. Issue: The General Liability Policy excludes coverage of damage to the insured's "own equipment"—i.e., loss of or damage to the bad component itself is not covered. Damage to the larger equipment can be avoided simply by replacing the bad component. However, replacement is uneconomic. In these circumstances, does the insurance policy cover the component manufacturer for the value of scrapped equipment if the equipment manufacturer (reasonably) decides to scrap and not replace? Does it make a difference if the component cannot be replaced without physically damaging the equipment to which it is attached? Does it make any difference whether scrapping is only slightly cheaper than replacement, as opposed to a lot cheaper?

Researching this interesting issue under American law using Westlaw or Lexis generates literally dozens if not hundreds of cases interpreting and applying the relevant provisions of the standard General Liability Policy over many decades in all manner of factual contexts, based on parsing of the relevant policy language, prior precedent and various public policy considerations. There are analogous cases involving defective window sashes and air conditioning systems incorporated into larger structures that cannot be repaired and replaced without in some way damaging the larger structure. There are other cases involving packets of rancid peanut butter incorporated into a cardboard kit of peanut butter cookie ingredients (the bad peanut butter packets could be replaced by opening and destroying the box), almond butter containing wood chips (that could theoretically be removed by painstaking use of tweezers). Beyond the sheer mass and density of precedent, the fabric and meta-rules of "legal reasoning" in the judicial opinions evinces a Western, or at least Anglo-American, "legal consciousness." Precedent is applied to the facts in a deliberate, explicit and conscious way. Judges give reasons, make logical distinctions, reconcile tensions and contradictions, refer to underlying policies, deliver conclusions and dissenting opinions, and so on,

in a manner that traces its roots back to Socrates and the thinking habits and style inculcated in law school.

By contrast, researching the same question under Japanese law produces virtually no helpful precedent. It is not just that precedents are few. More critically, the Japanese precedents do not contain articulated principles and concepts that help orient one's thinking on the issue at hand. The precedents reveal which side won but are otherwise intellectually void. Precedent is referred to only in rare cases. Reasoning is bland and conclusory. Dissents are rare. The same holds true across all areas of law, including constitutional law. Judicial opinions are the core texts of American legal education because they embody the essence of our traditions of thinking about legal issues. Casebooks of Japanese judicial opinions, on the other hand, are little used in Japanese legal education and take a back seat to dry academic articles and books by university professors in shaping legal doctrine. Japanese judicial opinions are simply not intellectually dynamic, crisp or substantive enough either to serve as educational texts or as reliable guides for structuring the issues in actual cases. These intellectual differences are deep-seated and reappear across multiple disciplines, not just the way judicial opinions are written but just as much in the way newspaper editorials, speeches on the floor of the legislature and scholarly articles are constructed.

Unlike U.S. courts, Japanese courts almost never cite, describe, distinguish, etc., other cases. In the U.S. you expect a court facing a case where the precedents don't give a clear answer to go through the precedents, describe what was at stake, summarize the reasons the earlier courts gave, etc. This is the methodology of the common law. Japanese courts do consult precedents but they don't tell the reader which ones they consulted, what the cases said or how the cases logically or otherwise affected the reasoning and outcome of the case at hand. The fact that Japanese courts don't have to put their cards on the table by citing specific precedent means that in practice they are free to ignore precedent and frequently do, as they are practically unconstrained by the historical legal connections that link one case to another.

