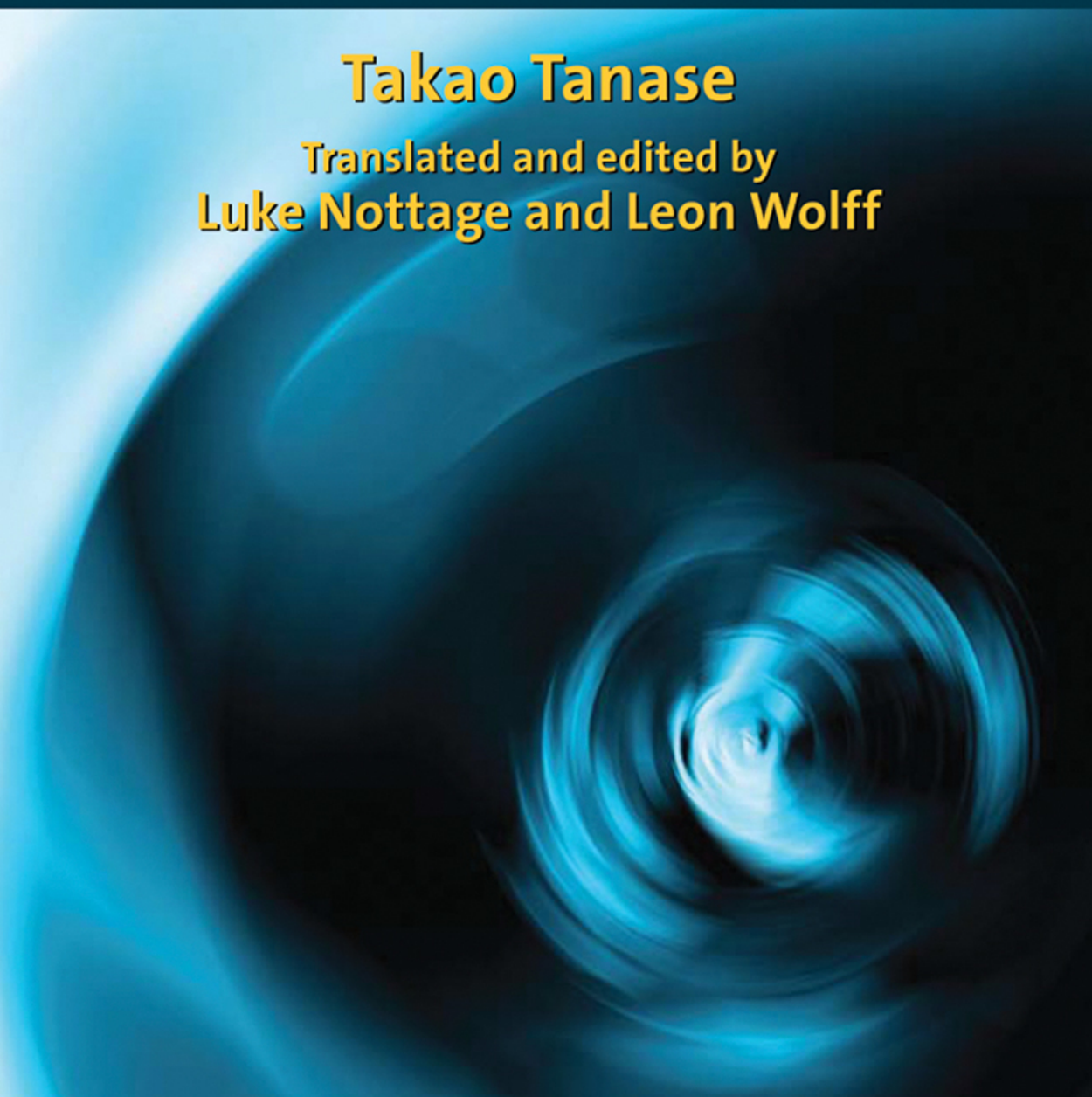
COMMUNITY AND THE LAW

A CRITICAL REASSESSMENT OF AMERICAN LIBERALISM AND JAPANESE MODERNITY

Takao Tanase

Translated and edited by
Luke Nottage and Leon Wolff



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A Critical Reassessment of American Liberalism and Japanese Modernity

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Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2009937883

ISBN 978 1 84844 785 1

Typeset by Cambrian Typesetters, Camberley, Surrey
Printed and bound by MPG Books Group, UK

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Translators' preface: the legal sociology of Takao Tanase

Takao Tanase is one of Japan's most respected and influential socio-legal thinkers (Feldman, 2007, p. 57). From an academic career spanning more than 40 years, including a three-decade stretch at the University of Kyoto from 1977–2007, Takao Tanase bestows a prodigious body of work: 17 authored, edited or translated books, and dozens of major journal articles and book chapters. This book collects together seven of his landmark essays. Originally published in Japanese in prestigious law journals or as book chapters published by leading publishing houses between 1990 and 2002, these essays appear for the first time in English translation. They provide an insight into the diverse range and imaginative scope of Tanase's legal sociology.

Until now, only a fraction of Tanase's work has been available in English. Even so, he has laid down several challenges to orthodox understandings about the role of law in Japanese society.[1] For example, his analysis of the extra-judicial management of high-volume traffic accident cases emphasised that non-litigiousness is a function of control by political and legal actors rather than a direct artefact of culture (Tanase, 1990). A decade later, his post-modern re-reading of Japanese legal history caused him to question whether transplanted legal codes will inexorably lead to the modernisation of Japanese society (Tanase, 2001). His empirical study of popular attitudes to the judicial reform process then revealed a paradox about the fate of a reform – enacted in 2004 and to take effect from May 2009 – to involve the citizenry in judging serious criminal trials in Japan: far from heralding the triumph of the rule of law, he argues that its success hinges on Japanese people remaining sceptical about the promise of universal law (Tanase, 2004). And his reflections on the history of Japanese law undermine confident predictions that law will propel China towards a modern market and political democracy (Tanase, 2006). These observations are important and profound. They underscore his global reputation as a leading authority on Japanese law and society.

[1] For a succinct introduction to Japanese legal history and key legal institutions, see Abe and Nottage (2006), updated at www.asianlii.org/jp/other/JPLRes/2008/1. html

The suite of essays in *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity*, however, go further, uncovering the full ambition of Tanase's legal sociology. As the title of the book reveals, Tanase extends his gaze beyond Japan. Indeed, only one-third of the book is directly concerned with Japanese law and society. The first third of the book is a searing critique of the ideology of liberalism in American law. The second third constructs a communitarian theory that can replace liberalism as a more suitable and progressive platform for balancing the needs of social cohesion with social justice for individuals and groups. The final third then re-evaluates assumptions about the 'triumph' of liberal law and modernity in Japan.

Tanase blends the 'perspective of the comparativist' with the 'vision of a bold theorist' in these essays (Scheiber, 2005, p. 2). As a comparativist, Tanase reflects broadly on law and society in both Japan and the United States. (Elsewhere, he has extended his analysis for example to China: Tanase, 2006.) Tanase canvasses a wide range of legal and social issues, such as legal ethics (Chapter 2), torts (Chapter 3), family law (Chapter 4), human rights (Chapter 5) and constitutionalism (Chapter 6). As a theorist, he applies these reflections to forge new understandings about broader socio-legal themes encompassing litigiousness (Chapter 8), modernity and modernisation (Chapter 7), and – most centrally – legal communitarianism (all chapters).

Tanase's methodology and mode of analysis are a refreshing departure from an increasingly positivist tendency in socio-legal studies of Japan. Adopting instead a 'hermeneutic, interpretive' strategy (Tanase, 2001, p. 187), he builds theoretical ideas from a careful re-reading of stories and data, identifying the values and ideologies that underpin the way law and society intersect. To be sure, his essays also draw on other approaches, such as the comparative doctrinal review of child visitations law in the US and Japan (Chapter 4), quantitative analysis of aggregate litigation data (Chapter 8) and the critical literature review of the scholarship of the renowned legal sociologist, Takeyoshi Kawashima (Chapter 7). Yet it is Tanase's interpretivist methodology that provides this book with an important and original voice.

As Tanase himself explains in his introductory essay (Chapter 1), the book addresses three main issues. The first is a critical re-examination of the liberal tradition of law in the United States. To what extent does liberal law represent the pinnacle of legal achievement, the so-called 'end of history' of law (compare Fukuyama, 1992; Nottage and Wolff, 2005)? Part II of the book (Chapters 2–4) is sceptical of legal liberalism's claims to superiority. Tanase deconstructs the underlying values of the liberal tradition of law and the unhealthy grip they often hold on cohesive social relationships. Tanase is prepared to acknowledge that liberal law can have (sometimes unintended) positive effects, building new communities out of fractured relationships

(Chapter 4). But mostly, he argues, it divorces people from their embedded community relationships (Chapter 2).

The second issue is whether there is a conception of law that can serve as a viable alternative to liberal law. Part III of the book (Chapters 5–6) is therefore an effort to build a universal theory of legal comunitarianism, drawing on the author's experiences with – and observations of – Japanese law. Tanase canvasses the broader literature on communitarianism to develop his own model that can serve as a progressive basis for upholding social cohesion while respecting the individual rights of disadvantaged persons and groups.

The third issue is whether Japan's legal history exemplifies the triumph of legal liberalism or the importance of communal relations. Part IV of this book therefore examines Japanese legal history, post-war litigation statistics and the theory of Kawashima, who popularised the notion that Japan will fail to modernise unless it fully embraces the rule of law. Tanase, who was his last *deshi* (senior graduate student) at the University of Tokyo, points out that Kawashima himself began to have doubts about this modernisation thesis. Tanase concludes that a communitarian theory of law provides a more nuanced explanation of how law and society interlace with one another, in Japan and beyond.

In this book, therefore, Tanase poses a direct challenge to much mainstream law and society scholarship by explicitly rejecting positivist and instrumental accounts of law. This is a major break, especially from existing work on Japanese law and society. Over the past 30 years or more, Japanese and foreign scholars alike have developed a range of theories explaining the relevance of law in Japan. Two of the more divergent answers derive from rational choice theory and anthropological or other studies of Japanese culture. Rational choice theorists argue that law matters because Japanese bargain, assert rights and otherwise behave rationally in light of legal parameters of incentives, penalties and predictable outcomes (for example, Ramseyer and Nakazato, 1999). Culturalists (Kawashima, 1963; Haley, 1998; Feldman, 2006) emphasise norms such as group harmony, preserving relationships, shame, face and a preference for ambiguity to explain why the Japanese 'do not like law' (Noda, 1976, p. 160). A group of younger scholars – Milhaupt (2002) and West (2006), in particular – rely on neo-institutional theory to come up with a more nuanced analysis: institutions and social capital shape the way Japanese respond to law.

Despite the diversity of views, these competing theoretical perspectives seem to be unified by a largely uni-directional vision of law. Both rational choice theorists and neo-institutionalists, for example, see law as an independent variable, determining Japanese legal behaviour. Culturalists, by contrast, see law as the dependent variable, determined by Japanese norms and attitudes. Both accounts, in short, tend to assume that 'law' and 'society' are fixed fields that exist in a linear relationship with another.

Tanase, however, does not. Instead, like a growing number of legal sociologists worldwide (for example, Garth and Sarat, 1998), he perceives a more constitutive, interactive relationship between law and social relationships. In Japan, according to Tanase, law plays a 'decentred' role.

> Since its reception during the Meiji period, law in Japan has enlightened society and separated people from their embedded communitarian contexts to become modern, free individuals… [But, at the same time,] law draws on an innate set of mechanisms that sustain order in a communally constructed society (Chapter 1).

For Tanase, law is neither marginal nor central – but, rather, displaced.

For this reason, Tanase criticises assumptions about 'Americanisation' and the triumph of liberal law in Japan (Kelemen & Sibbitt, 2002). Japan was never an 'empty vessel' that has passively consumed liberal law; rather, it is a breathing, living society that has adopted and adapted the law to meet its unique needs and experiences (Tanase, 2001). Nor is it inexorable that the introduction of Western law has propelled or will propel Japan on a path towards modernity (Chapter 7). Instead, as his quantitative study of litigation statistics reveals, the formal invocation of law to resolve contested disputes in Japan remains at fairly consistently low levels for the entire post-war period (Chapter 8; compare Ginsburg and Hoetker, 2006).

Nor should this be a cause for concern. Rather, it is a matter of some relief. For Tanase, the liberal tradition in law, especially as observed in the United States, is a threat to healthy social relationships. He is particularly critical of the way legal liberalism construes individuals as atomistic and abstract, rather than as real people embedded in broader community relationships. In some cases, such as in client-centred advocacy (Chapter 2), liberalism reinforces party estrangement and portends the inexorable destruction – rather than the possible repair – of fractured relationships. In other cases, however, such as the law on post-divorce visitations, liberalism can have unintended positive effects, building new and healthy family relationships out of those that have broken down (Chapter 4).

Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity is not only a wide-ranging and challenging thesis; it is also timely. The global financial crisis of 2008–2009, for example, has forced a re-think of American-style liberalism and its approach to conceptualising and ordering law, society and the economy. The 'third wave' of domestic law reform currently underway in Japan is also ripe for re-assessment. Will it fulfil its purpose of modernising Japan along Western lines (Foote, 2008)? And should it?

Acknowledgements

In 2005, the Boalt School of Law at the University of California, Berkeley, hosted a Sho Sato Conference to honour Tanase. Early versions of this book's chapters were shared with American socio-legal scholars, critical cultural theorists and Japanese law experts. This was the first time a wider sample of Tanase's legal sociology was made available, to much acclaim, to the English-speaking research community.[1] By making this work available to the wider English-speaking community of socio-legal researchers, this book directly confronts one of the persistent problems afflicting socio-legal studies today. Despite the globalised academic market, the language barrier continues to prevent many researchers from accessing the ideas of non-English-speaking researchers such as Tanase. Not only does this hinder the free exchange of ideas, but it also traps socio-legal research into generalising from a narrow data-set of Anglo-American common law or European continental law traditions. Socio-legal research suffers, concludes Tamanaha (2001, p. vii), precisely because it fails to capture the experiences of non-Western systems.

Although a translated and edited collection, Tanase remained very much in command. He selected the essays for inclusion; updated the chapters in light of new legal developments (especially Chapter 4); reviewed the draft translations; and prepared an introductory chapter to frame the unifying themes and concerns, specifically for this volume (Chapter 1). As translators and editors, we aimed to preserve Tanase's voice as faithfully as possible. As translators, we eschewed literal translation: we liberally re-cast sentences and re-ordered paragraphs to give full effect to the Tanase thesis. As editors, we were more circumspect. Due to space limitations, we omitted essays we would have otherwise included; kept discursive footnotes to a necessary minimum (especially in Chapters 2, 4 and 6); and edited out some contextual comments not essential to the overall argument (such as the recent reforms to Japan's judicial system, a backdrop to Chapter 8). But apart from this, we let Tanase speak on his own terms.

We translated the chapters from the following original sources, in which Tanase retains copyright:

[1] See the various responses to the draft translations available at www.law.berkeley.edu/2016.htm, further contextualised in Nottage (2006).

- Chapter 2. 'Invoking Law as Narrative: Lawyers' Ethics and the Discourse of Law in the United States' is a translation of Takao Tanase (1995), 'Katari to shite no Ho Enyo: Ho no Monogatari to Bengoshi Rinri', *Minshoho Zasshi* , **111** (4-5/ 6), 677/865.
- Chapter 3. 'The Moral Foundations of Tort Liability', is a translation of Takao Tanase (1994), 'Fuhokoisekinin no Dotokuteki Kiso' in Takao Tanase (ed.), *Gendai no Fuhokoiho*, Tokyo: Yuhikaku, p. 3.
- Chapter 4. 'Post-Divorce Child Visitations and Parental Rights: Insights from Comparative Legal Cultures' is a translation of Takao Tanase (1990), 'Rikongo no Mensetsu Kosho to Oya no Kenri: Hikakuho Bunkateki Kosatsu', *Hanrei Taimuzu*, **712/713**), 4/14.
- Chapter 5. 'Rights and Community' is a translation of Takao Tanase (1997), 'Kenri to Kyodotai', *Horitsu Jiho*, **69**, 7.
- Chapter 6. 'Communitarianism and Constitutional Interpretation' is a translation of Takao Tanase (2002), 'Kyodotairon to Kenpo Kaishaku', *Jurisuto*, **1222/1227**, 11/138.
- Chapter 7. 'Japanese Modernity Revisited: A Critique of the Theory and Practice of Kawashima's Sociology of Law' is a translation of Takao Tanase (1993), 'Kindai no Rinen to Yuragi: Kawashima Hoshakaigaku no Riron to Jissen', *Horitsu Jiho*, **65**, 26.
- Chapter 8. 'The Empty Space of the Modern in Japanese Law Discourse' is a translation of Takao Tanase (2001), 'Soshoriyo to Kindaika Kasetsu' in Yoshimitsu Aoyama et al. (eds) *Minjisoshoho Riron no Aratana Kochiku*, Tokyo: Yuhikaku, p. 287.

Above and in the Bibliography we did not translate titles of works in Japanese, nor do we indicate long vowel sounds with macrons or the like. Those who can read Japanese do not need this information; nor, really, do those who cannot!

Last, but certainly not least, we are grateful to the many colleagues who provided us with important feedback and encouragement in our project. First and foremost, we thank Tanase himself, not only for providing us with an opportunity to present his work to a wider audience but also for guiding us so patiently when this project stretched beyond its original timeframe. Second, we thank the participants of the 2005 Sho Sato Conference who shared their critical reactions to draft versions of these chapters. We especially thank Professor Harry Scheiber, who coordinated the conference, for inviting us to participate not simply as translators but also as scholars in our own right. Third, we extend our gratitude to a number of supportive colleagues who form part of the still-young – but fast-growing – Australian Network for Japanese Law (ANJeL): Kent Anderson, Meryll Dean, Tom Ginsburg, Souichirou Kozuka, Makoto Ibusuki, Hitoshi Nasu, Veronica Taylor and Melanie Trezise.

Finally, we tip our hats off to Wan Sang Lung for his excellent services again as a research and editorial assistant.

Luke Nottage and Leon Wolff
April, Year of the Ox (2009)

PART I

Introduction

1. Introduction – community and the law: a critical reassessment of American liberalism and Japanese modernity

This book analyses Japan's legal order from a communitarian perspective. The analysis, however, is not restricted to Japan. Indeed, a central concern of this book is to direct the critical gaze of legal sociology to issues confronting *all* liberal legal orders in comparison to the Japanese context – not least, modern society in the United States. Although each of the chapters in this volume presents distinct arguments and may be read in any order without detracting from an understanding of the book's themes, this Introduction collects together the elements of communitarianism and sketches its broad theoretical features.

Many in Japan have misgivings about communitarianism. The suspicion is that it cloaks a reactionary attempt to revive the old ways. In part, this wariness is attributable to Japan's unique experience with modernisation. Despite the adoption of Western law and the establishment of a modern nation-state during the Meiji period, traditional social practices have continued to thrive and obstruct the reception of law in Japan. Thus, the debate on communitarianism has been shaped by hegemonic narratives disclaiming the traditional order and proclaiming a law-based society. The legal profession, with its privileged access to the law, and the bureaucracy, with its top-down approach to modernisation, have been particularly instrumental in internalising this discourse in Japan.

At the same time, those in positions of power have resisted embedding law in society. Japanese history shows that the nation's ruling elite, responsible for placing Japan on the path of modernisation, commanded significant authority in society. It sought to dislodge the hateful shackles of law and to govern by invoking the power of patriarchy inherent in the traditional social order. In the aftermath of World War II, law became central to the State's agenda of dismantling these power structures and democratising society. Some progressives, lawyers and legal academics insist, however, that these pre-War structures of power remain largely in place.

Today, a liberal order is gradually taking root in Japan, and society is largely embracing this development. The Japanese are resistant to calls to resurrect community. Even if that is a good idea, in principle, they are largely

pessimistic that sufficient social and cultural resources exist to restore community. Past attitudes towards law, such as a dislike for litigation and a reluctance to assert rights, have a weakened hold on the current generation of Japanese.

1. TOWARDS A LEGAL SOCIOLOGY OF COMMUNITARIANISM

Given the political dynamics surrounding the reception of law in Japan and the general population's contemporary attitudes towards law, why then bring up the idea of community? I argue that law draws on an innate set of mechanisms that sustain order in a communally constructed society. This observation certainly furnishes an appropriate description of the Japanese legal order. Since its reception during the Meiji period, law in Japan has enlightened society and separated people from their embedded communitarian contexts to become modern, free individuals. But the march of law towards full realisation of this ideal has not been inexorable; it has encountered resistance from society along the way. From a legal perspective, this might suggest reluctant compromise; but from the functional perspective of society, the regulatory reach of law is infiltrating society and transforming the social order. Society is reconfiguring itself in the context of changes wrought by modernisation.

Japan compellingly illustrates these competing dynamics of the compromise/realisation of law and resistance/reconfiguration of society, having overlaid its traditional order with incongruent foreign laws. But the same phenomenon is equally apparent in contemporary Western societies. Indeed, communitarianism itself first gained its intellectual foothold in the United States. As a political tool, communitarianism was attractive: it could counteract the liberal assertion of rights and resurrect the family and local communities as the lynchpins of social unity. However, as a social theory, it was no rebuke to liberalism. Since law has completely penetrated every aspect of modern American life and constitutional protection has broadened to cover diverse individuals with disparate lifestyles, communitarianism – if anything – was little more than a call to build a new society. The United States has struggled to differentiate law from society because, ever since her founding days, America has accorded central importance to law in social life and enjoyed a strong tradition of liberalism. However, since the enactment of the Civil Rights Act in the latter part of the twentieth century, the feminist movement and rights activists in the disabled, gay and lesbian communities have widened law's ambit for protecting individual rights and thereby exposed friction between society and the traditional order. Just like Japan's experience with inheriting law, this activism is precipitating the dual dynamic of resistance and reconfiguration as American society embraces an expanded role for

law. There are several possible standpoints we may take on specific issues, and I am not intending to advance any particular one. As a legal sociologist, my task in this collection of essays is to analyse and report on the dynamics that interlace law and society.

Of course, my argument takes society to be a coherent unit of analysis, much like law itself, which, in turn, assumes that society is self-contained and cohesive. I readily concede this. This is why, in Part III of this book, I clearly set out my stance on how communitarianism functions in a diverse society. Nevertheless, given that law largely operates within the bounds of society and that society is constituted by principles essentially unlike those making up law, law must negotiate and accommodate society whenever it is invoked. To dismiss this and believe in the enduring triumphalism of legal principles is to succumb to the ideology of law as the ultimate truth – or, in the context of Japan's reception of law, to believe that modernisation is largely attributable to law 'from above'. Pragmatically, the discipline of legal sociology has concerned itself with the preconditions for the realisation of law by investigating those social factors that resist the reception of law or problematising the insufficiency of legal resources. In Japan, especially during the post-War phase of legal enlightenment, legal sociology was directed to explaining modernisation by law. It depicted Western-style rule of law as the ideal and painted Japanese society as a backwater for failing to embrace such law.

Yet legal sociology, a discipline devoted to observing how law functions in society, can potentially free us from this ideological grip of law. To be sure, Weberian jurisprudence on the historical development of societies and legal anthropological studies of law in tribal societies have also proved useful in expanding our intellectual outlook and in telling us about the possible shape law may take and its relevant social context. However, such works are very rigid in how they view the historical trajectory of modern law or are unsatisfying in their observations of the intersections between law and society. It is legal sociology – with its influences in, and from, critical legal theory and modern social theory – that has placed law's inter-relationship with society on the intellectual map. The many insights of legal sociology have also informed the writing of this book. Critical studies have exemplified how modern liberal law is steeped in its own historical contingencies and profoundly enmeshed in social conflict and oppression. Since it is no longer arguable that law embodies all truth and, as such, transcends society, this opens up a number of empirical questions as to the multiple intersections between law and society.

Nevertheless, unlike much critical theory, this book does not content itself with delegitimising law's false claims to neutrality and autonomy. It delves more deeply, examining the legal sociology of how, for example, law's attributes operate as legal ideology in constructing relations between lawyers and clients. Such observations provide specific insights into questions of how law

comes into conflict with society's constitutive principles – insights that are otherwise invisible in the sweeping jurisprudential debate between liberalism and communitarianism. Take, for instance, the problem of clients losing meaningful control over their disputes because their lawyers push a legalistic approach premised on the autonomy of law. The priority given to 'rights talk' in this micro-level invocation of law might lead to the conclusion that there is a lack of moral discourse, something that communitarianism would see as problematic due to the threat to social unity. However, such an analysis also sets us on the path to finding specific solutions for resurrecting dialogue in the law and connecting law and society – for example, by re-thinking professional responsibility.

That is precisely the theme in Chapter 2, 'Invoking Law as Narrative: Lawyers' Ethics and the Discourse of Law'. The chapter begins by contrasting professional responsibility provisions in Japan and the United States. Thus, article 1 of the Lawyers' Law in Japan proclaims that the mission of lawyers is 'to defend fundamental human rights and realise social justice'. By contrast, the United States takes the position that lawyers, as the 'representative of clients', should zealously assert their clients' rights in accordance with their client's instructions – a model of client-centred advocacy that is still almost unheard of in Japan.

The chapter explores how the American code of partisan lawyering derives from robust liberal ideals of protecting individual autonomy. Even so, the chapter shows that when clients retain a lawyer with a view to invoking law as an autonomous subject, they actually divest themselves of all power to reach an acceptable agreement with the other party. This is more than just a problem of powerless clients lacking the relative expertise of their lawyers. The problem lies more fundamentally with liberal discourse itself which excludes a space outside of the law for parties to engage in moral dialogue – a space where clients can set their own goals for invoking the law and agree upon a resolution of their disputes with the other side. On a more profound level, the sense of the modern – which hypothesises a clear-cut schema of subjects versus objects and postulates the essential 'otherness' of human beings – limits our conceptual frameworks and dictates the language of the law.

2. A CRITIQUE OF AMERICAN LIBERALISM

A distinctive liberal legal order underpinned by a modernist philosophy pervades contemporary society in the United States. With law penetrating all aspects of society, disputes are left to legal professionals instead of the parties, reinforcing party estrangement rather than relationship-building. Yet commu-

nity life experiences are also breeding new ideas for social life and enabling an alternative vision for society. This is due to the hermeneutical endeavour where people interpret the world around them and project new meanings about the world through their acts – which, in turn, builds new narratives into the law. Although a liberal ideology of law marginalises this endeavour, I argue we should be sensitive to it. We should commit to the possibility of constructing an inter-subjective world based on mutual understanding between clients and other parties.

This analysis of lawyers' ethics – more a critical analysis of modern American society than a direct appraisal of the Japanese legal order – appears as the first substantive chapter in this book since it most starkly highlights the overarching themes of this book: the rationale for examining law from a communitarian perspective and the methodology for doing so. Chapters 3 and 4 are similarly focused on contemporary society in the United States. Chapters 2 and 4 are more explicit in comparing the US with the Japanese case; Chapter 3, less overtly so. As a Japanese researcher, however, I always retain an intrinsically comparative perspective. This allows me to observe the US legal order and to read what American scholars say about their own society from a discreet distance and with dispassion. Yet hermeneutics tells us that we must also see the world as the Americans do if we are to understand their law. I have spent long periods of time in the United States conducting my research, and I read scholarly literature with this experience in mind. Thus, I develop a communitarian analysis not so much as a tool for analysing Japanese law. Rather, I want to take advantage of my upbringing in Japan – a society that strongly retains its communal roots – so as to envision a model of law that transcends national borders and applies universally to all contemporary societies.

I move now to explain the core arguments in each of the remaining chapters and their significance in the book's overall design. Chapter 3, 'The Moral Foundations of Tort Liability', explores the much-heralded 'crisis' in American tort law. It examines how law derives from the interaction of a liberal understanding of law, welfare state legal policy and the communitarian logic of everyday life. Torts, unlike contracts, are not planned or necessarily intended legal acts; they typically arise from largely unforeseen accidents. Yet victims pursue liability against those with whom they share a relationship, such as corporations, medical practitioners or property owners. The raison d'être for invoking law rests heavily on how the parties see themselves vis-à-vis the accident and the other party. This sets the expectations parties have of the law and, in turn, shapes the development of tort law in society.

To date, tort law debates have centred on either entrenching individualised principles of liability or minimising the transaction costs associated with spreading the financial costs of accidents. In this chapter, I refer to these two

competing conceptions of justice as 'individual justice' and 'total justice', and I explore their ramifications in the real world. 'Communitarian justice' is my alternative for plugging the gaps left by the other two conceptions of justice. Communitarian justice imagines social actors who can humanise their contextual connection with the accident and the other party. I show how this perspective has actually influenced the direction of both tort doctrine and harm restoration; and I also explore the practical implications this has for law more generally.

Chapter 4, 'Post-Divorce Child Visitations and Parental Rights: Insights from Comparative Legal Cultures', goes on to compare Japan and the US with respect to post-divorce child visitations. In the US, the courts are robust in their support of visitation petitions and visitations regularly take place across the country. In Japan, however, many non-custodial visitation petitions are turned down on the ground that it would be 'contrary to the welfare of the child'. For example, the child might be happy in her new household or otherwise might not wish to visit with the non-custodian parent. A close investigation of case law and academic commentary reveals the reasons for the divergence. Under liberal family law in the US, visitation rights fall within the rights of all parents to raise their children, and they cannot be denied unless there is a prior determination that the parent is sufficiently unsuitable to justify the deprivation of parental rights. Under Japanese family law, the court's assessment of the child's welfare always takes precedence over parents' rights. A further distinction lies in the conception of the family. Japanese family law envisions the family as a stand-alone unit and preserves the family as a self-contained entity. The US is more reductionist and extends a right to the individual to form a family. This, in turn, gives rise to questions about the constitutional protection of the right and the coordination of competing private rights.

These differences in the treatment of visitation rights reveal the pervasiveness of liberalism in the US conception of legal order. Methodologically, this chapter is interpretative in approach. Although the 'welfare of the child' and the 'best interests of the child' appear to be similar doctrinal tests, Japan and the US judge them differently and have distinct social contexts that furnish specific meanings to legal terms. Therefore, it is important to isolate what these social contexts are and, in turn, to develop a method for re-interpreting law. The general tone of this chapter is upbeat. Although liberalist law is not ideal – with divorce rates on the rise and the emergence of complex, post-divorce families – it does provide a workable framework for guiding children through the trauma of divorce. It also ensures relatively trouble-free visitations by vesting parents with the right to visit with their children. To truly satisfy the test of the welfare of the child, then, the visiting non-custodial parent must show a commitment to raising the child and must cooperate with the custodian to ensure a successful visitation. Everyday morality reaffirming the value of

the family must transform visitations into a 'supra-right' – something more than just a parental 'right'.

3. A NORMATIVE THEORY OF COMMUNITY AND THE LAW

The preceding case studies on lawyers' ethics, tort litigation and post-divorce child visitations call for building better inter-personal relationships, even in liberalist legal orders. As such, they demonstrate the need for a supra-legal, moral dialogue. Of course, individuals can engage in moral dialogue of their own accord by drawing on their own internalised sense of morality. However, primary morality resides in society and shapes both universal law as well as the social order. This is hardly a remarkable idea, but it is key to sustaining moral dialogue. Nevertheless, we must be wary of clothing society with ambiguous moral authority and fettering individual lifestyle choices. Equally, we must be critical of allowing morality to cement the status quo and suppress all critical voices. Ultimately, this becomes a question of balance. The next two chapters in this book consider how we can avoid the pitfalls of pernicious conservatism, maintain a critical posture and, at the same time, envisage a social order that is good and decent.

Chapter 5, 'Rights and Community', examines the relationship between rights and the interpretation of community. Human rights have made a significant impact on society today. They have succeeded in addressing oppression and exclusion within the prevailing social order, and have embraced groups formerly without vested rights as equal members of society. As such, human rights have had a positive influence on how the community is constructed. But is this enough? To ensure full community membership for those groups newly vested with rights and embraced by society, they need to be able to negotiate interpersonal relationships from a position of equality and to participate in collective decision-making. Yet existing theories on the legal protection of individual rights presume that people are detached from one another – that they have an inner core others cannot see and that the only way to interact is by expressing their specific intentions. The problem with this assumption is that it impoverishes the language required to negotiate relationships.

Further, critical theory on the public-private divide in liberalism observes that the 'private' – where the concern of liberalism is with individual liberty – is, in fact, a refuge for deep-rooted oppression and discrimination, and that this should be made 'public' and subject to regulation by law. The object is to expand the range of human rights. However, even if we draw a fresh line between the private and the public, discrimination may still infiltrate the private – a space law tends to ignore – and the pattern of segregation and

exclusion will repeat itself. To avoid this vicious cycle and envision a truly egalitarian community, the 'private' must be more than just private; it must be where individuals can internalise public principles. The 'public', too, must be more than a system of norms that sets out the boundaries between private realms. It must be a place which nourishes the sensitivity to intuit that exclusion and discrimination are unjust – a sensitivity that inspires efforts to redraw the distinction between the private and the public. Chapter 4, however, is more than just a searching critique of how liberalism seeks to secure individual liberty by drawing fine lines between the public and the private. Communitarianism posits the needs for a third space – the 'community' – in which the 'public' and the 'private' collapse into and co-exist with one another.

Chapter 6, 'Communitarianism and Constitutional Interpretation' carries these themes one step further. A communitarian perspective informed by critical theory's insights into the limits of liberalism is necessary to uproot oppression and discrimination in society, and to build a less repressive and more equal society. The chapter analyses the link between law and community, and examines in particular the constitutional protection of human rights. The argument here is two-pronged: first, community grounds the law; and, secondly, law constructs community.

The first prong – that community grounds the law – may appear self-contradictory given that law is generally supposed to guarantee individual liberty. Community, as it is conventionally understood, shackles individuals to community standards. In Japan, modernisation was meant to have installed law in society to supplant all-pervasive traditional community attitudes. Yet legal interpretation invariably draws on general attitudes and commonly held values in society. Society appears to collect together the views of its members and publicly determine what law should apply, independently of the State. Of course, judges may push their own view as to the correct interpretation of the law, even if it goes against prevailing attitudes in society. As such, society does not always generate the law. However, law is only 'law' once it functions in society, and the acceptability of law in society crucially turns on whether it so functions as the law.

When a law-imparting society is considered as speaking with a single voice, then a community comes into existence. Yet the reality is that society is torn by inner conflict. We may imagine multiple communities depending on how we untangle the different voices. A 'conservative' community is unconcerned with intra-society conflict and holds that society's voice can be located in the will of the majority. By contrast, a 'liberal' community regards competing values as unavoidable due to the inherent separability of individuals, and finds the single, law-imparting voice in a liberal law in which there is universal consent for preserving one's personal freedom. A 'republican' community believes that the common good is discoverable through deliberation.

However, this book employs critical theory to reveal society as a 'structuralist' community. In such a society, true conflict does not lie in the superficial clash of values or political discord, but in deeply embedded structural conflicts. In a structuralist community, the search is for community that can speak with a single voice about eradicating such conflicts. Various hegemonic discourses may subdue and purge structural conflicts from the surface of society, but they never really disappear. When the oppressed rise up in defiance, or less coherently complain about their plight, structural tensions percolating under the surface re-emerge. Others then hear about their struggle or grievances, and solidarity builds in society to overcome such structural oppression. This transition – from repression to resistance, to sympathy and then to liberation – portends a non-oppressive, egalitarian community. A structuralist community is where such a desirable end-goal is well within the people's imaginative grasp.

The latter part of Chapter 5 observes the processes of constructing such a community through the interpretation of law. It takes as a case study the right to self-determination. This liberal right preserves the competency of the individual to enjoy self-determination without any interference from the State, and, as such, appears innately incompatible with the idea of community. Indeed, the debate in the US over whether the right to privacy protects women's reproductive rights raises the very issue of whether society may impose its moral agenda on women and restrict women's right to self-determination. However, social existence presupposes that people are connected to one another and that the self is the subject of others' concern. Intervention and support are pre-requisites for autonomy. People can achieve autonomy only when their neighbours can build an environment that makes autonomy possible. Self-determination, then, is more than simply setting the parameters of individual freedom. Although self-determination implies people refrain from imposing their own moral judgments on what others might do, formal respect for individuality is not enough. A deeper, more multicultural respect for self-identity is required.

Liberty – that which individuals use and which the State guarantees through law – is insufficient to build meaningful social relations. We need a multi-layered society that can extend support to all sorts of individuals. Community allows us to view society as a site of human interaction. My argument is that law can be conscious of and produce such a community in the everyday practice of legal interpretation.

4. A RE-EVALUATION OF JAPANESE MODERNITY

The first two-thirds of this book set out the core of my communitarian theory;

the remaining chapters focus on the question of the modernisation of Japanese law. Two processes – not necessarily equally present throughout each stage in Japanese history, but certainly co-existing – have informed law's development in Japan. The first is 'modernisation': the transformation of Japan into a modern society by the adoption of Western law. The second is 'structuration': the assimilation of law into the organising principles of Japanese society, that is, the reproduction of deep-rooted structures in Japanese society irrespective of the passage of history. Communitarianism is relevant to this discussion. As Japan experienced the reception of law and its enlightenment of society, much talk centred on the glaring incompatibility between Western liberal law and Japan's pre-law communitarian order. But my analysis of Japan's reception of law shows that communitarian principles did not so much conflict with Western law. Instead, they actually supplemented the limits inherent within liberal law, thereby generating the peculiarities of law in Japan.

Chapter 7, 'Japanese Modernity Revisited: A Critique of the Theory and Practice of Kawashima's Sociology of Law', is the first to take up this theme. The chapter examines the powerfully influential work of Takeyoshi Kawashima, who saw law's potential for enlightening post-war Japanese society. Kawashima highlighted the strongly individualistic liberalism inherent in the modern law that Japan was borrowing from the West. Historically, during the rise of capitalism in the West, this law created free individuals liberated from the shackles of status-based systems and made market transactions the new norm. However, Kawashima also noted that individuals in Japan were strongly bound to village communities – the outcome of Japan's distinctive rice-farming practices – and that prevailing Japanese attitudes were in sharp contrast to the individualism of law. This, Kawashima pointed out, would obstruct law's penetration in society. The 'legal consciousness' of the Japanese, according to Kawashima, comprised long-standing traditional Japanese attitudes, cultivated in farming communities and antithetical to law, which would continue to imbue people's moral sensitivities despite the advent of industrialisation and urbanisation in the modern era.

This dialectic between the modernity ideal and traditional Japanese society contrasts two types of societies: one that is constituted by law, and another that rejects law as alien. Practically speaking, law's enlightenment of society would guide Japan from the former to the latter. Yet once Japan had effected democratic reforms and revived the economy, society itself no longer needed the enlightenment of law – or, more precisely, the people no longer felt the need for law. But this does not suggest, as Kawashima claimed, a return to a traditional society hostile to law. Instead, law was adopted and adapted in a Japanese way, and this law then served as the foundation for an industrialised society.

Of course, a deep divide separates Japan and the West in terms of how far law has penetrated society. This has continued to drive criticism of Japanese

society, and the project to enlighten society through law remains firmly on foot. Discursively, the notion that Japan is 'not yet modern' – that Japan has failed to embed law in society, despite ostensibly borrowing Western law and acquiring economic superpower status – continues to powerfully shape the way Japanese have viewed their society over the post-war period. This paradoxical understanding of modernity is universally shared among societies that have attempted to modernise by borrowing and adopting Western law. This might be the curse of Orientalism; but since a copy can never be more than the original, there is an endless cycle of adoption and adaptation of the copied by the copier.

The book concludes with Chapter 8, 'Litigation in Japan and the Modernisation Thesis', an empirical analysis of litigation in Japanese society over the 50 years since World War II. This chapter demonstrates how modernisation and structuration – the two competing vectors related to the reception of law – played themselves out over this period. When Kawashima published his work on legal consciousness and the project to enlighten society through law was in high gear, the post-war economy was in recovery and litigation rates were on the rise. However, when Japan shifted to an era of high economic growth, litigation rates stalled and even trended downwards. This continued for 35 years until the bursting of the 'bubble economy' in 1991. Japan was held out as an industrialised society that does not 'use' law. The legal consciousness of the Japanese was repeatedly called into question due to the discernible difference between how 'modern' Japan was when measured by rate of industrialisation compared to how 'modern' she was in terms of extent of engagement with law.

However, a multi-parametric analysis reveals that Japanese consciousness and behaviour did change over this period – and irrevocably so. This is also evident with litigation behaviour. When we disentangle what has and has not changed, we can see that law has been assimilated by Japanese society on its own terms and has developed into something quintessentially Japanese. When we use the benchmark of the extent to which Japan has adopted modern Western law, we fail to see this process. Some may argue that this is evidence of the adaptation of universal Western law by autochthonous Japanese culture. Instead, the Japanese experience with the reception of Western law shows how society restores what is unilaterally excised by modern law.

Such is the universal of law: law must function within the confines of society. This ties in with the book's larger theme of interpreting Japanese legal order from a communitarian perspective. The critique in the first part of the book – targeting the liberal legal order in contemporary US society in comparison to Japan – is therefore part of the larger project of socially contextualising modernity in Japan.

PART II

A critique of American liberalism

2. Invoking law as narrative: lawyers' ethics and the discourse of law in the United States

1. THE MORALITY OF PARTISAN LAWYERING

1.1 A Critique of Amoral Lawyering

American lawyers have come under recent fire for lacking a moral compass. Luban (1988, p. xviii), for example, charges that American lawyers 'are professionally concerned with the interests of their clients, not the interests of justice'. Certainly, the Code of Ethics of the American Bar Association (ABA, 2003, Art. 1.1) proclaims that 'a lawyer shall provide competent representation to a client'. Unlike article 1 of Japan's Lawyers Law (No. 205 of 1949) that provides that 'the mission of lawyers is to defend fundamental human rights and realise social justice', the ABA Code emphasises loyalty to the client.

Of course, the ABA Code includes express prohibitions on impeding fair trials, such as forging documents and bringing frivolous and vexatious suits (Arts 3.1–3.3). Similarly, the Japanese statute provides for client protection, such as prohibitions on self-interested dealings and duties to maintain client confidentiality. But the simple reality is that lawyers uphold their clients' rights under the law in return for a professional fee. Unsurprisingly, then, lawyers' loyalty to their clients cannot be easily prised away from their loyalty to the law. The criticism in the US – that amoral lawyering is undermining lawyers' obligations to the law – is, in effect, an allegation that these two commitments are no longer in equilibrium and that lawyers are overly focused on client service for private gain. Lawyers themselves are aware of this problem and, both in the United States and Japan (Rhode, 1981; Nelson and Trubek, 1992, pp. 1–27), are repeatedly turning to 'professional responsibility' for guidance. Is Luban's critique, then, just a variation on this theme of insisting on greater professional responsibility for lawyers?

A more penetrating analysis of the criticism about American lawyers' morality, however, reveals that its sweep is much wider than just a generic concern with lawyers balancing their respective obligations to the law and to

their clients. It targets America's highly legalised society itself. Indeed, Luban's objection is not that lawyers engage in *unlawful* behaviour, but that they take an *amoral* stance vis-à-vis the law by feigning indifference when clients seek to use the law for morally dubious ends. Luban argues that ordinary people are susceptible to moral sanction if they are complicit in immoral behaviour; lawyers, too, should not escape moral criticism if they help clients engage in immoral conduct on the pretext that they are the law's professionals. The brunt of Luban's criticism is not that lawyers who act as the client pleases do so for financial gain, but, more crucially, that the idiosyncratic division of roles in liberal society under which clients have full command over moral questions and lawyers devote themselves to being the law's professionals. This division of roles underlies liberal society's core norm of respect for client autonomy.

Yet why is the United States now concerned with moral lawyering? To answer this, we must venture beyond legal ethics and engage with liberal law itself. At the heart of Luban's critique is that law in legalised society is riddled with contradictions of a proportion never seen before. This chapter will argue that legal ethics provides a window through which we can gaze on the problems inherent in modern-day legal orders.

1.2 The Tension between Autonomy and Morals

First, let us get to the heart of the matter by exploring the moral imperative to respect individual autonomy, the subject of Luban's critique. The debate between Luban and Pepper (1986) helps crystallise the issues.

Taking on board Luban's criticisms about lawyers' disinterest in the moral consequences of their practice, Pepper defends amoral lawyering on the basis of client autonomy. Pepper argues that all individuals, as citizens, must know what the law is and, where necessary, gain access to it if they are to enjoy the rule of law. Citizens, then, need the assistance of lawyers trained in the techniques of law. If lawyers refuse assistance or prevent clients engaging the law because they are trying to invoke the law for morally unacceptable purposes, this takes away clients' full rights to avail themselves of law. What clients do after they access the law – that is, how they choose to exercise their legally sanctioned rights – is up to them. This freedom allows clients to enjoy moral autonomy. After all, morality in modern society is premised on innate individual freedom – the freedom of individuals to act according to their own moral convictions – and not simply on whether the individual's actions conform with prescribed forms of morality. Amoral lawyering prohibits lawyers from imposing their own moral concerns upon clients and upholds client autonomy by allowing the instrumental use of lawyers. Therefore, partisan loyalty to the client is, to all intents and purposes, ethically acceptable.

Client autonomy – the key to partisan lawyering – is deeply cherished in American society. The United States, many observe, has a distinct cultural tradition. Thus, American parents treat their children from an early age as individual personalities. American mediators, unlike their Japanese counterparts, respect the decisions of the parties in ADR proceedings; they do not purport to be morally superior. Similarly, mutual respect of each other's personhood – respect for other's freedom because of awareness of one's own free self – is deeply rooted in American society. According to Kawashima (1982b; see also Kashimura, 1994), such is the ideal state for civil society.

Why would Luban take issue with partisan lawyering in apparent defiance of his own society's core values? Luban rebuts Pepper's thesis by arguing that respect for autonomy does not necessarily exclude a role for moral judgment. To illustrate this point, Luban (1986, p. 639) writes: 'It is good for me to make my own decisions about whether to lie; it is bad, however, for me to lie'. This is certainly true, as far as it goes. Most would readily accept that autonomy requires individuals to accept responsibility for what they freely decide to do. But that is not the end of the matter. The next issue is whether we allow judgments of a moral nature in circumstances when moral approbation by others constrains the autonomy of the individual.

Moral approbation and individual autonomy are uneasy bedfellows. Moral approbation is a form of pressure; it compels people to act against their will. The incompatibility between deference to autonomy and moral approbation is particularly stark when, for example, people draw on conventional morality to dissuade others from asserting their rights. Yet all morality is 'conventional' insomuch as it is rooted in society, and it is impossible for people to escape the judgment of others unless they live in complete isolation. As such, there is a tension between autonomy and moral approbation. The issue then is simply where to draw the line. Pepper maintains that people should not have their legal claims morally questioned. After all, this is what it means to treat all individuals as citizens under the rule of law. By contrast, Luban (1986, pp. 641–2) argues that it is a natural state of society for people to morally judge and influence each other's decisions – and that the decision to engage the law is no exception.

We can draw an even finer line between autonomy and moral judgment. If we take autonomy seriously, then we should insist that nothing other than law should force people what to do; we should suppress the urge to pass judgment on the decisions people make. A slightly weaker version of this view says that lawyers should not morally judge their clients unless they have a pre-existing social relationship. This is because lawyers are in a position of authority and trust. Lawyers should jealously guard clients' capacity to avail themselves of the law. To not do so because the client's goals are morally unpalatable is to leave individuals hopelessly defenceless in the face of conventional morality.

Lawyers are ultimately 'others' to their clients; and even if lawyers embroil themselves in questions of morality, they cannot assume full responsibility for their clients' lives. Indeed, all this is how Pepper frames the issue of legal ethics. Pepper does not deny that, once clients gain full access to the law with the assistance of their lawyers, they must accept the consequences that invoking the law have on opponents and society at large. He even submits that lawyers should share their moral concerns, if any, with their clients about how their proposed use of the law and engage in a moral dialogue with them. Lawyers may even properly refuse cases or withdraw midway if the matter offends their deeply-held convictions. Thus, Pepper and Luban seem to be in agreement that the problem is about sensibly drawing the line between autonomy and morality.[1]

However, Luban and Pepper are, in fact, much further apart than this summary suggests and any common ground they share is, at best, superficial. This is because of Pepper's distinctive worldview about human association. Although this worldview primarily informs his ethical stance that lawyers must refrain from assessing the moral worth of a client's case in the interests of client autonomy, its influence is far more pervasive than just legal ethics. Specifically, when Pepper defends amoral lawyering by arguing that everyone should be able to access the law, he paints a worldview of formalised relationships between abstract legal persons. This is in striking contrast to the type of society Luban envisages – a human society where informal, mutual control is the norm. To be sure, Pepper's world is just an ideal type. However, the social practice of repeatedly re-iterating this worldview, and then lawyers relying on it to engage in amoral lawyering, abstracts specific, contextually rich relationships and constructs law as the transparent regulation of formal relationships between legal persons. If taken further, people will be seen to be implicitly asserting the lawfulness of their behaviour, even if they do not retain a lawyer or have a specific law in mind.[2] Others, not just lawyers, will then hesitate before interrogating the moral probity of their behaviour. This is the general ethos that allows society to endorse the version of legal ethics that Pepper favours.

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[1] In fact, there is debate as to the extent to which the ABA's provisions on ethics are devoted to partisan lawyering. Critics claim that both Luban and Pepper present caricatured and exaggerated depictions of how lawyers practise law (Schneyer, 1984).

[2] This is one example of what Habermas (1984b) refers to as a validity claim. This is when universal rules govern people's general relationships with others. Habermas drew on the arguments by Austin and Searle about how speech acts are performed by uttering expressions in accordance with certain constitutive rules. Habermas thought that an utterance is understood as meaningful if it refers to an understanding of established linguistic conventions (Nishizaka, 1988, pp. 161–81). Applied to law, people assert the lawfulness of their behaiour when their acts (utterances) make reference to the law (conventions).

This ethos relevantly sets the social conditions under which legal ethics will operate. How sharply we draw the line between the competing notions of autonomy and morality depends on how far we can presume the independence of individuals. Say we assume a society of strong-minded individuals who do not alter their beliefs, even in the face of moral censure, unless they feel convinced themselves to do so. Here, violation of autonomy does not arise as an issue. Authority-based force and social sanction exist on two different planes: the former has a decisive impact on individual autonomy whereas the latter does not even enter the picture.[3] Further, if individual autonomy accords with the general morality in society, then morality and autonomy are not in tension. *General* morality, in this context, is distinguishable from *conventional* morality in the sense I used it above to explain the tension between autonomy and morality. When the moral code of civil society under which all people are to be respected as free subjects infuses general social morality, anything that interferes with autonomy is subject to moral censure (Kawashima, 1982c, pp. 42–109). Thus, if the morality of partisan lawyering that Pepper justifies through respect for autonomy is deeply ingrained in American society, then this is principally because American society is actually comprised of autonomous individuals and vests autonomy with the imprimatur of morality. Further, when lawyers engage every day in the ethical practice of treating clients as autonomous individuals and refusing to question their substantive motives for invoking the law, they socially construct the moral basis of their practice – that is, that autonomy is commensurate with morality.

However, conflating autonomy with morality and removing any tension between them undermines the moral content of society. Baumgartner (1988, pp. 129–34) contends that moral minimalism – the relative lack of moral concern for others – is prevalent today, especially in the suburbs. People do not want to be entangled in unwanted relationships and are resigned to the fact that they cannot speak out on moral issues. As interpersonal relationships weaken and the popularly-held moral code crumbles – whether grounded in religion or conventional morality – people today no longer believe there is a firm foundation to engage in moral discourse. Such is the flipside to the reverence of autonomy – the demise of moral authority means people no longer speak in moral terms. Just as lawyers feel they cannot engage morally with their clients because they must respect their autonomy,

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[3] Nozick adopts an extreme view of autonomy, submitting that individual rights are inviolable and that the State should not re-distribute income for welfare or public services. Society is held together by the unprompted charity of individual right-holders (Wolff, 1994, pp. 19–24). Nozick's dichotomy between the compulsion of State law and spontaneous morality is not an anti-sociological conception but one, I suggest, that is an idiosyncratic marker of American society.

people feel they similarly cannot engage with their neighbours because of the loss of a widely-held moral code.

Luban criticises American legal ethics for its embrace of an extreme position on autonomy and seeks to right the balance by interposing morality. Luban's underlying concern is that as autonomy becomes the new morality, society faces a crisis by losing sight of the richness that characterises interpersonal relationships – a richness that cannot be reduced in terms of rights. Luban is not calling for greater morality in society. Rather, he is calling into question the conception of law that gives rise to the legal ethical position that client autonomy precludes lawyers from engaging in moral discourse. For Luban, lawyers should be able to draw on their moral convictions to advise clients that they should not lie (even if the law does not disallow it) or grant a reprieve to a debtor (even if the law furnishes a strict legal right to recover a debt). Not to do so, on the basis that it would illegitimately interfere with client autonomy, is to place the autonomy ideal on too high a perch.[4]

Luban's thesis requires us to see how everyday people, not jurists, view the law. It is a contextual view of law. Thus, a law may be formally valid, but bring about morally undesirable consequences if applied literally. For example, a law may authorise debt recovery as a matter of right, but common sense might tell us that recovery is harsh in the specific circumstances of the case (see, for example, Tanase, 1988, ch. 3). In practice, people tend to ask whether it is morally appropriate to act in a particular set of circumstances even if they are within their legal rights to do so.[5] Why, Luban asks, does not something similar take place within lawyer-client relationships?

Distinguishing between civil and criminal cases, Luban acknowledges the importance of strong partisan lawyering in criminal trials because of the need to equip defendants with all possible legal armory to counter the power of the procuracy. However, in civil cases, he calls for a more prominent role for moral testing given the potential harm an aggressive use of the law may cause others. This distinction between the civil and the criminal is indicative of his contextual understanding of the law (Luban, 1988, pp. 58–66). Luban goes on to argue that it is even more critical today for lawyers to subject clients' aggressive use

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[4] The relationship Luban draws between law and morality can be considered in multiple ways. One way, confronting the legacies of Legal Realism, is to regard morality as a way forward to escape the fatalism that 'law is what the judges say it is' and thereby save law from becoming an instrument of raw power (Luban, 1988, ch. 3; Luban, 1986, pp. 646–8). This approach involves interpreting the law to be what it ought to be. Another method (and the one adopted in this chapter) is to interrogate the moral propriety of law. This approach distinguishes between validity within the law and the validity of law in society, and gives moral priority to the latter.

[5] On the co-existence of the 'propriety' and the 'legality' of the law, see Tanase (1994), especially pp. 295–300).

of the law to moral scrutiny. With large corporations and people in positions of influence constituting the main customer base of lawyers, the aggressive use of law carries a real risk of harm to the other side and third parties.

By contrast, Pepper rejects testing the moral propriety of the use of law. By espousing respect for client autonomy, Pepper regards legality, not morality, as the final arbiter of determining whether clients may invoke the law. Luban targets that primacy in his critique.

Yet decrying a conception of law that fails to address the moral probity of legal action only goes so far. Luban limits himself to questions *extrinsic* to the law, namely, how morality is exerting a weakening hold on determining the merits of legal action. But he does not address questions *intrinsic* to the law, namely, why the law presumes that only clients can assess the moral propriety of their own claims as a manifestation of their own autonomy. For lawyers to engage in moral talk, we need to interrogate modernity itself – because modernity characteristically holds that morals are the private preferences of individuals and that laws are rules preventing autonomous individuals from interfering with one another. And to engage in a more wide-ranging critique of modern liberalism and its view of humanity, we need to attend to a more fundamental paradox. Under a conception of modern law, clients actually *lose* their autonomy when concerns about the suitability of engaging the law are severed from any consideration of the law. In such circumstances, clients feel that they lose effective and meaningful control of their cases, with lawyers invoking the law on their behalf. Yet, ironically, client autonomy is the core ideal justifying partisan lawyering, and trusting the client's decision to engage the law without question is the hallmark of partisan lawyering. Why, then, should inquiring into the probity of legal action harm client autonomy? Answering this question will help us get to the heart of the problems afflicting modern law and underlying partisan lawyering.

1.2.1 Alienation within the law

The private-public distinction The test of client autonomy is the extent to which the partisan claims advanced by lawyers match those that clients would have made themselves. The legal ethics of partisan lawyering are aimed at meeting the terms of this test. Thus, the ABA rules (Arts 1.2 and 1.4(b)) state that 'a lawyer shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued' and 'a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation'. These rules make it clear that clients have the ultimate authority to decide on the goals and strategies for engaging the law. As a vocal advocate of partisanship in legal ethics, Freedman (1980, pp. 69–70) acknowl-

edges that a lawyer's duty is not – as is often misunderstood – 'to achieve benefits for a client using all possible legal means', nor 'to decide what is a morally appropriate action and carry it out instead of the client'. However, he goes on to argue that a lawyer's role *is* 'to maximise a client's autonomy by providing sufficient advice for the client to be able to make wise choices'.

Despite these endorsements of client autonomy, Simon (1978) submits that there is no assurance that lawyers will pursue the same claims as their clients. This is because the private-public divide in modern liberal law excludes lawyers from any involvement in the way clients frame their objectives for using the law. Clients devise their goals in the private domain. Their goals are private, not publicly debated, and therefore inaccessible to their lawyers.

According to liberalism (compare Unger, 1975), everyone has the discretion to decide their own values and their own objectives in life. With lawyers occupying a position of authority, they cannot ask their clients about the values they feel are worth pursuing in the legal action since this will be seen to constitute illegitimate interference in the inner sanctuary where clients make their own choices as autonomous individuals. Lawyers, after all, do not simply listen to and familiarise themselves with their clients' objectives; they necessarily evaluate their worth and then apply their own personal and hence arbitrary moral standards in so doing. Therefore, lawyers refrain from venturing into the private realm and dedicate themselves to being law's professionals in the narrow sense of using the law on behalf of others.

When lawyers engage the law, they look for the technical grounds that uphold their clients' position as 'legally valid'. This allows them to avoid engaging with the clients' substantive motives in taking legal action. However, the other side is not just interested in whether they are confronting a legally viable case; they are more interested in the client's intentions for using the law to affect their relationship. Is the client seeking to drain all the nuances from the multi-faceted relationship and dissolve it into one of mere rights and obligations? Or is the client deploying the law to breathe new life into a currently troubled relationship? For clients to feel they have ownership over their legal action, they need to engage in such a moral dialogue over whether it is appropriate to use the law in such a way that it affects a specific relationship. Indeed, it is integral for goal-setting that clients take seriously questions about the propriety of bringing legal action.

However, when lawyers heed the sanctity of client autonomy and do not interrogate the propriety of legal actions they bring on behalf of their clients, any moral dialogue between the client and the other side gives way to technocratic legalism and the client becomes alienated from any resulting legal resolution. In essence, the appropriate use of law is only possible within a common normative framework. Modernist epistemology renders it impossible for clients to engage in a moral dialogue with the other side about the propriety of

the legal action because, according to modernism, this is a purely subjective matter. This is why clients are alienated from setting their own goals for making use of the law, even though this is meant to be their decision.

This reflexive retreat into legality because of the inability to engage in moral discourse is just one hallmark of modernity. Modernity also finds expression in Simon's positivist psychology of humans who are 'self-interested by nature, and pursue self-interest through the law' – Hobbes' trap of 'every man for himself'.[6] Such pseudo-factual propositions of humanity make it even less likely that clients can articulate their own personal, concrete goals amenable to an appropriate use of the law. Instead, client's objectives are subsumed into the operational goals of the law.[7] This is typified by the legal maxim of 'zealous advocacy within the bounds of the law' (Morgan and Rotunda, 1984, p. 36; Menkel-Meadow, 1984). Although, at first blush, this maxim seems to uphold individual decision-making, in fact the 'legalism' of the law creates relationships between individuals who are faceless and abstract, like *homo economicus* in the fictional market-place.

If clients instead reveal their true objectives to lawyers and lawyers represented clients accordingly, then logically no problem arises of legal representation skewed by a presumed set of client objectives. Yet, where partisan legal ethics prevail in practice, the assumption is that clients are autonomous and able to determine their own objectives. This sustains the division of roles in the lawyer-client relationship. That is, clients determine the 'ends' of legal action and lawyers are the 'means' to that end, which, in turn, allows clients to 'use' lawyers in service of their goals. Relatively speaking, such a robust form

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[6] In her review of the Kohlberg-Gilligan controversy, Benhabib (1991) notes that the Kohlberg thesis – that the ultimate stage of moral development is to be able to think and reason in abstract, universal terms of justice and not in terms of the good life – rests on a Hobbesian view of socially abstracted, isolated 'men sprung out of the earth, and suddenly, like mushrooms, come to full maturity without all kinds of engagement to each other'. This thesis denies women's relational experiences and generalises them into atomised and androgynous selves. To correct against this bias, Benhabib endorses Gilligan's view of considering morality within contextualised relationships between concrete individuals. She submits that it is only when we reject the Hobbesian view of modern man that we can envisage a contemporary relational ethic. Benhabib's arguments closely track those made in this chapter.

[7] This is also evident in negotiations. In what Menkel-Meadow (1984) describes as adversarial negotiations, parties stake their positions on legal grounds or literally force an outcome on the other side. Menkel-Meadow submits that a problem-solving approach to negotiations produces better outcomes. This involves understanding what the parties really want and taking into account ethical values and not just material satisfaction. However, as she herself acknowledges, the dominant legal culture makes it difficult to achieve such fleshed-out outcomes. The paradigm is still to go for a 'win-win' solution where the best option is one where both parties can profit.

of client autonomy exists in American society, where individuals are perfectly comfortable speaking up about their beliefs to their lawyers and in the face of legal authority.

The mutability of objectives However, it is impossible for all clients, no matter how assertive we may presume them to be, to have a clear set of objectives in mind when they retain the services of a lawyer. In the process of legal representation, clients slowly but surely develop, revise and refine the types of outcomes and remedies they want, after consulting and taking advice from their lawyers and negotiating with the other side. Thus, the clients' objectives for strategically invoking the law are not easily and neatly ascertainable at the very start of the legal action. Rather, they are tentative guides for advancing negotiations with the other side, discoverable retrospectively over the course of the negotiations. If client objectives are interactive in this way, evolving with the passage of time, then lawyers are not simply passive 'tools' for delivering client objectives. Instead, they are active agents in influencing client goals whenever they meet with the other side and regularly consult with their clients. Yet, if lawyers believe that client autonomy precludes them from accessing the 'private' aspirations of their clients, then clients lose a forum for communicating about – and interactively developing – their objectives. By default, the goal then becomes to maximise the gain permitted by law.

Ultimately, any distinction between the clients' own goals and those imposed by default blurs and disappears. The metaphor of the 'hired gun' is evocative in this respect. The lawyer is retained by the client as a weapon to further the client's interests. When clients fight their causes with the assistance of legal representation, people think that the lawyer's aggressive stance on rights is what the client wants. The same perception arises when the other side develops an equally aggressive defense in response. This attribution of the lawyers' 'means' as the clients' 'end' leads to the society-wide fantasy of the litigious society. As Auerbach (1983, p. 10) glumly observes, such is the state of modern American society. With its loss of communal ties, the United States is very much like a gun-toting cowboy, reaching for its sidearm at the very first sign of trouble, like a scene from a spaghetti Western. As means and ends become further enmeshed, the stage is set for the burlesque of *lawyers* mollifying *clients* intent on all-out legal warfare. Indeed, commentary on Art. 2.1 of the ABA rules (2003, p. 289) has gone as far as to recommend that 'when … a client [is] inexperienced in legal matters, … the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations'. Yet at this point – when clients adopt what lawyers must wryly observe is the alter ego of themselves, embracing law's imperative of insisting on strict legal rights – clients starkly reveal their alienation from their own objectives, even though the law holds them out to be autonomous subjects.

However, something more fundamental is at work here than just lawyers refusing to interfere in their client's private domain. The essence of partisan lawyering is that *lawyers* pursue whatever the client's objectives may be within the bounds of the law; *clients*, though, need not be partisan themselves. Clients may be aware that law holds only partial significance for the resolution they seek and that longer-term relationship-building may be preferable to an unwavering insistence on individual self-interest. But if their instinctive choice is to doggedly pursue their legal rights, then a more deep-seated legal culture is operating that envelops lawyers and clients alike.

This issue is on a par with Glendon's arguments about 'rights talk'. Glendon (1991, pp. xiii, 8) argues that Americans talk about rights in more strict and absolute terms than their European counterparts. When Americans assume that freedom grants them the 'right' to do whatever they want, prospects for necessary sociality are lost. In the context of the present discussion, the logic of the world of law is directly transposed into social life, thereby making it difficult to speak in moral terms. But when all is said and done, people live in a society; and the logic of the law – and its impact on the parties – should be subject to the logic of how people actually live their lives. Glendon deplores how law has infiltrated Americans' everyday lives, wreaking confusion because the language of law has exceeded its proper place. Yet, at the same time, she has faith that the language of relationships and responsibility is alive and well among ordinary Americans and that its message of solidarity can be read into the law, so that it softens the hard edges of the discourse of rights.

Thus, Glendon's snapshot of legalised society in the United States is one where the rules of law reach into every nook and cranny of social life and people talk with a 'legal' accent. Such a society has entrenched partisan lawyering in the form of extreme loyalty to clients. At the same time, this has propagated the crude language of the law into every lawyer-client relationship. This aspect of American legal culture has a more far-reaching effect than what ordinary culture is understood to exert. It alienates clients from their own objectives, in Foucault's sense of a culturally-embedded exercise of power. This is because clients do not, as they must, resolve their real-world problems by reference to the logic of the real world; instead they get caught up in the partisan pursuit of their legal rights and lose sight of the need to question the necessity or integrity of their legal action. This power play occurs in the context of the gulf that divides American lawyers and the majority of the general public. Lawyers, both individually and collectively, hold wealth and power. Most citizens, without access to the law, are condemned to legal poverty. But the power play is also relevant to the alienation clients experience at the hands of the law, a core theme of this book.

American culture constructs clients as free subjects who can choose their

preferred objectives free of any social constraints. Americans speak as if it were true that clients are autonomous and freely choose their objectives for bringing legal action. This is despite the fact that the language of the law infiltrates the language of real life and pre-determines clients' goals well before clients can actually choose them themselves. American culture, in short, pre-determines outcomes. This modern consciousness – one that creates an imagined world of autonomous individuals – lies behind clients' alienation within the law and, problematically, deprives clients of the ability to express themselves. By uncovering the hidden axioms buried in the everyday, we can find a way of restoring clients their voice and releasing them from their alienation.

Thus far, I have argued that alienation within the law occurs because *legality* rather than *propriety* determines the purpose of the legal action. Even though propriety should be determinative in whether or not to bring legal action, it is excluded from consideration. In its place is a more narrow concern with the availability of legal answers to the problem at hand. Simon first sought to explain this problem by reference to the public-private divide or, equally, the radical subjectivity of modern consciousness – that is, lawyers cannot or should not know their clients' purposes and where a chasm separates the clients' ownership of goals from the lawyers' carriage of the legal proceedings. However, if legalism always defaults as the 'means', then it becomes impossible to speak separately of the 'ends' of a legal action. Even so, if the primacy of the free subject is indispensable to modern law, the goals of a legal action must be ascribed to the client, even if they are devoid of any independent content. This is why client goals will necessarily equate with the operational goals of the law.

The peculiarities of modernity itself, then, are responsible for clients losing any real ownership over their objectives, precisely because modernity imagines – indeed, deems – clients to be autonomous individuals. If so, then we must carefully unpack the problem of alienation within the law in order to overcome it. We have already seen how Luban, in his critique of lawyers' failure to engage in moral discussion, has argued that we need to be able to talk about morality. His arguments rest on a different epistemology to that of modernity, with the latter's strict insistence on universality and hence strong veto of any differences in individual value judgments. In this part, I have drawn on Simon to show that legal practice has constituted legality as the default goal for legal actions. The analysis demonstrates that questioning the appropriateness of legal action should provide the social space for engaging in moral talk. After all, the broader reason why clients experience alienation at the hands of the law is because the propriety of legal actions is placed in the private domain – where clients freely choose their own goals and others cannot question their unreasonableness.

In the next part, I turn to the limitations of modernist epistemology that uphold goal-selection as a matter of individual free choice and address ways we may escape such limitations.

1.2.2 The expressivity of acts

From means to meanings We tend to believe that people act with a certain objective in mind. In nearly everything we do – from getting into a car *to go out*, to seeing someone *to ask for something*, and to retiring to one's room *to indulge in some quiet reading* – we set out to achieve certain pre-determined goals. Sociologists have long modeled how actors behave more or less rationally to achieve their own objectives (see, for example, Weber's conception of action or Parsons' theory of voluntary action: Parsons and Shils, 1951; Weber, 1953). Epistemologically, these models construct subjects separately from objects. From cognition to action, subjects are assumed to be *a priori* to, or contemplative of, objects (Sasaki, 1998, pp. 179–80; Maruyama, 1961, ch. 4).

However, this view of subjects and objects as discrete entities distorts how people behave in real life. True, actors may have a purpose in mind when they act in a particular way in the sense that they contemplate accomplishing something. Yet that same goal may inform another act which, in turn, gives rise to other acts, and so on *ad infinitum*. It is impossible to explain all these actions in terms of *a* means bringing about *a* particular end. Indeed, for any given act, an actor may have a particular goal in mind; but that goal will have been just one of any number of possibilities that could have occurred to that person. Thus, we cannot comprehend the act by reference to *that* goal. Although it may seem that a person's actions (such as getting into a car, seeing someone, or retiring to one's room) are separate acts motivated by distinct goals, they reflect more deeply the person's lifestyle choices and their understanding of their place vis-à-vis others and the rest of the world. As such, actions are not simply instrumental but an expression of one's understandings about oneself and the world. They must be comprehended as integrated within a totality of meanings.

This understanding of actions as an expression of meanings, when applied to legal ethics, requires us to rethink the lawyer-client relationship. In a lawyer-client relationship, clients seek to protect their interests by delegating legal action to their lawyers. If clients' interests are the 'goal' that lawyers seek to serve to the fullest extent possible, then clients' 'actions' – engaging legal assistance to assert the law against the other party – will be confined to a simple means to an end. Partisan lawyering is possible precisely because clients' goals are so narrowly constrained. However, the client's decision to secure their interests through law embeds multiple meanings to the legal action. If these meanings are radically disassociated from the legal proceedings, the client will not

'own', but feel dispossessed of, any results that flow. Again, this is to deny the client the opportunity to question the propriety of taking legal action. Instead, we must broaden how we comprehend 'acts' – from those motivated by 'goals' to those imbued with 'meanings'. So, too, we must open up the definition of 'propriety' – for example, how might the legal action affect one's relationship with the other party? – from something that can be easily discussed in terms of goals to something less deliberate relating to how one understands one's place in the world.

The autonomy of law Modern law makes it all the more difficult to achieve a broader understanding of propriety as one that comes within the realm of meanings. To overcome the barrier of modern law, then, we need to reassess how the ideology of law severs all questions of propriety.

The problem boils down to the concept of the autonomy of law. In general, autonomy of law has the narrow connotation that all answers to legal problems must come from the law itself. However, the ideology of modern law embraces a wider understanding of autonomy, incorporating claims about law's jurisdiction that *any* problems *with a connection to* the law must be resolved by reference to the law. The legal ethics of partisan lawyering is premised on this stronger version of autonomy. Lawyers' interests are implicated here because, as the law's professionals, they can best display their talents when law is central to resolving the issue. Thus, the more lawyers act as instruments of their clients to achieve their clients' objectives, the more they subconsciously define client problems in legal terms and believe that a legal resolution best suits their clients' purposes. The practice of law itself, in the way it engages with the law, effectively asserts to society this strong sense of legal autonomy. Thus, the ethics of partisanship – where clients are autonomous and lawyers are the loyal instruments for achieving client goals – constitute a true ideology. Although seemingly a neutral idea based on incontrovertible values in American society, partisanship effectively robs the legal action of any legally unrecognised meanings the client may ascribe to it, and instead advances the partisan professional concerns of lawyers.

However, this talk of ideology is not to suggest that the professional concerns of lawyers are the sole reason why clients lose any meanings they ascribe to a legal action when they seek a legal resolution to their problems. Various discourses surrounding the autonomy of law – about freedom, the rule of law, or individual autonomy – assume certain 'truths', such as that it is right to resolve legal problems exclusively by reference to the law, because to not do so is to succumb to irrational passion or the arbitrary exercise of power. The intersections and interactions of these multiple strands of truths affect the distribution of social wealth and power, and are far more powerful in imprint-

ing an ideology, in the true sense of its meaning, on society than any assumptions about the specific interests of particular subjects.[8]

In fact, when clients consult with lawyers, they are often convinced that it is necessary to take legal action, even though they know the law may not solve their problems. By thus deliberately making a choice to engage the law, they are participating in the game of legal autonomy. Other parties also see that the client is retaining a lawyer to serve his or her interests, and respond accordingly. This causes a vicious cycle: opponents plan their legal counter-offensive; clients, in turn, sharpen their legal strategy. Ultimately, neither side can leave the game without being prepared to suffer large losses. Not only does this define the rules of the game itself, but also the larger world *outside* the game. In short, there is pessimism about resolving the problem outside of law, expressing meanings in alternative action – a possibility inherent in the hiatus before the client resolved to bring legal action. Instead, the parties remain steadfastly committed to a legal strategy. This is the ideology of legal autonomy at work: it discounts any number of alternative possibilities for solving problems and instead creates an inter-subjective reality commensurate with autonomy where clients, their opponents and their lawyers believe that only law can resolve legal problems.

Renewing understandings of the world How can clients resist the dominant ideology of law and construct an alternative reality based on their own world of meanings? The answer is to change the way modern law dichotomises subjects and objects. This dichotomy lies at the heart of the ideology of legal autonomy and explains why the ethics of partisan lawyering, although intending to uphold client autonomy and ensure lawyers faithfully serve those interests, pathologically serves instead the operational goals of the law and alienates clients from the outcomes of legal actions. To break up the subject-object dichotomy, we must be careful not to 're-alienate' clients. We must seek to re-align subjects and objects by working *within* the world that clients inhabit, and not by relying on enlightening truths that exist *outside* this world.

One way forward is to revisit the observation that the goals attributed to the specific actions of an actor exhibit only a tiny portion of the meanings expressed by those actions. If we accept that people have and create their own understanding of the world (after all, people have an understanding of who they are and what world they inhabit that rationalises the actions they take),

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[8] 'In short, this power is exercised rather than possessed; it is not the privilege, acquired or preserved, of the dominant class, but the overall effect of its strategic positions – an effect that is manifested and sometimes extended by the position of those who are dominated.' See Foucault (1977, pp. 26–7).

these understandings of the world – no matter how suggestive of the subject-object dichotomy – cannot be attributed *a priori* to the client. The actor's 'world' is not the collection of all things with objective verifiable existences; it is the 'world' the actor imagines, interprets and understands to be in existence. The world is a primordially inter-subjective space formed by reference to others. The world is ascribed with given meanings such that actions are rendered meaningful when actors behave in a particular way towards others. However, the world does not come straightforwardly inscribed with clear knowledge. Rather, the world is endlessly rich, an obscure entity that people can only approach from a partial perspective (Nitta, 1988, pp. 3–35). When people do act in such a world and their actions carry meaning, their actions also express a specific understanding of the world. At the same time, when others observe and interpret the way people behave in constructing their understanding of the world, they cause adjustments to be made to that understanding and precipitate a new inter-subjective world.

Actors' understanding of the world (that is, meanings) – as revealed in the expressivity, rather than the instrumentality, of their actions – is neither owned by *subjects* prior to action nor the precipitant of action that bears on the *object* world. Rather, understandings of the world take place in an endless cycle. Actions derive their meanings from the existing world, and then these new meanings precipitated by actions are projected back into a new inter-subjective world. If society experiences this ongoing cycle of actors and actions renewing understandings of the world, then there is hope for preventing client alienation whenever lawyers take legal action. The first and most important step is to locate legal action within the site of this cycle of meanings. And it is narrative theory that provides the practical tools for implementing this project.

1.3 The Narrative of Law

1.3.1 The narrativity of fact-finding

Narrative theory holds that it is possible to identify story-like narratives in all types of talk with others (Kitamura, 1991; 1993). It is not simply that a common framework exists in a linguistic community to facilitate communication with others. Rather, there is an important, interactive site for constructing a world in which narrators project their understanding of the world and listeners hear such narratives (Polkinghorne, 1988). Although narratives have been the traditional realm of literature where story-tellers freely create their own story-lines, contemporary narrative theory in historical studies, sociology and clinical psychoanalysis uncovers narratives in a wide range of human endeavours. Narratives have also been unveiled recently within the field of law.

The general approach to law is to establish the facts and then decide the legal outcome. If the legal outcome is in doubt, then the law is interpreted.

Institutionally, trials separate questions of fact from questions of legal interpretation. Legal realism had already criticised this idea that facts can be established separately from the law. It highlighted how the reality of justice differs in practice, due to the indeterminacy of both law and facts and the inchoate sense of justice that leads courts to the conclusions they reach. By contrast, narrative theory denies this very distinction, in view of how the world is constructed.

First, let us look at how legal fact-finding may be understood as narrative and then see how this differs from fact-finding in its strictly technical sense. Take, for example, the situation in which a witness testifies in court that he or she witnessed the 'fact' that 'A hit B' and the court accepts this as fact. As long as the witness is not deliberately lying, the testimony objectively and faithfully reproduces the fact without any active construction on the part of the witness or the judge. However, 'hitting' is understood only because it already has a meaning attached to it; a purely factual testimony might be that 'A's arm flew through the air in an arc and struck B in the face'. We understand this to be that A 'hit' B when we comprehend the complete sequence of events involving A and B. We then attach the meaning that the particular movement of A's arm constitutes 'hitting'. The process of collecting together a series of observed events is necessarily a human exercise and, at least in incipient form, involves the act of 'narrating' a plot.

The attachment of meanings to events is even more obvious when the witness treats the fact of 'hitting' as worth telling among his or her many recollections. 'Hitting' is recalled as a 'fact' among a set of other facts, such as 'B treated A badly in the past and A bears a grudge about that' – which, in itself, is also meaningful given the factual matrix in which it is recollected and thematically organised. If we replaced all this with 'A has long borne a grudge against B because of all the things B has done', you can see that this is very much an integrated story made up of a series of events. Although not a creative piece of fiction, we regularly experience such story-telling where impressions change depending on the emphasis given to some facts over others. There is, in fact, considerable discretion in the way the story-line is developed.

Thus, legal fact-finding can be considered a form of narrative. If so, this severely punctures the legal conception of fact-finding as one where witnesses and judges reproduce the objective facts in the courtroom. Although a major blow for a traditional understanding of the law, the 'manipulability of facts' – the idea that judicial fact-finding involves collecting facts on a particular theme from a disparate series of events and, then, isolating a single unit of meaning – can generate a more dynamic function for legal actions than previously thought possible. Indeed, legal realists argue that judges do not syllogistically infer the legal outcome of a case from facts and the law, but rather intuit what an appropriate outcome should be. When judges make the facts fit

the outcome by utilising the latitude afforded by the narration of facts, they can actually achieve appropriate solutions while upholding syllogistic reasoning as a legitimate form of judging.

Further, Inoue (1993a, pp. 141–69) argues that it is possible to create trials where parties themselves can negotiate forward-looking solutions to their problems by treating fact-finding as a collaborative process among all the parties involved in the litigation. He believes that trials should be characterised by parties, with the assistance of the judge, confirming the facts *ex post facto*. Since facts are not really *clear* to the parties in the first place and are *variable* depending on the party's point of view, parties can use the trial to engage in fact-finding in a way that reflects their prospective concern to resolve the problem before them.

The idea that law is directly implicated in how people construct their world through narratives is highly relevant to the themes developed in this chapter. In the fact-finding process, each participant in a legal action – first the parties with their allegations of fact, then the witnesses with their corroborating evidence, and finally the judges with their decisions – contributes fragments of events to an overall story-line and thereby generates a meaningful statement of facts. When fact-finding functions in this way, the law becomes imbued with human experiences to a much greater extent than most would generally think. In particular, when people talk about the events they have experienced, they necessarily weave their moral judgments into their accounts. As a result, the law directly encounters the norms pervading peoples' everyday lives.

Even the simple fact of 'hitting' clearly shows the moral content of narratives. Hitting is not something that happens every day, so we think that hitting is something worth talking about. We wonder why someone felt compelled to hit another. Hitting is not simply a *descriptive* concept that people use, say and listen to in their everyday lives; it is a *normative* idea that exists by reference to other relevant norms that constitute society. In short, descriptive accounts and normative judgments – reflected in both legislation and case law (Kashimura, 1992, p. 96) – necessarily co-exist within everyday narratives.

This normativity is even more striking in more complicated fact-finding scenarios, especially when the raw facts are more splintered and contested. For example, Ehara (1992, p. 96) conducted an empirical examination of a sexual harassment trial and found that popular magazines effectively rewrote the plaintiff's complaint of sexual harassment into a tale of troubled love. In this case, morality was plainly important in how magazine writers assembled the facts together to create their stories. Phrases such as 'a sensible woman with a family' and 'if only she had been more forthright with the defendant from the very start' were employed to cement one version of a

Rashomon-like case[9] into the 'truth'. Although didactic language such as this is highly favored in popular magazines, it is impossible to completely divorce the moral from the descriptive, even in judicial fact-finding. Although judges consider the facts first in isolation and then as a whole to determine whether the events in question constitute sexual harassment or troubled love, a hermeneutical cycle exists between meaning and context. Consequently, veering from one version of the facts to the other inevitably involves a form of political struggle over meaning. In the sexual harassment case, the court did not simply carry out an objective determination of the facts. Rather, the court, attuned to the calls by women lawyers and activist feminist groups, developed an interpretative framework – and a concomitant moral vision – for re-constituting what people might normally regard as 'troubled love' into a new paradigm of 'sexual harassment' (Ehara, 1992, pp. 111–33).

In all legal actions, clients narrate the law in a similar, if less obvious, way. In light of this, it is a conceit for courts to boast that their fact-finding processes are free from moral judgments – that is, understandings about how the world is constituted and how people should relate to one another. Indeed, to do so might involuntarily privilege the juristic perspective on fact-finding. This is exactly the same scenario as lawyers who, although presumably devoted to attend to their client's goals, effectively impose the operational goals of the law on their clients. Clients, then, could seize ownership of their legal actions by openly admitting the continuity between facts determined by judges under strict, juristic procedures and facts narrated by clients within a more amorphous moral matrix. Therefore, one reason to focus on the narrative aspects of law is to equip clients with the power to resist the involuntary entrenchment of juristic perspectives (see also Scheppele, 1989). But before we delve into exploring this potential, we should see how narrativity inheres in legal interpretation. That, alongside fact-finding, is also basic to law.

1.3.2 Legal interpretation and narrative

Legal interpretation typically involves divining the meaning of terms in express propositions of law. For example, say a law states that 'cars must not be driven into parks'. If there are questions about whether cars are prohibited from any school area where children play or whether motorcycles are allowed in parks, these are answered by divining the scope of such terms as 'parks' and 'cars' (Fuller, 1958, pp. 661–9). Several canons of construction may be called

[9] *Rashomon*, a film directed by Akira Kurosawa and based on Ryunosuke Akutagawa's acclaimed novel *Into the Grove*, tells the story of a murder and rape recounted from the multiple (and conflicting) viewpoints of the participants and observers of the incident. A recent Hollywood film along similar lines is *Vantage Point*.

upon, such as ascertaining the legislative purpose of the law, cross-referencing to how foreign jurisdictions resolve the ambiguity, determining the inconvenience caused by the prohibition, and comparing how the term is construed in similar provisions. But there is often no agreement as to how to apply each of these canons or as to which one has priority if different canons lead to different interpretations. Thus, there is no generally accepted 'universal' method of legal interpretation. Although a person may seek to legitimise a specific interpretation by employing one of these canons of interpretation, the method cannot legitimise the conclusion: whether an interpretation carries the day depends on how persuasive it is. Persuasiveness here is linked to narrative.

A narrative coheres in meaning by the way in which the narrator puts together a series of events. Conversely, meanings of individual events are elucidated by reference to the whole. This holism arises because we see ourselves living (or, more bluntly, we *wish* to be living) in a single, meaningful world (Geertz, 1973, p. 5) – and this impulse finds expression in our narratives. In the aforementioned example of a law banning cars in parks, those who would extend the prohibition to include school grounds and motorbikes would probably raise values such as safety or the importance of recreation. Those who would prefer a more restrictive interpretation would probably raise the trump card of individual liberty. Such values become themes in structuring narratives. Yet without events to furnish subject-matter, these cannot be fleshed out into narratives.

The highly technical nature of legal debates, and the emphasis on the supreme values of logic and lucidity, effectively eclipses individual events from view. Yet when we speak of 'safety', for example, we are not simply advancing a logical step in an abstract argument. Safety conjures up vivid images to both speaker and listener alike, such as innocent children happily playing or delinquent youths noisily riding their motorbikes. These images are highly persuasive in sustaining a particular interpretation of the law. Concrete, paradigmatic cases supply an underlying narrative to abstract propositions of law (Matsuura, 1983; see also Ishimae, 1989), and the narrative underlay discloses dimensions that are both factual and normative.