The line of cases on the so-called “Japanese poison pill” culminating in the Bulldog Sauce case are illustrative. Prior to 2005, Japanese case law held consistently that a company could not issue stock or stock rights if the “primary purpose” was to thwart a takeover. This case law stood in the way of the poison pill. In 2005 Livedoor made a hostile bid for Nippon Broadcasting Service (“NBS”). To block the bid, NBS issued a slug of warrants to its affiliate, Fuji Television. The Tokyo High Court ruled that the issuance of warrants was invalid because its “primary purpose” was to block a hostile bid, but then went on to add detailed (and gratuitous) dicta that established four new detailed categories of “abusive acquirers” which it would be OK to try to block using warrants. Where these four new categories came from, or what they had to do with the disposition of the case, were never explained. Then, in 2007, Bulldog Sauce shareholders voted to cause the company to issue warrants, the effect of which was coercively to cash out Steel Partners as a shareholder. The Tokyo District Court, ignoring both the old “primary purpose” cases as well as the Livedoor-NBS “abusive acquirer” categories, created yet another rule, to the effect that if a large number of shareholders approve an issuance of warrants against a specific bidder, the approval is presumptive evidence that the bidder was somehow “abusive” and deserved to have his bid blocked. The Tokyo High Court, on appeal, then went in a completely different direction and redefined “abusive acquirer” to mean any profit-motivated financial investor that was not in the same business as the target company. The Supreme Court ended up with a position that was similar to, but again somewhat distinct from, the District Court. In none of the cases is there a specific discussion of what the relevant precedents are or of what the lower courts actually say. The whole process is a kind of legal shadow boxing that leads to results that are pulled out of a black box.

These large differences in judicial style, at the same time, do not mean that one system generates results that are markedly more “predictable” or even more “rational” or “scientific” than those generated by the other. In a homogeneous intellectual culture like Japan’s, members of the Japanese legal community

will be guided by an unwritten collective common sense that accurately anticipates litigation outcomes (and their predictions will be far more accurate than, for example, those of professional investment managers, applying sophisticated models, who so often underperform the dartboard method of picking stocks). Therefore, the difference is not one of outcome or predictability, but of methodology and consistency. The Japanese methodology is vaguer, less dependent on an articulation of rights, rules and precedents, and guided by what clearly appears to be a different definition of “consistency.” The Japanese judicial process (and therefore the litigation process) recapitulates and is an extension of the tentative and incremental adjustment of interests and relationships among those seated around the table that is such a central feature of Japanese life.

As I will argue in the final section, one very predictable feature of Japanese litigation is that it will be drawn out, impose multiple pressures on the parties to split their differences out of court, and ultimately, should the parties ignore those pressures, award the plaintiff economic relief that is disappointingly modest by American standards. This combination of disincentives to litigate both reflects and reinforces the underlying reality of a culture that is reluctant to resolve disputes in the crystalline language of rights, rules, precedents and principles.

As my last exhibit of vagueness in the realm of private law I offer the communitarian “stakeholder-centric” vision of the corporation propounded by Japanese courts. When addressing corporate law issues such as the validity of “poison pills” and other techniques to impede unwanted takeovers, Japanese courts have responded with an intellectually incoherent philosophy that pays lip service to the objective of maximizing “corporate value” on behalf of shareholders at the same time it imposes a countervailing “corporate responsibility” to serve and balance the interests of multiple constituents or stakeholders: employees, suppliers, customers as well as the surrounding community. The Tokyo High Court’s 2007 Bulldog Sauce decision is the most poignant recent judicial statement of this typically Japanese tendency to blur boundaries and split logically irreconcilable propositions down the middle:

A corporation is in theory an organization with the goal of maximizing corporate value for distribution to shareholders, but at the same time a corporation cannot insist on the goal of profit alone. It has a social existence, it embraces employees within it, and has external relationships with suppliers and customers through which it gains profits. Profits must be seen in the context of these other relationships with employees, customers, suppliers and the surrounding community, i.e. the corporation's stakeholders. It is not possible to view corporate value simply in terms of the corporation's own profits. Steel Partners has no interest in participating in Bulldog Sauce's management and is only interested in getting profits from increases in stock price. As such it is an abusive acquirer. Its aim is to get a majority of the company's shares, control it, and use control as a means of making a profit for itself. It has no perspective on the good management of the company and thereby in fact reduces the corporation's corporate value and reduces the economic wellbeing of other shareholders. It is wholly reasonable to discriminate against an abusive acquirer such as this. When there is a threat of this kind, a company is wholly justified in taking defensive measures.⁴⁵