Although law officially distinguishes between the assertion of facts to make out a cause of action and the exercise of normative judgment to determine the effect of those facts, both facts and norms are narrated within an overarching, coherent narrative and the boundaries between them are far more fluid. When we explain the purport of a case, we speak about how people should behave or how they should relate to one another; conversely, when debating the substantive law (such as corporeal punishment: Baba, 1994), we depict the actions of specific individuals in a society where law is a part of life. The world in which facts and norms are expressed in narratives is basically the world in which we experience life. When we do something, we assume a world in which these

actions are meaningful. Our actions, as a result, project a particular understanding of our world. Normative ideas about how the world *should be* subtly and silently inform our subjective projections of how the world *is* – our understanding of what the world is. Although these normative attitudes are basically constructed by the world (people, after all, can only have partial and limited perspectives), they project how people see their place in the world and, as such, renew the world with their actions.[10] This phenomenological cycle – where actions both constitute and are constituted by the world – presents itself, especially in verbal form, as narrative.

A world where facts and norms are intertwined – a world which both produces and is produced by narratives – enables us to speak in moral terms. I have already shown how the modernist epistemology of radical subjectivity silences lawyers from all moral talk, as Luban critically notes, and, therefore, alienates clients from their own legal actions, as Simon contends. The key to overcoming this lies in narratives. Narrative theory, after all, does not distinguish between facts and values. It holds that morals are not freely chosen by individuals but are located in the real world (Sandel, 1982, pp. 133–74). This idea has much in common with Selznick (1987). With his communitarianism-based sociology, Selznick criticises the conspicuously American juristic view that only 'choices and promises' can bind free subjects to obligations. Instead, he stresses that the most important of a person's obligations arise out of 'attachment and commitment'. Selznick goes on to argue that just because something is a right does not make it moral, and that all rights claims should be morally tested by asking the purpose to which the rights will be put. To be able to apply this test (and thereby to enable moral talk), we need to explicitly locate our obligations to others in our attachments – that is, in the fact of living in this world.

However, Selznick (1987, pp. 457–61) argues that little critical insight is gained simply by locating society's morals in common beliefs, by elevating morals that *do* exist to morals that *should* exist. Instead, objective morals – what he terms a 'community of reason' – must come into play. However, as postmodern theory observes, even 'justice', as distinguished from 'the good', which meets a strict test of universality cannot escape ideological contamination. Since this chapter is trying to deconstruct the ethics of partisan lawyering by exposing its underlying ideology – one that is firmly rooted in American society and tightly ensconced in the axioms of modern legal ideals – it cannot follow Selznick's approach of objective morality. Rather, it finds

[10] We make out our case for rights by speaking in forked tongue: we refer to what the law *is*, but we also assert that the law *should* support our claim of rights. This 'forked' approach to rights assertion reflects this chapter's thesis that understanding the world and projecting the world are two sides to the one coin. See further Tanase (1991).

support in the thesis of Rorty (1991, pp. 59–80) that our values lie in our 'web of beliefs' and advocates a sociological investigation into how society shares common beliefs. In truth, no society can subscribe to a completely coherent set of beliefs; and fault-lines appear in the discourses of people when they talk about their values, even if they are from the same world. Structuralism best explains the recurring patterns in the axiomatic assumptions deeply rooted in society. But if we are observant, we can also uncover teeming micro-worlds bubbling near the surface, created through the myriad acts people perform and the myriad narratives that they tell. These micro-worlds should filter through multiple layers to the core of society. Contemporary post-structuralism (Foucault, 1981) empowers us to focus on the narratives of law as set out in individual narratives.

So far, this part has explained the features of legal narratives and the methodology for approaching them. With this in mind, we can now return to the problem of the lawyer-client relationship and explore ways clients can regain ownership of legal actions. Clearly, the way forward is to note the narratives of clients when they speak about their case and how they expect the legal action to improve their situation; to interpret these narratives as the means by which clients renew their understanding of the world in which they live; and to locate the lawyer's role as one that facilitates this process. Specifically, then, what should we expect lawyers to do as a matter of legal ethics?

2. RELATIONAL SUBJECTS

2.1 Overcoming Alienation

Generally, clients consider legal action when they are dissatisfied with the current circumstances and believe that law will be effective in changing their fortunes. When clients are involved in disputes in this broad sense and take legal action to escape their situation, it may appear that clients are making instrumental use of the law, re-working their present situation by relying on the script of the law as underwritten by the power of the state. But this is not all that occurs: law also functions as a medium for expressing clients' understandings of the world. When a client's understanding of the world, as articulated in their legal actions, encounters a similar understanding of the world held by the other side, these two world-views interact and repeatedly reconfigure themselves, building an inter-subjective reality common to both parties. Because this expressive function of law does not have any visibly instrumental effects, it has been ignored as a legitimate site where clients set their expectations about their legal actions. Not only is it overlooked in schol-

arly accounts on legal ethics and dispute resolution, it is also insufficiently familiar to the disputants themselves.

However, parties always project their understanding of the world in the narratives they tell about their cases, even if they may not be aware of this. Given that humans yearn for meaning and want to live in a meaningful world, parties necessarily confirm or re-create their understanding of the world in the process of resolving specific cases. The problem, then, is the tendency to dismiss or disregard how people interpret the world when they file a legal action, especially in suits where they are represented by lawyers. If we can overcome this tendency, we can point the way forward for re-formulating legal ethics. To think this through, I would now like to turn to an actual case described in detail by Cunningham (1992).

The case involved a defendant stopped by state troopers on patrol because, it was claimed, the defendant failed to stop when the traffic lights blinked red late one night. The defendant was insubordinate and the troopers suspected that he might be in possession of illegal firearms, so they tried to conduct a body search. When the defendant resisted, the troopers arrested him for disorderly conduct. Cunningham took on the defendant's case and, when he read the police record, he thought right away that this was a *Terry*-stop gone wrong. In *Terry v Ohio*, 392 US 1 (1968), the Supreme Court ruled that police officers who are questioning a suspect on other possible charges must have a specific cause, not just a vague intuition, to suspect that the person has illegal firearms before they may hold or physically search him or her without a warrant. Cunningham felt that he could make an argument that the troopers had overstepped the bounds set by the *Terry* precedent. He was further encouraged when he obtained fairly valuable material from his client interviews and was confident of winning the case.

However, a judge rejected his pre-trial motion to dismiss the case, holding that the police had the discretion to hold the defendant in temporary custody and to conduct a body search because the defendant was insubordinate and the police feared for their physical safety. Yet, when it came to trial, the prosecutor withdrew the indictment early on in the proceedings, saying that it was not worth wasting resources on a matter where a guilty verdict could only result in a light fee. The defence, keen to get an acquittal in a jury trial, were unable to have their day in court.

The relevance for us is how the defendant felt throughout his ordeal and whether his legal representation appropriately carried this into the legal arena. Most defendants, of course, want to be found not guilty or to receive the lightest possible sentence. Therefore, lawyers typically think up possible lines of defence and then devise a strategy for persuading judges and juries of the defence's position. In this respect, we cannot find fault with what Cunningham did. The withdrawal of the indictment was probably a result of prosecutorial

uncertainty about meeting the burden of proof, despite the judge's ruling in the pre-trial proceedings. No doubt the efforts of the defense lawyers also played a part.

However, a different account of the case emerges if we listen to the defendant's narration of the events. The defendant was an African American who felt the case was about racial discrimination. Yet this was not clearly and systematically asserted in the proceedings. His lawyer took immediate notice when the defendant alleged racial prejudice. So did the judge when the defendant made the same claim in his testimony in court. Conscious of a prospective appeal, he duly placed it on the record, even though ultimately rejecting it and dismissing the pre-trial motion. Arguably, then, the defendant's claim was at least heard in the legal arena.

On closer scrutiny, however, this was not so. This is because the defendant's words were based on the world in which he lived and their meaning could only be understood in that context. The transcript of the defendant's interview by Cunningham (1992, pp. 1323–4) neatly captures the African American experience in American society, especially those who aim for a better life. The police experience a separate world – one where they brave life-threatening danger day and night in upholding law and order in a violent society. American police are told to use their authority to seize control of a situation and to give orders, not explanations. With the defendant expecting an explanation as a respected member of society and the police flexing their authority to demand unconditional compliance with their orders, conflict is unavoidable when these two worlds collide. What, then, should the defendant's lawyer have done in these circumstances?

The orthodox course of action, and one adopted by Cunningham in this case, is to put together a strategic legal argument. The defendant had experienced discrimination for his entire life and he understood this case to be yet another example. If the defendant had not endured discrimination on a regular basis and was not angry about this, then he probably would not have been so tenacious in his insistence on an explanation nor so defiant in his demand to be treated as a respectable citizen, even if he was affronted by the arrogant language of the police officer. However, the law does not perceive this as discrimination because it is so pervasive in American society. In his oral reasons for dismissal, the judge held that the case was due to the defendant's overly aggressive attitude and had nothing to do with discrimination at all.

Cunningham contested the ruling by boiling the case down to whether, in light of the *Terry* case, the police had specific grounds for suspecting that the defendant possessed illegal firearms. If the court accepted the defense's argument that the police did not have such grounds, then the body search would be illegal and the defendant would be found not guilty. Longer term, the defendant would be able to avoid future unfortunate encounters with the police

where he felt he was being racially targeted and compelled to forcefully assert his identity. More basically, the *Terry* case itself reflected the changing definitions of discrimination, with many voices objecting to arbitrary body searches because they reflected racial prejudices predicated on unspoken stereotypes about African Americans. In this respect, it is significant that the defendant fought his case based on *Terry* because it would change pre-*Terry* attitudes that remain in police questioning and judicial rulings. One might think, therefore, that this case is a straightforward example of where justice and legality were largely in accord.

However, there are limits to how far the law can address discrimination. The law does not regard the police officer's arrogant and dehumanising treatment of the defendant as discriminatory, even though it rankled the defendant and caused him to rebel to protect his identity. If the police officer's enforcement of the law was discriminatory overall, it is unlikely that it would be deemed unlawful so long as it was in compliance with legal procedures. These limitations in the law mean that complainants of discriminatory conduct that fall below the legal threshold either face a brick wall in pursuing their complaints, or are forced to accept their fate knowing that they will not be heard.

Put shortly, the law is limited in what it can do. To punish discrimination that fails to meet legal standards would amount to excessive interference in personal freedom given that law, in its narrow sense, is the mobilisation of force. It would also be burdensome procedurally to indict subtle forms of discrimination given the requirements of due process. However, we cannot allow people to be silenced before the law's significance in people's lives. As von Jhering (1915 [1872], p. 59) succinctly observed, 'property is but the periphery of my person extended to things'. Law is not simply about securing monetary satisfaction by way of a legal remedy; it is more about restoring dignity to a person who has been injured. This pathos, although invisible under a positivist conception of the law, both informs the law and brings it to life.

To return to the discrimination context, African Americans' anger and sorrow at being denied respect may have led to the *Terry* decision, but the substantive norms established in the case do not capture the full extent of their grievances. When these grievances are fully communicated to and understood by others, an inter-subjective world comes into existence in which everyone understands the meaning of particular events in the same way. Not only does this eliminate unlawful forms of discrimination; it also creates a shared world of enormous significance to parties, one that gives meanings to the law. When such meanings – developed interactively beyond the realm of law – are embodied within the 'hard' law of penalties or remedies, then parties will be satisfied with the outcomes of their cases.

Of course, it is impossible to completely reconcile the worlds of African Americans and the police. Thus, there are likely to be further unfortunate encounters like the one described by Cunningham. However, when two worlds are in constant conflict over the meaning to be ascribed to a single event (like a late-night inspection), efforts to resolve each of these conflicts gives rise to the possibility of a reciprocal transformation of the two competing worlds. Therefore, we should re-conceptualise lawyers as those who attend to the emerging present realities in a dispute, participants in maturing micro-level inter-subjective worlds.

Let us reconsider the ethics of partisan lawyering in this light. The alienation of clients, despite the mantra of client loyalty, arises because lawyers reduce client goals to the instrumental use of law in order to achieve a 'hard' resolution of their problems. Lawyer-client communication in practice diverges from the meta-level ideal of lawyers listening and engaging with their clients. Instead, lawyers listen to what their clients say purely to glean an objective account of the facts and to distil all references to the law's multiple meanings into one that can lead to a state-backed legal outcome. Instrumentalism in communication prevails over expressivity because of the ideological impact of the autonomy of law and the expertise of lawyers.

In fact, Cunningham writes of his regret for focusing too much as a lawyer on meeting the *Terry* standard and not enough on listening to how his client construed his world. As is clear from his article title – 'The Lawyer as Translator' – Cunningham submits that lawyers should re-word what clients want from the law in terms the law can understand. He concedes that if he had made more of an effort to enter the defendant's world and comprehend his allegations of racial prejudice, he would have been able to prepare a more persuasive case targeting unjust police questioning as in the *Terry* case. After all, the narrative contained in the defendant's deposition and in records of client interviews constituted a single text replete with meanings and interpretations attached to the various events – events that could not be reduced to a single, unequivocal reading.

In fact, when Cunningham reviewed his client interviews after the end of the trial to write his article, he was immediately struck by the client twice mentioning he was having trouble with his gearbox, a fact that did not give him too much pause at the time of the client interview but which actually was significant. In the defendant's overall story about racial prejudice, the defendant told Cunningham that his car 'was short of hydraulic oil' and 'to shift the gear I would have had to switch off the engine'. (This revealed to Cunningham that the defendant had definitely come to a complete stop at the intersection.) Therefore, the defendant was convinced that the only reason why the police stopped him at the intersection was because he was an African American driving in a white residential area late at night. (Cunningham's belated insight

about the case only makes sense within the defendant's overarching narrative about racial prejudice.)

Sociological research has repeatedly shown that when events connected by a consistent plot within a narrative are forced into a different context, this erases their original meanings. When others do not listen or mishear a narrative, there is discord over which framework is to be preferred in the clash between the competing narratives. A highly subtle power-play takes place in these circumstances, as is frequently observed in relationships between professionals and clients. For example, research into the interactions between psychoanalysts and patients shows that when therapists ignore what clients are saying or suddenly change the topic when ordinarily they would be expected to answer a question, they achieve a definition of what professional communication should be like and create a present reality about the special nature of the therapist-patient relationship (Nishizaka, 1992). A similar power-play at the micro level is evident in how Cunningham draws on the autonomy of law to reconstruct the defendant's narrative of racial prejudice into a legal narrative. This power-play condenses multiple realities into a single reality and, at the same time, socially reproduces the autonomy of law.

Thus, clients will not find it easy to restore their voices in the law, so long as this powerful underlying ideology forces lawyers to slavishly adopt a juristic perspective despite personally intending to give legal effect to their client's goals. To ensure that clients are heard in the law, we probably need to take a tough line – by creating an alternative reality that can resist the micro-level power-plays found in client-lawyer interactions. The time has come to re-vest the logic of life into the law; to curb the idealisation of the rule of law; and to contain the spread of rule into areas previously undisturbed by its presence.

The more law achieves autonomy, by contrast, the more the counter-ideal antithetical to autonomy is set in motion – herein lies the key to making the law more relevant to people's lives. The law must not only *rule* over us but *be ruled* by us. We cannot rule over the law simply by having democratically elected legislatures and a fair judiciary. People must be the protagonists in each and every forum where law is at work. However, we cannot rely on autonomous individuals to voluntarily turn a blank slate into a living, breathing law. Instead, we must rule over law by embedding it within our everyday lives in which we project new understandings of the world while constrained by pre-existing perceptions. Ultimately, this means reading into the narratives of law a meta-level imperative to rule over the law.

Generally, when people engage in talk with others, they include implicit meta-level assertions about the proper way of talking. If the other person does not think the speaker is talking appropriately for the occasion, he or she may try to change things by showing offence or ignoring the speaker's remarks and changing the topic. These, in turn, prompt further responses, and ultimately a

compromise is reached on the appropriate way of talking for that time and place. As previously noted, professionals exercise strong control over how their clients talk because any meta-level discord is resolved in a manner unilaterally favourable to the professional. In the context of lawyer-client relationships, lawyers either prevent clients from talking about the meanings they attach to the law based on their world views or do not listen to them even if they should. This is due to the gap in expertise and authority between lawyers and clients, and the ideology of law that holds that legal problems should be resolved by reference to the law.

However, there is a further resilience in the narratives clients tell rooted in their actual lives. In their analysis of lawyer-client exchange in divorce cases, Felstiner and Sarat (1992) observe that neither lawyer nor client holds all the power. Rather, both deploy power in their mutual interactions through various techniques such as making threats, evading answers and clamming up. In fact, even when lawyers present cogent proposals which their clients seem to understand, quite often clients will – and, arguably, should (Wada, 1991, ch. 2) – return to their original positions after a while and resist the lawyer's proposal. If the law is about reasoned argument, then the logic of life will determine whether feelings will necessarily follow – and since clients keep a foot in the real world, they have the ultimate authority to refuse an unsatisfactory legal proposal. This is more broadly rooted in the very ambivalence of law. No matter how autonomous the law becomes, ultimately it must hold good in the world in which people actually reside. Accordingly, law must be reconciled with the logic of everyday life (see also Conley and O'Barr, 1990). Client narratives developed by reference to the law can bridge this ambivalence about the law and, accordingly, exert a meta-level control over the law.

2.2 Visibility of Others

How, then, does a narrative of law incorporating meta-level control over the law re-shape the relationship between people and the law? The key notion is 'visibility of others'.

If valid law is autonomous and a-contextual, then people respond as if they were lawyers – concerned with whether their behaviour, such as their legal claims against others, satisfies the requirements of law. If their claims against others fulfil the written propositions of law, then they have a viable case; the propriety of the action is irrelevant, and the relationship between the self and the other is ignored. It is enough to assert the legal validity of a claim and unnecessary to inquire further into the appropriateness of using law in the specific context of the case. The autonomy of law stands in contrast to autochthonous authoritarianism, and has been loudly hailed for establishing the rule of law as a universal development in human history. However, the de-

contextualisation of law cannot be wholeheartedly endorsed in modern legalised societies. With law consuming people's everyday lives, people are looking for new ways to connect with one another.

People in societies where law is a last resort and rarely used accept that the abstraction of relationships through law is an unavoidable social choice, even though they must be pushed into taking legal actions and redefining their relationships with others in terms of rights and duties. By contrast, people in societies where law is integral to everyday existence need to focus on context and fashion a flexible way by which law can foster relationship-building with others. To do so, it is necessary to foster concrete relations and relativise the role of law. In this sense, the narrative of law is key: it foregrounds the worldview of the person engaging the law and makes others visible again. (The autonomy of law erases others from the centre stage of legal reasoning by virtue of its abstract standards and inferential style of reasoning.)

Some lawyers are already beginning to listen to clients' stories, not impose them into legal frameworks. Based on his own practical experiences in resolving disputes, Hirota (1993, pp. 210, 166) resolutely rejects the conventional approach to dispute resolution that starts with the law. Instead, he proposes getting to the heart of the dispute by focusing on the words clients use in telling their version of events. These words are not tired and dull, but 'central to resolving the dispute, buzzing around like elementary particles full of energy'. By contrast, the law is 'fixed and unchanging, like wood or stone in the physical world'. Disputes can be resolved, he writes, by directly accessing this layer of energy which envelops disputes before they ossify. The most arresting part of his analysis is his view that it is the parties themselves who resolve the dispute between them. 'Even when civil disputes reach an impasse', Hirota (1993, pp. 92, 71), 'the parties retain their own identity to the very end'. He also praises human nature: 'people exhibit profound depths in disputes, and evince even greater depths when trying to resolve them'. These observations provide support for his position of listening to what the parties say.

However, when Hirota talks about listening to clients, he does not see them as autonomous individuals, nor does he interpret their words only by what they are consciously trying to convey. Repeatedly, in his book, Hirota argues that the dogma of 'free will' prevents us from 'hearing' the parties' voices and distorts a real understanding of the dispute. Words are the window into the inexpressible. Modernity might find it paternalistic to peer into the hearts of clients. This is a real risk. Hirota (1993, pp. 113–14) even concedes that his ideal lawyer 'is someone who likes to help others and even is a bit of a busybody'. In sharp contrast, American lawyers are almost neurotic in refusing to venture into the private realms of their clients. This resonates with the remark by Baumgartner (1988, p. 132) that 'where people are morally disinterested in others, people are not very altruistic'.

We can expect client narratives to make others visible, whereas the law keeps others hidden in the background, because narratives express understandings about the world in which the self and other inhabit, not because they disclose the types of discernible legal actions or statements of facts that the self may assert against the other. Lawyers need to listen to what is unsaid as much as what is said in the narrative. Thus, law's all-pervasive narratives empower clients to speak about concrete events because the shackles of modernity's autonomy dogma are removed from the speaker-listener relationship. This sets the stage for transforming the lawyer-client relationship.

Clients do not talk directly about the law, only their disputes, in their narratives. As such, law is essentially relativised in client narratives. So the challenge for lawyers and clients alike in dispute resolution is first to engage with all the people who are participants in the substantive dispute, and then to consider how to resolve it by trusting only in what is useful for its resolution. This reverses the primacy of *law over the people* implicit in the ideology of the autonomy of law, and instead results in the everyday practice of *rule over the law*. Thus, the three-way relationship between the self (the client), the lawyer and the other (the opposing side) is restored to a real relationship between people rather than as narrow 'elements' in a legal cause of action. And this changes, too, the meta-level definition of legal communication – about how to talk about the law and how to listen.

2.3 The Ethics of Inherence

I have just explained how law's narrative re-constitutes the relationship between law and people, making others visible. The subject of the law is also transformed.

Modern liberal law presumes people to be free subjects and considers it an unfair constraint on the enjoyment of liberty to require subjects to justify their freedom outside the bounds of the law. The free subject is socially constructed by talking about law in this way. Thus, the autonomy of law actually produces autonomous individuals. In the context of the lawyer-client relationship, autonomy of law results in the ethic of partisan lawyering under which clients autonomously determine their goals in bringing legal action and lawyers try to effect these client goals to the best of their ability using all legal means at their disposal.

A narrative approach to law, however, unsettles the relationships assumed by a such discourse of law centred on autonomy – a discourse that assumes that clients are subjects, lawyers are instrumental participants, and other parties are invisible 'others'. Narrative discourse highlights law's contextual nature and concrete relationships between clients and other parties, thereby creating 'relational subjects'. A new subject is 'summoned into and accepted

within' the narrative (Matsuda, 1989). We need a new legal ethic to address this change in subjects and, further, to ensure lawyer-client relations are meaningful for the client – an ethic that inheres in an inter-subjective world in which both the client and the other side can interact with one another as relational subjects.

Cook (1993, p. 2473) applies a post-modern perspective to submit that legal advocacy should serve the socially disadvantaged. His is a call 'to empty oneself of Self in preparation for serving the Other … [so that] … the stories and experiences of the latter will be given a certain affirmation and credence they normally lack as marginalised narratives within a dominant discourse'. The Self is the subject constructed by the discourse of legal autonomy; the Other is the subject that the same discourse excludes and renders invisible. Cook's thesis is that the felt pain of exclusion at the hands of the dominant discourse is the key to deconstructing the Self and enabling an 'ethical encounter' with the Other. Cook argues that it is the socially disadvantaged who happen to be the Others marginalised in society. However, it is *all relational subjects* who are Others in the true post-modern sense of alternative lives being marginalised by the dominant discourse. As such, lawyers can have what Cook calls 'ethical encounters' with such subjects – that is, clients who live in a relational world – by being sensitive to their exclusion at the hands of the discourse of the autonomy of law.

This model of lawyering can find expression in the 'ethics of inherence', as a counterpart to the ethics of partisanship. The ethics of inherence supports attempts by clients, as relational subjects, to re-construct in the course of their disputes the inter-subjective world they share with other parties. Lawyers are not to look down from law's lofty heights, as partisanship has it. They should 'inhere' in the client's world, seeing things as much as possible from the client's perspective and locating the law within what they can see is the client's world. However, the lawyer's role is not restricted to serving the wishes of the client. Even if untainted by the autonomy of law, that nevertheless simply rehashes the ethic of partisanship. I have already explained how clients' goals are never firmly established in advance but evolve interactively through the course of resolving the dispute while negotiating with the other side and consulting with lawyers. The ethics of inherence considers that lawyers, too, have an important role in evolving and settling clients' goals.

In a divorce case analysed by Felstiner and Sarat (1992), a lawyer rebuked her client's romantic wish to stay on friendly terms with her ex-husband, sure that the client would regret her decision. The lawyer stated that she had seen too many women pushed to tears and so her job was to keep her client on the straight and narrow: divorce is all about money. In the terminology of alternative dispute resolution, the lawyer was acting as an 'agent of reality'. This phrase is mostly used when lawyers seek to lower clients' expectations about

massive compensation payouts generated from media stories or the rumour mill. Here, it is used to mean forcing clients to face up to a reality that they do not see and then proceed with a rational resolution of the dispute. When clients confront this reality and begin to entertain doubts about the self-evidence of the world which, until then, they have identified with, they see the events in a new light and start talking about them in terms of an alternative narrative. When the world that this new narrative opens up for the client encounters the other side's matching world, an inter-subjective world comes into being. The resolution of disputes lies in this re-narrative process of clients telling new narratives when they encounter something different.

This has some semblance to psychological therapy. According to Herman (1992, p. 181), a psychoanalyst, 'speaking the truth is therapeutic'. Consider the case of a person with many psychological inadequacies because he has suffered childhood trauma of abuse or incest and in adulthood does not have sufficient self-respect or a sense of trust to form relationships with others. The basic course of treatment is to encourage him to talk about the traumatic experiences he has repressed and buried, and reintegrate them into his self-perceptions. The narrative of trauma involves more than a clinical description of events. It must incorporate the patient's own feelings, the physical pain, the trembling, the nausea and any other such physical sensations. These are the 'facts' experienced by the patient. The therapist makes the patient talk about facts which he himself no longer wants to remember, within the safe and supportive environment of a therapeutic relationship. As the patient then repeats the facts, re-telling them over and over again, he no longer feels that the facts hurt him. With this new understanding, the patient can then proceed to live in the present.

Lawyers cannot be expected to achieve the same depths as a psychotherapist, even if the narrative approach is the same. But the same essential dynamics are at work in legal actions: the client and the other side confront the facts underlying their dispute and repeatedly re-tell them until they reach an appropriate meaning of the events. Just as a therapist needs to mediate in cases of psychological trauma because of repression or an underdeveloped self overwhelmed by events, lawyers, too, need to serve as 'agents of reality' in disputes. Lawyers should get clients to face up to reality and tell their own stories. This is because factual perceptions may be distorted due to emotional conflict or tactical considerations, but also because a repressive legal culture – in which lawyers must accept their complicity – does not allow moral talk.

However, it is open to debate whether or not the lawyer in Felstiner and Sarat's case study actually knew what was 'reality'. After all, the client is in the better position to know her ex-husband's character, his economic circumstances and the type of relationship they enjoy. Further, although seven or eight out of ten women may have regretted taking a soft approach in their

divorce settlements, the client may have been part of the more fortunate minority. Thus, lawyers do not represent 'reality' in the sense of objective truth. Instead, they should be seen as simply recommending to clients 'realities' seen from the view of general fairness or lawyers' ordinary prudence. This is how we should locate the statement by the lawyer in Felstiner and Sarat's case study, herself a divorcee and a career divorce lawyer, when she asserted that women are driven to tears because of selfish men. This is not to say that lawyers should not present realities to unknowing clients. But they need to be painfully aware that what they see is filtered through the lens of their own experiences. Likewise, the ethic of inherence, too, does not mean that lawyers must share the reality and world of their clients to be ethical; it means empathising and supporting clients' efforts to re-narrate their stories in a world they can only partially perceive so that they can build tentative inter-subjective worlds with their opponents.

3. CONCLUSIONS

This chapter entered the debate about the ethics of amoral partisan lawyering. It highlighted the problems with the contemporary legal order in the United States and developed an alternative practical vision of legal ethics in response. I now tie together the conceptual threads of this chapter and demonstrate how the new legal ethics and their underlying conception of law contradict modern law.

Figure 2.1 illustrates the framework of modern law upon which the ethic of partisan lawyering is premised.

Partisan lawyering envisages a lawyer-client relationship in which clients are autonomous individuals and use lawyers as technicians to instrumentally serve their goals in legal actions. Partisan lawyering imposes an ethics of amorality (that is, lawyers are not to appraise the moral merits of the legal action because, out of respect for autonomy, this would amount to interference in clients' goal-setting). It also promotes hard-line rights assertion within the bounds of the law (that is, lawyers must make maximum use of their technical skills to further the interests of clients in their suits). Partisan lawyering further justifies the legal practice of service for the benefit of the client. The autonomy of clients who can make instrumental use of lawyers is also a social precondition for creating the practice of partisan lawyering. This image of clients, projected both normatively and didactically by the ethic of partisan lawyering, is designated in the top right of the figure as the 'construction of clients'.

The construction of clients occurs in lawyers' everyday discourse, both formal and informal, about legal ethics, such as when they justify their work,

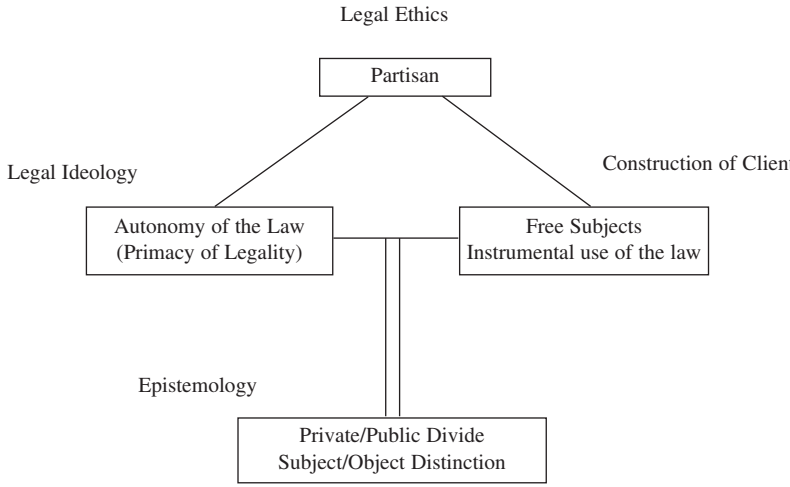

Figure 2.1 The conventional model of legal ethics under modern law

reflect on their role, or – at a more micro level – promote an image of themselves as 'professionals' in their relationships with clients. But the same discourse also produces the ideology of law. The primacy of legality (that is, where law's goals substitute for the client's goals in the course of the lawyer developing a legal case) reflects legal autonomy in its strong sense. One of the roots of this problem is that lawyers bear what Weber (1959, p. 364) calls 'status consciousness'.

Since law invokes the power of the state, it necessarily takes the form of conditionality – if particular facts exist, then particular remedies follow – and the relevance of facts is strictly tested. Such a narrow form of legal inquiry (legal autonomy in a weak sense) supplants more general social concerns about what *should* happen in a given case and leads to the establishment of a professional bar. More directly, a strong autonomy (where there are jurisdictional claims that law should be central in defining who people are and how they should relate to one another in a modern world of modern consciousness) is far more pervasive than the ideological agency of lawyers' professional activities. In that sense, the relationship between legal ethics and the ideology of law in Figure 2.1 should be understood as two-directional.

In fact, the intricately intertwined, mutually constitutive and synchronous relationship among legal ethics, construction of clients, legal ideology and deeply entrenched modern consciousness (epistemology) has, in turn, informed this chapter's methodology. Inspired by phenomenology, it has devised a new model of lawyer-client relations through the narrative of law.

For ease of explanation, the chapter looked to the narrative quality of law to resurrect the expressive function of law abandoned by legal autonomy. And yet legal autonomy has its own discourse to regulate and legitimise such legal practices as ignoring parties' narratives and hearing them only as simple statements of facts. The discourse of legal autonomy is a meta-level narrative, higher than the parties' own narratives of law, yet it has the same characteristics as ordinary narratives, plotting a series of events according to a theme. Although this chapter has not specifically isolated those narratives of modernity, methodologically it involves the same process as explained in Part III.

To return to Figure 2.1, the bottom box refers to the epistemology upon which modern law is premised. The public-private divide is pivotal to this epistemology. Although individuals may freely choose their own values and are not to be constrained in exercising their freedom, they need common rules by which to live with one another in a society. These common rules must satisfy the strict test of potential for universal application such that they constitute the 'public' (compared to the 'private', where individuals select their own values). In this divide, however, social morality lacks sufficient universality to ground public rules. This difficulty leads to a strong version of autonomy and the amoral nature of partisan lawyering. The subject-object distinction is another aspect of the epistemology of modernity. It presumes that subjects and objects are separate entities: subjects have goals and use objects as their instruments. This is directly tied to the construction of clients as free subjects who make instrumental use of the law. What this seemingly self-evident subject-object distinction ignores, however, is that subjects and objects stand in a mutually constitutive relationship. This explains my alternative model of the ethic of inherence, designed around the idea of the expressivity of acts.

Figure 2.2 represents this new model in analogous fashion to the conventional model of legal ethics in Figure 2.1.

Figure 2.2 reverses the positions of ideology of law and the construction of clients compared to Figure 2.1. Whereas the autonomy of law displaces goals in favour of legal validity, Figure 2.2 gives precedence to the propriety of the legal action. The idea is that law may not be appropriate in the given circumstances, even though law is stated to apply universally at all times and for all contexts. Whether law is appropriate or not depends on its context (the contextuality of law). This is consistent with our everyday intuitions and, therefore, should dictate our use of law. However, when the autonomy of law collides with common sense, it proceeds beyond its narrow meaning of the search for legality and instead embraces a wider meaning of a jurisdictional claim. Indeed, it is difficult to halt this forward march of legality when, as the interrelated elements of discourse in Figure 2.1 demonstrate, people think that propriety of legal action in tune with social morality strongly encroaches on individual autonomy.

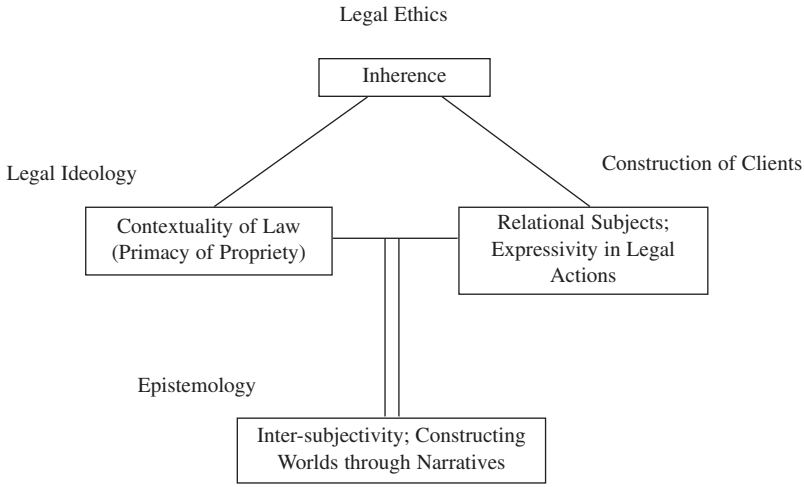

Figure 2.2 An alternative model of legal ethics

Under the ethic of inherence, clients are constructed as relational subjects, not free subjects. When law's validity is understood contextually, clients are also understood to exist in the world. Since a legal dispute is a problem between the self and the other, legal context and the specific relationship between the parties should guide the dispute resolution process, not abstract legal principles. Context and relationality, if taken to their limits, can have endless reach, making it difficult to glean any clear outlines. This is where ends-and-means causality fails and where understandings about the world inherent in human action come in (the expressivity of legal action).

At an epistemological level, too, the mutually constitutive concepts of worlds and inter-subjectivity replace the dichotomies of public and private and of subjects and objects. Goal-setting subjects and wilful actors are not blank slates anymore, but strongly coloured by the social. The conception here is that actors are subject to existing understandings of the world while projecting their own understanding of the world. They are not free individuals who choose and act upon their own goals. Methodologically, people construct worlds through narratives. The idea of narratives is that people exist inter-subjectively as 'we' rather than just 'me' (Ono, 1994, ch. 1). However, an inter-subjectivity that exists across all of society – represented by a single voice – is a very strong version of community and one that does not accord with the state of contemporary societies. Just as actions do not necessarily reiterate existing understandings of the world but projects new understandings as well, so, too, the individual and the other side have the opportunity to particularise their own inter-subjective understandings of the

small universe they share. To incorporate community while also valuing individuality is the very project of post-modernity – something that both builds on the achievements of modernity and criticises its core claims to search for a more liveable society.

3. The moral foundations of tort liability

1. THE TORT LAW CRISIS

Tort law is said today to be in crisis. A dramatic expansion in the category of legal issues disposed of as torts has precipitated this crisis, causing confusion and tension in the established legal and social orders (O'Connell, 1971). The advent of no-fault insurance (promising prompt and calculable provision of compensation to traffic accident victims: Tanase, 1990c) and acclaim for New Zealand's comprehensive compensation scheme (Kato, 1989) have fuelled concerns that the expansion of tort litigation is inefficient. Some writers, such as Sugarman (1985), have gone so far as to propose doing away with tort law altogether. The costs of tort-based recovery far outweigh the benefits, critics argue, and tort law is failing in its purported objectives: deterrence of unlawful behaviour, compensation for harm and securing justice between the parties.

Japan's system of administratively managed justice – where the state standardises liability and fixes allowable damages awards – is pitched as an alternative to litigated individual justice. The system promises 'quick and certain relief for victims' by bypassing costly and time-consuming trials and embracing centrally administered systems of relief (Sato, 1979, fn. 10). Yet Japanese courts are now clogged with tort suits. Since the late 1960s, Japan has witnessed a surge in mass torts (such as in traffic accidents, medical negligence and product liability cases), the recognition of new causal relationships and increased demands for relief. This highlights the inefficiencies of the traditional court-centred system of compensation. There are now calls to 'detortify' the law – to establish avenues for relief outside of tort law.

The expansion of tort law is also jarring the interface between law and society. This is evident in the way tort law resolves problems through the blunt instrument of monetary compensation whereas people have more heartfelt expectations for relief should they suffer a wrong. The legal test of 'unlawfulness' triggering tort-based recovery, too, differs from what most people would regard as unacceptable behaviour. People manage this dissonance by pursuing social action in tandem with legal claims for compensation. However, this bifurcated approach breaks down as society becomes 'juridified'. As many observe, Americans traditionally refuse to apologise even if they cause an accident. This highlights how people can start to feel uneasy when the logic of

the law infiltrates everyday life. The backlash against tort law grows as the categories of recognised torts expand to gain a foothold in people's intimate relationships – within schools, communities and families (such as 'malparenting' suits: Galanter, 1983). Another trend, therefore, emerges: 'anti-tortifying' the law – opposing the intervention of tort law and preserving the logic peculiar to everyday life.

2. MORAL IMPLICATIONS

How, then, should tort law be guided through this sort of crisis? Shifting perspectives slightly, this chapter unpacks the problem by focusing on the moral implications of tort law.

One challenge for tort law is 'anti-tortification' – the purported exclusion of tort law from everyday life on the basis that its operating logic departs from that of society. Anti-tortification does not question the power or effectiveness of law to compensate victims. Rather, it doubts the very legitimacy of tort's rules on what constitutes 'unlawful' behaviour and how people should accept responsibility for such conduct. To address the crisis in tort law, therefore, we must investigate the conceptions of substantive justice and the moral implications that inform the law.

By contrast, 'de-tortification' critiques the inefficiency of the torts regime and does not appear to raise any moral concerns. Indeed, many commentators are opposed to upholding a traditional, justice-centred conception of tort law and deliberately exclude moral considerations from accident compensation systems. However, efficiency – the watchword of the de-tortification movement – is really a question of how to choose rationally among different means. This choice is only persuasive to the extent that people agree on the goals of tort law.

Admittedly, no one doubts that tort law should continue to provide relief to victims; that much is evident from the symbolic use of the very terms 'victim' and 'relief'. However, it is no longer clear who the 'victim' is, given that tort law is shifting its focus from traffic accidents to medical negligence and product liability cases, and from the bureaucratic regulation of improper behaviour to the imposition of positive duties of care on individuals. It is also unclear whether proposed comprehensive systems of relief are effective, and even why relief for victims should stand as the goal of tort law. When consensus breaks down in this fashion, society engages in moral debate in its search for the substantive foundations of law. After all, law itself provides few clues as to what is sufficiently 'unlawful' to justify compensation. Arguably, tort's widening grip and the moral questions it implies explain why the US is turning its back on no-fault insurance and why New Zealand's system of comprehensive

coverage – said to be the best accident compensation law in the world – is not being picked up by other jurisdictions. Renewed interest in moral issues in the US academic community is generating a fresh debate over whether tort law should return to its classical roots of 'corrective justice'.

There are no quick-fixes for the crisis in tort law. Calls for victim compensation and modifications to the design or theory of the system will not get to the heart of the problem. More basically, we need to query whether a bloated tort law impinging on all aspects of life is appropriate for the society we live, or wish to live, in. Tort law needs to be debated at the moral, not just the functional, level. The proposal by Epstein (1973) for corrective justice, of course, is consistent with this moral turn in tort law. However, his model of presuming liability and then defining narrow excuses is far too inflexible to encapsulate the diversity of contemporary torts (England, 1980). More importantly, the model fails the crucial test of moral theory, the key theme of this chapter. This is because it is too rigid to accommodate people's practical concerns for negotiating a delicate balance between the logic of the law and the logic of real life within the overarching framework of tort law.

Two competing claims underpin popular criticism and resistance to tort law. They manifest themselves both in the anti-tortification and de-tortification movements. The first is that people in today's more affluent society want high-level guarantees of security and compensation for all accidents (Friedman, 1985). The second is that they yearn for a new community where they can enjoy a quality of life beyond the mere material. A legal theory will not survive in today's world unless it takes a consolidated approach embracing both 'compensation' and 'community'.

More precisely, people's values about the proper basis for law inform how the law is routinely applied. When people claim a right to damages and the courts uphold those claims on the evidence, this may appear like the inner workings of a closed, self-referential legal system. Actually, however, people are going outside the law and reflecting on law's legitimacy (Tanase, 1991). This micro-level reflexivity ultimately determines whether society normatively supports or rejects the current torts regime. If so, then the solution to the torts crisis first requires exploring why, whether in or out of the courtroom, people claim that they have 'rights' or that the 'law' is on their side. Then we must extract the supra-legal, moral bases for these claims for relief, crystallise them into clear standards and reintroduce them into ordinary legal discourse. This is what this chapter means by ascertaining the moral foundations of tort liability.

3. INDIVIDUAL JUSTICE

Specifically, three main substantive moral foundations support tort liability.

These appear both in the everyday application of law and, at a higher level of abstraction, in legal theory.

The first is 'individual justice'. This is based on the liberal ideal that anyone who unlawfully interferes with another's liberty – that is, their exclusive rights to life and property – is bound to compensate him or her for that, and only that, harm. An important implication of liberalism is that it requires actors to respect the freedom of others. However, it also secures a space within which they may freely act by delimiting the scope of and liability for unlawful conduct. Limited liability – or, put differently, the prerequisite that unlawfulness be 'objectively' tested – is indispensable for a contemporary system of compensation through private law damages. Even though it is morally compelling to grant relief for victims, courts are usually cautious about recognising new forms of liability. They are concerned about taking the law down the slippery slope of expanded liability just as much as they are with achieving a fair allocation of specific losses (Mochizuki, 1990).

However, individual justice – which touts freedom as the ultimate value in torts – cannot construct a tort law that meets people's contemporary expectations simply by requiring objective unlawfulness. The determination of objective unlawfulness requires 'judicialisation' where the courts assume responsibility for adjudicating disputes about damages. However, judicialisation gives rise to efficiency problems associated with 'total justice' (discussed in the next part) and disavows the search for community – the pursuit of contemporary values in society. Specifically, objective unlawfulness removes any sense of interpersonal connection – essential from creating communities – from the concept of liability. At first blush, this might seem an odd conclusion. After all, liability is defined by law and, where necessary, may be enforced by victims through the power of the state. Paradoxically, however, liability loses its coherence when injected with objective meaning and enforceable legal sanction. This is due to the 'blame game' and reductionism.

Put shortly, the blame game is about laying responsibility at the other party's feet. The legal counterpart to the blame game is adversarial court proceedings, where the parties battle it out over the issue of liability. Jurists take for granted that defendants will deny liability and attempt to prove that the plaintiff was responsible for his or her own misfortune. They also presume the importance of the burden of proof for guaranteeing objective liability. However, in real life, the blame game clashes with an idealised view of humanity in which people have a strong sense of responsibility. The legal blame game also comes into tension with good social morals when victims go all out to lay full blame on the other party. This is encapsulated in the common American expression, 'nothing to lose': you try to make out your case and then wait for the court to decide; if you fail, you are none the worse for trying. On the one hand, this entrenches a 'fight for law' (von Jhering, 1915 [1872]). But,

on the other, Americans themselves – especially those with a strong sense of old-fashioned community – criticise the 'disease of litigation' for the moral decay of modern America (Engel, 1984).

Another problem with objective unlawfulness is that it sets the stage for reductionism – the 'evisceration' of moral issues. For example, when someone is killed, the family of the victim is stricken with grief and consumed by anger. But the law can only grasp such a tragedy in terms of lost earnings and damages for pain and suffering. Arguably, individuals should go outside the law and atone for their deeds over their lifetime. Yet this dual-level response is not always possible. In part, this is due to the intervention of lawyers and insurance companies who distance the parties' emotions from the issues. More fundamentally, the same liberal ideal behind individual justice eschews responsibility except as established by law. Admittedly, liberalism's approach to securing individual freedom by delineating the boundaries of liability only has narrow application to enforcement through law. However, an individual may be equally weighed down by the force of moral censure, and may want to be free of any unnecessary interference from others. This feeling gives rise to a reductionist tendency to objectively recast moral culpability in the same terms as legal liability. In other words, moral responsibility arises from, but is no wider than, legal liability.

4. TOTAL JUSTICE

A second conception of justice underlying tort law is 'total justice'. Like individual justice, total justice is concerned first and foremost with the harm done to the victim rather than whether anything unlawful took place. In the machine age, where a momentary lapse can cause a devastating accident, it has become more natural to focus on the effects of an unfortunate accident rather than to view the problem in terms of tortious liability for some unlawful behaviour (Tunc, 1988). Given that similar types of accidents occur over and over again in large numbers, as is the case with automobile accidents, it also seems natural to consider accidents in aggregate and predictable terms. This harm-aggregation approach involves the holistic macro-management of torts on the one hand, and, on the other, the identification and accommodation of gaps resulting from the universalisation of relief for harm.

If individual justice is micro-justice, then total justice is macro-justice. Whereas individual justice relies on the courts to find objective unlawfulness and adjudicate questions of legal liability, total justice relies on the capacity of the bureaucracy to manage society appropriately. For example, Japan takes a holistic approach in its compulsory insurance scheme for traffic accidents. With close links between the bureaucracy and insurance schemes, along with

judicial efforts to 'bureaucratise' justice by standardising liability criteria and damages amounts, disputes are effectively managed society-wide. These sorts of systems also represent an elaborate vision of total justice (Tanase, 1990a).

The harm-aggregation approach in total justice is also influential given the shift to strict liability (diminishing the importance of proving negligence) and the 'explosion' in tort-based liability. The logic underlying greater support for victims and heavier liability for actors draws on the concepts of 'deep pockets' and 'superior risk manager'. 'Deep pockets' means placing the burden of the loss on those who can most bear it and spreading the costs involved across society in the form of higher insurance premiums and product prices. The 'superior risk manager' concept connotes imposing liability on those who can most efficiently manage risks so as to reduce total costs. This approach takes an aggregated view of harm, and accepts that there are predictable and unavoidable costs associated with social benefits such as industrialisation and automobile transport (Calabresi, 1970).

Therefore, total justice offers important insights for designing a legal theory and an institutional system for contemporary tort law. It also accords with calls for a safer and more comfortable living environment commensurate with rising living standards and the belief that science, technology and high-level social management can achieve this. However, total justice – with its emphasis on society-wide security – is destructive of another core value: community solidarity. The everyday expression, 'you should take full responsibility for what you have done', nicely highlights the problem. Many point to 'moral hazard' in insurance – the idea that people can condense their liability in tort for injuring another in the form of upfront payments of insurance premiums. People come to the view that, so long as they are insured, they do not owe anyone anything. This is hardly consistent with our vision of a good society.

However, this is not to conclude that insurance should be banned. Not only is this unrealistic, it is too risky for victim and tortfeasor alike. To take responsibility does not strictly mean to accept *all* the consequences that flow from one's wrongdoing. The expression 'full responsibility' is rooted in the importance of human inter-relationships, importing a greater expectation than merely paying the price for one's acts. To take responsibility is to face up to the pain and suffering endured by the victim as a result of one's wrongful conduct, as one human being to another. Even though accidents cannot be undone, people may deal with them in a sincere way, which paves the way for a belief in people's empathetic potential. The harm-aggregation approach, by contrast, pitches tortfeasor and victim as debtor and beneficiary in a passive relationship vis-à-vis a management entity. People no longer encounter one another. This loss of face-to-face engagement makes it difficult to forge the horizontal relationships necessary to form communities.

5. COMMUNITARIAN JUSTICE

Communitarian justice responds to this critique. Communitarian justice imagines a torts regime in which people feel interconnected with one another and value those interpersonal relations. To appreciate the scope of the communitarian conception of justice, consider how it envisions society and interprets the social relationship between tortfeasor and victim.

Torts are usually understood as arising between total strangers exemplified in the case of traffic accidents. The law constructs the tortious relationship on a similar set of social assumptions. Yet, as a Japanese proverb says, 'even the brushing of sleeves is rooted in fate'. In other words, day-to-day life does not involve an atomistic world of dispersed individuals doing their own thing; even in casual encounters, life is a dense network of diverse horizontal and vertical relationships built around similar concerns and preferences. When we reposition tort law in this context, we see new possibilities. New categories of torts fusing contractual and tortious liability, such as *culpa in contrahendo* and the duty to provide a safe environment, reflect this dense relativity in tort law. From product liability and medical negligence through to the much-debated 'neighbourhood suits' in Japan (Inoue, 1993b, pp. 542–3), quite a few problems dealt with as torts can be reconstructed through a contractual lens – at least in theory. This, too, shows the high importance tort law places on relativity (Okuda, 1974).

The rest of this chapter develops practical recommendations on how tort law might develop so that parties may value interpersonal relationships. Let us start with three specific principles on when to recognise liability for damages.

The first is comprehensibility. Total justice takes an expedient approach to determining liability. This is because it is concerned with providing effective relief rather than censuring the unlawful conduct. Put crudely, total justice will uphold liability where prices can subsume the costs or insurance can spread the risk. This occurs even if society thinks it is unduly harsh to impose a duty of care in the circumstances. Indeed, total justice collapses damages into compensation, failing to problematise negligence in the first place. On this logic alone, then, the tortfeasor and victim will never face one another. Unless people comprehend the 'unlawfulness' of their tortious acts within the relevant social relationship, we cannot expect tortfeasors to empathise with their victims' anger and pain. The rationale behind total justice, therefore, prevents people from 'comprehending' their liability.

The second principle is respect for personhood. Unlike comprehensibility, this principle tends to expand liability. In professional negligence cases, informed consent and affirmative duties to assist the client in reaching a prudent decision are now entrenched in tort doctrine (Logie, 1989). These

concepts pave the way for substantive equality between the parties, at least in a contemporary sense, which is essential for building face-to-face relationships. This distinguishes communitarian justice from the pre-liberal version of communitarianism, which tends to evoke images of individuals locked into oppressive, suffocating communally-oriented relationships. The antimony of 'law versus community' cannot provide for horizontal solidarity in a legalised society; we must search for a social solidarity that can go beyond individualism. Some are pessimistic (Auerbach, 1983), but this book joins with theorists like Green (1985) and Selznick (1989) in elaborating possibilities for bridging law and community.

The third principle relevant to determining the parameters of tortious liability is relational care. In general, we must be cautious about upholding legal liability for omissions. Otherwise, we risk compelling individuals – as total justice is prone to do – to act in particular ways. At the same time, we cannot go too far in the opposite direction, by making the adhesive quality that binds people together in relationships the exclusive province of extra-legal morality. Reliance-based liability in contract law offers a way forward. Where one party takes positive action to bind another to an inescapable contractual relationship, reliance-based theory prevents the first party from acting in a self-interested way if this places the other party into a difficult position (Kawakami, 1988). Communitarian justice envisages society as a web of relationships. As in contract law, specific relationships emerge over time from mutual interactions; they are not forged externally around a person's designated position or function in society. Thus, tort liability is underpinned by mutual care and consideration. People do not betray each other's trust, nor withdraw from a relationship without feeling they have lost.

Finally, communitarian justice also differs from individual justice and total justice in its proposals for the structure of tort law. In schematic terms, individual justice focuses on the existence or otherwise of facts relevant to establishing the elements to the cause of action (using a 'conditions-consequences' dyad). Total justice considers who ought to be assigned the burden of damages (a 'damages-burden' dyad). Communitarian justice is committed to the diachronic process of recovering from a wrong, whereby tortfeasors face up to victims and reflect on how they may ease the victims' pain and suffering. Communitarian justice therefore necessitates revisiting the role of systems such as mediation. Such fora should offer an arena for tortfeasors to face up to victims and not – as is the case today – where mediators can assert their authority to force court-like settlements (Tanase, 1990a). Likewise, court proceedings should seek to incorporate a process whereby parties can negotiate a pathway to recovery. Parties should be granted greater autonomy, for example, and court formalities relaxed to allow more contextual legal argument.

In conclusion, the development of contemporary tort law can be viewed through the kaleidoscope of these three intersecting conceptions of justice. We can build a tort system more suited to our times by slotting in the logic of communitarian solidarity between the two existing approaches of freedom and security.

4. Post-divorce child visitations and parental rights: insights from comparative legal cultures

1. INTRODUCTION

The issue of child visitations is assuming greater importance in Japan. Each year, approximately 250,000 Japanese children in 150,000 family units witness the divorce of their parents. Overall, more than 23 per cent of all Japanese children are expected to experience the breakdown of their parents' relationship before they reach adulthood. With the divorce rate hovering at its post-war peak, more fathers seeking to maintain a parenting role post-divorce and many mothers preferring to sever all ties with their ex-husbands, visitations disputes are climbing. So much is borne out by recent statistics. In 1998, visitation cases numbered 1,700 mediations and 290 formal adjudications; in 2006, they had nearly tripled to 5,600 cases overall.

Yet full visitations rights are seldom allowed. Of the 5,600 cases concluded in 2006, visitations by non-custodians were approved in 57 per cent of all cases. Of these, only half permitted visitations of more than once a month and only 14 per cent granted overnight stays (Tanase, 2008). Japanese family law appears ambivalent about endorsing co-parenting post-divorce. Although article 766 of the Civil Code proclaims that the 'best interests of the child' should guide post-divorce parenting arrangements where the former spouses cannot agree on these themselves, article 819 provides that only one parent should have 'parental power'.

This ambivalence is reflected in judicial attitudes. Since the Tokyo Family Court first recognised visitations in 1964 (14 December 1964, 17 *Kagetsu* 55), Japanese judges have consistently refused to recognise a right in non-custodial parents to visit with their children post-divorce. Even as recently as 2006, the Tokyo Family Court (31 July 2006, cited in Tanase, 2008) held that, although visitations were 'desirable', some restrictions should apply to the 'extent and manner' of visitations to ensure the child's healthy growth and personal development. In this case, the court ordered supervised visitations and banned overnight stays with the non-custodian.

The sole Supreme Court authority on point (6 July 1984, 37(5) *Kagetsu* 5) is another typical example. In this case, a father appealed a first-instance

ruling turning down his request to visit his child twice yearly. The father argued that visitation was a natural right deriving inexorably from the parent-child relationship and that, by article 13 of the Constitution (the 'right to life, liberty and the pursuit of happiness'), the lower court was wrong to exclude him access. The Supreme Court dismissed the appeal, holding that 'visitation is a matter for the [Family Court] to determine as part of resolving custody cases, and that refusing to grant visitations on the basis that it is contrary to the welfare of the child does not give rise to any constitutional issues'. Although the judgment accepts that non-custodial parents may properly petition the courts for child visitations (Ishida, 1988, pp. 112–13), the Supreme Court starkly revealed its unsympathetic attitude to visitation requests. In this case, it straightforwardly dismissed the father's modest request to see his daughter twice a year. (If a US court had heard this same case, no doubt it would have ruled the first-instance decision unconstitutional.)

The courts' diffidence to child visitations, however, is not simply obduracy on the part of the judiciary. If anything, it is broadly consistent with prevailing social norms. Although there are no precise statistics on how many children maintain contact with their non-custodial parent following divorce, the results of a postal survey prepared by Madoka (1987) and completed by participants in her 'Divorcing with a Smile' seminar programme show that 29 per cent of non-custodial fathers and barely 10 per cent of non-custodial mothers maintain contact with their children (see also Aihara, 1973, p. 18, Table 6; Ishikawa, 1988; Terado and Imura, 1988). The extracts of correspondence quoted in Madoka's article acutely convey the pain and despair felt by non-custodial mothers who, refused all contact with their children, can only pray from afar that their children are happy and content. Divorce in Japan, it seems, breaks families apart for good (Bryant, 1984, pp. 86–90).

Of course, the US is hardly perfect in how it handles non-custodial visitations. In particular, complications commonly arise in making visitation arrangements because of the trail of bitterness left between the ex-spouses leading up to determination of primary custody. A social problem is also emerging whereby divorced fathers are falling into arrears with their child support payments and failing to maintain contact with their children. Even so, child support in the US is paid to 74 per cent of eligible divorced women caring for children under the age of 21 (two-thirds receive the full entitlement). This compares with 11 per cent in the case of Japan,[1] revealing a deep

[1] This is the figure for divorced, single mothers (it does not include women who have subsequently re-married): Outline of the Results into a National Survey of Single Mother Families (Department of Health and Welfare, 1984, p. 10). According to a survey cited by Ishida (1988), which incorporates both regular and occasional child support payments, the figure is 19 per cent.

gulf between how divorced fathers in Japan and the US contribute to the costs of child-rearing. A nationwide survey in the US found that nearly 60 per cent of parents who had separated within the last five years maintained contact with their children at least once a month (Furstenberg et al., 1983, pp. 656–68, p. 665 Table 7). Following the enactment of joint custody laws, there is a new push for joint child-rearing (Folberg, 1984–5, p. 85). Put bluntly, this evidence shows how far Japan lags behind the US in this field. Japan's tough line on visitations is more than a mere difference of judicial view over whether ongoing child access is, on the facts, in the interests of the child. When a Japanese court can reject a modest request by a father to see his daughter twice-yearly, even though the father has no discernible character flaws and is expressing an ordinary parental wish, a more deep-seated difference is at play. There exists a difference in the way Japanese think about law and the family.

This distinction between fact-finding and value judgment is, indeed, a fine one. When, as the Supreme Court put it, 'the court at first instance *found on the facts* that granting access to the child would be contrary to the welfare of that child', the lower court was not only making a judgment about the specific merits of the case before it. It was also incorporating a more basic value judgment, viewing the evidence through the prism of contemporary Japanese society to educe widely-held and distinctive values about the family and legal order. Indeed, the very test of the 'welfare of the child' – a test which few would dispute is a perfectly legitimate standard to apply when determining visitation cases – compels the courts to make such core and distinctive value judgments.

After affirming that 'visitation rights are based on the natural desire of parents to see their children grow up and must be respected as a fundamental human right', the Supreme Court immediately added: 'However, by necessity, visitation arrangements should conform with the welfare of the child. Where it is found that this is not possible, restrictions – or a complete ban – on visitations become unavoidable'. By so holding, the court was reiterating a classic judicial and academic formulation of the visitation doctrine (Numabe, 1981, pp. 175–8). It bears a striking resemblance to the general test of 'the best interests of the child' in US law, one applied widely in US cases ranging from child custody to adoption.[2] However, an examination of relevant precedent in the US clearly shows that *parental rights*, as opposed to the *interests of the child*, strongly influence American judicial decisions (Henszey, 1976–7, p. 77). Despite a similarly worded test in Japan, Japanese judges are far less generous than their American counterparts in granting visitations, largely

[2] For example, California's Civil Code §4601 provides that 'the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child'.

because Japan lacks a corresponding conception of parental rights. Just as social norms have informed the abuse of rights doctrine, which in Japan is concerned with balancing competing interests (Young, 1984, pp. 970–1), so too visitation doctrine takes its cue from prevailing social norms (Higuchi, 1988, p. 241). For Japanese, these norms are as natural as the air we breathe. But if we do not critically scrutinise the assumptions that inform our value judgments, since these assumptions themselves are value-laden, then no amount of arguing over the fine points of individual judicial decisions will change the destructive and enduring effect divorce has on Japanese families.

The aim of this chapter is to identify and critically analyse the different normative perspectives that shape the visitation doctrine in both Japan and the US. Specifically, the next section will explore a Japanese decision where the court refused a petition for visitation, using it as a case study into the type of reasoning that leads Japanese courts to reject visitation rights. Section 3 will then turn to the US, examining cases which have upheld the importance of parental rights. Finally, the chapter will explore US perspectives on law and the family that sustain the prevailing view that parents have an inviolable right to visit their children.

This chapter has both similarities with and points of departure from the previous chapters. Like Chapters 2 and 3, this chapter demonstrates how widely and deeply liberalism imbues American law and society. This is in contrast to the more communitarian ethic that distinguishes law and society in Japan. However, unlike these earlier chapters, this chapter is more upbeat about liberalism and is honest in acknowledging the achievements of the United States in retaining important relationships for children of divorced families. Japan, by contrast, could benefit from a re-think of its approach to post-divorce visitations. However, this is not to proclaim the triumph of liberalism and the failure of communitarianism. Far from it. As the chapter notes, one of the secrets of the United States' success with child visitations law is how both law and society are geared towards preserving important family relationships despite the breakdown of marital relations. It is this relational – indeed, communitarian – ethic, more so than any strict liberal parental 'rights', which makes the American approach to child visitations a valuable model for Japan to emulate.

2. WHY JAPANESE COURTS DENY VISITATIONS

First, let us look at a typical family law judgment in Japan and use it as a case study into why Japanese courts deny visitation petitions. We will examine a case heard by the Osaka Family Court on 23 May 1968 (*Kasai geppo* 68; see also Nakagawa, 1969).

Facts

The plaintiff married the defendant in November 1957 and, the following year, gave birth to their son. Soon after, the defendant became involved with another woman. In January 1960, the defendant petitioned for a mediated divorce; the plaintiff counter-petitioned for shared domicile. Although the imbroglio between the parties lasted several years, they finally divorced by mutual consent in November 1964. Under the terms of their consent agreement, the defendant assumed custody over the child. The parties also 'agreed that [the plaintiff], upon request, may visit [her son] no more than eight times a month and, during holidays, have him stay over at her home for no more than five consecutive days'.

Following the divorce, the defendant and his new partner lived as a family with the plaintiff's and defendant's son, a child from the new partner's previous marriage and the defendant's and new partner's own child. In April 1965, they married. At the same time, the new partner adopted the plaintiff's and defendant's child as her own. (The defendant also recognised his own child from the new marriage and adopted his new wife's child from her previous marriage.) As soon as the plaintiff became aware that her son had been adopted, she petitioned for mediation to give her legal custody over her son. The mediation sessions failed to produce agreement. She then filed suit, seeking *inter alia* visitation rights.

Judgment (omitting the portion on change of parental custody)

Visitation rights may arise as an issue because there is no express provision dealing with this under current Japanese law. Naturally, biological parents should be entitled to see their own child. However, the welfare of the minor might require imposing partial or full restrictions on such visitations.

In the context of the present case, joint custody over the son is held by the defendant and, by virtue of adoption, his new wife. As a matter of law, the plaintiff cannot petition for a change of custody. Further, the son has settled down and appears to be content living with his real father (the defendant) and his adoptive mother. He does not wish to change this living arrangement. Teachers at his primary school are also opposed to the plaintiff visiting with the child because, although visitations have occurred since he began school, the experience has shaken him psychologically and affected him in an undesirable way. With all this in mind, and in the interests of the child's welfare, the plaintiff should not be allowed to visit her son at the present time.

A three-tiered rationale underpins this judgment against the petitioner. The first is that the child's welfare is the overriding consideration for determining visitation rights. Courts therefore may strip natural parents of all contact with their child if considered to be in the child's interests. The second is that the courts disallow third-party involvement once a child is placed in a happy home environment. The courts, therefore, have even stronger reasons to deny visitations if a step-parent adopts the child and the child is happy in the new family environment. The third, more implicit and less obvious than the first two, is that any agreement reached by the parties at the time of the divorce does not sway the Family Court's decision about whether or not visitations are in the child's interests. This last rationale can be inferred from the court's refusal to

acknowledge not only the *terms* of the parties' agreement on visitation, but also the *fact* that the parties had reached an agreement to begin with (see further Matsukura, 1985).

At first glance, these rationales seem unobjectionable. That the Family Court should prioritise child welfare in determining family law cases, especially those directly concerning children, seems self-evident and irreproachable (Shimazu, 1973; Tanikawa and Maezawa, 1986). So long as children are being raised by loving and caring parents, outsiders should certainly not be allowed to interfere in their care, nor weaken – no matter how slightly – the parent-child bond. Further, courts should freely disregard agreements made by parents, especially those reached during the hurly-burly of divorce, where they find that a subsequent change in circumstances makes the agreement no longer consonant with the child's welfare.

US family law also accepts – or, more accurately, seems to accept – a similar line of reasoning. Thus, the priority afforded to children's welfare is embraced in the 'best interests of the child' test. This applies to a wide range of contemporary issues involving care and custody, including determinations of primary custody, cessation of legal guardianship, and adoption approval (Stiles, 1984; Glendon, 1986; Ryuzaki, 1988). The view against disturbing a happy home is caught up in ideals of 'family autonomy' and 'family privacy'. These ideals preclude the government from interfering in the exercise of parental rights, and curb third parties from invoking the power of the courts to intervene in domestic affairs. US precedent, too, clearly provides that any custody decrees ordered during divorce proceedings are subject to judicial review at any time.

Does this suggest that the ruling against the petitioner in the Family Court case study, as well as the analogous conclusions reached by the Supreme Court and most academic commentators in Japan, are unexceptional and undeserving of special scrutiny? Absolutely not. This is because Japanese and US courts reach patently contrasting decisions, even though they seem to apply the same line of judicial reasoning. For example, US courts rarely deny visitation petitions brought by non-custodial parents on the basis of the 'best interests of the child' test (Weitzman and Dixon, 1979). Even on a selective reading of the relevant case law, US courts will not refuse visitations simply because it is against the wishes of, or inconvenient to, the custodial parent (*Asbell v Asbell*, 430 S W 2d 436, Mo. 1968). Nor will they make visitations conditional upon payment of child support (Fournie, 1977, pp. 121–2; compare Ishikawa, 1988, p. 45). Similarly, the behaviour of the non-custodial parent at the time of divorce is irrelevant to determinations of visitations, except in the case of child abuse (Lewinski, 1984, pp. 198–9). Although the wishes of the child are taken into account, courts rarely refuse visitations on this basis alone, unless the child is mature (*Eylman v Eylman*, 22 A D 2d 495, N. Y. App. 1965).

Courts ensure that non-custodial parents can properly exercise their visitation rights by imposing several sanctions against custodians who obstruct or otherwise undermine visitations. These include stripping custodians of primary custody, cancelling their child support payments, holding them in contempt of court, and subjecting them to tort-based causes of actions (Allen, 1985–6, p. 490). Judicial precedent and legislation have also extended visitation rights to others who have significant contact with the child – such as grandparents (Lewinski, 1984, pp. 200–206), siblings, de-facto parents, step-parents and even lesbian partners – irrespective of whether the custodian objects to such visitations. No doubt these new rights have evolved from the courts first granting visitation rights to natural parents who, before the divorce, had a hand in raising their children (Shapiro and Shulz, 1985–6).

Clearly, we cannot explain away this difference in judicial outcomes – despite the similarity in legal doctrine – on the basis that US or Japanese judges pay mere lip-service to the interests of the child, or that different social contexts lead to different interpretations of what constitutes the interests of the child. Although these arguments seem superficially attractive, the respective tests of 'the welfare of a child' (the Japanese test) or 'the best interests of a child' (the US test) provide few clues as to why Japanese and US courts respectively refuse or grant visitations. What is more conclusive is the distinctive reasoning in the two jurisdictions. Put differently, there is a considerable difference between what *appears* to be similarly-sounding legal tests and what *actually is* the real reasoning lurking beneath the doctrinal veneer.

Thus, family privacy – the second rationale operating in the above-mentioned Osaka Family Court decision – has divergent meanings in both Japan and the US. In the US, step-parents must notify and obtain the consent of the non-custodial parent to adopt a child (*Armstrong v Manzo*, 380 US 545, 1965). Where the non-custodial parent objects, it is not enough to show that the adoption is in 'the best interests of the child'. Special circumstances must exist which indicate that the non-custodial parent had renounced the parental role. These circumstances might include deserting the child, not maintaining contact with the child for over a year without special reason, and failing to pay pre-determined child-support (Uniform Adopt Act, 9 ULA §6(a); see also Laskiewica, 1982). In Japan, by contrast, a step-parent does not even need to seek permission from the Family Court for adoption (proviso to Civil Code Article 798). As the Osaka Family Court held:

> Adoption *per se* provides no grounds for changing custody; indeed, if the adoption means that the child is happy in his or her new home (with the new set of parents), there is a strong case for denying a natural mother visitations with her child.

In practice, this means that the non-custodian is divested of all visitation rights once the custodian re-marries.

In the case, the husband initiated the divorce after getting involved with and conceiving a child with another woman. It was entirely foreseeable that he would re-marry. (This fact is also relevant to the third rationale about how visitation agreements may be reviewed at any time, as we shall see shortly.) In effect, a natural mother would have no chance at all of visitation with her child if, within a few months of finalising the divorce, the father re-married and the father's new partner adopted the child. In this case, however, the parties had reached a formal agreement allowing the natural mother to meet with the child twice a week. This agreement was reached after several mediation sessions where both parties were represented by lawyers. There was no evidence to suggest that the agreement was a sham so that the husband could dupe his wife into agreeing to a divorce (compare Madoka, 1987, p. 17). According to the American Uniform Marriage and Divorce Act (§409(b), 9 ULA 211, 1979):

> A party seeking to modify a prior custody decree made in the best interests of the child must show that special circumstances have arisen that make continuing custody extremely harmful to the child. The party 'cannot plead circumstances which were foreseeable at the time the decree was determined'.

Indeed, US law places a special duty on custodial parents not to interfere with non-custodial visitations (Allen, 1985–6, p. 494). It imposes significant legal restrictions on the custodian moving residence for a new job or for child-raising purposes (Sheehan, 1986).

The three-tiered rationale underpinning Japan's approach to regulating ongoing non-custodial visitations is not as axiomatic as it first appears. Indeed, it is highly problematic. The next part investigates the differences in logic that can lead Japanese and US courts to reach such divergent decisions despite invoking seemingly similar doctrinal reasoning.

3. VISITATIONS AND RIGHTS

Under Japanese case law, visitations are weak, not strict, rights. Courts can curtail such rights when a child is content in a new household. However, in the US, visitation rights are widely granted to both parents and parent-substitutes alike. US courts rarely refuse visitations to natural parents who helped bring up the child prior to the divorce.

This part analyses why the US vests parents with strong rights. First, as a matter of doctrinal logic, visitation rights are conceptualised as constitutionally-protected, fundamental human rights (compare further Chapter 6 below). Second, as a matter of legal culture, the paramountcy of rights means that, unlike in Japan, the *interests* of the child do not trump the *rights* of parents.

3.1 Constitutional Protection of Parental Rights

First, let us look at visitation rights as a matter of legal doctrine. The US construes visitation rights as a natural offshoot of a parent's constitutionally protected right to raise his or her children. In Japan, too, many believe that visitation rights are 'natural rights that derive from the innate relationship between parent and child', thereby falling within a broad definition of fundamental human rights (Tokyo Family Court, 14 December 1964, 17 *Kagetsu* 55; see also Kohata, 1987, pp. 114–15). In practice, however, the fate of visitation petitions under Japanese law depend merely on whether or not there is just cause for the court to hear the petition; it does not depend on questions of basic constitutional rights vis-à-vis the state. Therefore, disposition of visitation rights in Japan is a matter of balancing competing private interests. The petitioner identifies the relevant interests that support his or her petition – in general, the emotional interests of the parent or, better still, the interests of the child to be loved by his or her parents – and the court then balances these against the interests of the custodian or the custodial child for the child to remain in a peaceful home environment (Tanaka, 1980, pp. 250–1). By contrast, in the US, the right to bring up a child is literally a right under the constitution, which can be pleaded against the state. Since visitation rights are inextricably linked to this constitutional right, they are not susceptible to any simple balancing exercise between competing private interests.

A wealth of authority clearly establishes that visitation rights in the US are premised on a parent's constitutionally protected right to bring up his or her child. The basic principle of modern liberal societies is that, in religion, politics and social life, people have free choice over how they live. As a corollary, people have the freedom to choose their spouse, build a family and raise their children (*Skinner v Oklahoma*, 316 US 535, 1942; *Loving v Virginia*, 388 US 1, 1967; *Griswold v Connecticut*, 381 US 479, 1965). When, for example, the state imposes a particular type of educational philosophy contrary to the educational preferences of parents, or removes a child from a home environment deemed detrimental to that child's development and places him or her into protective custody, issues immediately arise as to whether parental rights have been violated (*Meyer v Nebraska* 262 US 390, 1923; *Pierce v Society of Sisters*, 268 US 510, 1925). In particular, a parent's right to due process has been prominent in recent cases involving child abuse. In child abuse cases, authorities have placed abused children in temporary protection and stripped the parents of all their parental rights. However, courts have invariably required strict proof rather than the normal civil trial standard of 'a preponderance of evidence' before allowing authorities to deprive parents of their parental rights (*Santosky v Kramer*, 455 US 745, 1982; Sander, 1983). Alternatively, they look for the least drastic alternative outcome (Note, 1980,

pp. 1237–8; Garrison, 1987). Due process generally requires these additional steps before a court will accept that state concerns prevail over a parent's constitutionally protected rights (Buckholz, 1979, pp. 725–6).

Given that 'the best interests of the child' is a very open-ended legal standard which invites judges to impose their own value judgments in evaluating the evidence, some advance a compelling argument that it is *prima facie* unconstitutional to deny parents their rights on the basis of a highly discretionary legal test (Note, 1980, pp. 1231–5). To be sure, the courts employ the same test of the best interests of the child when determining primary custody post-divorce. However, the courts need to designate one party as custodian because divorce makes joint custody physically impossible. It is both unavoidable and crucial for them to evaluate the competing claims and decide whose custodianship is most in the interests of the child. Indeed, to state upfront a later conclusion, this is not about taking away parental rights. It is about partially subjecting those rights to minimum necessary restrictions in circumstances where it is physically impossible to exercise those rights in full. Thus, the test of the best interests of the child is restricted to primary custody determinations. It has no generic relevance to cases involving deprivation of parental rights, even if the child's interests are at stake in such cases.

Courts overstep the strict confines of custodial determination if they interfere with non-custodians' parental rights to raise their children to a degree beyond that which is strictly necessary. A specific example is where the court bans all child visitations. Such decisions, like child abuse cases where parents are stripped of all parental rights, are subject to stringent constitutional oversight. True, a mere heartfelt plea by a non-custodian 'just to see my child' may not connote that the parent is hoping to 'bring up' that child. However, custody intimates that ordinary contact strengthens the bonds between parent and child – and this simple pleasure of bringing up a child through a loving parent-child relationship is an inexorable and indispensable part of the constitutionally protected right of raising a child. Thus, the right of non-custodians to maintain ongoing post-divorce contact with their children appeals to a logic similar to that underpinning the broad understanding of custody as child-rearing. Visitation is not a new right that arises from a divorce.

This link between visitations and parental rights explains why banning non-custodians from visiting their children is akin to stripping custodians of all their parental rights. Adoption law lends further support for this view. Certainly, the courts recognise the right of a non-custodial parent to object to an adoption. They will only force an adoption over and above the non-custodian's objections – that is, deprive the non-custodian of his or her parental rights – if the latter is declared unfit as a parent. This suggests that in adoption law, courts are cautious about extinguishing the relationship between the child and his or her natural parent. In these cases, however, the courts – at least, for

the time being – are only concerned with upholding the non-custodian's rights to child visitations. The significance of adoption law, then, lies in the idea that denying non-custodians child visitations is equivalent to depriving them of their parental rights altogether.

US courts are also broadening the category of persons who can assert parental rights. For example, the courts are re-assessing the constitutionality of granting biological mothers exclusive custodianship over children born out of wedlock and refusing to extend any parental rights to the biological father. The case law trend is for parents in non-traditional families or outside a *de jure* marital relationship to be able to assert parental rights. Constitutionally guaranteed parental rights, then, are pivotal in understanding the rights of non-custodians to visitations. Specifically, the connection between the biological parent and the child cannot be severed purely because of a lack of a legally recognised marital relationship. Thus, parental rights have been extended to *de facto* husbands (*Stanley v Illinois*, 405 US 645, 1972), unmarried live-in partners, sperm donors for artificial insemination (Kaiser, 1987–8, p. 88), and natural fathers of illegitimate children whose legal fathers have not disavowed paternity (Meiners, 1986). On the other hand, courts respect the privacy of custodians, especially the wishes of the biological mother's new spouse to adopt the child or even raise the child as if his own by not disavowing paternity. As a result, a blood relationship is insufficient to ground parental rights. Proof is required that the father was 'parent-like', taking an interest in the birth and making subsequent efforts to maintain contact with the child (*Quilloin v Walcott*, 434 US 246, 1978; *Lehr v Robertson*, 463 US 248, 1983). Conversely, the courts are affirming rights to visitations and ongoing contact with children for *de facto* or psychological parents, such as foster parents or *de facto* adoptive parents, despite any objections by the natural or legal parent in whose custody the child has been placed (Lewinski, 1984, pp. 191–226). The message in these cases is that parents who lose child custody upon divorce are in a stronger position to have their parental rights protected compared to natural or *de facto* parents. This is because these divorced parents are not only related by blood, but also have shouldered responsibility in bringing up their children *Quilloin v Walcott*, 434 US 246, 1978, p. 256).

All this evidence points to a judicial trend towards resolving visitation issues by reference to parental rights. US courts accept that the 'best interests of the child' test, by itself, is far too arbitrary to deprive parents of their rights to raise their children (Novinson, 1983, pp. 124–39). Despite the absence of authority directly on point, the Supreme Court would no doubt follow the tone established in the existing case law to strike down as unconstitutional orders, such as those made in Japan, which deny all child visitations on the basis of 'child welfare'. This is because the court would not sanction a major assault on parental rights by cutting off all parent-child relations, unless there was a

clear finding of prior child abuse or alternative grounds that the person was otherwise unfit to be a parent.

3.2 Child Welfare and Parental Rights

Even though rights matter in the US, this is not to suggest that child welfare has no bearing on visitation issues. Indeed, there are still three possible avenues for invoking the 'best interests of the child' and subtly influencing visitation determinations, even though visitations are manifestly classed as rights. Yet the highly constrained role that the 'best interests of the child' test can play in child visitation cases reveals that US courts genuinely construe visitations as an extension of parental rights.

The first avenue for taking into account child welfare is when custody and visitation issues are decided together as part of settling all post-divorce care and custody arrangements. Parental rights do not figure in custody battles; the child's happiness is dispositive. But this judgment about which parent can best provide for the child's happiness also influences questions of visitations. The courts may subsequently review a custody order at any time if they believe that the order is no longer in the interests of the child. The courts must evaluate the impact on the child's welfare before approving any such modifications.

Even so, custodianship and non-custodial visitation are distinct issues. The balancing of competing interests required to determine a custodian cannot have broader application, nor overturn the constitutionally protected fundamental human rights of the non-custodian. For example, some have persuasively argued that custody modification proceedings differ qualitatively from original custodial hearings, and that the best interests standard has no relevance to custody modifications. Accordingly, once the divorce is finalised and custody determined, a new family unit is created around the custodial parent and the child. The courts must respect the new family's privacy, namely, the constitutionally protected rights of the custodial parent to raise his or her child as he or she sees fit without interference from others. Although it is possible to modify custody orders if necessary, judges do not make wholesale modifications simply to accommodate their view of what is in the interests of the child. A petition by a non-custodian for a change of custody on the grounds of child discipline, educational upbringing or the custodian's sexual relationships is strictly scrutinised since it is akin to depriving parental rights. The courts do not take a fresh sheet of paper and ask whether a change of custody to the other parent better serves the interests of the child. They will only deny custodial rights in exceptional circumstances, where continuing custody would cause serious detriment to the child (Uniform Marriage and Divorce Act §409(b), 9 ULA 211, 1979). Thus, a bright line distinguishes original custody determinations (decided on a balancing test) and custody modifications (decided on the

issue of the custodial parents' rights). This has a flipside for non-custodians. Visitation rights – which non-custodians can effectively exercise as single parents – are considered separately from the competing wishes of custodians, even if visitation details are considered together with custody as part of broader caretaking arrangements.

The second avenue by which child welfare considerations can be factored into visitation determinations is when ascertaining 'suitability as a parent'. Whether or not someone is a suitable parent ultimately depends on whether he or she can provide a well-balanced family environment within which to raise a child. Invariably, suitability is tested by asking whether the family environment is desirable for the child. Applications to modify custody, and thereby in effect to strip a natural parent of parental rights, are grounded in claims that the natural mother is going out with too many men or otherwise harming the moral development of the child (Shernow, 1988, pp. 698–701). Such applications illustrate the close link between parental suitability and child welfare. After all, parental suitability, which can be invoked as a limit on natural parents' absolute rights to bring up their children, is defined from the perspective of the child's interests. And those demand that a child be raised in an appropriate home environment. According to the general consensus of family law scholars in Japan, inquiries into limits of parental rights are justified on the basis that 'parental authority is more about the duty (rather than the right) to raise children' (Wagatsuma, 1961, p. 316).

Parental suitability – the idea that parents are only suited to parenthood if they can raise their children well – accepts that the state may cross the line and, in the interest of the child's welfare, interfere with a parent's right to make individual child-rearing choices. By subjecting parental rights to corresponding duties, it paves the way for legal intervention across the entire spectrum of child-rearing decisions. Parents can no longer assert that they can raise their children as they see fit and no one can interfere with their decisions, or that they have an automatic right as a parent to see their children unless there is a compelling reason otherwise. Instead, we can imagine mothers being told not to 'make waves' in the child's new second home environment and chastising themselves for being 'selfish' to want to see their children (Madoka, 1987, p. 17); or fathers submissively accepting court orders declaring visitation not to be the child's best interests.

By contrast, the US has resisted this trend towards subjecting parental rights to duties and undermining autonomy in child-rearing. This is no doubt due to the liberal values that sustain its rights-based society. Except in clear and compelling evidence of significant harm caused to the child, US courts accept that there is no intrinsic way of knowing whether something is or is not in the best interests of the child (Mnookin, 1975; Goldstein et al., 1973, n. 27)). Ultimately, it is in the best interests of the child for a parent to use his or

her own judgment in raising the child. This respect for parental discretion is ingrained in the doctrinal standard that 'the state's guardianship interests in the child's welfare are *de minimus* if the child is being raised by a fit parent' (*Stanley v Illinois*, 405 US 645, 1972, pp. 657–8; Novinson, 1983, p. 127). This standard is two-pronged: the issue of (i) parental fitness must be considered separately from and before (ii) the best interests of the child.

Even though parents' rights inform child visitation issues in the US, surely visitations would not be granted where it is clear from all the evidence that it would be harmful to the child. Admittedly, under orthodox law, public policy arguably constrains the constitutional entitlement to visitations. In practice, however, broad questions of social utility only slightly fetter the constitutional protection afforded to parents. If anything, policy-based judgments about parental suitability largely reinforce visitation rights. As a matter of policy, the benefits children derive from visitations carry significant, albeit not exclusive, weight. Policy arguments, then, constitute the third avenue by which considerations of child welfare can impact on visitation disputes. In practice, hotly contested visitation cases rarely result in court judgments upholding visitations as a *prima facie* parental right. Instead, courts mostly grant visitation applications, emphasising that visitations are in the interests of the child. Conceivably, as Japanese anti-visitation theorists and a few US scholars argue, courts should constrain rather than uphold visitation rights where visitations can be shown to have a negative effect on the psychological stability of the child by disrupting domestic peace and undermining the child's commitment to his or her custodial parent (compare Goldstein et al., 1973, pp. 37–9, 116–9; Kajimura, 1976).

However, policy considerations do not undermine visitation rights in the US. On the contrary, they manifestly serve to *strengthen* those rights. This is because several empirical studies on the effect of divorce on children have guided contemporary law and practice on visitations. Thus, studies have shown that, at the time of divorce, children are 'intensely afraid of being abandoned by their [parents]' and those children who are 'unvisited or poorly visited' by their fathers are 'likely to feel unloved and unlovable' (Wallerstein and Kelly, 1980, pp. 46, 218). Studies have also revealed that children who receive the same love and guidance from both parents as they did before the failure of the marriage recover most quickly from the mental anguish of divorce. Further, on a more practical level, policy favours ongoing contact with non-custodial parents (especially bread-winner fathers), because non-custodians will feel a real attachment to the child and contribute more genuinely to child support (Chambers, 1979, pp. 127–9).