As writers in the "law and economics" school have pointed out, logically speaking, a corporation's *raison d'être* either is to maximize shareholder value, or it is not.⁴⁶ Establishing shareholder value as the overriding objective management is required to pursue creates a clear standard that, if one believes the market works well in general and in the long run, should naturally and automatically maximize collective economic interests. Conversely, telling management that they must maximize both shareholder value and that of other stakeholders creates an equation that cannot be simultaneously solved and is hopelessly confusing. If nothing else, shareholder value is a clear and logically coherent standard that also happens to embody the most fundamental values of market-oriented liberalism. Beyond

45. Tokyo Koto Saibansho [Tokyo High Ct.] July 9, 2007, 1806 Shoji Homu 40, 47 (Japan).

46. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW*, 35 – 39 (1991).

its simplicity and clarity, it embraces a vision of shareholders and other market participants as competing atoms that, in the dynamic process of mutual collision, unconsciously optimize collective welfare.

By contrast, the Japanese “stakeholder” value theory of the corporation reflected in the Bulldog Sauce decision fogs over the inherent irreconcilability of two standards, one of which commands management to serve one master and the other of which commands it to serve multiple masters. As we have seen, blurring the edges in this (unprincipled) way is a recurrent feature of Japanese legal thinking. Old fashioned Japanese give-and-take among the parties seated at the table by its nature requires the participants not to think too hard about logical consistency. The Bulldog Sauce decision poignantly captures this characteristic intellectual fog in the prototypical Japanese context of reconciling multiple interests in the old fashioned Japanese way. When corporate management in America is faced with a decision to shut down an unprofitable factory or resist an unwanted takeover, the standard on which they make their decision is reasonably clear. In Japan, on the other hand, the law gives no direction other than to invite the parties to come together and commence sincere discussions.

III. CULTURAL AND INSTITUTIONAL APPROACHES TO JAPANESE LAW REVISITED

John Haley’s 1978 article “The Myth of the Reluctant Litigant” started a movement in the small world of Western scholars of Japanese law that rejects as “myth” the claim by Japanese scholars, led by Kawashima, that Japanese have a distinct “legal consciousness” based on Japan’s culture and history. In particular, Haley and his successors have dismissed as “myth” the claim that the Japanese are somehow innately less eager to resort to court than citizens of other countries. The fact that the number of civil lawsuits per capita is significantly smaller in Japan of course cannot be denied—the question is “Why?”

Haley's original explanation for the lower litigation rate was "institutional" obstacles, primarily too few lawyers and judges and other impediments such as the requirement that plaintiffs post expensive bonds as a precondition of filing certain kinds of suits.⁴⁷ More recent institutional explanations by Western legal scholars, led by Mark Ramseyer, have focused on the predictability of Japanese litigation outcomes in relatively routinized areas such as traffic accident law; if potential litigants know with reasonable certainty the probable outcome of litigation in advance, the argument goes, they will tend to settle out of court without going through an expensive lawsuit.⁴⁸

Both of these analyses broadly imply that, people being people, if the institutional obstacles could somehow be magically removed and the Japanese litigation system looked more like the U.S. system, Japanese would sue each other with the same frequency and eagerness as Americans. So, the implicit logic goes, if there were only more lawyers and judges, or if Japanese judges delivered judgments and damages awards that were less predictable, then Japanese litigation rates would naturally rise to U.S. levels. Note the universalistic "people are people" values and assumptions that are quietly embedded here. Note also the typically Axial attitudes in the urge to expose received wisdom as "myth."

The dichotomy posited between "cultural" and "institutional" factors seems obtuse and one-dimensional to me: the two are necessarily deeply interdependent and interactive. Institutions reflect culture, in some sense *are* culture. Haley and Ramseyer are both of course correct that institutional obstacles to litigation do exist in Japan, many of which they in fact overlook. One important institutional factor is an effective cap on damages. What is predictable is that there will never be any multimillion dollar judgments for cases involving asbestos, nuclear radiation,

47. HALEY, *supra* note 4. Haley's argument is further elaborated in *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX*, 83 (1991).