Although policy considerations are usually aligned with rights theory, this is not inevitably so. Indeed, as a matter of policy, social factors – rather than rights – may guide visitation decisions. This is because social inertia, akin to

self-fulfilling prophesies, can be a factor in policy considerations. For example, a major reason why Japanese fathers and mothers who initiate divorce do not see their children post-divorce is because they feel that they cannot do so, even if they want to (Madoka, 1987, p. 16). If staying in a failing marriage is 'for the benefit of the children', then divorcing is regarded as abandoning the children. Most guilt-ridden divorced parents then do not ask to see their children. This creates community misunderstanding about child visitations, generates in-principle opposition to them, and ultimately reinforces the stigma equating divorce with child abandonment.

To escape this vicious circle, and enable child visitations, a rights-based approach is needed. Individuals then can break free from the shackles of community-held stereotypes and demand visitation as a matter of right. The discussion thus far in this chapter has drawn on contemporary America for comparative insights into how a society can largely accept visitations as part of everyday life. However, it was not too long ago that divorce in the US also meant the irreversible collapse of the family unit. After all, every society assumes that divorce is a last resort and, to varying degrees, stigmatises divorce as 'leaving' the household and 'abandoning' the children (Fournie, 1977, pp. 118–9). What allowed American parents to resist this social stigma and persist with their wish to see their children was a strong conviction about their individual rights. A commitment to rights in the US meant that parents were unafraid to assert their individual rights in the face of countervailing social norms. Early ground-breakers were finally able to change prevailing conceptions about divorce and pave the way for today's policy affirming the value of child visitations.

Thus, under US law, the non-custodial parent is entitled to continuing child visitations because the natural right of parents includes the right to bring up their children. Ultimately, non-custodial parents cannot be deprived of this right, even by law. Indeed, non-custodians may invoke all necessary legal protections to enforce this right over and above any objections by the custodial parent. Even if a visitation directly raises issues about the child's welfare, the right is so strongly entrenched that, in practice, it can effectively brush aside any such concerns.

Japan's unfriendly approach to visitations is in stark contrast to their wholehearted endorsement in the US on the grounds of manifest parental rights. Although to date Japan has largely taken a dim view of visitations and has developed a visitation doctrine quite divergent from its more upbeat US counterpart, there are many family court attorneys and legal scholars who believe that non-custodial parents deserve to visit with their children. Efforts to make this happen are proceeding slowly but surely (Aihara, 1969; Numabe, 1981; Terado and Imura, 1988). However, most Japanese advocates of reform are not seeking to develop visitation doctrine by reference to a rights-based approach.

Instead, many are disavowing parental rights and invoking child welfare rationales in favour of child visitations. Thus, they argue that parents must be made to recognise that child visitations with the non-custodians are also for the benefit of the child. To that end, child welfare alone – not parental rights that, they claim, are never absolute – justifies child visitations (Kunifu, 1971; Nakagawa, 1969, pp. 149–50). For sure, this argument has much to commend it. The disavowal of parental rights and focus on child welfare alleviates the problem of custodians with parental authority 'locking' the children in their own households. This, in turn, creates the scope for non-custodians to visit their children.

However, to use legal jargon, the non-custodian's 'visitation right' here is no more than a 'reflex interest' of the child's rights. Children do not realistically initiate requests to visit their non-custodial parent. Nor do they accede to a requested visitation if they know it would upset the custodian, even if that means suppressing any natural and unconscious urge to see the non-custodial parent (Aihara, 1969, p. 45; Madoka, 1987, pp. 12–13). Therefore, without any legal means to demand visitation as a matter of right and without any bargaining power due to lack of contact with the child, the non-custodian faces virtually hopeless odds of accessing his or her children, unless the custodial parent is particularly understanding and accommodating. Visitations are weakened – not encouraged – by prioritising child welfare over parental rights, despite the good intentions of its proponents. Even though the child welfare argument is intended to be invoked against custodians, it can be turned against weaker non-custodians to thwart their case in dispute resolution proceedings. At the very least, it has fuelled deeply-rooted misunderstandings in Japan about visitations. Non-custodial parents who yearn to see their children, then, are dismissed as selfish and told to 'put up and shut up' for the sake of their children (Aihara, 1969; Terado and Imura, 1988, p. 168).

Therefore, if Japan is serious about child visitations, then the child welfare argument – as a non-rights-based approach – must be dismissed as unsustainable. Nevertheless, most Japanese lawyers and academics hesitate to embrace an all-encompassing rights-based approach to visitations, influenced no doubt by society's widely-held dislike of rights. Arguably, then, a legal-cultural reappraisal of Japan's visitation doctrine would carry enormous practical significance, albeit in a roundabout way.

However, even if this led to an acknowledgement of the rights-based nature of visitations, this in itself would still be inadequate to ensure social acceptance. To facilitate cordial child visitations important to the child's moral stability, certain social conditions must be set in place compatible with across-the-board child visitations. Ongoing visitations are the only way for post-divorce children to maintain a connection with their non-custodial parent. Therefore, visitations should allow for more hands-on parenting than simply

scheduling meeting times. They should allow non-custodians to be involved *as a parent* in the child's growth. Indeed, reports indicate that US children do not feel that they are in single-parent families after the divorce. They derive their self-worth from their relationships with both parents. Non-custodians, even though visitations only allow them to play an indirect and ill-defined role vis-à-vis their children, can feature strongly in their children's lives through ongoing effort and a strong commitment to parenting. Like ordinary parents, they can contribute to their children's moral development and have a recurring influence on their personal values and life choices (Wallerstein and Kelly, 1980, pp. 207, 257).

Therefore, visitations must be *de minimus* rights – a right to a right, if you will – if they are to function in ideal form as an organic part of post-divorce family relations. Consider day-to-day parenting. Most parents are unaware that they are exercising parental rights when they raise their children (unless, of course, third parties have previously sought to interfere in their parenting decisions). Contrast this with non-custodial visitations. Non-custodians must be acutely aware of their rights, since they risk losing contact with their children unless they can prevail over the custodian's opposition to visitations. Visitations must be more than a right to child access. They must provide true parenting opportunities for non-custodians, equal to the custodian's right to autonomous parenting. Of course, such visitations are ill-served by invoking arguments about child welfare or parental duty. These only serve to impoverish rights or promote reductionism (the tendency to think in terms other than rights), doing little to solve the problem. Instead, there is symbolic significance to upholding visitations as the right of parents to raise their children, a right which cannot be deprived upon divorce. Parents will regain their self-confidence as parents when their children, despite lingering anger for the selfish and inexplicable break-up of the family home, tell them that they still love them and wish to see them. Parents will reclaim their self-respect, following a period of hurt and loss of self-esteem due to the failure of the marriage, and they will come to realise that parenting remains an important and enduring task.

The key to entrenching visitation rights, then, is to resist the reductionist tendency to see visitation rights in all-or-nothing terms – and to divine a means to allow non-custodial parents an active parenting role in post-divorce, highly conflict-laden, complex family relationships. In the US, parental rights have been critical to its forthright approach to visitations; but so too has the emergence of the post-divorce composite family. The post-divorce composite family is a uniquely American institution. Children, their separated parents and even their new step-parents constitute a single family. Contrast this with the position in Japan, where divorce forces the departure of one of the parents. The next section therefore explores how the post-divorce composite family

functions to support visitations and how it facilitates a rights-based understanding of visitation rights. First, it will look in greater detail at how reductionism impairs visitations. Next, it will critically examine how the post-divorce composite family type, as a unique institution, curbs such reductionism and supports visitations.

4. VISITATIONS AND COOPERATION

4.1 The Dangers of Reductionism

Visitations are an integral part of the ideal post-divorce family type. Identifying with the non-custodial parent is indispensable for the healthy self-development of the child. However, visitations take place during fixed times and outside the normal custodial household. The community would hardly support a wider role for visitations given their awkward nature and ostensibly marginal role in raising children. The evidence points to many cases where non-custodians lose their initial enthusiasm for visitations and their visits gradually falter, then fail. This is especially so when custodians strongly oppose visitations. The simple act of requesting a visitation becomes energy-sapping. If the custodian sets strict limits on the conduct of the visitations, for example, the non-custodian plays a largely meaningless and marginal role in raising the child and is unlikely to sustain interest in continuing rounds of visitations (Grief, 1979).

Say, however, the non-custodian forges ahead with visitations as a matter of parental rights, despite lack of cooperation from the custodial parent. Visitations will then suffer from becoming fixed and inflexible. In particularly high-conflict situations, the terms of the visitation will need to be spelled out precisely and in advance. An example might be that: 'the child shall spend every Saturday afternoon until Sunday dinner time at the father's house'. Of course, the disadvantage of this degree of specificity is that the conditions become locked in and all flexibility is lost. Life becomes bedevilled with constraints. The non-custodian, of course, must keep the same time open for the visitation appointment; the custodian must accommodate accordingly. Say the visitation is set for every Sunday. This means not only that the custodian cannot freely make holiday plans or take the children out shopping, but also that he or she must be home at the agreed time to receive the children after the visitation. Logically, of course, there is nothing to prevent the parties from discussing changes to the visitation schedule or adjusting times for picking up and dropping off the children. However, where there is a rift between the parents, the parties will be uncomfortable communicating with one another to arrange reasonable changes to the visitation conditions. By default, the orig-

inal visitation conditions will remain binding. This lack of cooperation between estranged parents directly affects children's lives. The children themselves are forced to bear the brunt of an uncompromising visitation schedule. All this brings to a head the shortcomings of visitations, and has led to calls for restricting them.

Lack of cooperation similarly afflicts custody arrangements. In the usual case of sole custody, the custodian has exclusive decision-making authority over the child and the non-custodian generally cannot interfere with these caretaking arrangements. However, assuming that visitations take place even within restricted times, non-custodians do get to meet with the children, talk to them about their day-to-day lives, and go all out to provide a 'second home'. Inevitably, non-custodians will pass on their own style of parenting to their children. Both parents' ideas of custody will then come into conflict with one another.

In the US, for example, custodial mothers typically complain about non-custodial fathers spoiling their children during weekend visits. This alleged irresponsibility makes it difficult to exercise discipline at home. More seriously, non-custodians may pass judgment on what they hear goes on at home and thereby interfere in custodial decisions. Where the parents cannot resolve their differences over custody arrangements and the custodian expects the non-custodian to 'return fire' with a custody modification petition, visitations invariably become the ugly battleground for custody battles. Even if it does not go this far, non-custodians naturally have a stake in how their children are raised. This is true whether they maintain strong bonds with their children through regular visits, or have their hands full leaving entire weekends free for visits or paying for child-support. Where personality differences precipitated the divorce and feelings of hatred have not subsided, the parties, almost unconsciously, will attack the other's parenting choices and seek to interfere in the child's care. The presence of a committed non-custodial parent in a child's life, then, has both its pluses and minuses. It is a blessing for a child to receive plenty of love and support, both financially and morally. But a child's heart can be ripped apart by a tug-of-war between parties who think they are the more suitable parent. Belief in parental rights in such highly charged circumstances can be detrimental, resulting in the child being pushed and pulled in different directions by warring parents. In this light, the Japanese instinct to feel 'selfish' in wanting to see the child is, if nothing else, a conclusive demonstration of true parental love.

Yet some form of social mechanism must operate in the US to ensure parents *cooperate* when exercising their rights. This would put in context the widespread use of visitations in US society, duly involving such problems as setting visitation conditions and respecting custody arrangements. In other words, all segments of society have to work towards a cooperative approach

to visitations, balancing visitation rights with competing rights. Visitation rights must be more than simply securing fixed meeting times – they must be elevated to allow for *real* parenting. Visitations must also be allowed to function flexibly to respect the autonomy of the custodial household and – above anything else – to cater to the needs of children. To achieve this, cooperation must be entrenched as a major social objective, rather than left to the post-divorce family to arrange. The issue then arises about the socio-cultural milieu most appropriate to achieve a post-divorce family – a truly single family unit rather than a mixed bag of legally recognised parent-child relationships. This issue neatly connects with this chapter's critique of visitations in Japan – which, although in apparent accord with US doctrine, function in a strikingly different manner.

Specifically, how does a post-divorce family come into being? To answer this question, we must first ask what type of family relations emerges post-divorce. In particular, what relations give rise to conflicts and serve to undermine the conception of a single 'family'? Consider Figure 4.1, a simple diagram of the post-divorce composite family.

Post-divorce, the child is placed with the custodial parent (and sometimes a step-parent). The non-custodian maintains a child-parent relationship through visitations. It is this relationship between the non-custodian and the child that may cause friction in the custodial household. Indeed, the closer the relationship between the non-custodian and the child, the more likely that conflict will arise over custody and caretaking arrangements. Communication between custodial and non-custodial parents breaks down. Visitation conditions become fixed and inflexible. Should the custodian's new spouse seek to adopt the child of the former marriage, US law erects a huge barrier by requiring the consent of the non-custodian – a parental right of the same hue as that which underscores visitation rights. Intense conflict among the parties prevents smooth resolution of any adoption.

Note also that Japanese law severs the non-custodian's relationship with the child. The child is placed exclusively within the custodian's or step-parent's

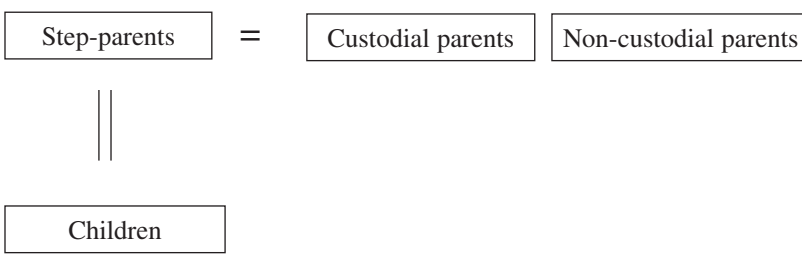

Figure 4.1 The post-divorce composite family

household. Japanese law, then, ignores that three sets of parent-child relationships exist following divorce. Instead, it forces the post-divorce family into the same mould as that of the non-divorced family, effectively destroying any prospect of creating a single post-divorce family unit. So long as Japanese law refuses to accept that the non-custodian-child relationship cannot – or must not – be broken, it will not address how to mediate the different complex relationships that emerge post-divorce. This makes it unlikely that Japan will develop a reasonably coherent post-divorce composite family type that can facilitate visitations.

Reconsider Figure 4.1 in light of the above. Although there are latent conflicts in the post-divorce family, with its many co-existing, complex family-child relationships, we can observe two important strategic ways for making the family work as a single institution. The first is to contain the conflict between the custodial and non-custodial parent. Even though it might be impossible to expect two parties who have elected divorce to share a closely-knit, joint-custody relationship like that during the marriage, the parties can be expected to forge a sufficiently cooperative relationship so that visitations may appropriately achieve their wider purpose of co-parenting. Both custodial and non-custodial parents should share the view that parental responsibilities remain despite divorce. The parties should be able to control feelings of discord and bitterness, which either precipitated the divorce or were created during dissolution proceedings, at least in the relationship with the child. They also should be able to cooperate as appropriate, and with an air of diplomacy, to facilitate visitations. Thus, it is possible to conceive of a single, all-encompassing 'family' that includes the non-custodial parent (the outermost boundary in Figure 4.1) by prescribing the conditions necessary for bringing up a child.

However, this single family still divides into two distinct households. There is a concomitant risk that the single-family unit might split along these fault lines. In particular, in a parent-centred view of the post-divorce composite family, two loosely-connected parent-child relationships exist, necessarily locked in conflict with one another. The first is centred around the custodial parent, who asserts exclusive custody rights and seeks to exclude all external parties from interfering in parenting. The second is centred around the non-custodial parent, who tries to infiltrate household affairs through visitations. Therefore, to prevent the division into two households and pave the way for a single-family unit, a conception of the family must be built around the child, not the parents. From the child's point of view, there are three important parent-child relationships – one with the custodial parent, another with the non-custodial parent, and yet another with the step-parent. Expressly embracing the child's viewpoint makes it possible to achieve a single post-divorce family unit. This is the second important strategy for securing necessary cooperation among the parents so as to ensure successful visitations.

It is all very well and good to aim to ease tensions between the parents and to deliver a child-centred conception of the post-divorce composite family. But successfully achieving these aims is socially determined. The question then arises: how so?

4.2 Securing Equity

First, consider the strategy of easing hostilities between custodial and non-custodial parents. Put simply, this is achieved by securing equity in the divorce process. Generally, divorce gives rise to two types of inequities. The first is when one party is assigned full blame for the divorce. This might be because they were responsible for the abuse, infidelity or other cause that grounded the divorce. Alternatively, it might be because they initiated the divorce to the surprise and shock of their spouse. True, the latter may not come within the narrow meaning of fault; but it is roughly equivalent insofar as one party initiates the dissolution of the marriage and the other party feels personally betrayed. The second inequity that arises from divorce is the loss in social status following the divorce. Whereas men typically do not experience much change in their financial position, women, especially home-makers, find it hard to earn an adequate income even if they gain access to the labour market. Further, re-marriage among women – especially in Japan – is generally low and, in this respect, planning for life post-divorce is not easy.

So long as these inequities from the divorce remain un-remedied, the parties are unlikely to cooperate with one another to coordinate visitations. Indeed, in extreme cases of inequity – say, for example, the custodian was the 'victim' in the divorce and harbours strong resentment for treatment during the marriage – he or she will probably go all out to obstruct visitations. On the other side, many non-custodians may shirk from even broaching the prospect of visitations, even if they wanted to see their child (Madoka, 1987, p. 16; Wallerstein and Kelly, 1980, p. 231). These points, especially the loss of status in the wake of divorce, have been central concerns of divorce law. If prevailing law fulfils its expected function, then presumably there should not be any victims of divorce. In this respect, marshalling available legal resources to secure divisions of property and child support is absolutely critical to eliminate any further imbalances between the parties. Around the world, the failure to pay child support is a significant social problem. Japan has an extremely poor record both in terms of the legal means to enforce payment and the current levels of default (Tanaka, 1987). It is as if society as a whole is not set up to allow for post-divorce co-parenting.

The first inequity caused by divorce, different degrees of fault for the breakdown of the marriage, is also left largely untouched in Japan. True, there are existing equity guarantees in one shape or another in the case law. Thus,

the courts will not recognise petitions for divorce from culpable spouses, preventing extreme cases of inequity. Since the innocent party is effectively 'expelled' from the marriage in such cases, the courts require the petitioner to procure consent from the other party by providing a generous settlement of property. However, there are also absurdities in the law. For example, culpable parties may be forced to remain in a failed marriage; and those who petition for divorce are prevented from seeking property divisions and child custody. Clearly, we cannot expect fault doctrine to address equity concerns (Noda, 1981). Indeed, as many commentators observe (Yonekura, 1987; Uramoto, 1982–87), the world-wide trend, including in Japan itself, is to regard fault as legally irrelevant. This is so not only for determining the availability and level of support, but also for finalising the divorce itself (Schwab, 1985; Toshitani et al., 1988).

Although no-fault divorce renders fault legally irrelevant, this does not necessarily mean that fault is *socially* irrelevant. So long as people in society actually subscribe to the view that marriage is a pledge for life, with each spouse bearing a moral duty to cherish the family for the benefit of the other spouse and any children of the marriage, then betraying this social expectation will undoubtedly provoke an angry emotional response. Indeed, it is classic reductionism to link the absence of *legal* fault with the absence of *moral* fault. The legal irrelevance of fault derives from the absurdity of compelling parties as a matter of law to value the family; it is more desirable for society that moral norms sustain the duty of loyalty to the marriage (Kawashima, 1986, pp. 145–77). However, morality, too, has coercive force similar to law, insofar as it has underlying social power to direct individuals. It can unnecessarily and anomalously lock the parties and even the children in a 'family' devoid of true meaning and racked with discord. Further, divorce attaches a strong stigma, not only to the culpable party but also the party forced into the divorce. This means that society as a whole makes no constructive effort to put in place social or legal conditions to enable post-divorce life planning for divorced couples. A parallel can be drawn with the persistent view in the community that 'the unemployed are lazy', resulting in the underdeveloped state of welfare policy. So long as the general public looks down on divorcees as 'morally defective', society cannot move to seriously consider how to preserve parent-child relationships after divorce. The upshot of all this is that a balanced approach to divorce requires embedding the absence of fault as a matter of law, and then reductively and forcibly entrenching absence of fault as a broader social value.

Yet the message in the moral precept 'thou shalt not divorce', unconditional and dogmatic as it may seem, is also indispensable to grounding the social order. After all, no matter how much the parties try to make periodic visitations succeed, a child's attachment to both parents means they never really

recover from the shock of seeing their mother and father divorce on bitter terms (Wallerstein, 1989, p. 19). Considering the effort needed to make visitations work over several years, parents first need to acknowledge that they have broken the central norm of upholding the marriage.

However, for this moral norm not to have a coercive effect, the parties must continue to feel that they have obligations towards their former spouses and children – not because of any *extrinsic* social norms strongly critical of divorcing parties, but because of the parties' own *intrinsic* sense of morality (Mizuno, 1981; Maeda, 1985). After all, outsiders do not know the circumstances that compelled the parties to divorce. Thus, divorce stands apart from crimes such as murder and theft, which are impermissible regardless of the circumstances. Also, the norm in favour of preserving the marriage should apply to both husbands and wives equally. Although the fault doctrine in Japan has egalitarian application as a matter of law, more often than not women bear the greater burden. On the one hand, non-custodian mothers feel anguish over leaving their children when the biological father remarries and unilaterally refuses all visitations (as in the Osaka Family Court case considered in section 2 above). On the other, non-custodian fathers feel awkward requesting visitations, even though they have a strong interest in parenting and want to stay in contact with their children, because child-rearing is seen as women's work (Noda, 1981, Part III, n. 10; Sato, 1983a; Kohata, 1986).

In the interests of a strong community and despite any law on no-fault divorce, divorcing parties should be held to account to their spouse and children for failing in their duty to preserve the marriage. Equally, however, this accountability must be managed to ensure equity between the parties. In the US, counselling is made widely available for this purpose. In particular, where there is no legal but moral fault for the divorce, the 'victim' – the one presented with the divorce – will try to invalidate the divorce on moral grounds. The 'protagonist', on the other hand, will defensively assert his or her lack of legal responsibility and seek to deflect all moral responsibility, or will pretend that he or she was not to blame for the divorce. But this will only inflame the victim, who will step up the blame game, thereby further deteriorating relations between the former spouses. If divorce is constituted by reference to these competing, all-or-nothing definitions of fault and absence of fault, then ultimately the *absence* of *legal* fault will be twisted and turned to mean the *presence* of *moral* fault. The 'victim', in addition to the pain of the divorce itself, will also feel deep hurt at being mistreated as a human being. Counselling overcomes this difficulty.

Counselling uses a variety of psychotherapy techniques. The victim confronts the incontrovertible reality of divorce. The perpetrator confronts the moral blame for betraying the expectation to uphold the marriage. In particular, the victim might raise self-defence mechanisms – either by escaping or

distorting reality – which comes not only from the pain of separation, but also from the deep hurt associated with being 'dumped' and the associated connotation that he or she is no longer 'attractive'. The counsellor's role is therefore important to create the conditions under which victims can pick up the pieces, restore their self-esteem step-by-step, accept the divorce, and discuss re-building a life after the divorce, including any arrangements for joint parenting (Nitta, 1980). The counsellor need not play the same supportive role for the protagonist. Although it is taboo for the counsellor to assume any direct moral authority over clients, the counsellor may direct the protagonist to properly explain to the other party why they wanted to – or felt that they had to – end the marriage. Moral norms support a firm version of reality for members of a community, and avoiding those norms undermine the rationality of social action. Accordingly, marriage counselling is about protagonists confronting this normative reality and accepting in good faith all relevant responsibility for the divorce.

There is a general lack of such counselling in Japan (Maezawa, 1988, p. 307, n. 7), despite some counselling within the family court system, and poor post-divorce social support. These are important reasons why equity between the parties is insufficiently restored to enable visitations, and why it is hard to secure cooperation between custodial and non-custodial parents. Indeed, the outlook for greater use of counselling in Japan – both before and after divorce – seems most unlikely, at least for the near future. This lack of receptivity to counselling is because few in government, the judiciary or even the general community advocate strengthening legal entitlements to post-divorce social security. Even if misunderstandings about divorce eventually dissipate, the philosophy of counselling – to support the individual and encourage autonomous problem-solving skills – is foreign to the Japanese experience.

For the sake of explanatory expedience, allow me to summarise the discussion thus far. My argument begins with the *ends* and then moves to the *means* (necessary to achieve these ends). Thus, I have argued that cooperation (easing tensions) between the parties is important to enable a post-divorce composite family unit. Cooperation requires fair distribution of assets and equitable division of responsibility. In turn, this necessitates greater investment in legal infrastructure and universal provision of counselling services. Even so, culture determines which means are selected. Parties need to be equipped with extra capabilities (legal tools) to ensure fair property distributions in all of the countless divorce cases that take place in Japan (Uramoto, 1982/1985/1987). Counselling efforts can assist those crippled by feelings of personal loss and lacking the strength to face up to reality. More generally, it can develop individual autonomy. This legal infrastructure and self-support will then allow the parties to talk rationally with one another on an equal footing, paving the way for equity – in the sense of distributive justice – between the parties. The

upshot of all this is that autonomy in negotiating with the other party – not just distributive justice and conflict management – is critical to ensure that visitations become true co-parenting opportunities, rather than degenerating into a meaningless schedule of meetings (for example, Aihara, 1969, pp. 53–4).

If we switch the ends for the means, we can see that contemporary Japanese society (the ends) is a far cry from what is needed to resolve visitations issues (the means). Lack of enforcement means that parties to Family Court mediations, for example, commonly make promises they have no intention of keeping. Parties to divorces by consent, the most popular form of divorce and which does not require personal appearance before the Family Court, seldom proceed by way of meaningful discussion necessary to achieve the minimum requirement of true consultation (Ueki, 1986). Therefore, the search for a post-divorce composite family in Japan must commence, first and foremost, with a critical explanation of why there is this lack of dialogue.

4.3 The Privacy Ideal

Let us turn to the second strategy of forging a child-centred conception of a post-divorce complex family unit. How does such a family unit affect child visitations? And how does the prevailing legal culture define its properties? If 'child-centred' simply means prioritising the interests of the child over those of the parent, then this merely dredges up old arguments that child welfare concerns may trump parental rights. This is hardly the way forward to entrench visitation rights. Instead, a child-centred conception of the family must be grounded on the notion of 'child autonomy', a perspective that has much in common with parental rights. The reasons for this become clear if we compare the classic US line on 'the best interests of the child' with the analogous Japanese concept premised on notions of family privacy.

The legal definition of 'the best interests of the child' under US law is the key to unlocking the potential for greater recognition of child visitations in Japan. This is because the 'best interests' standard, unlike the Japanese test of child welfare, carries a strong inference that preserving the parent-child bond through ongoing visitations with the non-custodian is in the best interests of the child. Although Japanese law deems that it is in the 'child's welfare' to maintain a close relationship with the custodian, a child-centred model extrapolates that it is in the 'child's interests' to sustain each and every child-parent relationship. Compared to 'child welfare', the 'interests of the child' standard connotes more strongly that the child is someone with interests separate to and from the parent (the custodial parent). At first blush, US constitutional jurisprudence – which, as we have already seen, holds that the child's best interests are not sufficient grounds to deprive parental rights – suggests a parent-centred conception of the family where the child's interests are only of

secondary concern. However, the parental right to raise a minor child is grounded in the view that the child has interests differing substantively from those of the parent.

The opposite is true in Japan. Even though 'child welfare' intimates a child-centred conception of the parent-child relationship, Japanese law prioritises the parents' interests of fulfilling their 'duty-based right' to cater to the needs of their children. Japanese law does not vest the child with his or her own unique interests. Even if a mother is convinced that 'no way' would her child want to live with such an 'appalling father', the courts may very well force such a living arrangement on the child. Non-custodians are left fighting 'selfish' feelings for wanting to see their children (Sato, 1983b). So long as Japan fails to embrace the view of children as autonomous individuals with their own thoughts and emotions, an ideal post-divorce family unit is unlikely to emerge to facilitate cooperative co-parenting between parents still reeling from an acrimonious divorce.

Just as contrasting views on the child-parent relationship have caused the US and Japan to reach different conclusions on visitations despite similarly-worded tests, so too with 'privacy'. In Japan, privacy generally means preventing the disclosure of information that one does not want to come to the attention of others. Japanese fear exposure to curious looks. Especially in a gossip-mongering society such as Japan, everyone is sensitive to the real possibility of discrimination, censure or other form of community backlash. Conversely, Japanese are often said to have a weak sense of privacy. Privacy is given a low premium: people pry into and gossip about others' lives, and they are expected not to hide things from one another in family or other close relationships. Put differently, people's social spaces are divided into two spheres. There is the '*uchi*' (inner circle), where there is no privacy; and the '*soto*' (outside relationships), where there is considerable sensitivity to the gaze of outsiders. However, the dividing line between '*uchi*' and '*soto*' is a fluid one. On the one hand, new friendships and relationships can turn what was '*soto*' into '*uchi*'. On the other, some familiar relationships can become stiff and formal, such that '*uchi*' subdivides into both '*uchi=uchi*' and '*uchi=soto*' (Kyogoku, 1983, pp. 191–204).

Let us take this conception of privacy and apply it to the context of the post-divorce family. The child-custodian family (which may sometimes also include a step-parent) is the most '*uchi*' of '*uchi*'. Here, privacy does not figure. By contrast, the non-custodian stands outside in an antagonistic relationship with the custodian, the nucleus of the household. Without any chance to achieve '*uchi*' status, the non-custodian is treated as '*soto*'. Japan's approach to custody is in marked contrast to that in the US. In the US, courts use privacy narrative to protect against abuse of judicial review of custody determinations. They will uphold the privacy of the custodial family when a

non-custodian seeks to interfere in caretaking arrangements or brings a custody modification petition on the grounds that the custodian's personal life is having a bad influence on the children. By contrast, Japanese courts go further than just preventing interference in custodianship; they completely exclude the non-custodian parent from the family unit and erect a high barrier around the custodial household. Thus, Japanese courts strongly enforce privacy protections (Higuchi, 1988).

Although both jurisdictions seem to expound the autonomy of the custodial household, there is a difference. Unlike Japan, the US sees the problem as the right of the custodian to raise his or her children. The US invokes 'privacy' when those parental rights are at risk, for example, where a modification of custody is sought on the grounds of the interests of the child. Privacy, in short, is about self-determination of private matters. This is illustrated in *Roe v Wade*, 410 US 113 (1973), where the court held 'it was a women's personal choice whether or not to give birth' (Takai, 1988b, ch. 1). Courts cannot deprive people of their fundamental human right to marry and have children. It is about the essential freedom to do as one sees fit, including the choice to have and raise children, without any interference from others (Ishii, 1983–85). This emphasis on privacy, especially family privacy, fosters value diversity – the heart of a liberal society – both now and for future generations (Rubenfeld, 1989).

A privacy perspective that takes the individual as the starting point and emphasises free choice has enduring implications for understanding the family. Rather than a single conventional group, the family is more like an aggregation of individual relationships, each vested with their own individuality. In many second-marriage households in the US, for example, many children do not call their step-fathers 'dad' but by their first name, which speaks to the individualised nature of the relationship. Many Americans also do not accept that step-parents should adopt children in the hope of building a happy home environment around the second marriage (Visher and Visher, 1981). Step-parents will only apply implicit and unreasonable pressure on the children to stop feeling love for their natural parents; and children will not have real feelings for their step-parents, even if their relationship becomes legally recognised. This view is explicable by the strong conviction that the family is not just a single household, but a collection of individual relationships.

However, privacy is not the only reason why the US has conceptualised the family as a collection of individual relationships. The rise of second-marriage composite families, due to a soaring divorce rate, has also forced the US to reflect on and revise its own thinking on the family (Furstenberg et al., 1983, p. 661). Thus, two forces are mutually driving this individualised conception of the family. The first is the changing view of the family brought about by the reality of divorce and prevailing liberal ideology (including privacy norms).

The second is the role privacy has played in building a conception of an individualised family unit and enabling this to extend logically to the post-divorce family. The same forces also operate in non-divorce contexts. Adopted children are told at an early age that they were fostered out or adopted (Yonekura, 1982, ch. 4); single women (Donovan, 1982–3) and 'married' lesbians are seeking to become mothers through artificial insemination. These developments have also contributed – albeit indirectly – to the emergence of the post-divorce composite family.

Thus, Japan and the US seem to share a conception of privacy keeping strangers out of the family home. However, the US embraces individual and liberal self-determination, and so succeeds in providing a flexible post-divorce complex family institution that includes non-custodians as well as step-parents. Of course, there is nothing to prevent the Japanese family being re-fashioned on similarly liberal lines. Theoretically, the Japanese conception of privacy as keeping secrets may be logically interpreted to embrace *control of individual information* (which disallows disclosure of information against one's will: Sato, 1972, pp. 60–2; Matsui, 1988; Sakamoto, 1982) and *private self-determination* (which forbids interference from others: Yamada, 1987; Sato, 1972, pp. 53–7). Indeed, there is some evidence that change is afoot. But it will not be easy to change Japanese attitudes to privacy. Most Japanese do not think twice about the government collecting personal information about citizens. Even more feel that their '*uchi*' inner-circle relationships – whether in or out of the workplace – constrain them from doing as they please. However, with divorce figures (especially between couples with dependent children) as sobering as they are today, surely the time is ripe for Japanese society to reflect on whether it should continue to subscribe to a 'village-based' social order.

For child visitations to become reality in Japan, therefore, we can simply wait for a transformation in social attitudes. Or we can seize the initiative, modernising family law and, in the process, bringing about a revolutionary shift in societal norms. Modernising Japanese family law, however, is not simply supplanting Japan's existing regime with an American-style liberal family law. It is also about institutionalising the relevant social practices and normative values that encourage and nurture children-centred relationships. Liberalism alone is not the answer. Liberalism, after all, is concerned with autonomous 'rights'. Yet the antidote to Japan's modest record on child visitations is to focus just as much, if not more, on 'supra-rights'.

PART III

A normative theory of community and the law

5. Rights and community

1. AMBIVALENCE ABOUT RIGHTS

The language of 'rights' is almost ubiquitous. From unimpeded access to natural light, a clean environment and smoke-free living, to privacy and self-determination, we increasingly assert our 'rights' to protect ourselves from what we think are unfair violations of our freedoms or personal interests. We hear 'human rights' discussed in the mass media on an almost daily basis. We subject the bureaucracy to more searching scrutiny by asserting our 'right to know'. Yet despite this general acceptance of rights, we still steel ourselves before insisting upon our rights in real-life situations. This is because it feels awkward, if not outright uncomfortable, claiming our own rights or disclaiming the rights of others.

Why are we ambivalent to rights? Is it due to an underdeveloped rights consciousness? Or perhaps self-interested opportunism, where we agree on the general principle but oppose its application in particular settings? I suspect something else is involved. To be sure, rights are worth protecting and we should expect new categories of rights to develop to safeguard new interests. Yet appeals to rights also have a destructive force: they interrupt the flow of everyday social interaction and create tensions in social relationships. Although influential scholars such as Kawashima (1982a, pp. 112–17) argue that rights assertion is essential to fostering a healthy respect for rights in society, this is not always true. Indeed, sceptics might point to the negative side to rights assertion – where asserting rights has little, if anything, to do with ensuring respect for the position and plight of others.

What might be the downside to asserting rights? One possibility is that it disturbs the social order. This view assumes that society dislikes conflict and almost instinctively clings to the current order. Therefore, society is uneasy about its members insisting on their rights. The argument also accepts that some have a stake in the existing order and that, rather than disavowing disputes, society actually suppresses those individuals who oppose or criticise the established order. If so, such scepticism about rights could be easily dismissed as political conservatism (compare Abel, 1979).

To do so, however, would be to miss the point. After all, whether rights-scepticism is conservative or not depends on the specific right at issue.

Consider the US Supreme Court's ruling in *Lochner v New York*, 198 US 45 (1905). In this case, the court held that worker protection legislation was an unconstitutional incursion of the right and liberty of the individual to contract. This ruling exemplifies how rights assertion – in this case, by the employer – can function conservatively to suppress those who seek to transform the pre-existing class-based order. Therefore, given that rights may be asserted to achieve both conservative and progressive ends, the problem with rights assertion is not politics. It is *force*. And it is this force implicit in rights assertion that is antithetical to the spirit of community.

Asserting rights is an exercise in language. To prevail in one's claim is, first and foremost, a linguistic pursuit. In practice, however, only a minimum set of words is required to bring forth law's compulsive powers. The expression 'I have rights' – without justifying or explaining one's position – is a strong expression of will that robs communication of much valuable vocabulary. We baulk at rights assertion because the language of rights, infused with the logic of liberalism, ruptures communication. Although the law recognises that rights assertion is necessary to enforce the performance of duties (the counterpoint to rights), it also insists, as a matter of individual freedom, that enforceable duties must be expressed in clear rules. Thus, law-specific arguments arise over whether a particular rule should strictly apply in the circumstances.

However, in real life, this style of argumentation offers an extremely limited linguistic basis for fostering inter-personal relations. Typically, relationships are replete with obligations, cherish emotional attachments and are ongoing. Communication is crucial to support and preserve such continuing relationships over time. Rights assertion leads to a breakdown in communication, degenerating richly-textured human relationships into crude equations of rights and duties.

One objection to this argument is that rights are usually asserted *after* a relationship has failed, that rights assertion does not, by and of itself, break down relationships. This counter-argument also draws a distinction between society-at-large and small groups, positing that rights have no place in the latter where normal social relationships should prevail (Shimazu, 1991). To be sure, the rules appropriate for small groups, where there is face-to-face interaction, should differ for those in society more broadly where relationships are more anonymous. Measuring one by the standards of the other is to commit a category error. If this analogy is extended to the comparison of societies, a further issue arises over the distinction, if any, between pluralist and homogenous societies. Some, for example, argue that rights create a sense of unease in homogenous Japan, whereas law plays a larger role in social control in more diverse societies such as the US. Eventually, Japan too will need more rules to allow co-existence among people with disparate experiences and attitudes.

These sorts of arguments are common because of the acknowledged tension

between rights and community. However, it is not necessarily compelling to resolve this tension by dividing society or societies up into different sites. For example, markets – usually held out as an exemplar of society more broadly – may evince traits more commonly associated with small groups; consider relational contracting among firms in long-term transactional relationships (Macaulay, 1963). Conversely, families and workplaces – sites where we would expect a greater spirit of community – may become a breeding ground for rights talk. This might be so in sex discrimination cases. As these simple examples demonstrate, social spaces bleed and blur into one another. This is because of two quintessentially contemporary concerns. The first is that no social site in modern society can afford to ignore rights. The second is that the business world – increasingly recognising the limits of rights – has to sustain complex relationships by building principles of cooperation into everyday rights.

The argument that rights are only asserted after a relationship fails, and therefore does not undermine cooperation *per se*, also draws artificially bright lines between different social sites. To be sure, it seems oppressive to curb rights assertion and insist on cooperation when, for example, basic trust – the basis for spontaneous cooperation – is missing from the relationship. Economically, too, markets lose their vitality unless parties can freely wind down pre-existing relationships and build new productive alliances. However, taking the example of divorce (discussed in Chapter 4), parents still have responsibilities to their children and, despite lingering hostilities, must cooperate on matters ranging from child support to visitations (Tanase, 1990b). It is precisely because of lingering rights concerning, for instance, child support and visitations that feuding spouses cannot go entirely their own separate ways.

Another reason why it is unsustainable to separate out social sites is that rights talk does more than deal with problems in specific relationships. It also defines our understanding of relationships more broadly. Many point to how repeated use of the language of rights has the potential to recast the way we subconsciously use language. Glendon (1991) observes how Americans speak of rights in rigid and absolute terms, noticeably avoiding the use of the word 'responsibility'. Gilligan (1982) contends that people overwhelmingly prefer to reason from universal truths when dealing with moral issues rather than adopt a situational ethic by considering issues in light of relevant personal relationships. Further, Nedelsky (1991) argues that the metaphor of 'boundaries' – where everyone is violable and cannot be touched by others – imbues talk about rights and freedoms, dating back to efforts by the Federalists to preserve the property rights of propertied men against the unpropertied general public. He concludes that this use of language has impeded the emergence of a discourse about dependent and interdependent relationships.

Methodologically, these points are valid. Just as 'truth' is informed by our own worldview, so too the assertion of rights appeals to a meta-level construction of the world – a construction that morally sanctions whether or not rights exist in a given relationship. The more we assert rights, the more this constructed world view develops to entrench rights assertion, and the less it becomes possible spatially to separate those sites where rights are appropriate and others where everyday talk suggests they are not. In part, this reflects 'juridification' (or legalisation), a phenomenon unique to modern legal orders.

With the spread and entrenchment of respect for rights in society, there is lingering unease that appeals to rights will rob communication of the vocabulary necessary to build and sustain relationships. Creating different sites where rights may or may not operate is not an effective solution to this concern. This is because it ignores that rights and community need to co-exist across different social sites and that rights talk structures and diffuses a particular construction of society. The answer to overcoming scepticism about rights in contemporary societies – where the boundaries between different social sites are collapsing – is not to contain rights assertion, but to reinstall community by resurrecting the language of cooperation. How might this be possible? In the next section, I respond to this question by critically exploring what I term the 'notion of rights'. This holds that rights must be rigorously protected because rights attribution is actually indispensable to fostering cooperation.

2. LIMITS TO THE NOTION OF RIGHTS

2.1 The Acknowledgement of Violence

The notion of rights starts from the acknowledgement of violence. The Reverend Martin Luther King, a leader in the civil rights movement, once said: 'It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important' (*Wall Street Journal*, 13 November 1962, p. 18). When social relationships themselves are already violent, people expect that rights will stem such violence. Violence subjugates individuals by forcibly overpowering their will. Apart from insults, defamation and now 'hate speech' (Matsuda, 1993, pp. 17–51) that can amount to violence, there is no innate form of words for making requests, seeking consent or building relationships. Equally, the language of rights talk is akin to an incantation summoning law's powers of compulsion; rights talk is never intended to *create* something with the other party through the medium of language. Yet in the wordless space where violence holds sway, rights are also a form of wordless violence. When these two forces of violence contend with one another, they secure a space that protects free will from arbitrary interference.

In cases of racial discrimination, this violent space is obvious to all. However, it is less obvious that the same violent oppression exists whenever someone asserts a right. Nonetheless, if anything, alleging facts of prevailing violence and insisting upon one's individual rights are the same form of social practice. As this practice gains greater acceptability in society, it achieves a dual effect: the construction of social reality (that is, the acknowledgement of violence) and the legitimisation of rights assertion (that is, the creation of rights). In other words, legal regulation infiltrates the 'private' realm – customarily the exclusive province of individual freedom – when violence is discovered.

This interaction between violence and rights typically creates new rights to contend with violence when pre-existing rights spawn oppressive relationships. For example, when property owners seek to extend their control over labour by relying on property rights in circumstances which may be deemed violent or oppressive, society steps in by recognising a collection of 'social rights'. Some rights – even if lawful – may offend society's sense of fairness by forcing people into a vulnerable position against their will. When 'the haves' insist on their strict legal rights causing violence to the 'have nots', the law develops a seemingly endless catalogue of new derivative rights – a trend that libertarians deplore as an unfair incursion on fundamental rights.

Another important trend underscores the twin practices of denouncing violence and asserting rights: the intrusion of law into the private realm. Consider sexual harassment, a formerly unfamiliar but now widely understood collocation in Japan. Often referred to as sexual violence, sexual harassment is now understood to involve the abuse of power by men to violate the sexual autonomy of women. The curtain has been lifted on seemingly casual or personal workplace-based relationships between men and women to suggest exploitative relationships of power by men over women and patriarchal assumptions of female inferiority. This type of awareness has been achieved by women asserting their rights.

Schoolchildren are also asserting rights to self-determination, challenging mandatory crew-cuts and demanding disclosure of internal school records (see further Chapter 6). With debate raging over disciplinary education and corporal punishment by teachers, the allegation underlining this assertion of rights is that school education is a site rife with violence. Of course, it is only natural that many will be perplexed by – and contest – these radicalised allegations of violence. It is also unclear whether society will share the understanding pushed by those asserting rights, since too many variables are at play. Still, society is moving in the direction of recognising such rights, even if there are failures and backlashes along the way. As new rights swell the pages of the law books, they gain a surer foothold in defining human relationships and acquire a built-in function of eradicating violence from society.

Will this accretion of rights in society engender a greater sense of community? Proponents argue that true dialogue can only begin once violence is eradicated. Certainly, it is possible to force relationships by discounting others' intentions. The real world contains many examples of such relationships tinged with violence. However, this is hardly consonant with the spirit of an ideal form of community. We can acknowledge that a community is present only to the extent that a system is in place allowing people to influence one another through the medium of language and to decide matters by consent.

Inclusivity, like dialogue, is another defining feature of community. Society excludes people who are the subject of violence. Racial oppression has marginalised African-Americans in labour markets, shunted them into the hidden class of the unemployed, and excluded them from society's core values about social status, education, beauty and trustworthiness (Young, 1990). Thus, the renunciation of violence against African-Americans, by putting an end to their segregation and welcoming them into mainstream society, was a significant development in the creation of community. This same logic underscores efforts by others, such as women, children and persons with disabilities, who justify their push for rights on the basis that violence equals exclusion and that rights equal participation. Thus, one vision for society is to embrace people hitherto excluded and denied voice as equal members of society by respecting and upholding their rights. Such is the 'notion of rights'.

2.2 Micro-level Violence

However, this argument – that recognising and upholding rights leads to the creation of a community – is subject to an important caveat: it does not explain the mediating role of language. Even when violence (that is, the involuntary disregard of free will) is successfully contested, dialogue can only be restored if the language of relationship-building accompanies the assertion of rights. And even when rights assertion challenges another aspect of violence, exclusion from core values, rights remain like gaping holes in a loose net. To fill its empty spaces and embed formerly excluded individuals into a community, we must pave the way for their participation. Language is indispensable to this end.

From the perspective of language, rights are problematic because the strong undercurrent of liberalism within rights causes a loss of vocabulary. This limitation to the conception of rights can be observed both in dialogue and inclusivity. First, consider inclusivity. With the micro-violence of rights chipping away at law's express prohibitions, a problem arises that victims of discrimination may continue to be excluded.

The law has cast its net over many areas where people may be discriminated against in social life – from employment and education, through to marriage and residence. Inexorably, however, the law has limited reach and

relapses into a regulatory shopping list. This is unavoidable given that law, as an instrument of state power, must not unfairly violate individual freedom. Beyond that, the law simply reflects the general sensibilities of society at any given time, expanding the categories of impermissible discrimination or paving over the cracks in the law by explicitly outlawing certain discriminatory conduct. Yet the further law extends its regulatory net to catch discrimination in sites previously the preserve of individual freedom, the more discrimination stretches into new private realms to reproduce violence. In all societies, discrimination is linked to stereotypes about body odour, accents and wild personalities. Although, on first appearances, this superficially seems like a matter of personal taste, it reveals the private character of discrimination, always escaping the grasp of the law.

Not only does law fail to keep pace with discrimination, a truly 'liberal' law is also geared towards guaranteeing freedom when issues are deemed private. This compounds the problem of regulating discrimination. Regulating an area by shifting it into the 'public' simultaneously renders everything beyond it as 'private'. This process of 'sanctifying' the private – designating an area which must not be touched by law – fosters the view that it is unfair to interfere even in circumstances of discrimination, provided that the discrimination does not infringe the law.

Still, the ideal of equality that permeates legal prohibitions and rights recognition may infiltrate the private realm and thereby extirpate the roots of discrimination. Indeed, this is the positive aspect of the conception of rights. But for this to happen, people need to be equipped with the language to grasp the equality ideal and to determine whether it is implicated in any troubled relationships with others. In turn, people must acknowledge that, within limits, they may be subject to moral judgment and intervention, even in areas of individual freedom. The problem is that this conflicts with the common understanding of rights.

Another reason why rights – premised, after all, on a particular world-view – are powerless in the face of micro-violence is that a gap lies between the abstract subject imagined into existence by law and the subject created contextually in real life. When a victim of discrimination has his or her rights recognised and personhood affirmed, he or she is then expected to assert those rights actively as a subject. However, micro-level violence has already harmed the identity necessary to pursue rights. Specifically, a person must adopt the identity of a 'victim' when laying a complaint of discrimination, especially as part of asserting rights. This gives rise to a powerful inner distortion. Even though discrimination is manufactured from superficial points of distinction, the victim actually perceives that he or she has the objective negative traits giving rise to the discrimination. This is why it is so dangerous to assume the role of 'victim' (Bumiller, 1988).

A psychological experiment presented as evidence in *Brown v Board of Education*, 347 US 483 (1954), in which the US Supreme Court held segregation in education to be unconstitutional, nicely illustrates this problem of refracted identity. African-American girls were given dolls identical except for colour. After being observed playing with the dolls, the girls were asked which dolls they liked the most and which the least. Most said the white dolls were the nicest and the black dolls were ugly. Similarly, the law is not structured to prevent victims internalising the same perceptions as those who perpetrate the discrimination. This gives victims mixed signals as to whether or not they should complain about discrimination. The double-bind is paralysing. Although not unusual in everyday life, in law the effect is particularly crippling, since the law – removed from the site of discrimination – requires strict proof of discrimination as part of the cause of action. This presses people more firmly into believing that discrimination took place because they themselves bear all the hallmarks of a 'victim'. Thus, even when rights are recognised, micro-violence remains, impeding the path to inclusivity which is integral to the conception of rights (Kurihara, 1996, pp. 11–29). Likewise, dialogue is stymied by the very world-view that sustains rights.

2.3 Non-existent Dialogue

Although rights invoke state powers of compulsion to physically end all violence against victims of discrimination, this simply acknowledges that people are entitled to a personhood free of all violence. However, the notion of rights also admits a role for dialogue. Dialogue takes place when, except in the case of a direct legal obligation, there is consent – whether by *quid pro quo* or persuasion – about recognising individual identity and allowing people to act in their own way.

The issue, however, is the substance of such dialogue. From her experience as an African-American woman, Williams (1987) argues forcefully about the importance of rights for members of minority groups. However, she admits that rights are not expected to bring human understanding but to 'deal at arm's length'. Williams here may be understood as strongly denunciating violence, much in the same vein as Martin Luther King, and repudiating even the remotest possibility for relationship-building. However, it is not immediately clear whether she believes there is any prospect for moving beyond arm's length dealings. Williams herself rounds off her arguments with an optimistic – indeed, ambitious – prediction of a shift to a more ideal society where rights recognition will foster greater respect for human rights. At the same time, when she writes about her own experiences with the violence of discrimination and advocates in favour of rights, she arguably idealises arm's length relationships and reinforces the importance of an inviolable inner realm.

This is not specific to Williams. It is a general understanding in modernity and, therefore, of the world on which law is premised. Because we have an incomprehensible and inaccessible inner realm, we are 'others' to the rest of the community. And because arbitrary will is core to this inner realm, it is impossible to understand others. This implies that this inner realm gives 'others' a latently violent existence. If people in such a modern society perceive one another as 'others', they will be strongly motivated to set clear boundaries between and among themselves so as to protect themselves from violence and to preserve their own 'otherness'. These boundaries are rights. And when people assert their rights, they are also silently constructing a world in which they must separate themselves from latently violent others.

In a world where people categorically assert rights in this way, people do not 'understand' the other and must engage in dialogue with each other in order to get things done. This dialogical world is suggestive of a deliberative community. This situation becomes clear if we contrast explicit, communication-based understanding in Japan with implicit understanding which is at the root of Japanese society. Implicit understanding, making it possible to understand one another without saying anything, is the basis for making assumptions about people and the society they have created. When people act and communicate in accordance with its presuppositions, they discursively create a world-view that describes a form of reality. There is potential, particularly in the case of Japan, for implicit understanding to lead to non-communication that, in turn, may lead to lack of understanding. This gives rise to a real risk of exclusion, the key theme of this chapter, where you are 'in' if you implicitly understand and 'out' if you do not. Many, even in Japan, have recently pointed to the harm of still relying on a traditional preference for implicit understanding when, in fact, people are not actually understanding one another.

In light of these negative attributes, the notion of rights has much to offer Japanese society by preventing social exclusion and promoting ongoing communication among people. But can people truly communicate with those they do not understand? People engage in little more than monologue when they talk to pets or out-of-space aliens, leaving aside the prospect for communication through body language. Where a society is constituted by a language of rights but without mutual understanding, is it not then more realistic that people will only communicate about what they understand? And what they know is the language of rights. Ultimately, rights talk – 'I have the right'; 'you don't have the right' – weaves its way into society, displacing everyday communication.

3. THE POSSIBILITY OF COMMUNITY

Having scrutinised the limitations of a conception of rights, how then can we realise the potential for a community that embraces both dialogue and inclusivity? To answer this question, we need more detailed research on how modern societies engage in rights discourse. As neo-liberalism gains momentum, even in Japan, rights enable more people to engage in dialogue with one another or allow them to feel more comfortable interacting with others through a limited rights-mediated dialogue. Rights assertion is also proving important today to sensitise us to traditional forms of oppression and exclusion and to aim for social inclusivity. A wide-ranging network of Non-Profit Organisations, grass-roots citizens' movements and volunteer groups is also playing an important role in mediating politics and meeting people's varied concerns and needs. In these ways, society is reaching new ground to deliver substantive dialogue and inclusivity beyond *de minimus* rights.

These positive developments deserve recognition. However, we must also draw attention to how rights talk inevitably constructs people into abstracted subjects lacking a communitarian ethos. If modernity connotes liberating individuals from the constraints of community so that they can become free subjects, then modernisation is still proceeding along these lines even today. Yet we must go beyond modern law's intellectual framework of bifurcating the state and the individual in binomial terms if we want society to embrace relationship-building and to fulfil this raw conception of rights. Specifically, this means interposing the trinomial of 'society' between the individual and the state, and not imagining society as an autonomous collection of individuals acting according to their own free will. Society precedes the free subject: it determines their attitudes, values and connections with others. Questions of rights must be considered from this classic sociological perspective of the embedded individual constructed by society.

At the same time, we must also dismiss binary oppositions as the regressive cast-offs of modern law. Rorty (1993, pp. 111–34) sees greater power in the remedies provided by rights to arouse empathy – to look and listen to the pain of those who have experienced harm – in contrast to law's more abstract precepts such as respect for human rights. Here, post-modern arguments, with their scepticism of reason, drawn attention to the poignant effects of story-telling. Gilligan (1982), for example, argues how universal morality marginalises the place of relational moral reasoning in which people care about the pain imparted to others in their interpersonal relationships. This was in the context of her thesis denouncing the so-called universality of meaning which, in fact, is sexually discriminatory and meaningful only according to men's experiences and social roles.

These sorts of binary oppositions – reason versus emotion, universality

versus particularism – are especially striking in the discourse of legal professionals. These binary oppositions spread throughout society in much the same way as rights talk prevails in the discourse of social life. This does not mean that universality and reason always prevail. Discourses marginalised in these binary oppositions naturally and continually resurface in real life as embodying the logic of everyday life. The intention of this chapter was to flesh out the discourse of rights using these marginalised discourses. By doing so – by enabling people to encounter concrete others in concrete contexts – we can awaken the prospect of community.

6. Communitarianism and constitutional interpretation

1. THE COMMUNITARIAN PERSPECTIVE

1.1 Individuals' Sociality and Social Individualism

Communitarianism observes that human beings are inherently social. As a legal theory, it holds that the community matters in the spirit and interpretation of law. From a sociological perspective, people are born, raised and socialised in social groups – whether families, communities or even entire countries – each with their own specific set of values and sensitivities. People value the connections they have with others in these groups. Yet it is not easy to factor this communitarian orientation into the interpretation of law. This is because individual liberty is assumed to be the fundamental norm of law. Under the liberal conception of legal order, society is made up of free individuals who, through the exercise of independent will, form voluntary relationships with others. Law provides a framework for preserving individual liberty and ensuring autonomy to enter into relationships. The impetus of law is, as far as possible, to reduce society to an association of individuals (compare Inoue, 2001).

Of course, it is important not to over-emphasise the tension between sociality and individuality or between sociological perspective and legal thought. Sociology also verifies that people like to be free and resist unnecessary restraints on liberty. Likewise, the law imposes many obligations upon individual behaviour which people freely and voluntarily assume, even if these obligations go beyond the minimum necessary restrictions on individual liberty. (Family law is a classic example of this.) All this is perfectly understandable: it is hard to conceive of society without law or law divorced from society. Even though communitarianism juxtaposes the individual with society and advocates that law should consider community values, installing a strong community in conflict with the individual is inconsistent with social reality and is unlikely to attract popular normative support. Therefore, a less strict form of communitarianism is called for – one that acknowledges people's communitarian existence (something which conventional legal reasoning has tended to ignore) and incorporates this reality within the normative framework of legal debates.

There are multiple theories of communitarianism reflecting theorists' own views about how individuals are defined by society and how individuals, thus socialised, construct society. One extreme example is 'liberal community' based on the free association of individuals. In a liberal community, people are socialised into and identify as a community of 'free individuals'. This theory does not conflict with the precepts of liberalism; if anything, it reinforces them (for example, Gardbaum, 1992). Yet given the diversity within communitarian theory and community's relevance to law, we need to examine in greater detail the actual community that exists within society, as well as the type of community that is abstracted and articulated within the law. To do this, it is useful to distinguish three dimensions to communitarianism (Caney, 1992; Gardbaum, 1992).

The first dimension is descriptive. This means elucidating the type of community within which people exist. Sandel's (1999) 'situated self' and Taylor's (1994) 'constitution of community through self-interpretation' are examples. These accounts do more than try to be appropriate assessments of community; they unsettle human understandings of liberalism which lie at the heart of legal thought and, in turn, significantly influence legal practice. Thus, both Sandel and Taylor critique the Rawlsian liberalism of the social contract in which the organising principles of society are assumed to be rational and value-neutral and effectively abstract individuals from their social and moral contexts.

The second dimension is normative. If people develop their identities and aim for self-realisation within society, especially within specific groups and associations, then arguments will arise over how law should sensibly maintain group relationships and protect community values. The third dimension is procedural. For law to be upheld within society, procedures are needed to acquire community support. If people value community, then they will also value the law that both nurtures, and is nurtured by, community.

Although these three dimensions are inter-connected, theorists differ widely in their conceptions of community. These range from strong collectivism to liberalism. Social theorists and legal philosophers have led the way on developing communitarian theory, proposing coherent communitarian models drawn from their own ethical and cognitive theories. Doctrinalists are more eclectic in their use of the communitarian perspective. Nevertheless, all cannot help but notice community in light of recent social changes. Especially in recent years, the reach of law has extended to questions it has not previously noticed, subjecting formerly private issues such as gender roles in the family and children's rights to public regulation. On the one hand, this is part of a process whereby existing social groupings are breaking down and society is polarising into two: the individual and the State. On the other, these new questions are not easily resolved by reference to liberal understandings of rights

alone. To tackle such issues, those undertaking legal interpretation must go beyond syllogism within the bounds of the law to examine society and place law in its social context. Necessarily, interpreters come face-to-face with people's inherent sociality and must reconcile this with law's own working hypothesis of individuality. Legal interpretation is a reflective process of both narrating one's own understanding of society and articulating, through interpretation, a law-inclusive vision of society. This is the legal interpretation advocated by communitarians, one that includes the parameter of community. A key mission of communitarianism, then, is to observe how community is constructed within the praxis of legal interpretation.

1.2 Grounding Communitarianism in the Rule of Law

A community-based approach to legal interpretation may be justified on an additional ground. Relevant to the procedural dimension to communitarianism, this ground is concerned with the legitimacy of law. Generally, whenever law is invoked, interpreted or judicially enforced, the meta-ethical assertion is that this is appropriate because the rule of law is morally right. However, there are two pre-requisites to proclaiming the validity of the rule of law. First, those under the rule of law must accept that the law is just. Secondly, guarantees must be in place to guard against the arbitrary interpretation of law and thereby prevent the rule of law from becoming the 'rule of man'. To satisfy these two conditions, liberal theory holds that law and its interpretation must be subjected to universal reason. However, as we shall see shortly, this approach has practical limits. This, in turn, prompts calls for procedures that will obtain community approval of the law.

Interpreting the law on the basis of reason involves identifying, as Rawls does, the conditions which all rational humans universally agree should be the basis for co-existence and then deducing the law from these bedrock principles. In reality, however, reason is time-specific. Thus, in Rawls' liberal theory of justice, the rationality standard is really a covert form of the standards then prevailing in the post-welfare state. Of course, there is nothing particularly wrong in declaring that the best law is that which meets prevailing sensibilities and circumstances. However, the claim of the universality of law is open to doubt if the law discoverable by virtue of reason can shift according to the times. Social change is neither consistent nor wholly progressive. And it is riddled with conflict: some want change; others resist it. Reason, too, is quintessentially and inexorably a matter of perspective: it may mean different things – or even eclipse entire issues from view – depending on one's personal philosophy or circumstances. If so, a more promising approach to legal interpretation is to discover the law by reference to what society considers to be valid and not by reference to the universality of reason (Rorty, 1991, p. 168;

compare Kawamoto, 1999; Kitada, 2001). Identifying what society itself directly approves as its law, as a means of achieving what universal reason cannot, is what is meant by 'invoking community'.

A careful review of Japanese case law reveals numerous cases where community shores up the interpretation of the applicable law. A classic example comes from the judicial standard of '*shakai tsunen*' (the common sense of society).[1] This is where courts call on 'the common sense of society' to interpret, for instance, the definition of obscenity. To determine whether the facts disclose criminality or unconstitutionality, the Supreme Court has ruled that 'published material is obscene where the prevailing view of society deems it to be so'. The Court has accepted that deductive reasoning alone is insufficient to justify a punishment or remedy based on the harm caused by the alleged obscene material to humanity or public policy. Instead, they ground constitutional interpretation on society's collective judgment.

Judicial review of legislation also requires community input. The validity of legislation is tested by scrutinising the legislative purpose and the means to achieve that purpose, and using a range of criteria ranging from strict scrutiny to the minimum permissible reasonableness. The choice of criteria depends on the importance of protecting the constitutional right alleged to be violated. However, these criteria are hardly sufficient by themselves, as demonstrated by the ongoing debates within the judiciary and the academy over the choice of judicial review criteria and their application to the facts of the case. The word 'reasonableness' – as the central test in judicial review – does not immediately presuppose the judgment of the general population along the lines of 'the common sense of society'. However, reasonableness has parallels with tort law's 'reasonable person test' under which common law judgments test 'what the ordinary person would think is reasonable in the circumstances of the case'. Therefore, both judicial review and common law torts articulate a communitarian test of 'reasonableness'. Therefore, reasonableness can also mean divining the views of the general public affected by the relevant legislation or the state action, rather than relying on the objective judgment of persons with specialist knowledge. In this sense, legal interpretation is opened up to the general public. However, society's collective judgment is subsumed back into the legal world when judges engage in a normative assessment – once again, in the name of 'reasonableness' as a legal test – to determine whether or not that judgment is understandable or acceptable. Thus, society's collective judgment is re-integrated into law's deductive system.

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[1] A search of the *Hanrei Taikei* case-law database using the search terms 'common sense of society' and 'constitutional provision' resulted in 135 hits (6 April 2002).

1.3 Liberalism and Community

To incorporate society into legal reasoning, however, society must be able to speak of the law in one voice – or, more accurately, society must be conceptualised as such within the discourse of law. If popular support matters, then conceivably this voice might be the view reached by the democratically and legitimately constituted majority. Legal interpretation – in effect, judicial legislation or the judicial exercise of power – can then be justified on the basis of democratic rule. However, this democratic majoritarianism is in danger of failing to protect judicially the rights of the minority against the tyranny of the majority – the dilemma of liberalism versus democracy. Further, majoritarianism unsettles the distinction between law and politics – that is, the belief that law is separate from political judgment and has its own internal logic and reasoning processes.

Invoking community promises to overcome this difficulty and provide a clearer basis for the rule of law. To invoke community could mean to extrapolate what the coherent basis to law is from society's unique cultural makeup and shared traditions. Or it could mean to explore law's social infrastructure by how civic-minded (as opposed to a self-interested) people would disinterestedly approach public issues such as those relating to law. Of course, to ground the law (or, more specifically, the judicial interpretation of the law), it is important to be able to speak of a community – whichever form it might take – as though it supports the contemplated interpretation. However, there are limitations to proceeding with a narrative construction in the absence of substantive community, and legal interpretation which incorporates community narratives – whether legal traditions or deliberative community – will undoubtedly produce thick layers of community. Here, we see the recursive relationship between invoking an existing community and constructing a community by invoking communitarian legal interpretation.

Furthermore, critics often associate communitarianism with conservatism. After all, the group is prioritised over the individual and those not integrated into the community are excluded. This argument certainly has elements of truth to it. But such a law-granting community is entirely consistent with the assumption of the free individual. Or, rather, such exclusion is necessitated by the assumption of the free individual. This is relevant to resolving the Kantian contradiction between the free human being and the compulsion of law. For a person to be essentially free, and yet be subject to the force of law, the law must be something that people seek to obey by their own volition. There are objections to Kant's conception of freedom of the self-regulating, autonomous individual – that a person is not free if he or she cannot control their impulses and must be subjected to the force of law. However, this understanding of freedom permeates views rooting moral autonomy in civil liberties, such as article

13 of the Japanese Constitution: 'All of the people shall be respected as individuals.' Likewise, popular sovereignty conceives of a constitutional order in which citizens actively construct and participate in law-granting communities.

Thus, the rule of law itself mandates the invocation of community, and a positive understanding of freedom conceptualises community as part of the constitutional order. On this view, it follows that community, law and freedom are not mutually exclusive ideas but intimately connected with one another. In summary, community is constructed and projected in legal interpretation because law functions within society's domain. In particular, constitutional interpretation occurs when individual rights are pitted against general mores and implicit social understandings; this provides an exceptional opportunity for society to reflect on what it is and how it should be. If the correct answer is already inscribed in constitutional norms (and that the winner between the state and the individual is always the individual), then this process of reflection is reduced to little more than simply learning what the law is and society being enlightened by the law. However, most situations are more fluid. As long as there are no forgone conclusions, legal interpretation is the site where the community searches for solutions, not to learn pre-determined answers.

The rest of this chapter looks in greater detail at how constitutional interpretation may invoke and construct community.

2. INVOKING COMMUNITY

2.1 The Crew Cut School Rule and Conservatism

Let us begin by considering a concrete case. Many judgments in Japan refer to 'the common sense of society'. One such example is the case over the constitutionality of a school rule requiring shaven, closely-cropped hair ('the crew-cut rule') (Judgment of the Kumamoto District Court of 13 November 1985: 1174 *Hanji* 48–57). Although a school principal generally has discretionary authority to make school rules necessary to achieve educational ends, the crew cut rule came under constitutional scrutiny as to whether 'it was reasonable in view of the common sense of society'. Although the grounds advanced for the school rule raised questions about its reasonableness, the Kumamoto District Court ultimately held that the principal's discretionary authority 'cannot be said to be exceedingly unreasonable'. The issue, however, is how the court invoked community to reach this decision.

The judgment emphasised that 'crew cuts … are still socially accepted as the hairstyle for male pupils and are especially preferred in rural districts'. The judgment went on to point out that only 32 out of 209 schools in Kumamoto Prefecture at the time allowed long hair, most in Kumamoto City. If hairstyle

were a constitutionally protected right but one which a school principal chose to restrict on pedagogical grounds, what significance would lie in the 'social acceptance' of crew cuts in determining the issue of the reasonableness of the school principal's actions? Arguably, the court may infer reasonableness from the fact that many other school principals also exercised their professional and expert discretion as educators to reach a similar judgment. More likely, however, courts would acknowledge the opinions of parents that crew cuts were 'suitable for boys' and that students 'should not be worrying about such things as their hair'. Alternatively, the court may acknowledge that the principal exercised reasonable discretion in adopting the crew-cut rule fully aware that most parents would support it.

A potential criticism of the court's decision is that it abdicated its important responsibility to protect individual human rights against parental and community pressure (Moriyama, 1989, p. 147). The community invoked by the court was a pre-constitutional community – one without a deep-rooted respect for basic human rights. To invoke such a community was to turn a blind eye to the constitution – to cherish conservatism in the face of law-inspired social transformation. Indeed, appeals to this type of community are not uncommon. In *Bowers v Hardwick*, 473 US 186, 1986 at p. 194, a case which challenged the constitutionality of state laws imposing criminal sanctions for sodomy, the US Supreme Court observed that such sanctions 'were deeply rooted in history and traditions since the founding of the nation, as can be seen in their existence in many similar state laws'. The court then held that there was no provision in the federal constitution protecting such acts.

In his analysis of grass-roots efforts to implement laws requiring integrated schooling for children with disabilities, Engel (1993) concedes that the phrase 'law and the community' does not have a single, all-encompassing meaning; it connotes different things for different districts. However, Engel goes on to argue that, if he were to single out a defining feature of the law, it would be its 'alien and intrusive' character in exposing power relationships and prevailing norms within communities. Therefore, invoking community in legal interpretation would have negative consequences, delimiting the boundaries of the law and blunting law's effectiveness outside these borders. But does community have to stand in such an antithetical relationship with law?

2.2 Liberalism's Community

We may legitimately invoke community to interpret the law – even constitutional precepts – where community itself already incorporates constitutional values and embraces a legal tradition centred on the proper interpretation of the constitution. Dworkin's (1986) 'liberal' community – which he locates within his model of legal reasoning – is a classic example of such a commu-

nity. Community lies at the forefront of Dworkin's ideas, particularly about 'law's integrity'. His interpretative method '… instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness'. This is consistent with his thesis that respect for humanity requires treating all individuals 'with equal concern and respect', a proposition which lies at the heart of the law (Ito, 2000, pp. 3–21). In other words, law's integrity is the integrity involved in treating others fairly and equally as citizens within a community (see, for example, Michelman, 1986, pp. 70–3).

Where we can assume the mutually constitutive relationship between law and society, constitutional interpretation requires us to, first, consider what the community is and, then, ask how we can ensure that the person seeking to assert constitutional rights can be treated with equal concern and respect as a member of this community. For example, community has been advanced in the American debate about whether to 'legalise' the classroom by requiring school authorities to exercise due process. This debate was precipitated by school authorities' handling of racial tensions, and was concerned with whether and how to include hitherto excluded groups within the fold of the community (Higuchi, 1992, pp. 67–9). In fact, the debate about school-mandated crew-cuts in Japan was less about whether crew-cuts were appropriate for school-age boys and more about the disciplinarianism of schools that insists on interfering in matters such as students' hairstyles. The issue was picked up by the media and it became a major point of contention in public opinion. Understood in this context, the Kumamoto trial was linked to broader community reflection about whether or not children were being treated with equal concern and respect as individuals. This approach determines constitutional rights by projecting a society in which such rights are constitutive of the community. In this respect, these constitutional rights secure a stronger foothold in society as interpretation embeds them in more secure social contexts. The idea here is that community is not opposed to law, but that a better community is reborn through the law, offering hope for the future (Koizumi, 1994).

However, the cynic might question this as smoke and mirrors – that community is pre-conceived to generate specific interpretations of the law. The suspicion is that the answer to the question of constitutional interpretation is already known and that the integrative community is merely a circuitous device to explain that interpretation. To reach the 'known' conclusion, liberalism applies reasoning that parallels that of securing the right to freedom – by presuming that individuals have a basic desire for moral autonomy. By this logic, the metaphysics of freedom, and its essentialist assumptions about the individual and the community, furnish the foundations for law. Indeed, this

logic may be seen in law's highly elaborate conceptual structure. However, is it not better to seek out a conception of community which is reflective of real communities and their role in imparting law? Cannot community rejuvenate law, just as law's 'alien and intrusive' powers have rejuvenated communities? The following two contexts offer a conception of community which imparts law, not one which is subsumed by law.

2.3 Republicanism and the Dialogic Community

The first context is 'republicanism'. This is a community derived from the self-regulatory ideal. People must desire law's constraints for the rule of law to be universally valid. This approach overlaps somewhat with liberal approaches to community – for example, the fictionalised community along Dworkin's lines with an innate orientation towards 'integrity'. In liberalism, however, laws regulate the co-existence of free individuals and, therefore, involve a meta-ethical assumption that law is only related to the question of justice. Republicanism criticises this as a weak conception of law. It asserts that one dimension of the law is the common good. This determines what is desirable for the members of the community and what values they ought to pursue. These are then enforced through the power of the State. Sandel, for example, notes that the US Supreme Court used the First Amendment to strike down a state governor's attempt to ban Martin Luther King's 'Freedom March' for fear of clashes with white Americans. However, Sandel contends that it would not be appropriate to apply the same logic to Nazis holding meetings in Jewish quarters. He urges going beyond liberalism's concern for absolute state neutrality vis-à-vis the content of citizens' speech and for regulatory intrusion only where speech manifests harm. Instead, Sandel (1999, pp. 35–9) argues that the state may legitimately judge the value of speech acts depending on whether the social movement is justified on its substantive merits.

In other words, legal interpretation necessarily entails substantive debates about what constitutes a good society and good law. The communitarian project involves consciously searching for the communitarian underpinnings of what the law ought to be. Yet this project of discovering the law differs from the democratic project of distilling majority opinion. Indeed, republicanism is critical of the politics of interest-group pluralism, whereby self-interested individuals form majority camps to secure laws most favourable to their position. Instead, republicanism imagines a type of politics whereby people distance themselves from their own private interests and position themselves in a public space to determine what is universally good. This is an important limit on the way we think about the law, especially constitutional issues. Democracy, after all, shares liberalism's view of humanity, sanctioning the

pursuit of self-interest even to the extent of deciding public issues. This understanding of the law strongly advocates neutrality both in law and the exercise of state authority. It builds into constitutional review strong constraints against violating the freedom of those private realms reserved to individuals. By contrast, republicanism tries to read into the law broader, substantive judgments about the common good. Accordingly, it insists that those participating in the communitarian discovery of the law place themselves in a public space divorced from private self-interest and rigorously debate the common good.

In the republican vision of communitarianism, therefore, deliberation assumes central importance. This gives rise to three implications, at least in relation to constitutional interpretation. First, if the law is discovered deliberatively by the community, then courts should both respect and invoke this law. In the crew-cut case, this means giving decisive weight to whether members of the community agree to the rule after free and unfettered debate, not whether there is general community support for the rule. A legal theory that fosters such decision-making epitomises republican communitarianism.

Second, members of the community should receive direct constitutional protection to take part equally in such deliberations, along the lines of Ely's 'process theory' (Matsui, 1991, pp. 255–85). Favouring a republican interpretation of US constitutional law in Bower's case, Michelman (1988) advances the view that the guarantee of privacy – in addition to property rights – is indispensable to civic participation in public deliberations. This view presupposes autonomy for participation. It is reminiscent of arguments that, historically, civil society in the West was patriarchal and exclusive of women's and children's voices (Murakami, 1983, ch. 4). However, drawing on the work of Arendt, Saito (1997) submits that we need to 'judge the public good based on content, not personal attributes' and 'to listen and to judge others for what they say, not for who they are'. 'Emergent politics', Saito adds, must be taken into account to ensure that some people are not silenced in public deliberations. Saito's thesis can be understood as uncovering the inherent unlawfulness of publicly devaluing – in the form of legal sanctions – matters which are central to a person's identity, such as homosexuality.

Third, judicial interpretation of the constitution is an integral component to community deliberations. This responds to critics of republicanism who charge that most people cannot become part of republicanism's standing citizenry because they lack the time and the expertise to engage in public debates. The courts can lead public debates in lieu of citizens through both the trial process and the writing of legal opinions (Michelman, 1986). In schematic terms, liberal courts transcend community, sustaining and regulating the forum in which a community conducts its politics; by contrast, republican courts participate in the political arena in search for the common good in the community.

2.4 Structuralism and Critical Theory

Even if we can establish a dialogic community and its members can freely engage in public deliberation, structural problems may obscure some issues in the deliberative process and thereby distort the discoverable law. For example, modern day feminism and the children's rights movement point to how the crew-cut rule evinces sexist attitudes on the part of parents (that is, crew-cuts are 'suitable for boys') and an adult discomfort with child sexuality (that is, 'an obsession with one's hair'). These prejudices would continue to percolate under the surface, even if deliberations were completely free. In the crew-cut case, for example, the court noted that teachers discussed the school rule in faculty meetings and confirmed its continued application. But since teachers were above such biases, the faculty discussion does not necessarily imply that the school rule was reasonable. Although I use the word 'biases' here, in reality, unspoken assumptions invariably penetrate our decision-making processes. Many argue that we should just acknowledge that the law is constrained by prevailing social conditions and views. However, the problem with this view is that people may be silenced by these hidden prejudices. Even if they speak out, their views may not resonate with the community and be disregarded. If people cannot clearly articulate the issues because they, too, are beset by the same biases, then at best their deliberations will ultimately result in a superficial accord on community.

Is it possible, then, to find a way out of this impasse? One possibility is to conceive of a separate law-imparting community. Even societies which seem to contain only one cohesive community are, in fact, torn by complex and discordant conflicts of interests. They are stratified by such power relationships, dividing members into the core and the periphery, the powerful and the vulnerable. The lens of structuralism reveals that prevailing, taken-for-granted attitudes in society may reproduce dominance and control in power relationships and thereby distort the nature of community. School rules, for example, are a form of adult oppression over children based on specific ideas about children's proper place in society. This hidden power play comes into focus when children openly complain about having their hair shaved into a crew-cut (Moriyama, 1989, p. 83).

This underscores a problem at the very heart of the republication conception of the deliberative process. Although deliberation implies rational debate, some matters cannot be expressed rationally; others remain shrouded in silence, since a lack of appropriate language in the community precludes rational debate. The risk is that republicanism excludes such matters from debate (Young, 1990, ch. 4). Yet in such circumstances, emotion – the very opposite of rationality – can play a positive role, allowing people to articulate what they object to or, in the absence of words, to express their pain non-verbally. Again,

the rationality criterion may hinder participation by suffocating emotional expression. The requirement of equality in deliberative republicanism, too, can impede meaningful participation in debates. Given that a person's moral subjectivity is established through concrete relations with others and inextricably linked to the formation of that person's identity, formal equality abstracts that person from the social context in which they and others are embedded (Sakaguchi, 1999, pp. 13–20).

This is not to reject rationality out of hand; it is simply to be sensitive to the limits and pitfalls of rationality. Given that emotion – especially pain – is a necessary byproduct of social dysfunction, emotion is a perfectly reasonable tool to highlight and resolve issues. Indeed, emotions are easily comprehensible because of human empathy (West, 1993, pp. 265–98). Thus, listening to other voices and extrapolating 'unrealised possibilities' in society help to underpin a structuralist understanding of the use of community in legal interpretation (Young, 1990, p. 6). In some respects, law may not be an appropriate tool for unlocking unrealised possibilities from social conflict and structural discord. This is because legalistic thinking is concerned with applying rigorous doctrinal reasoning, grounding the law on a bedrock of principles, emphasising moderation and consideration, and constraining state power. And yet law might still be useful. Just as everyday people turn their minds to resolving problems once moved to action, so, too, do judges and academics. Even if it difficult to define justice, we know what injustice is and can get angry about it. The community that we live in – and the community that underpins the law – is a community with emancipatory potential.

2.5 Summary

The foregoing discussion has examined four types of communities that may conceivably be invoked in legal interpretation. Figure 6.1 summarises these communities and their inter-relationships.

Conservatism and liberalism are placed at opposite extremes. Conservatism conceives of community in a straightforward way – a community which shares culture and traditions and where the group exercises control over individual members. But this type of community offers little for legal interpretation, considering the innate liberalism of constitutional law. The liberal community stands at the other extreme. The liberal community is so overloaded with legal fictions it is hard to get to its law-imparting heart. Republicanism avoids this problem by depicting the core of community as the process whereby the people themselves determine the law through rational deliberation. However, republicanism presumes a public spiritedness in its model of participatory civic deliberation so that majorities do not hijack community self-governance. If this becomes a strong presumption, the republican community also becomes

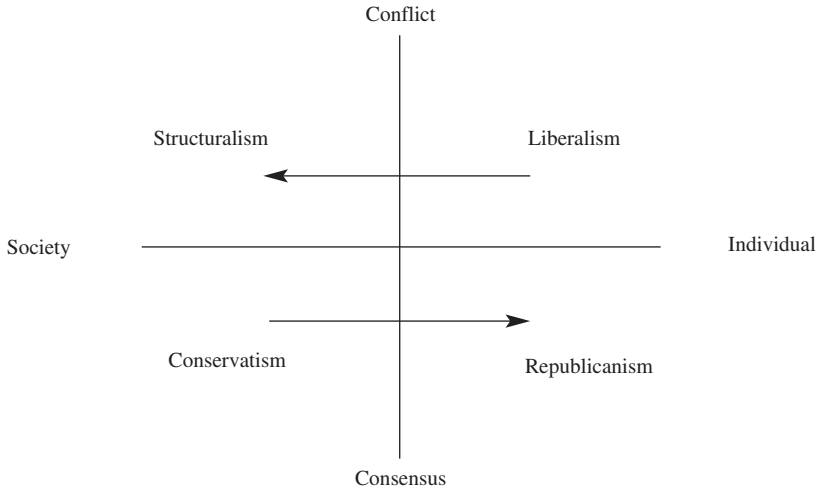

Figure 6.1 Communities invoked in constitutional interpretation

divorced from the real community. Another problem with republicanism is that rational debate directed at securing agreement over what the law is may unwittingly exclude some from the deliberative process. The notion of community must promise new possibilities for law, acknowledging structured conflict in real communities and eschewing false unity. Such is the structuralist vision for community.

In the conceptions of community summarised in Figure 6.1, liberalism and republicanism take individual freedom as their starting point, and then imagine either a liberal law or community-based self-regulation. This contrasts with conservatism's traditional community and structuralism's community, where society is prior to the individual. The horizontal axis, 'individual – society', depicts these distinctions. The vertical axis, 'consensus – conflict', represents commonality in values and culture (or consensus achieved from deliberation) versus tension in values and interests. Liberalism broadly acknowledges diversity in values and the individual's right to pursue his or her own self-interest; it sees universally valid law transcending the border of individual freedom (Hasebe, 2000). Structuralism accepts contemporary critical theory, and sees structural discord despite laws' claims of universalism. However, this does not mean nihilism. Structuralism is aimed at lifting the facade of law's claim to universalism in order to dismantle entrenched structural injustices also implicated in the law. Structuralism also appeals to our compassion by encouraging empathy with people's pain and hoping for a society free of injustice. In this respect, it is quintessentially communitarian.

We expand our opportunities for critical reflection if we are conscious of how we invoke community in constitutional interpretation. General community consciousness – such as the ingenuous test of 'common sense of society' – can only be acceptable in contemporary society, and support the legitimacy of the law, if it incorporates constitutional values and provides genuinely reflective opportunities to debate specific issues. This is portrayed in the bottom part of Figure 6.1 by the right-pointing arrow depicting greater opportunity for critical reflection, when we move away from 'conservatism' towards 'republicanism'. At the same time, both liberalism and republicanism must be alert to the possibility that reason, universality and the private-public divide – all central tenets of the law – may subconsciously operate to exclude or oppress members of the community (Sakiyama, 2001, ch. 2). Critically reflecting on deeply-rooted structural conflicts bubbling beneath the surface opens up new horizons for interpreting constitutional law. This is shown in the top part of Figure 6.1 by a left-pointing arrow depicting greater opportunity for critical reflection when we move away from 'individualism' towards 'structuralism'.

The explanation thus far has presented traditional community as conservative and wholly opposed to constitutionalism. However, some elements of traditional community should be reconsidered as sources of community values. As contemporary law penetrates people's daily lives, exposing the limits of liberalism, critical reflection must be applied to the conservative community, learning from the logic of everyday life. Although this 'invokes' community in the sense of discussing law by reference to community, arguably it also 'constructs' community by engaging critical awareness of how constitutional interpretation and application may envisage a future for society. This theme is pursued in the next part.

3. CONSTRUCTING COMMUNITY

3.1 The Ambivalence of the Right to Self-Determination

How might community be constructed through constitutional interpretation? The previous part imagined community as law-imparting and analysed how such a community may be invoked to interpret the constitution. This part explores how community may transform itself by accommodating law.

The self-transformation of society has often been depicted as a one-way process of enlightenment whereby the universal truth of law reveals itself in and transforms society. However, what law regards as truth will naturally differ depending on whether society is assumed to be a homogenous grouping whose members all share modern values or a diverse mix of individuals with

diverse values. Although many have thought that society's communitarian side embodies pre-modern social principles that should be brought under control, communitarian principles also have the potential to overcome the one-sided nature of modern law that afflicts contemporary (post-modern) society. Thus, the relationship between law and society is dynamic and interactive. Society engages with the ideals of law and embeds them as rational, while law learns from autonomous operating principles deeply entrenched in society. The interpretation of law – and, in turn, the construction of community – takes place within this interactive process of cross-reflection (Tanase, 2002). Another assessment is that community is invoked deliberately within a reflexive cycle: community values derived from society are read into the law which is refracted back into society and reconfirmed. The theme for the rest of this chapter is to consider constitutional interpretation from this perspective. It will do so by exploring the right to self-determination.