48. J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates* (Draft of November 7, 2010), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf.

toxic shock syndrome, tobacco, securities class actions, treble damage and punitive damages, and other potential jackpots for plaintiffs and their lawyers. What is also predictable is that litigation will take time, and can be stretched out for many years by foot-dragging defendants.⁴⁹ This is not the result of an undersupply of judges and lawyers, but the time-honored practice of the courts. The famous Minamata case is a fitting emblem of “time” as a major “institutional” barrier not mentioned by Haley and Ramseyer: a case in which 2,955 people contracted Minamata disease (mercury poisoning), and 1,784 died, as a result of the dumping of mercury into Minamata Bay by Chisso Corporation; the ultimate outcome of this case, 22 years after the lawsuit was commenced, was a total award of roughly two million U.S. dollars against Chisso Corporation and \$700,000 against the Japanese government.

Yet other litigation contexts reveal additional “institutional” obstacles that frustrate plaintiffs and dampen the incentive to initiate a lawsuit. Take divorce. The divorcing couple must first submit to compulsory (but non-binding) conciliation for six months or more before filing suit. This is a welcome opportunity for a recalcitrant defendant to buy time. A plaintiff seeking economic relief in the form of a division of property, alimony or child support is stymied by a lack of compulsory discovery rules

49. Mark Ramseyer points out that the arithmetic means of civil damages awards and lengths of civil trials are comparable in Japan and the U.S. A critical difference, however, as Ramseyer himself points out, is the absence of “jackpot” awards in Japan that create incentives on the part of plaintiffs and their lawyers to litigate. In addition, comparing the length of civil trials in the two jurisdictions is to compare apples and oranges. In the U.S., the actual trial takes place in a single continuous proceeding that can take from a few hours to a few weeks. What determines the length of the proceeding is (1) the intensity of pre-trial motions and discovery and (2) the degree of congestion in the court that determines when the actual trial can be scheduled, a matter over which the litigants have no control. In Japan, the trial takes place in one or two hour sessions that take place monthly over many months. Unlike the practice in the U.S., Japanese litigation parties and the judge all have a large degree of control over the length of the trial. Typically judges are reluctant to settle a case on the merits and will keep scheduling monthly trial sessions until the parties come to a negotiated settlement.

and related enforcement mechanisms that make it easy for the defendant to hide assets and avoid penalty if caught cheating. Even after a court orders a division of property, alimony or child support, the court has limited power to compel the defendant to pay up. There are no criminal deadbeat father statutes as in the U.S. Courts are reluctant to get involved in child custody issues at all, with the result that actual physical custody of a child is tantamount to legal custody. Child visitation orders can be freely ignored without fear of sanctions. The end result of weak courts and modest monetary awards is much the same as in the case of vague contracts: knowledge that the parties (and especially the plaintiff) are unlikely to get satisfaction in court leads to negotiated out of court resolutions of divorces, at modest amounts, in an overwhelming percentage of cases. Further upstream, the weakness of the legal system encourages prospective marriage partners (and their families) to protect themselves by performing due diligence, and obtaining reliable references and other assurances of trustworthiness and creditworthiness before registering their marriages, which in turn presumably results in less divorce-prone marriages downstream.

The list of “institutional obstacles” multiplies as one explores other areas of litigation. The artificiality of disentangling these “institutional barriers” from underlying “culture” becomes clear as one starts imagining what the Japanese litigation landscape would look like if the “institutional barriers” were dismantled and replaced with American counterparts—discovery, the jury system, contempt of court sanctions with real teeth, joint child custody, punitive damages, etc. Quite simply, Japan would no longer be Japan. The notion that “but for” the specified “institutional barriers” Japanese would be merrily litigating away just like Americans overlooks the fact that the “institutional barriers” did not arise out of thin air but are themselves reflections and products of an underlying culture. The multiple and complex embodiments of culture - including “institutional barriers”- are all one ball of wax that cannot be selectively untangled.