The right to freedom is at the core of the constitutional guarantee of human rights. The constitution is entrusted with the task of ensuring that state powers do not unfairly violate personal rights, from freedom of speech and religion to habeas corpus and economic rights. The right to self-determination is another such freedom. However, its reach is more ambiguous compared to other, more historically identifiable freedoms; and its purport is obscure – so much so that there is debate over whether it is a constitutional right to begin with. Nevertheless, the right to 'independently define one's identity' is a central tenet of freedom in US jurisprudence, with US privacy doctrine firmly denying any scope for state intrusion in intimate relationships such as the family (*Bowers v Hardwick*, 473 US 186, 1986, at p. 205 (Blackmun J dissenting)). Pivotal to liberal society, yet constantly contested due to its indistinctness, self-determination plays an important role in fashioning society.

In addition to its pivotal place in freedom, self-determination is under the spotlight because women, persons with disabilities, children and the terminally ill – marginalised in society and under either the care or control of men, the able-bodied, parents and doctors – are beginning to assert themselves. Put simply, they are seeking to overthrow paternalism. In some cases, those under patriarchal control (such as women) are artificially constructed as incompetent; in other cases, the law has imposed necessary restrictions on self-determination for their own protection. Unlike other, more classical freedoms, then, self-determination – despite sharing the moniker of a freedom – is not simply about banning all forms of interference by the state. Although the right to privacy implies a right to be left alone, it is important people are not simply left in the lurch; instead, they should be provided with support so that they can be left alone. All this suggests that there are two sides to self-determination. One is to uphold personal autonomy and remove the shackles of patriarchy; the other is to create an inter-connected society to support individual auton-

omy. The community perspective is directly implicated in this dual understanding of self-determination.

Thus, although the right to self-determination is a core liberty, it diffuses to protect diverse lifestyles on the one hand and obliges autonomy in interdependent relationships on the other (Kawamoto, 2000, pp. 15–33). By venturing from rights into duties, this is a departure from established approaches to constitutional interpretation. Then again, even in classic protected freedom cases, such as cases brought by racial minorities and women objecting to hate speech and pornography (Takahashi, 1997, pp. 221–46), it is similarly difficult to achieve a fair balance of the contending interests simply by isolating the purported harm as in the 'clear and present danger' test. Specific assumptions are embedded within the question of harm, and it is only when objections are raised that we begin to appreciate others' pain (Matsuda, 1993, pp. 17–51). We can set appropriate limits to freedom of expression against the backdrop of a structuralist community – a community which demands that speech be considered in its social context, denounces injustice, and aspires to an egalitarian society. Constitutionalism typically upholds individual freedoms by intruding in the vertical relationship between the individual and the state. It draws the line, however, at involving itself in conflicts about freedom in horizontal, interpersonal relationships, leaving this to other realms of the law (Higuchi, 1998, pp. 63–99). However, state authority is also implicated in horizontal relationships given that most citizens seek to draw on state power as a resource in some of their disputes. For the ordinary person, a human rights violation – whether of discrimination or privacy – is, first and foremost, a violation of a personal, interdependent right (Uchino, 1999, pp. 33–6). Thus, the contextual and interdependent nature of freedom must factor into debates even over narrow constitutional rights.

The theme of this part is to explore self-determination as something that extends beyond conventional understandings of personal freedom. Following Derrida's ideas about 'dangerous supplements' (where one concept cancels out its twin concept), the next section proceeds to focus on the very concept of self-determination. It argues that, although self-determination is built on the notion of autonomy, paradoxically, it is the suppressed counter-ideal that actually facilitates autonomy.

3.2 Heteronomy and Responsibility

In a judgment handed down on 29 February 2000, the Supreme Court of Japan (2000) 54(2) *Minji Hanreishu* 582–708 explicitly recognised the right to self-determination in medical treatment – a right that may even displace the preservation of human life. The case involved a patient who, for religious reasons, did not want any transfusion of blood during his operation. The hospital

decided that it would respect the patient's wishes as far as possible, but would provide a blood transfusion if necessary to save the patient's life. Ultimately, the hospital did perform a blood transfusion without the patient's consent because of severe bleeding during the operation. At first instance, the patient lost his suit against the hospital. The court held that it would be contrary to public order and good morals for doctors to undertake surgical procedures without the benefit of blood transfusions, because to do so might cause the patients' death. On appeal, however, the High Court and subsequently the Supreme Court ordered damages for violating the patient's tort-based right to personhood on the basis that the patient clearly intended to refuse any medical care involving blood transfusions and the hospital should have respected his wishes.

Almost all academic commentators support the conclusion reached by the appellate courts (for example, Higuchi, 2000). Medical practice, too, has followed the lead and moved towards respecting patients' self-determination, assuming that liability will not attach if, in accordance with the patient's wishes, an operation is undertaken without transfusing blood. Popular opinion is also increasingly accepting self-determination in medical practice. Further, the appellate courts probably would have reached the same decision even if religion had not been present on the facts, since freedom of religion was not cited as a ground for judgment. But there is scope for further argument about balancing a person's strong convictions and the requisite standard of medical care. A particularly difficult issue is raised by the right to die – an issue highlighted in the High Court's opinion when it stated: 'humans, facing inevitable death, make choices about how they live their lives'. Although dying with dignity evokes widespread sympathy, most people remain uncomfortable about loosening the rules on euthanasia.

Part of the reason for that is a fear that doctors will exceed their usual function of providing medical care. But there is deeper discomfort about regarding human life as an object one may freely dispose of. In fact, the United States has accumulated a large body of case law on the issue of refusing surgical blood transfusions, with minute legal analysis over whether this amounts to suicide or an unfair restraint on a doctor's professional discretion (Maruyama, 1992; Takai, 1998; Nakamura, 2000a; 2000b). The courts there apply the standard approach to restricting constitutional rights. They first acknowledge that the right to self-determination is a protected freedom and then ascertain whether the state has an over-riding interest which justifies limiting that right. However, the larger issue is defining when self-determination allows people to determine – exclusively – their 'own affairs' (Takahashi, 1998). Might not people feel uneasy doing so because this is not what happens in real life?

The right to self-determination is supposedly based on 'bodily integrity' – the inviolability of one's body. A doctor who acts without a patient's consent

does so unlawfully, even if the care is medically appropriate. The patient and doctor are independent subjects and medical care is based on express and specific agreement. This model has merit insofar as it excludes ambiguous paternalism and allows patients to participate in their own medical decisions. However, it tends to over-simplify relationships. To most people, it is important that they can place complete faith in their doctors' expertise to provide them with the best possible medical treatment. They also want to feel that their doctors are doing all that they can to cure their illness by keeping them 'informed' about their treatment rather than just obtaining their 'consent' to a course of treatment. If satisfied that their condition merits it, most patients will accept a punishing treatment regime to restore themselves back to health. Integral to this is the feeling that others – in this case, doctors – are showing concern for the patient's own body. This determination to cure a patient's illness for the sake of family or others close to the patient also gives the patient the strength to keep on living. Thus, relationships with others may be implicated in the patient's decisions about bodily integrity (Bai, 1994; Schneider, 1998).

It is true that if others' concerns about a patient's treatment were expressed wholly out of self-initiated, private affection, this would not contradict the notion of bodily integrity serving as the key concept in these types of cases. However, bodily integrity – like liberalism and individualism – presumes a sharp distinction between what is private and what is public and, therefore, what is subject to regulatory intrusion by law. Actually, concern over treatment by others is less private and more social – in the sense that it is underpinned by a social normative consciousness. As such, it is inextricably linked to heteronomy and third-party interference rather than bodily integrity. Bodily heteronomy – an incongruity in the eyes of the law – is more grounded in people's real lives and experience than are over-simplified understandings of self-determination. Indeed, the notion of bodily heteronomy features in debates not only about medical care, but also about abortion, where bodily integrity is talked about in strong terms.

The right to abortion has generated a political storm in the United States, with reproductive freedom the catchcry of the abortion movement. *Roe v Wade*, 410 US 113, 1973 is the most direct statement of the right to abortion rooted in personal freedom. The Supreme Court upheld abortion on the grounds of privacy – that abortion was a women's personal decision and impervious to state interference. The feminist movement has gone so far as to argue that without the right to abortion the state is forcing women to have children, invoking historic control over women's lives and sexuality. The right to abortion has represented a fight for women to reclaim their bodily integrity from third-party regulatory control (Cornell, 1995; Fraser, 1997, ch. 4).

While most would agree that a blanket prohibition on abortion is impossible, they would still be taken aback by dogmatic assertions that 'childbirth is

a woman's choice' (Tama, 2001). After all, real life is not so adamant about exorcising heteronomy. Since only women can give birth, others around them – husbands, parents and even society – have taken an interest in women's sexuality (Ehara, 2002). Even the notion of a fetus' right to life – leaving aside religious or philosophical concerns – expresses others' concern in a women's child-bearing sexuality constructed as part of her maternal instincts. Of course, we must duly acknowledge that such concerns have placed a heavy, one-sided burden on women and strongly pressured women to tame their own bodies. Contemporary society is also witnessing greater diversity in domestic partnerships and child-raising, with many choosing not to marry or even preferring single motherhood. There is a groundswell of opinion that the state should neither support nor regulate in favour of a particular model of the family (see, for example, Maruyama, 2001 in relation to France). All this suggests that upholding a woman's right to privacy over whether to have a family – including whether or not to abort a pregnancy – goes some way towards releasing women from oppressive relationships and contributing to the diversification of modern lifestyles. However, if family planning is defended deductively from the *a priori* proposition of bodily integrity, then all family issues can be reduced to questions of individual choice. Arguably, no contradiction arises between the freedom to have a family and the commitment to an existing family (Cornell, 2001, ch. 4). Surely, however, problems will arise if the freedom to have a family extends to the freedom to design a family, and if the priority given to individual freedom and self-expression infiltrates family relationships.

Feminism has criticised the private-public divide by problematising power within the 'private' sphere. Although this critique has refined the concept of the private, the criticism should instead be directed to the division itself, between the public and the private. Productive dialogue in society is unlikely unless thought is given to how the social penetrates the 'private' and how far and in what respects freedom should have a role to play in forming families (Mies, 1998). Thus, it is important to turn self-determination on its head and allow it to embrace the idea that 'my body is not my own' – an idea premised on heteronomy, where the body is the site of ongoing negotiations (Nakayama, 2000). As a result, even if we conclude that women enjoy self-determination over whether or not to give birth, there is still an underlying responsibility on the part of society to support the burden imposed on women to bear children. This responsibility suggests the need for social rights such as the right to equality and the right to an environment facilitating childbirth (Takai, 1988a).

Thus, when 'bodily heteronomy' is backed up by self-awareness by others of their responsibilities, the stage is set for autonomy. As a matter of human nature, too, heteronomy is a pre-requisite for autonomy. An old Japanese detective show used the telling one-liner: 'your parents are weeping because

of what you have done'. This is a line that remains valid even today in criminal psychology. Children are invariably driven to delinquency when they think that no one cares about what they do. It is impossible to cause grief to others if others are not concerned about one's behaviour (that is, one's body). Thus, autonomous subject-hood – a state of self-control without succumbing to impulsive behaviour – is dependent on others' concern. Of course, many in society are unable to cut the apron strings, lacking the strength to live as individuals. Although no simple matter, community – in the sense of affirming interpersonal relationships – is constructed by recognising that heteronomy is not only inextricable from, but also indispensable to, autonomy. Acknowledging community in constitutional interpretation in turn creates and strengthens community.

3.3 Dependence and Support

Another context where communitarian ideas – rather than freedom – underpins the concept of self-determination is when someone lacks the capacity for autonomy. People who cannot decide their own affairs by themselves must have decisions made for them. However, the issue of incapacity is often contested. At first blush, it seems as if the issue is simply an objective test of whether or not someone is competent. However, in many situations, the state or society is left to make difficult decisions as to whether to allow people to decide matters for themselves (Minow, 1986). In this respect, the capacity for autonomy is relative to broader societal concerns. Taking this one step further, the capacity for autonomy will also depend on how much support is provided by society.

The idea of an accessible society for persons with disabilities has become deeply entrenched in many societies, including in Japan. However, the extent to which someone who depends upon others' support is 'autonomous', and therefore competent to make his or her own decisions, turns on how much support society extends to empower people to make their own decisions. This is a thorny issue. An even more profound problem arises when someone who has exercised self-determination is held to account for his or her actions. If it is clear that he or she lacked the capacity for self-determination, the issue becomes whether society should be responsible for turning a blind eye to the person's incapacity. Thus, the idea that self-determination entails self-responsibility does not take root in every instance. If anything, debates about the right to self-determination usually shy away from proclaiming that society should exercise more responsibility and provide better support services, presuming instead that personal capacity is not a burden normally assumed by society.

Of course, this presumption of capacity is merely an artificial device to prop up the right to self-determination. It has an inherent fragility, vulnerable

to questions about defining capacity for self-determination in the interests of society and offering responsibility or support for the exercise of self-determination. The danger of personal freedom is rooted, no less, in the essential sociability of those who lead individual lives with the support of society. This is best understood by considering a case about integrated schooling for students with disabilities – a case raising obvious issues of support services.

The case, brought before the Kobe District Court, was an appeal against a decision by a high school refusing entry to a student with severe physical disabilities (Judgment of 13 March 1992, Kobe District Court, 1414 *Hanji* 26; see further Yokota 2000, pp. 304–5). Although the principal refused entry because of concerns about the student's ability to function at school, the court ruled that this refusal was an abuse of discretionary authority. This was because the plaintiff had demonstrated the required level of academic ability and, based on his record over three years at junior high school, was expected to successfully complete his high school courses. The purport of the judgment was that it was impermissible to disallow a student entry to school because of a disability if he or she had adequately fulfilled all other relevant entry requirements. Newspaper reports applauded the court's good sense.[2] Yet, if we were to ask whether the same judgment would have been rendered a decade earlier, the answer would be probably not. The court's decision was no doubt the culmination of a decade's experience with comprehensive schooling in Japan (Ochiai, 1996) and, in particular, a shift in social attitudes. If so, the decision as to whether or not the plaintiff was sufficiently competent to satisfactorily complete an education at a regular high school did not simply rest on his objectively determined capacity. It turned on his constructive 'capacity' – a capacity constructed by a social conscience that seeks to include persons with disabilities in society as much as possible. Of course, the court did not enter into the pros and cons of comprehensive schooling. Instead, the court decided the issues on the basis that the plaintiff wanted a regular education and had attained the requisite academic standing. In short, the court gave effect to the plaintiff's self-determination and attributed capacity to him. The court did not address the question of whether capacity hinges on societal support.[3]

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[2] The Asahi Shimbun newspaper, in its 13 March 1992 edition, reported the judgment favourably, with headlines such as 'A Judgment Giving Hope to the Disabled' and 'Doors Open to Regular School'. In addition, it reported the view of a Ministry of Education official who believed that the judgment would have a significant impact on school practice, since many schools were refusing entry in circumstances similar to the present case.

[3] In a similar case, the Sapporo High Court (Judgment of 24 May 1994) dismissed the plaintiff's constitutional argument that he had a right to autonomous choice. The plaintiff appealed the school principal's decision to move the plaintiff into a special class rather than allow him to advance to the next grade. The court's decision

However, would it be acceptable, say, for a person with a hearing disability who wanted to go to a regular school to demand sign-language interpreting in all classes? The unspoken assumption in the Kobe case is that the parents would provide full nursing care for the plaintiff. However, if the parents were unable to supply such care, would the plaintiff be ruled incompetent to attend school? Such questions are asked and answered every day by educators catering to children with disabilities (Engel, 1993). There is emergent practice without the benefit of a priori rules that can provide uniform answers (Karatani, 1986). As social practices accumulate into experience, society constructs the capacity for self-determination of persons with disabilities. Thus, support services emerge, ranging from financial support provided by schools and local organisations to more ad hoc understandings and cooperation extended by children and their parents in neighbouring schools, who also play a part in school authorities' decisions about entry. These support mechanisms make autonomy possible.

At the same time, society or other persons who are obligated to provide required social services may perpetuate discrimination because of the weight of the burden (Ida, 1996). Persons with disabilities, in turn, may be weighed down knowing that they depend on the goodwill of others for their support. People whitewash the arbitrariness of support by talking of rights and grounding them in universal principles. Yet societal understanding is indispensable to acknowledging and concretising such rights, or else we return to the problem we started with. Ultimately, society needs to accept that support comes at a cost and to make a positive commitment to make itself more accessible to persons with disabilities (Ishimura, 2002).

At a deeper level, the provision of such support requires society to reflect on the type of society it wants to be. For example, whether a minor is deemed to have capacity will depend on whether society tests capacity on the basis of academic ability alone or also takes into account other skills such as sociability. This choice of criteria, in turn, is contingent on how society is structured (compare Foote, 1991). Assume that society does not have a pre-ordained existence but could exist in alternative forms, and that, in its present, contingent form, society allows some to secure positions of advantage while others occupy positions of disadvantage. It would hardly be progressive if society were to define capacity in favour of those in positions of advantage and restrict the self-determination of those in positions of disadvantage. The idea of accessibility

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was probably inevitable given that the case was presented in strong either-or terms – that is, the plaintiff's self-determination versus the school principal's exercise of professional discretion. However, the court could have embarked on a more searching analysis on the prospects of self-determination in schooling for the disabled, if the dispute were framed in terms of the plaintiff's capacity to advance to the next grade relative to the support the school would need to provide. See Inoue (1999).

for those with disabilities exemplifies how the able-bodied have critically reflected on the way society has been constructed with them at the centre and with unnecessary limitations on the capacities of persons with disabilities. The idea of accessibility may be credited with redefining capacity by transforming the very structural makeup of society (Takai, 1998).

All this is also relevant to the concept of responsibility. Law's basic approach is to determine whether an individual has any given responsibility by testing whether that individual has the capacity to know right and wrong and to act accordingly. However, although capacity seems to be a matter of attributes peculiar to the individual in question, in fact it is strongly contingent on society. Individual responsibility must necessarily be indeterminate given that it is dependent on the level of support provided by society, or whether the society has critically reflected on how it makes itself more accessible.

US society experiences this instability in individual responsibility as the paradox of freedom and responsibility. The use of law to strengthen social controls – witness, for example, the trend towards tougher sentences and the criminalisation of domestic violence and child abuse – does not only implicate legal liability; it also presumes freedom of action as triggering liability. Accordingly, an increasing number of juries return not guilty verdicts after hearing testimony from psychologists concerning emotional scars from abuse suffered by the defendant as a child that have surfaced in the form of post-adolescent anti-social behaviour. Nevertheless, even in the US, many are critical of defendants' attempts to divert responsibility for their crimes on others or even society (Westervelt, 1999). Instead, as Oliver Wendell Holmes remarked cynically: 'The law considers … what would be blameworthy in the average man, the man of ordinary intelligence and prudence and determines liability by that' (Holmes, 1881, p. 108). To maintain order, society usually presumes capacity and impresses each individual with responsibility for his or her actions.

At the same time, however, we are sensitive to situations when people offend because cracks in social arrangements – such as child abuse, family breakdown or failure in competitive school entrance examinations – have thwarted them from achieving their potential. The person's life history may reveal to us that the person is more a victim than an offender (Sarat, 1994). The law accommodates this by allowing for 'extenuating circumstances' and redefining the concept of legal competence. Good faith and the abuse of rights doctrine also provide special protection. Constitutionalism, too, should be similarly accommodating, reflecting on the social barriers to self-actualisation rather than insisting on a blanket right to self-determination premised on individual freedom.

This approach is suggested by Amartya Sen, whose conception of human rights incorporates the importance of social rights by proclaiming the right to

expand 'human capabilities' (Onuma, 1998; Yamamori, 2000). It is also evident in the results of public opinion polls where, for many Japanese, 'human rights' connote rights relating to one's existence such as the 'right to live like a human-being' (NHK, 2000, pp. 90–94; Yasune, 2000). People's moral instincts find expression in the phrase 'dependent capacity' – the notion that the capacity for autonomy is contingent on society.

3.4 Difference and Acceptance

How, then, should we approach the question of subjecthood? As a pre-requisite to self-determination, subjecthood requires that one must have the capacity to make autonomous decisions. More fundamentally, however, when others recognise that a person is entitled to make his or her own decisions, that person is imputed with a constructive subjecthood. This may be understood quite easily in light of the distinction the Civil Code draws between 'act capacity' (the competency to act) and 'rights capacity' (legal competency). Given that modern legal systems recognise that all people are equally entitled, subjecthood is conceptualised as the authority to freely exercise one's rights. Such a conception of the subject then dovetails into a recognition of self-determination. As a result, the subject has an abstract quality, attributed to all people equally; it is not dependent on having a particular morality, ability or social attribute.

A good illustration of 'subject abstraction' is the issue of sexual self-determination – an issue that is generally linked to personhood. For example, Sechiyama argues that disapproval of prostitution is due to the view that sexuality and personality are indivisible – the sexuality-as-personality thesis. However, this is merely a moralist stance, he writes, and to impose this view of morality on others who do not share this view constitutes an infringement of the right to self-determination (Sechiyama and Tsunoda, 1998; Sechiyama, 2001, ch. III). Naturally, the decision to treat one's sexuality as separate from personality, and amenable to commodification, is a matter of individual lifestyle choice and hence is a moral judgment, which in turn constitutes a part of an individual's personality. The upshot of this is that when people assert sexual choices as a matter of self-determination, they are not seeking direct acceptance of themselves as specific individuals who are commercially exploiting their sexuality. Rather, they are seeking acceptance of their universal personality as subjects vested with the right to freely choose their sexuality and to reject society's appraisal of such choices.

This dual nature of personality – concrete personality as represented by that particular person's lifestyle and abstract personality where that person's lifestyle choices will be recognised – each dominates real life and legal arenas. However, they are both necessary alternative modes of representation when

we relate to one another. When the right to self-determination is legally in dispute, the immediate issue is not whether we find merit in that choice of lifestyle, but whether or not we should accept that person's authority to choose that lifestyle. This is not to suggest that this judgment is reached without any regard to a social evaluation of the lifestyle. To take an example from family life, the self-determination of parents with children is a difficult issue given that separate personalities are involved. Even so, in the US, there is a strong tendency to respect parents' self-determination concerning their children's religion and school education. This is due to the view that raising the next generation in one's own way yields the diversity necessary for a liberal society. Contrast this with prostitution. Although some may strongly assert this to be a matter of self-determination, most people would look down on prostitution as a specific lifestyle and would not assign it to be a matter of lifestyle choice that an individual may make freely (Cornell, 1995, ch. 2; Asano, 1998; Yoshida, 2000, ch. 7).

Similarly, various social norms allow people in everyday life to make judgments about other people's lifestyles, including ranking or even pointedly criticising different choices. This allows us to size up in a concrete way each other's personality and character. However, the legal recognition of self-determination and its infiltration into society invalidates these assessments of concrete personality. To a certain extent, even in real life, abstract personality becomes the controlling mechanism for recognising one another in our interpersonal relationships.

We see in the interplay between these two conceptions of personality an overarching trend of concrete personality giving way to abstract personality, consistent with the widespread juridification and mainstreaming of liberal thought in modern society. However, in contemporary society, dissatisfaction with abstract personality as defining modern identity has led some to start demanding recognition at the level of concrete personality. A good example of this in Japan is the suit filed against Tokyo City by a gay group (Judgment of the Tokyo High Court, 16 August 1997 *Hanrei Taimuzu* No. 986 pp. 206–16). Although the legal principle most directly relevant to the case was equality under the law, the suit also raised the wider issue of sexual self-determination – whether those whose sexual preference is homosexuality are entitled to protection from discrimination and from suffering social disadvantage on the grounds of their sexuality.

The plaintiff formed, and was active in, the Association for Working Gays and Lesbians. When he applied to stay at a city-managed youth hostel, his application was refused. According to the hostel's mission to ensure the wholesome development of young people, the Youth Hostel had lodging facilities with separate rooms for men and women. It would not allow gays or lesbians in either of these rooms. At issue was whether it was lawful to apply

the sex-segregation policy – designed to discourage sexual activity in the hostel – in such a way that it would effectively preclude any homosexual guest from ever staying at the hostel. (The Youth Hostel claimed that gays would engage in sexual activity if allowed in the same-sex dormitories.) The judgment found that given the significant detriment the hostel's policy would have on gays and lesbians, the hostel needed to carefully scrutinise whether or not a more restricted method was available. By failing to do so, the hostel's refusal to provide lodging was unlawful.

Although this judgment is vitally significant for acknowledging society's changing attitudes to homosexuality and reflecting on the way society produces discriminatory effects for gays and lesbians, it also holds an elusive significance for the concept of the subject. In its judgment, the Court observed that society held problematic and discriminatory attitudes towards homosexuality: thus, dictionaries describe homosexuality as 'abnormal sexual desire' and children called the plaintiff a 'fag' in the public bathing facilities at the previous lodgings. Clearly, society has looked down on homosexuality as sexual excess or deviance. These social attitudes – whether directly held or refracting the views of other lodgers and the general community – no doubt influenced the city's refusal to offer the plaintiff accommodation (Kazama, 2001). The judgment goes on to suggest that the city's assumption that gays would have sex with one another if they were in the same room – although realistically an unlikely prospect given that other people would be sharing the dormitory – was one that was implicitly captured by prejudice rather than informed by fact. If these prejudices were swept away, how would we expect society to represent the personality of gay and lesbian people?

Under the sexuality-as-personality thesis, homosexuality has been strongly linked to personality and represented as such. There has not been much scope for constructing an abstract personality that quarantines the subjective and moralistic evaluation by others. In this sense, educating the community about homosexuality has been significant in lightening the burden on the concrete personality of gays and lesbians by treating homosexuality as a private matter, that is, endorsing a universal personality. This education has involved explaining that gays and lesbians just happen to be sexually attracted to members of the same sex but that, in all other respects, they feel love and live everyday lives just like heterosexual members of the community (Karatani, 1986). However, where even stronger claims are advanced for equality between homosexuals and heterosexuals – such as gay marriage – a further round of attitudinal changes is needed in society for these claims to be upheld.

A possible solution is to further abstract the subject (see, for example, Hasebe, 2000). In practice, the nature of the family is diversifying, even for heterosexuals. Many either do not or cannot choose the model of a two-parent family to raise their children. In modern day society, many of us probably

harbour discriminatory thoughts about those who do not subscribe to the model of the nuclear family. Of course, many also resist the view that homosexuality is an alternative form of family life. Although the US is embroiled in controversy over the issue of whether or not gay couples may adopt children, the general view remains unshaken that a child's upbringing requires both a mother and a father. Recently, concerns have arisen over the welfare of children who are adopted through agents or born into families by way of artificial insemination technology or surrogacy. With heterosexual couples plagued by divorces, children born out of wedlock and domestic violence, there is no direct model available for comparison. We must engage in debate about the nature of the family and how children are raised, not just sexual orientation. In that debate, we can conclude how far we should respect gays' and lesbians' self-determination (see, for example, Sato, 2001).

Constitutional interpretation is a matter of the inherent restrictions to freedom as the reasonable distinctions in discrimination cases. Considerable concern and controversy in society about the nature of the family lies behind such a legal judgment. The freedom to form intimate relationships which in and of itself may involve children is a matter of public concern. When the abstraction of the subject proceeds one-dimensionally and is secluded within the private domain of each individual, the problem is the type of society people want to live in. It is a sign of the health of a society when members go through the push-and-pull of encountering others' diverse normative views and then identifying with each other as concrete personalities. This autonomous production of the social order within society cannot be ignored when considering inherent restrictions on freedoms. To be sure, there are social norms that unnecessarily constrain people's freedom. As critical theory tells us, conventional child-rearing – which, at first blush, seems to derive from the science of psychology – may actually come from the collective experiences of heterosexual society. Therefore, it is blind to and exclusive of alternative views. We must be aware of and reflect on all this, as well as acknowledge the overwhelming grievances gays and lesbians feel in society.

Thus, concrete personality is inextricably linked to the substantive interests of society. Dialogue between those who ascribe and those who are ascribed with personality – often after a political struggle when hierarchical power is at play – achieves a settled representation of the personality. This section has considered gays and lesbians as an example. However, other groups have engaged in 'identity politics', demanding a change in the way they are looked upon in society. These groups include not only women and persons with disabilities; but also a wide range of people who, through a range of experiences – unemployment, crime, victimisation, academic failure, family disruption and poverty – feel that they are persecuted or are misunderstood by society. Although there have been demands for legal recognition and legisla-

tive action in response to each of these individual problems, and progress is being made, there is also a struggle to change the concrete personality discernible within each of these categories into something which is more positive (Fraser, 1997).

The backdrop to this widespread rate of identity wars in contemporary society is that macro-political conflict such as class war is disappearing. In its place, previously unnoticed issues of pluralist and structural conflict endemic in society have entered the political stage. The advance of democracy and human rights also helps such advocacy (Laclau and Mouffe, 2000, ch. 3). People have also begun to articulate their human urge to live a meaningful life in an increasingly affluent society. It may be a personal matter to answer questions about one's self-identification and how to live one's life. However, so long as people are connected with one another and are inextricably part of the society in which they live, these are not just personal questions; it is critical that people are affirmed by others and by society. As long as people demand that society itself reconfigures the structural principles, it is not enough for society merely to affirm a distant, abstract personality.

On the one hand, widespread societal acceptance of the 'abstract nature of the subject' – the abstraction of different lifestyle choices – paves the way for personal autonomy to pursue one's own life choices. On the other, 'the diversity of the subject' is also a prerequisite for autonomy, given that people cannot live meaningful lives unless their lifestyles are accepted as morally worthy. At first glance, the 'diversity of the subject' seems like an eminently private question of how society views people who are different. However, as suggested by the slogan 'the personal is the political', people resent it when they feel that prevailing social attitudes oppose them, and it is important to vent the issues conspicuously on a political and public stage (Mouffe, 1996). Constitutional interpretation requires acknowledgement of this resentment and a definition of community in terms of mutual, non-oppressive relationships among people with concrete and diverse identities.

4. CONCLUSIONS

This chapter has used self-determination as a case study of how community is constructed in constitutional interpretation. The analysis explored an interpretation of law which deliberately constructs community in positive, normative terms – the second of the three dimensions of communitarianism outlined at the outset. Methodologically, the chapter deliberately adopted a method to reflect upon the assumption of individual liberalism – a theory that has supported the interpretation of the constitution to date – by juxtaposing it with the logic of the real world in which people actually live their lives. Even

though body, capacity and subject – the three cornerstones making up the right to self-determination – can only exist in real life when inextricably linked with other people, this chapter showed how they are constructed as self-contained by forcibly severing social interconnectedness. When this fact is subjected to critical reflection and legal interpretation restores real life interactions with others, community is constructed within the law (Omura, 2002).

The premise of bodily integrity underlining the concept of 'body' is integral to self-determination. However, people react in real life in ways that cannot be understood using the lens of exclusive bodily self-control, such as when people create relationships of trust during medical treatment or when they deal with the multi-dimensional implications of abortion. Similarly, the presumption of capacity which determines who has capacity to exercise self-determination does not reflect how society works in real life. Instead, society is deeply implicated in the construction of an individual's capacity. The same applies to the 'abstraction of subject', which pretends that self-determination is a personal matter of no interest to society. If so, society would be weak, lacking in moral fibre, and incapable of providing people with life-affirming identity. In truth, society continually defines personality on increasingly concrete levels.

The principles of such a community – a community rooted in the real world – inform the construction of community within the interpretation of law. If law is seen as a self-contained system, then such a construction is an external, alternate logic infiltrating the law. However, if modern law is constructed by removing ideals antithetical to itself and thus increasingly exposing the unreasonableness within it, then we witness the deconstruction of law. Self-determination is not possible without the counter-ideals that contradict, and thus are negated by, autonomy. Deconstruction picks up the necessary connections, and re-writes law's account of itself.

Specifically, the invocation of bodily integrity to underpin self-determination is intended to totally exclude heteronomy and uphold autonomy. However, autonomy itself is sustained when others express an interest in one's body; the same can be said of autonomous capacity. Unlike the general understanding of autonomy, in which one eliminates reliance on others and places reliance on the self, the capacity of the self can only be understood by how far reliance is reposed in others. For this reason, a core component of the right to self-determination is negotiating those relationships one has with others (Hori, 1994). Subjecthood, too, must acknowledge equality between the self and the other in abstract personality – that is, dismiss all differences – to ground self-determination. Equally, however, it is essential to accept personality at the concrete level to avoid discrimination – negation of the moral worthiness – in the exercise of self-determination. Without such an affirmation, discrimination ultimately creeps into the private domain beyond the reach of legal regulation.

Either it continues exclusively within the private sphere or manifests itself as resistance to public redistributive policy. By contrast, concrete personality – which affirms differences and survives society's moral judgments – becomes part of the person's identity and makes autonomy possible.

Thus, in each of the three dichotomies – autonomy/heteronomy, autonomy/dependence and autonomy/difference – it is untenable to rely on a pure conception of self-determination eradicating the second lesser item. Instead, heteronomy, dependence and difference are all elements indispensable to autonomy. If this is the society we live in, constitutional interpretation must take this fact into account. There are contradictory moves to secure autonomy by erasing heteronomy, dependence and difference to secure reliance on others for the sake of autonomy. Unlike previous understandings of self-determination, these are inseparable strategies. Law's proper place in a mature society is for it to penetrate society and for society, in turn, to be a constitutive part of law (Morita, 1998). Since constitutional rights are necessarily interdependent, the preferred community for constitutional interpretation is a political community of diverse individuals. Such a community imagines the entire spectrum of society engaged in debate and dissent in specific, concrete contexts.[4] Constitutional interpretation necessarily involves consulting with others. This contrasts with the ethical community of free individuals – a community where society idealises mutual respect for individual dignity – which, to date, has informed the interpretation of individual-liberalist constitutionalism.

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[4] I should touch upon here the points of similarity and difference with Taylor's form of communitarianism. Taylor (1994, Tanaka trans.) certainly uses the concepts of identity and recognition; he also applauds multiculturalism. Basically, however, his argument is that 'free individuals' are only feasible within the communities that nurture them so we must aim for the sustenance of those communities. Even if this argument may preserve the distinctiveness of communities defined by regions and strong cultural traditions, it is insufficient for acknowledging personality given that society is riddled with strong structural divisions – a key theme in this chapter. In terms of the four categorisations of community in section 2, Taylor remains within the republican model and does not see the structuralist community. I also differ from Taylor when, in section 3, I argue that communitarian principles within conservative communities necessarily must reflect human existence in society. I go on to explain the difficulties with mounting a communitarian argument that ignores such societal existence.

PART IV

A re-evaluation of Japanese modernity

7. Japanese modernity revisited: a critique of the theory and practice of Kawashima's sociology of law

1. THE MODERNISATION THESIS

Japan's adoption of a modern Western law during the Meiji Period (1868–1912) is the key to understanding Japanese law today. In every society, law embodies an essentially different logic from that which constitutes society. Tension exists in the interface between law and society: on the one hand, law can be a powerful tool in the enlightenment of society; on the other, society can shield itself against the infiltration of law's competing logic. In Japan, however, this tension is particularly stark precisely because Japan 'received' law that was modern and Western. The Meiji expression *wakon yosai* ('Japanese spirit and Western learning') nicely captures the tension. Thus, although Japan needed the 'Western learning' of law because it was indispensable to industrialising the economy and creating the modern state, it could never displace the competing 'Japanese spirit' that underpinned Japanese social relationships. This tension subsists on a more subconscious level, too, in the way Japanese people refuse or fail to grasp the purport of Western law and interpret and, instead, apply it in a Japanese manner.

However, the failure of the 'Western' edifice of law to reign in the 'Japanese spirit' was sharply attacked in the aftermath of World War II when people searched their souls for reasons why the country had been dragged into a rash war. People felt that the 'Japanese spirit' itself was the problem and that Japan needed to embrace the 'Western spirit' – the rich idealistic core – of the law. This new understanding of the law was the brainchild of Professor Takeyoshi Kawashima, and it was one that spoke powerfully to post-war Japanese society.[1] Kawashima's convictions about the universality of law and

[1] This chapter was originally published in a special edition of *Horitsu Jiho* to commemorate the work of Professor Takeyoshi Kawashima. Kawashima was enormously influential, not only because he laid the foundations for post-war legal sociology in Japan but also because he developed the theoretical postulates for modernisation theory. Further, he elucidated the character of modern law and suggested ways for

its potential to enlighten society were the theoretical threads that tied together his sociology of law. Enlightenment of society was possible, Kawashima argued, by distinguishing between the *ideal* of Western law as viewed through the lens of legal sociology and the *reality* of Japanese society that has failed to make use of that law. This distinction squared nicely with Japan's post-Meiji experience with modernisation and the reception of law to aid that ongoing process.

However, people interpret reality through the filter of their own concerns and interests. When people find their interests are in conflict with certain elements of reality and adjust their interests accordingly, the way they perceive reality also shifts. The aim of this chapter is to locate the discipline of legal sociology championed by Kawashima – and, indeed, his contemporaries – within this dynamic of practices shaping perceptions and vice-versa. By so doing, the chapter aims to re-open the question of the relationship between law and modernisation in Japan.

Two core themes define Kawashima's legal sociology. First, Kawashima was a modernisation theorist. From *A Theory of the Law of Ownership* (1949) to *The Legal Consciousness of the Japanese* (1967), Kawashima's work sought to elucidate the ideal of modern law and to bring Japan's actual state of pre-modern consciousness up to this ideal standard. Second, Kawashima was a scholar of legal interpretation. From *Law as Science* (1955) to *Modern Society and the Law* (1959), Kawashima's career was completely consumed by the task of illuminating the scientific nature of law. His legal sociology provided the methodological underpinnings for both law-led modernisation and legal interpretation. His ideas about the universality and historical inevitability of modernity informed his convictions about the enlightenment potential of modernity. Likewise, his ideas about legal norms as directly observable facts (*Sein*) allowed him to conceptualise law as something beyond a generic body of principles and more as an applied social science.

These twin concerns – modernising Japan and transforming law into a scientific endeavour – were heavily implicated in Kawashima's sociology of law. However, these concerns were not Kawashima's alone. His ideas about modernity and law that underpinned his scholarship were also shaped by far-reaching changes at the time: the post-war collapse of the old order and its legal architecture, and the re-design of the state and a law to support a new, democratic society. Indeed, the reason why Kawashima was able to cast such a large shadow over post-war scholarship in Japan was that he had an acute sense of what the times demanded and was able to speak to the people and legal scholars in a way that addressed those needs.

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interpreting the law. He also gave social scientists working outside the discipline of law the necessary vocabulary to conceive of and describe the law. This chapter considers all of these far-reaching contributions Kawashima has made to legal sociology.

However, we will not be able to appreciate the full significance of Kawashima's legal sociology simply by locating it in its historical context. In *A Theory of the Law of Ownership*, Kawashima set out to show that the defining characteristic of law in modern Western society was its 'modern character'. For Kawashima, modernity was not a historical condition but the abstracted basis for how law and legal order should work in Japan. Although a difficult notion for even legal scholars to comprehend given that Japan was not in such a position, he hoped to raise awareness about this version of modernity among legal scholars and then utilise it to enlighten the broader population. This formulation of modernity by Kawashima provided a basis for critically analysing any contemporary issue irrespective of point of time (Kawashima, 1949).

The a-historicism of Kawashima's formulation of modernity, however, does not mean that we should read Kawashima a-historically. Indeed, it is *because* of this a-historicism that we should be sensitive to the times in which Kawashima wrote. Whereas Kawashima placed complete faith in the value of modernity, today we take a more nuanced view. With talk of an overly 'litigious society' (compare Galanter, 1983) and the costs of 'a surfeit of law' (Teubner, 1990, pp. 235–92) on autonomy, it is no longer safe to assume, as Kawashima did, that the use of law is always right. For sure, most ordinary Japanese would not 'put up or shut up' when their rights have been infringed. Yet, despite another round of judicial reform underway since 2001, they still seem to prefer the 'Japanese' way of resolving their problems without having to go so far as invoking the law or insisting on legal rights. Kawashima seemed to ignore the threat that the inherently a-contextual assertion of rights poses to dense, social networks in everyday life.

Of course, we would be wrong to reject modernity out of hand simply because we are sceptical about it. We should not refuse law to those who seek it. We cannot deny modernity itself and we cannot countenance a reversion to pre-modernity. However, the enlightenment project connotes a stronger version of modernity. The project is directed not just to those who *cannot* use law but also to those who *do not* make use of the law, telling them that it is 'right and proper' to do so – and thereby enlightening those who are otherwise ignorant of their sorry life without law. It is an ideologically driven social project to manipulate social consciousness; but it is also an ideology of the legal order itself that transcends both Kawashima as an individual and any specific period in time. When engaging with questions about the validity of law in practical terms, we invariably assume that it is 'right' to invoke the law if it is 'valid' to do so. However, just because X *is* the written law, it does not necessarily follow that we *should do* X. Practical moral judgment lies between formal and actual validity. Once we acknowledge the possibility that a better solution might lie outside the law, we can integrate our moral convictions into

our use of the law. Or, to draw on Habermas (1984a), we can no longer simply *assume* the moral basis of our claims of validity but must *explicate* – through reflection and moral suasion – their normative force when others contest in court our claims about validity.

Such a reflexive approach to law freed from its modernist ideological trappings redefines the relationship between modernity and subjectivity. Traditionally, modernity has been concerned with securing subjectivity *through* the law. A reflexive approach, by contrast, is more ambitious and meshes subjectivity *with* the law. Thus, a reflexive approach is not so much a retreat from modernity, but a step up from an 'incomplete modernity' and towards a more robust form of modernity. To be sure, this approach calls into question the axiomatic values of modernity and challenges modernity's project of enlightening society through law. Yet the distinction between the 'enlightenment' and 'reflexive' potential of modernity – and, in turn, between a 'modern' and 'contemporary' legal order – allows us to see how legal sociology has subsequently developed in response to Kawashima's monumental scholarship over half a century. What we observe is a scholarly turn from enlightenment to reflexivity in response to the problems inherent in a modernist ideology of law. The post-Kawashima shift from modernity as intrinsic to the validity of law provides us with clues about Kawashima's brand of legal sociology and its impact on modern-day legal sociological understanding of the structural properties of the legal order.

It also sheds light on another key theme in Kawashima's writings: legal interpretation. Kawashima insisted that law's purport had to be objectively clear. This was to ensure that law was given effect as written and did not depend on a given party's position of power. Kawashima was specifically concerned with the government's oft-changing 'official' position on the anti-war Article 9 in the Japanese Constitution of 1947, a position that swayed with the prevailing political climate. Like other legal scholars at the time, Kawashima was sensitive to the politicisation of legal interpretation and wanted a secure legal scholarly basis to attack the sullying of law's authority by the abuse of discretionary power. For law to assert its own authority and prevail over traditional power, it had to refuse to succumb to discretionary interpretation. In real cases, the only law that should matter is that which is objective and formal. Formal claims of validity trump subjective claims of validity based on individual will or conscience.