Obviously, culture is not static and institutions change. Following the publication of “The Myth of the Reluctant

Litigant” in 1978 Japan lowered two “institutional barriers” cited by Haley by substantially increasing the number of Japanese lawyers and reducing or eliminating the requirement of litigation bonds in shareholder derivative actions. As a result of a large new supply of lawyers in recent years, it is true that litigation rates have slightly increased—but not nearly in proportion to the increase in the lawyer population. The elimination of expensive bond requirements for shareholder derivative suits resulted in a slight and temporary increase in derivative actions, but the volume of such litigation is still miniscule by U.S. standards. Law itself is an “institution.” Under the U.S. post-War Occupation, the Japanese were force fed a constitution, a company code, a securities code and an antitrust statute - all of which were essentially carbon copies of U.S. equivalents. The way in which Japan actually applied those laws to life as it is lived, during the 60 years that followed, is starkly different from the way in which those laws are applied in the U.S.

America also bestowed baseball on Japan. The rules are the same in both countries, but the way baseball is played, including field tactics and strategy, fan behavior in the stands, etc., are all strikingly different.⁵⁰ Among other things, there is no booing in

50. The reductionist tendency of the “institutional” approach reveals itself in Ramseyer and Nakazato’s paper aiming to debunk the “myth” that Japanese and American baseball are different games: “Our dataset offers a test of [Robert] Whiting’s hypothesis, and it suggests he is wrong: Japanese owners bid for players offering the same attributes American owners want. Owners must attract fans to the stadiums, buyers to the merchandise retailers, and viewers to the television broadcasts. Toward that end, they will bid for the players want to see (though fans in turn seem not to bid enough for tickets and merchandise to let the teams break even). Japanese owners may pay substantially lower salaries than American owners, but -- as a comparison of regressions indicates -- they pay for the same qualities. Apparently, Japanese and American fans prize the same game.” Ramseyer and Nakazato point out the obvious correlation in both countries between a player’s statistics and salary: the higher the batting average, the higher the salary. To jump from that obvious correlation to the conclusion that game is played the same in both countries (or more mincingly, “Japanese and American fans prize the same game”) will strike most knowledgeable baseball fans as risible. Minoru Nakazato & J. Mark Ramseyer, *Bonuses and Biases in Japanese Baseball* (Discussion Paper June 2007) available at http://www.law.harvard.edu/programs/olin_center/papers/

Japan, no spitting on the field, and no brush back pitches. The differences are consistent with the underlying differences in culture.

The notion that “people are people” and that given the same institutional environment they will behave in the same way, of course, reflects typical Axial sensibilities that underlie individualism, Christianity and universalism. I can only speculate, but I sense a missionary spirit in the search for an “institutional” explanation of Japanese behavior. If only the “powers that be” would reform the external institutional environment, the thinking seems to be, the Japanese would be liberated to become more like us - more litigious, more egalitarian, more independent, more free-thinking. It simply cannot be that they are “naturally” less litigious, egalitarian, independent and free thinking than we are. The same spirit infuses the “End of History” school of thought: if only democracy and capitalism can be exported to the great unwashed regions of the world, peace and prosperity will bloom.⁵¹ The “End of History” viewpoint has suffered somewhat in recent years as it has crashed against reality in the Middle East and other uncooperative regions of the world. Culture is stubborn.

The institutional explanation of Japanese behavior offers an additional protective benefit to scholars working in highly politicized, race and gender-sensitive American universities. It is entirely consistent with the radical “people are people” idea that dominates the curriculum, admissions, recruitment and promotion policies of the academic establishment. Explaining Japanese behavior as unexceptional using statistical regression analysis offers a “scientifically” bullet-proof defense against charges of racism. As the reaction to the original presentation that evolved into this essay revealed to me, suggestions that

pdf/Ramseyer_et%20al_589.pdf.

51. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE END OF MAN* (1991) (arguing that liberal democracy may constitute the “end point of mankind’s ideological evolution” and “the final form of human government” and as such may constitute “the end of history”).

“people are different” now seem to verge on heresy within U.S. academic establishments outside of Japan.

The dismissal of culture in explaining Japanese law seems to me an ironic side effect of Axial ideological battles being fought outside of Japan. The fact that it is unconvincing to the Japanese themselves should raise the level of skepticism: who are these foreigners to tell the Japanese that their senses deceive them? I also wonder whether the foreign advocates of “people are people” are themselves convinced: Why are we foreigners fascinated by Japan if not because at every turn it offers us glimpses of ancient ways of thinking and feeling that have disappeared elsewhere?