Legal formalism is pure ideology, of course, and legal realism quickly exposed it as a fiction. Kawashima did not unconditionally accept the ideology of formal validity. Indeed, he accepted the arguments of legal realism and frowned upon claims about formal validity. However, committed as he was to modernity's enlightenment project, he could not endorse the realists' conclusions that legal interpretation is ultimately about political power. Kawashima

agonised over the dilemma of law's amenability to discretionary interpretation even though the rule of law was meant to trump the rule of will. He forged a solution by drawing on legal sociology and radically re-casting the discipline of law into an empirical science. He purported to clothe the discipline of law in objective terms: Law was not general principles with a metaphysical existence yet lacking in objective truth; it could be described objectively as that which the courts interpret the law to be. However, in legal praxis, it is impossible to limit oneself to questions of what the law *is* and avoid all questions of what the law *ought to be*. Kawashima's pitch for 'law as science', then, was a fallacy.

To vest intangible law with real social power, law must be both 'right' and 'verifiable'. These were the two pragmatic concerns underpinning Kawashima's life-long career in legal sociology and informing his project to enlighten Japanese society – from a society that did not use law to an ideal, modern society that would. Every single piece of Kawashima's work slotted into this overarching narrative of modernisation, and the ingenious design and impassioned language of his scholarship powerfully conveyed this theme to his readers. At the same time, the validity and formal existence of law are not always self-evident in the real world. And the implicit ideological assumption that people would demand law and that law would prescribe a solution to their problems came under mounting criticism, ranging from fierce ideological attacks to more mild expressions of discomfort. Naturally, Kawashima's project of enlightenment through modernisation was not immune from these criticisms. In the immediate post-war period, the national priority was to erase the large gap between Japanese pre-modernity and Western modernity and it was possible to place stock in the historical universalism of civil law and its conceptual categories. But not for long. Soon, doubts emerged about the ideology of modern law, even in Kawashima's work, and efforts focused on eradicating these causes for concern. The goal of this chapter is to read Kawashima in such a way that we can trace the cracks that appeared in the modernity ideal, explore the implications these have for re-assessing modernity, and then examine what all this tells us about how the modern-day legal order should work.

2. THE SPIRIT OF LAW

How did Kawashima come to believe that the use of law was morally justified in modernising society? Here, we are not interested in the legal ideology Kawashima implicitly accepted as a jurist or his idiosyncratic views grounded in his own life history. Instead, we are interested in how Kawashima could presume the validity of the law required for a modern legal order. This legal theoretical premise allows us to track how legal sociology used to, but now no

longer, accepts that modernisation will ultimately enlighten society. But when Kawashima charged that Japan must shrug off its 'backward' legal consciousness, he failed to explain why it is valid to *use* the law and why it is unjust *not* to do so. Thus, the empirical question of law's validity is left open by Kawashima. However, Kawashima had an unshaken conviction in the universal validity of law, evident in the types of circumstances he regarded as problems and, more controversially, in the meaning he ascribed to observed facts. This chapter questions the basis for Kawashima's conviction in universal law.

2.1 The Determinism of Modernity

For Kawashima, the hallmark of modernity was capitalism where society as a whole engaged in the exchange of goods. For exchange to take place, capitalism required exclusive control over goods and a framework for determining an equivalent price when trading different goods. The institutions of private control and social exchange dovetailed to form the distributive mechanisms of the market, under which land formerly under semi-feudal rule and people (labour) were transformed into marketable goods. In Kawashima's analysis, modern capitalist societies developed property rights and contracts as key private law concepts to legally facilitate the exchange of goods. Exchange was neither forced through the seizure of goods nor obligated by imposing external economic sanctions. Free exchange under the principle of equivalence meant that people could freely release their exclusive control over property to others in exchange for their goods. Free will made exchange possible, and so personhood became a legal category (Kawashima, 1981, vol. 7, pp. 25–8).

Thus, the key civil law notions of property rights, contracts and personhood emerged in tandem with the rise of capitalism and the spread of trade. As we now know, the modernist trappings of such law ensured that it applied regardless of the idiosyncrasies of specific states or legal communities. However, something more is needed for universal law to actually function in society. Individual attitudes that mediate between law and society must also become as modern as modern law itself. Unless individuals internalise the values of law, people will deviate from what the law requires even though it is the law of the land. This will happen when the compulsive force of law has failed to fully penetrate society. Without modern legal consciousness, a more serious problem than deviance may also arise – the violation of internal freedom, as Kant forcefully puts it. If law is unable to sustain itself without relying on external sanctions, then people will see the law simply as a coercive system of authoritarian orders.

To quote from Kawashima (1981, vol. 7, pp. 25–8):

> There is a discrepancy between the free will of subjects who are not subservient to

others and legal norms that are historically inexorable and socially compulsive. The only time this discrepancy collapses is when individuals voluntarily and willingly accept the dictates of the law.

In an 'inimitably modern civil society', it is possible to internalise legal norms robustly when the norms are the 'fruit of a civil society inclusive of all members and are its universal *logos*' (Kawashima, 1981, vol. 7, pp. 64–5). Put differently, when citizens internalise the universal precepts of law and accept its modern spirit, a legal order emerges in modern society. Otherwise, a modern legal order does not take root, even if the law is clothed in modern form. This is precisely what happened in Japan: Japanese society lacked a modern legal consciousness corresponding to the modern law it imported from the West. Thus, Kawashima's project of enlightenment through modernity was directed at gifting Japanese society with a legal order of universal law by converting 'backward' attitudes towards the law into a modern legal consciousness.

What is striking about Kawashima's understanding of modernity is how he spoke of the validity of law as a scientific truth. The development of law into its current modern form based on notions of freedom and personhood, Kawashima submitted, was because of the economic transition in society towards universal exchange of goods; and the capitalist institution of exchange of goods was itself related to Marxist historical determinism. Thus, Kawashima thought it was possible to explain in objective terms the development of law's distinctively modern face by identifying the peculiar set of socio-economic forces that generated it and by holding the deterministic evolution of law as an analytical given. Kawashima also subscribed to the historical deterministic view of modern legal consciousness. Precisely because legal consciousness is integral to a substantive legal order, it 'both constitutes and supports' a modernity centred on the universal exchange of goods (Kawashima, 1981, vol. 7, p. 60). In contrast to the West, Japan did not enjoy a modern legal consciousness because, as Kawashima put it, the exchange of goods was insufficiently developed at that time to sustain a functioning legal order. Pre-modern consciousness, which is just as pre-ordained in pre-modern societies as modern consciousness is in modern societies, influenced social life as well as attitudes towards law in Japan.

However, in purely economic terms, Japan was already clearly employing capitalist modes of production in the 1940s when Kawashima began to throw himself into his scholarship. Village communities that Kawashima felt mothered Japanese legal consciousness were becoming less self-sufficient and were soon swallowed up by commodity exchange and the cash economy. This was especially pronounced in 1967 when Kawashima authored *The Legal Consciousness of the Japanese*. Unless Kawashima defined 'modernity' in a

Weberian sense to mean a particular ethic in Western modernity, it was odd for him to characterise Japanese society as 'pre-modern' when Japan was in the grips of high economic growth. Yet while Kawashima's model directly tied legal consciousness – like law itself – to the social context, the model declined to acknowledge the historical contingencies of modernity.

Herein lies a contradiction. How is it possible to assert Japan's pre-modern legal consciousness when society was modernising economically? The only plausible explanation is to invoke the 'cultural lag' model in sociology, which holds that cultural factors fail to keep pace with social change because they are firmly embedded within people's decision-making processes and deeply rooted in their personalities. This model explains why pre-modern legal consciousness persisted despite the economic changes wrought in society by the universal exchange of goods. The consistent theme in Kawashima's *The Legal Consciousness of the Japanese* was this version of reality – that Japan's legal consciousness was in transition. The enlightenment project was to propel legal consciousness along its slow but steady path towards inexorable modernity so that it would be in equilibrium with modern society. Kawashima was able to speak about the development of a modern society and modern legal order in objective, scientific terms by construing the foundations of law in this way. Legal sociology, as a cognitive discipline, led Kawashima to presume the universal validity of law as an outcome of the notion of historical 'progress'.

The key planks of Kawashima's legal sociology were his views on the real foundations of law and his use of the cultural lag model to explain the gap between theory and reality. These forged his conviction about the integral importance of the validity of law to modernity's enlightenment project. However, later theoretical work could not sustain this conviction. This was because the pre-modern/modern dichotomy lost much of its empirical utility in subsequent efforts to describe Japanese society and was even converted into a direct, up-front test of law's validity.

2.2 The Redefinition of Pre-modernity

The pre-modern/modern dichotomy was questioned by those who felt uncomfortable attributing to the Japanese a 'pre-modern' legal consciousness that needed to be brought up to speed with the modern standard. If modern-day Japan still evinced what Kawashima dubbed as 'pre-modern' characteristics despite its transformation from a mere trading economy to a capitalist state enjoying high levels of economic growth, then something more must be at play than a lingering consciousness caused by cultural lag.

Some scholars were doubtful about Kawashima's theory of legal consciousness because they felt it did not adequately explain why Japanese avoided litigation. For example, Sasaki (1967, pp. 113–28) interviewed users

of mediation services in Japan and found overwhelmingly that people avoided litigation for rational reasons. These rational reasons included the costs and delays involved in litigation and the complexity of litigation procedures. They were far more significant than what Kawashima might term as 'pre-modern', irrational reasons, such as the social approbation for bringing suit and the dislike of black-and-white solutions (although he did try to reinterpret this survey research in light of the cultural lag model: Kawashima, 1982e, pp. 366–70). Further, in 'The Myth of the Reluctant Litigant', Haley (1978) provocatively deployed statistical evidence to show that litigation rates were higher pre-war than post-war, thereby throwing cold water on the theory that Japanese avoid litigation because of a traditional legal consciousness. Instead, Haley submitted that the Japanese do not avail themselves of litigation because institutional barriers, presumably a result of deliberate government policy, hindered access to and weakened the effectiveness of the courts.

However, such institutional explanations of litigiousness cannot entirely discount the operation of attitudinal factors. After all, the Japanese may have allowed a deficient judicial system to remain in place because, under prevailing attitudes, they did not see a problem with the lack of practical machinery to effect their rights. These attitudes crucially shape what, at first blush, might appear to be rational reasons at the individual level for avoiding litigation. Yet even if the Japanese are ambivalent about the law, Kawashima's pre-modernity/modernity dichotomy cannot adequately explain why such attitudes exist so that Japanese continue to avoid litigation under extant institutional arrangements.

Take traffic accident litigation. A sharp rise in damages suits in the 1960s peaked in the 1970s and then declined dramatically. This shift cannot be explained by Kawashima's model since it posits that litigation rates will grow as modern legal consciousness takes grip. More relevant was a series of welfare-maximising dispute resolution policies aimed at reducing the transaction costs involved in victim compensation and prioritising relief for victims who bore the bulk of accident costs. These measures included the introduction of compulsory insurance, the standardisation of relief, and the institution of free traffic accident advisory services.

Such manipulation of existing institutions is a very recent legal phenomenon and an important intervening variable in explaining people's legal behaviour. However, it is impossible to grasp its importance unless we dismantle modernist stereotypes about the legal order – that is, that people have clear rights and should know about and assert their rights. Even with established rights, it is important to bear in mind that society can freely determine who gets what rights (Galanter, 1976).

Once again, consider Japan's system of traffic accident compensation. The system compensates 'harm' differently to that allowable in torts. Further, it

promotes standardisation by restricting formal suits and effectively excluding representation by lawyers, thereby containing transaction costs given that discretion is very difficult to regulate (Tanase, 1990c). The point here is not to debate the merits and demerits of this Japanese system. Rather, what is important is that realising rights, no matter how obvious a goal it might appear to be, involves making subtle choices about values and translating these into specific institutional contexts. The outcome is a system *sui generis* to that society.

Therefore, even Haley's suggestion that institutional disincentives cause low litigiousness in Japan still shows that Japanese attitudes are at play, because the Japanese people have socially accepted such an institutional environment – even if it is one designed by a ruling elite indifferent to litigation. Legal consciousness, then, is what people imagine the law should be. As such, this consciousness not only affects the design and operation of legal institutions in society, but also the legal behaviour of the people.

The view that society rationally chooses its legal system after a comprehensive cost-benefit calculation by its members is to place excessive faith in reason and commit the Hayekian error of 'central design'. In practice, the people imagine the legal system into existence through their collective attitudes towards human relationships, power and authority, and dispute resolution. The legal system, then, is underpinned by the legal culture unique to that society. Thus, attitudes to law are as far-reaching – and therefore as deeply-rooted and durable – as those constituting society itself.

Such attitudes are so independently durable that they transcend sweeping social changes and structure society according to their blueprint. As such, they undermine Kawashima's enlightenment project which, after all, is directed to 'modernising' the substantively economic rather than the normative basis of society. Indeed, post-Kawashima, the general sociological literature outside the field of law gradually distanced itself from modernist theory (for example, Bellah, 1962). For example, scholars explored alternative explanations for Japan's non-Western pattern of industrial development. Some theorists posited that there are multiple pathways to industrialisation beyond modernisation. Others suggested that Japanese-style factors contrary to the modernity ideal actually sustained Japan's industrial progress. Methodologically, too, scholars departed from evolutionary historicism, where consciousness was basically a dependent variable in society. Many such as Nakane (1970), embraced structural anthropology, where consciousness was an independent and unique factor in society that prescribed how society would respond to social changes.

This paradigm shift shows that the phrase 'Japanese legal consciousness' may mean different things depending on the underlying theoretical perspective. It may mean a 'pre-modern' consciousness that will inevitably evolve into a modern consciousness over the course of history. Alternatively, it may refer to a truly 'Japanese-style' consciousness that is an immutable and unique

determinant of Japanese society. The academic world increasingly embraced the latter meaning because of unease with attributing a lack of modernisation to excessive cultural lag. Except in his early work, Kawashima also came to consider Japanese legal consciousness as unique to Japan and not necessarily caught in the march towards universal modernity. Through a subtle turn in his work, Kawashima both joined with, and contributed to, this paradigm shift in sociology.

2.3 Cracks in the Conception of Pre-modernity

This turn in Kawashima's work occurred when he purported to apply his model of a modern legal order developed in such early work as *A Theory of the Law of Ownership* to assess the empirical reality in Japan. In 'The Formation and Dissolution of Feudal Contracts' (Kawashima, 1949) and 'The Unilateralism of Public Construction Contracts' (Kawashima, 1950), he minutely examined Japanese-style contracting practices and uncovered feudal power relationships in what otherwise appeared to be modern contracts.

His analysis compared pre-modern Japanese society with that of Western feudalism to depict a patriarchal Japanese society defined by dependent, protective relationships (see Kawashima, 1982a, p. 190 and following, 210–11). Under patriarchy, the stronger party provides benefits, unilateral favours that may be freely withdrawn at any time; the weaker parties owe services, unquantifiable obligations that lack any clear ambit. This is in stark contrast to modern contracts under which independent parties of their own free will exchange goods and services under their control for other goods and services of equivalent consideration. A modern contractual relationship is rights-based because it is predicated on mutual exchange between independent rights-holders. By contrast, the Japanese patriarchal system of benefits and obligations, despite the appearance of mutuality and symbiosis, is authoritarian because it involves the will of only one of the parties. Kawashima supported this analysis by referring to specific examples of contractual language that demonstrated the unilateralism of Japanese contracts. Examples include: 'the landlord reserves the discretion to reclaim the land at any time, including during the term of the lease, whenever he so requests', and 'a lender may pay compensation in an amount he deems reasonable when he terminates the contract for his own reasons or convenience'. Kawashima argued that this language discloses power relationships disguised as rights.

Cracks began to appear in the modernity ideal when Kawashima juxtaposed Japanese patriarchy with Western feudalism. According to Kawashima's analysis, rulers and subordinates in Western feudalism dealt with one another as independent subjects and their relationship of power and control was subject to certain quantifiable limits. Yet Kawashima failed to find such rights-based

relationships, even in incipient form, in Japanese feudalism. Further, he went on to argue that patriarchy subsequently pervaded all social relationships in Japan, extending past the Meiji period to the rise of capitalism and escalating during the advent of political totalitarianism. If so, then 'pre-modern' consciousness does not really capture the differences between Japanese and Western experiences. Might this not mean that Japanese consciousness deserves the appellation 'Japanese'?

Kawashima's 'Social Structure and the Courts' (1960; 1982d, pp. 2–29) further highlighted the contradictions in his view that a 'pre-modernity' experienced distinctively in Japan would ultimately disappear because of the enlightenment of modernity. Distinguishing between rights and authority, Kawashima argued that unilateral authority would not only marginalise the judicial settlement of disputes about rights between equal parties, but also would work to prevent any prospect of the courts transforming power-based relationships into those based on rights. Power elites concerned about maintaining the status quo may exert tangible and intangible pressure to dissuade those who want to assert their rights from filing suit in court. Alternatively, they may invoke the State's policy on the administration of justice to require non-judicial settlement of disputes such as by restricting rights to petition the State or introducing alternative dispute resolution (ADR) systems. Thus, Kawashima attributed the failure of pre-war courts to operate as they should under a modern legal order to the patriarchal management of disputes by extra-judicial means rather than to any aversion to litigation on behalf of the citizens. If we reposition this explanation more along Haley's lines, then Japanese are 'reluctant litigants' because the government has denied them access to the courts. If so, then it is virtually impossible to account for the historical determinism of 'pre-modern' law given that it is more the product of deliberate law-related policy rather than any popular aversion to litigation.

Of course, for Kawashima, governmental law-related policy may have been shaped by prevailing patriarchal power in society and, therefore, may not have been such a strong independent factor in constructing pre-modernity in Japan. If the establishment of power relationships in Japan were an inevitable outcome of Japan's transition from pre-modernity to modernity and found expression in government policy, then this would support the proposition that society has that law which is appropriate for its stage of social development. In fact, in a separate article on the introduction of mediation systems, Kawashima (1982e, pp. 354–62) observed how the government sought to reassert control in the face of social unrest wrought by increasing disputes among the peasantry and rising rights consciousness among farm tenants. The government did so, not just by forcing alternative dispute resolution on the people, but also by championing mediation in the context of pre-modern social relationships (Hagiwara, 1974). Here, too, Kawashima explains government

policy within the framework of pre-modernity and modernity – a battle between the inevitable growth of rights consciousness and official resistance to it that draws on a backward consciousness to keep it in check.

However, if we accept government policy as an intermediate variable, then we are a step closer to acknowledging that each society has its own distinctive legal system. Take mediation, for example. Although Kawashima regarded mediation as a pre-modern form of dispute resolution (in contrast to litigation which was modern), mediation has in fact produced a more varied range of views. Post-war scholars in civil procedure and legal sociology in Japan, for example, thought that mediation would be a popular substitute for litigation because of its more summary nature, or that it would be the functional equivalent of litigation in terms of administering justice (Hagiwara, 1974). The United States has also recently re-evaluated the place that mediation, especially its more idyllic elements, might play in the legal order in terms of facilitating greater agreement between parties (Tanase, 1990a; 1992, ch. 6). These different ideas about mediation, whether expressed as overt policy demands or less coherent statements of expectation, reflect the specific ways each society imagines its own legal order to be. Once we separate out these competing ideas about mediation, we can see that, just like the extra-judicial approach to traffic accident compensation claims, Japan's system of mediation is neither 'pre-modern' nor 'modern' – it is simply 'Japanese'.

The intermediacy of political power also shows that pre-modernity further back in Japanese history was not as monolithic as we might suppose. For example, Mizubayashi (1983) contends that a form of universal law based on reason took hold during the Middle Ages in Japan due to the power play among independent feudal clans. However, law was subordinated to the exigencies of governance in the later Modern Ages so that patriarchal political power could monopolise the legitimate use of violence. Integrated within this control structure, families and village communities diffused community principles throughout society. This, in turn, served to buttress the legitimacy of state control. Strictly speaking legal policy was not implicated in this shift from the Middle to the Modern Ages. Yet an intricate interplay of political, social and cultural factors fashioned the specific design of Japanese political authority that gave rise to Japan's 'pre-modern' legal order – which, despite being blithely labeled 'pre-modern', was in fact rich and complex.

Thus, Kawashima's project of enlightenment through modernity not only mistakes the universality of modern law, it also robs pre-modernity of its unique historical richness. Because Kawashima analyses modernity by reference to the economic exchange of goods and abstracts legal orders from their historical contingencies, he concludes that modernity is a goal that all legal systems can and should achieve. However, when he tries to enlighten society and closely observes the empirical reality of Japanese society, he cannot help

but notice the idiosyncrasies of Japanese society. This paradox appears as a crack in Kawashima's enlightenment project: what at first he regarded as pre-modern consciousness, he has subtly re-read as Japanese-style or invented consciousness.

2.4 The Arbitrariness of Legal Culture

If the legal order and legal consciousness we observe in Japan is peculiarly Japanese, we cannot assume that all humankind is following a universal path of development. This suggests that we should re-open the whole question of whether a single system of universal law is desirable to begin with. If we depart from modernisation theory and instead delve into the innately Japanese dimensions of Japanese society to theorise why Japan industrialised differently to the West, then we need to rediscover the rational centre of these Japanese-style dimensions. Likewise, just as commentators have readily dismissed the Japanese-style legal order as backward and vulnerable to the progressive march of universal modernity, we should now be amenable to evaluating the Japanese legal system in a more positive light.

However, the Japanese legal system has rarely been portrayed in unequivocally positive terms, least of all by Kawashima. So long as law is caught up with such universal ideals as rights, freedom and equality, then it is difficult to put a positive spin on the Japanese ambivalence towards law because it risks diminishing these core values. We must also be on guard against easy assumptions about the rationality of the status quo ('all that exists must be rational') or simplistic generalisations about the primacy of the economy ('all's well if the economy is well'), assertions that sometimes raise their head in more positive accounts of Japanese society. In practice, just as consciousness implicates the underlying culture of society and is therefore largely stable, culture is sufficiently autonomous to withstand one-dimensional shifts in the sub-structures of society, its economic stages of development or its functional demands. Culture is inherently arbitrary – that which exists just so happens to have existed. Despite the apparently deterministic overtones of an emphasis on unique legal cultures, Japanese society was neither pre-ordained to take its current shape nor precluded from taking different form; there was and is always the prospect for a radical alteration to the status quo. Culture is encoded with essential information about the workings of the social order. When we re-imagine a legal order quite different to the one now, it provides important clues as to what needs to change.

With these reservations in mind, we might still question whether it is always right to use the law when we engage in contemporary debates about the legal order and when we cast our eyes over Anglo-European societies that have completely embraced law in its 'modern' form. The problem of the

'surfeit of law' in the West is a salutary lesson for Japan: we cannot glorify the use of law without querying the uses to which it is put.

Of course, the law presumes that it is socially rational just because it is the law. To apply extra-legal, practical and moral reasoning to assess the merits of a person's claims to a legal interest is suicide for the law and represents unfair State interference into the autonomy of the individual. The autonomy of the law in this modern sense is an immutable concern without which everything will stall. However, the enlightenment project makes an even stronger assertion: It demands that all problems – no matter how they arise in daily life or how multi-faceted they might be – should be treated as 'legal' problems under the umbrella of a valid, autonomous law (Shklar, 1966). When legal space fills its bounds or, more accurately, overflows, people begin to talk of excessive litigiousness (Tribe, 1980, pp. 544–67) or the problem of legalisation. The question we face today, however, is one step removed from this: that is, how should we use the law? Legal sociology, as a discipline dedicated to understanding the legal order, must provide us with some answers both at the empirical and theoretical levels.

3. PROSPECTS FOR CIVIL SOCIETY

This chapter first analysed how Kawashima developed his sociology of law to sustain his conviction in the validity of law and its integral role in modernity's enlightenment project. The chapter then critiqued legal consciousness theory by noting Kawashima's turn away from his initial convictions. However, contemporary scepticism about the use of law relates to how the inbuilt constraints against excessive legalisation inherent in Kawashima's model of modernity failed to work due to subsequent social changes.

Thus, in 'The Spirit of Legality', Kawashima (1982b, pp. 112–72) advanced the proposition that people with a strong rights consciousness who cherish their legal rights must also respect the rights of others. A society where everybody respects each others' rights and the free will of others to exercise their rights is a type of ethical community. Such a civil society, as an ideal, underpins law's enlightenment project. Like other modernisation theorists at that time, Kawashima believed that Western societies in fact had achieved this special type of civil society. However, later studies in legal history revealed that 'civil society' was in fact a patriarchal community that tightly regulated its membership. When society later industrialised and rights (that is, property rights) became a matter of capital, class conflict erupted, heralding the arrival of the activist state and the erosion of personal autonomy (Murakami, 1985).

Further, like the game theoretic 'prisoner's dilemma' between cooperating or defecting, there is a similar strategic tension between asserting and respecting

rights. In the United States, lawyers are often retained as 'hired guns' – weapons for both protecting one's own legal rights and fighting any aggressive rights assertions by others (see further Chapter 2). By contrast, post-war Japanese society was criticised for not caring about rights and legal enlightenment was an oft-repeated refrain. Democratic ideals gained greater traction in post-war Japanese society and the conception of human rights embodied in the Constitution achieved widespread social acceptance. Yet these dynamics were not attributable to increasing rights assertion but a consciousness of growing respect for rights. People understood and acknowledged others' rights on the basis that they were human demands rather than legal rights.

Of course, the assertion of new rights – such as women's rights and children's rights – can have a powerfully enlightening effect on society, highlighting the pain of victims in cases where society was not previously conscious of any violation of rights. Even asserting existing rights can give new voice to particular grievances. Nevertheless, for rights assertion to translate into respect for rights, society needs a thick form of communality to embrace 'supra-rights' – rights that are more than just rights. The task that confronts us now is to reconsider the civil society that Kawashima created to give coherence to law and re-conceptualise it into something more expansive and more responsive to modern-day sensibilities.

8. Litigation in Japan and the modernisation thesis

1. JUDICIAL REFORM AND THE REMODELING OF JAPANESE SOCIETY

In June 2001, the Judicial Reform Council (JRC) handed down its Final Report.[1] The reforms it proposed were sweeping. It recommended tripling the number of lawyers admitted to practice each year, improved access to justice, and popular participation in civil and criminal trials. The impetus for the JRC recommendations was an acknowledgement by the ruling Liberal Democratic Party (LDP) and the business sector that Japan needed to build greater capacity into the Japanese legal system to enhance Japan's ability to compete in an increasingly globalised economy.

The judicial reform process coincided with changing attitudes to law and litigation. The general antipathy to litigation has broken down, as Japanese turn to the courts in greater numbers, filing mass claims against firms for environmental damage and defective blood products as well as individual disputes for medical malpractice and workplace bullying. A spate of legislative initiatives has tackled new and emerging social problems, such as domestic violence and stalking. Never before has law played a more visible role in Japanese society.

This represents a major transformation in Japan, especially considering that Japan effectively industrialised without the benefit of law. Such an expanded place for law may also reflect the growing impact of globalisation in an era when, according to a report from the LDP, 'the world is being united through market principles, freedom and democracy' (LDP Legal System Investigatory Council, 1997). Even so, each society retains much that is distinctive as well as elements that resist change. The impact of the global market economy and concomitant changes in people's consciousness and lifestyles may well destabilise a settled way of doing things in Japanese society. Yet it is fully conceivable that certain

[1] See *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century* (2001) The Justice System Reform Council www.kantei.go.jp/foreign/judiciary/2001/0612report.html at 6 April 2009.

idiosyncrasies will remain or eventually re-emerge (see, for example, Tanase, 2003; 2004; 2006).

Social systems theory argues that social systems adapt to changes in the social environment by responding to the relevant issues at the time or changes in popular attitudes. Even without necessarily adopting a strongly functionalist approach, this insight allows us to imagine multiple possible responses to a single environmental change. A society's underlying consciousness – a blueprint for the design of that society – then indicates the particular way in which society will adapt to exogenous change. This is a structuralist view of social change – one that takes legal consciousness seriously. Consciousness, in short, is an *a priori* social construction that directs and influences social change; consciousness does not follow social change.

Kawashima's theory of legal consciousness reverses this dynamic. Initially greeted with enthusiasm, his theory later lost many of its adherents as the academy recast legal consciousness from a *dependent* to an *independent* explanatory variable. Kawashima's theory, in effect, was a project to transform post-war Japan into a modern society. To this end, he conceptually distinguished between a state of pre-modernity and a state of modernity. At that time, his modernisation thesis hit a raw nerve and received warm support, but it began to lose its persuasive force as society itself gradually changed. In particular, his thesis that the transition to market-based commodity exchange would bring about a modern popular consciousness was not fully borne out by Japan's subsequent history. So much is evident from the continued Japanese ambivalence about resorting to litigation, as this chapter will show.

Kawashima's modernisation thesis also encountered problems with less tangible, but no less real, social trends, such as general attitudes to law and regulatory style. The reluctance to sue, a pre-modern attitude in Kawashima's eyes, continued despite the entrenchment of the Constitution and private law in society. Normatively, too, Japan's miraculous post-war economic growth and social stability were thought to be due to Japan's configuration as a society without law. Kawashima's assertion of the historical determinism of a Western modernity as an ideal type ended up losing its appeal (Tanase, 1993). The consensus was that Japanese society had institutionalised its own distinctive structure which determined Japan's path to industrialisation and its approach to resolving attendant social problems.

Even so, the argument persists that Japan has yet to modernise. Although industrialised, the argument goes, Japan has still not achieved an ideal state of modernity. The structuralist view, attaching explanatory significance to consciousness, has failed to secure much currency. Instead, legal scholars and practitioners see the law not only as a rational tool of governance, but also as an indispensable instrument for protecting freedom and human rights. In this sense, Japan has endured criticism as an irrational or oppressive society

because it fails to use law. Current judicial reform initiatives lend credence to this criticism. The JRC Report (ch. 1, para. 2), for example, describes the judicial system as at 'twenty per cent' capacity and advocates a society where the rule of law is the 'flesh and blood' of Japan. In this way, Kawashima's project to enlighten society through modernity remains on foot even today. This enlightenment project not only idealises modernity, but also assumes the historical necessity for society to progress sooner or later towards that goal.

There are two competing claims about the future of Japanese society: one proclaims the historical universality of humanity's progress towards law; the other depicts Japanese society as uniquely unwilling to avail itself of law. This chapter examines the mobilisation of law in Japanese society and connects the present judicial reform discussion with Kawashima's theory of modern legal consciousness. Is Japan transforming itself into a society that finally uses law? If so, how is this manifesting itself? This chapter answers these questions by investigating changes in litigation rates using primary source data derived from the *Judicial Statistics Yearbooks (Shiho Tokei Nenpo)*, published annually by the General Secretariat of the Supreme Court of Japan (see also Hamano, 1999–2000; Tanase, 1977).

2. CREDIT PROVISION CASES VERSUS CONTESTED CASES

How, then, have litigation patterns changed post-war? Figure 8.1 provides an overview, illustrating shifts in newly lodged suits each year. The data set begins in 1952 when Japan sufficiently recovered from the social turmoil in the immediate aftermath of World War II and began to collect official data. The latest useable data is for 1998 (after which the Yearbooks simplify the data categories rendering comparison with previous years impossible). The litigation rate is shown as the number of cases per 10,000 people (except for tort litigation – per 100,000).

The first trend that stands out is the high volume of expedited debt proceedings ('*tokusoku* cases': the top line). The cases peak with just under 680,000 cases in 1984; the volume in the late 1990s also approached this level (610,000 cases, or one case for every 200 people). *Tokusoku* cases are simple cases involving monetary obligations. The spread of credit necessitates efficient means to enforce debts and courts are called upon to fulfil this function. It is difficult to imagine any significant degree of legal consciousness involved on the part of citizens in such cases. However, in more traditional societies, credit is provided on the basis of personal trust, as in mutual finance schemes dating back to the Kamakura era. Even today, the debtor's personal connections help secure credit, as evidenced by the custom of requiring personal guarantors (see, for example,

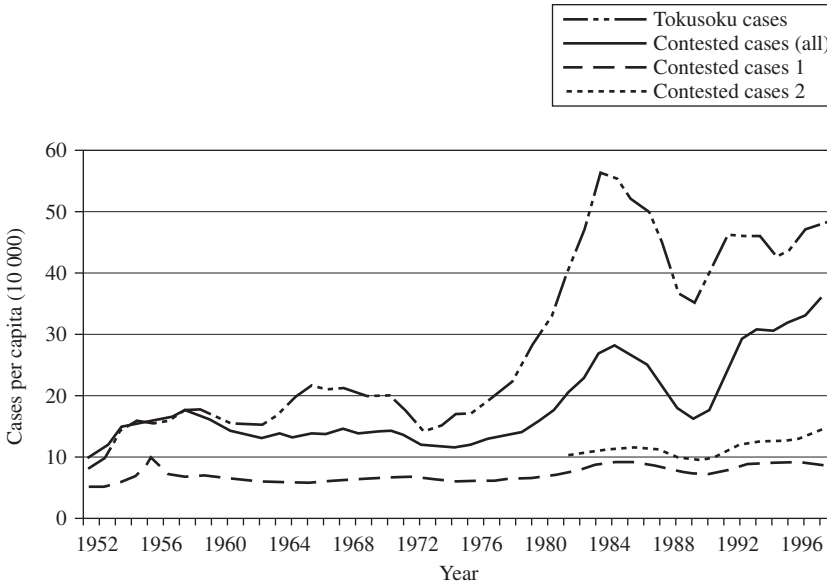

Figure 8.1 Litigation rates

Winn, 1994, in relation to Taiwan). Personal guarantees reduce the likelihood of default and furnish an alternative framework for discharging the debt without the need for court proceedings. Thus, the increase in *tokusoku* cases in the 1960s, and the rapid rise from the mid-1970s, is probably due to a decline in the effectiveness of such informal mechanisms in Japanese society.

The surge in credit recovery cases was also due to the greater willingness of financial institutions to extend consumer loans and credit facilities without requiring security or personal guarantees. To manage this risk, financial institutions developed credit management techniques to screen out high-risk debtors. Unofficial avenues such as loan sharks – a major social problem today – were also used to extract repayment of debts. This complex interplay of factors and causes produced longitudinal variance in *tokusoku* cases as shown in Figure 8.1. Each of these causal factors is important in explaining credit litigation trends in Japan, although it is difficult to pinpoint their respective individual impact from an aggregated set of figures.

Another trend evident from this Figure is the total number of cases brought in district and summary courts in non-expedited proceedings ('contested cases', that is, all cases except *tokusoku* cases: the second line from the top). The rates here evince similar longitudinal changes as the *tokusoku* cases. Increases and decreases are virtually identical over the entire period, except for a time in the mid-1960s when litigated cases were stable and only *tokusoku*

cases increased (with an overall correlation of r = +.87).[2] There are two possible explanations. First, contested cases may in fact comprise cases similar to *tokusoku* cases, at least in sheer force of numbers. Secondly, even if the type of cases is different, a common factor may influence the frequency of both types of cases and therefore explain particular short-term fluctuations in litigation rates. I will consider the first explanation here, and leave the second explanation for section 3 below.

Figure 8.1 shows that contested cases increased sharply in the first half of the 1980s and over the 1990s. If we examine separately the numbers of cases in district courts and summary courts over these two periods, we can see that the summary court cases increased especially rapidly.[3] Also, a breakdown of summary court cases in 1998 shows that so-called credit provision cases (cases involving loans or related claims) comprise 78 per cent of normal summary court cases. Moreover, a breakdown of outcomes for cases among this 78 per cent demonstrate that many were default judgments (65 per cent) and relatively few were contested through to final judgment (only 19 per cent).[4] Thus, we can infer that the main reason why total contested cases and *tokusoku* cases show similar longitudinal shifts is that a large proportion of litigated cases in fact were summary court credit provision cases.

To further confirm this, Figure 8.1 also records contested case rates after excluding the influence of such credit cases. The *Judicial Statistics Yearbooks* only began reporting the numbers of credit cases in 1982, so Figure 8.1 shows these as 'Contested Cases 2' from 1983 (the third line from the top, which we will refer to as 'non-credit cases' below). To try to capture this aspect for the entire post-war period, cases completed without a hearing or with only one hearing – most likely default judgments – are also excluded as non-contested and are depicted by the 'Contested Cases 1' line at the very bottom of the Figure ('fully heard cases').

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[2] To check more directly over the period for short-term shifts, rates of change over the previous year were calculated for both litigated cases and *tokusoku* cases. This also generated a strong correlation of r = +.77.

[3] For simplicity, the Figure does not distinguish district and summary court cases. However, during the rapid increase in litigation between1980 and 1985, district court cases rose by 10 per cent while summary courts recorded a threefold increase. From 1990 to 1995, the case load increased 40 per cent for district courts compared to 150 per cent for summary courts. Accordingly, much of the increase in litigation comes from summary court cases.

[4] There are even fewer cases in which parties or witnesses are examined: only 3 per cent of all cases. Thus, even when contested cases lead to judgment, virtually all involve cases where there is no substantial argument. Incidentally, in ordinary litigated district court cases (excluding credit cases) in 1998, 18 per cent were default judgment, 32 per cent contested cases leading to judgment, and 34 per cent settlements. Witnesses were examined in only 32 per cent of all these cases.

At first glance, a long-term stable trend is apparent for both categories of contested cases without any substantial fluctuations. After reaching an initial peak of 9.6 cases per 10,000 persons in 1958, the rate for fully heard cases declines to about six or seven cases, except for another increase to around nine cases in the first half of the 1980s and since 1994. One interpretation for such stability might be that the number of judges dealing with cases only increased slightly over this period, so that limited capacity in the court system inhibited litigation (see generally Haley, 1978). Such an interpretation would be appropriate if citizens forewent litigation because the numbers of judges did not keep pace with the number of cases brought to the courts and this resulted in delays. However, an alternative interpretation is also possible: because there was no increase in truly contested cases, courts themselves did not try to increase the numbers of judges.[5]

The number of lawyers is another institutional factor that bears a more direct relationship to the rates for non-credit cases. The number has steadily increased over the entire period, but only doubled from 6.9 (per 100,000 people) in 1952 to 13.7 in 1998. Credit provision cases are mostly litigated by staff of lender firms, and only 9 per cent of cases, even combining district and summary cases, involve represented plaintiffs. So lawyer numbers bear no relation to increases or decreases in credit-related cases. But in non-credit cases, especially in district court cases, the role of lawyers is more decisive in case filings. Lawyer scarcity influences litigation not only directly, when parties are unable to secure the service of an available lawyer. It is also relevant indirectly, when lawyers may not actively encourage new cases because they already have their hands full with existing ones, or when potential clients may be put off asking evidently busy lawyers to take on their cases. Thus, with lawyer numbers limited to a two-fold increase over the post-war period, contested caseloads stabilised over the long-term. This reinforced the percep-

[5] According to Murayama and Kato (2001), the number of judges increased by around 400, from 2,582 to 2,996, over the period when contested cases were stable at low levels from 1970 to 1998. Yet this increase (by 16 per cent) was less than the increase in the general population (by 23 per cent), and total litigated cases themselves increased five-fold in District Courts and by 1.8 times in Summary Courts over this period. An explanation for this gap, mentioned in the text above, is that a large proportion of the increase in cases comprised non-contentious credit provision cases. Other factors might also have been involved in absorbing the increase in cases over this period. These include the reassignment of judges from criminal to civil cases and general improvements in the capacity to deal with cases, including contested cases, such as better use of court clerks and improved procedures for identifying legal points in dispute. This whole topic is directly related to the ongoing judicial reform project, and more detailed studies are needed into what extent, if any, institutional barriers are preventing citizens from filing suit.

tion that Japanese society did not use law despite spectacular economic growth. In fact, as shown in section 4 below, the presence of lawyers and tort litigation rates are strongly correlated. It is difficult to confirm a direct causal relationship between lawyers and litigiousness, but a correlative relationship between the two is strongly indicated.

Thus, there is a consistently stable supply and demand relationship between litigation levels and institutional responses after World War II. However, the equilibrium has also shown some disjunction. When Japan first discussed the question of an appropriate number of legal professionals, small-scale reforms were made to the national bar examination. But the corporate sector and the LDP agitated for large-scale increases in the bar and for deregulation, given the transformation of the Japanese economy by global market forces. This has greatly disrupted the way lawyers have operated and, less visibly, has changed the way they think about potential court cases. Already, the rate at which lawyers represent parties in traffic accident mediation proceedings has risen sharply since the mid-1970s. From a stable rate of around 16 per cent since 1966, when data was first collected, it had exceeded 50 per cent by the late 1980s (Figure 8.2).

Interestingly, a similar path is evident in the rate at which mediations have failed to result in agreement. Over the same 20-year period, failed mediations

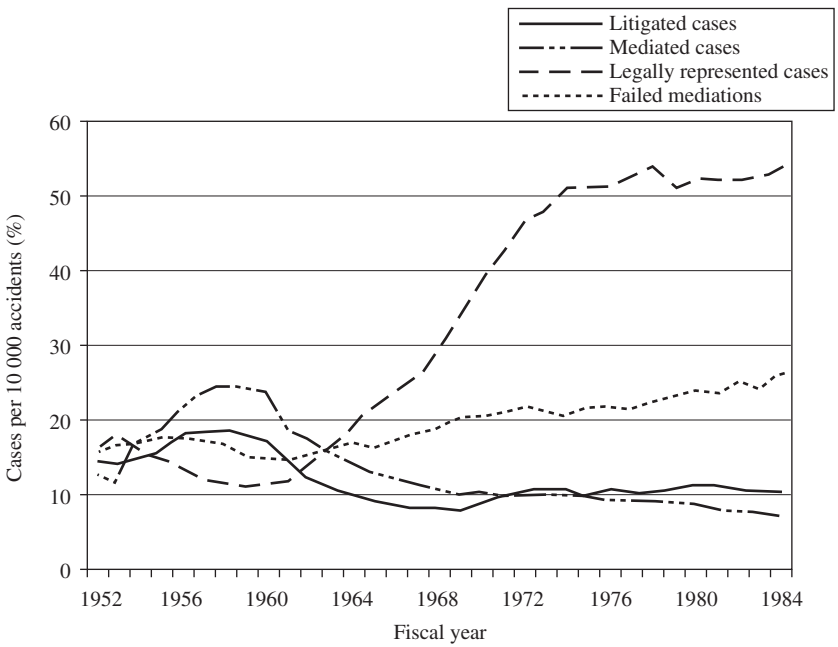

Figure 8.2 Automobile accident cases

have risen more than 10 percentage points, to 26 per cent.[6] We can also compare the rates at which parties resorted to litigation or mediation to pursue their compensation claims for traffic accidents (across the total number of accidents causing personal injury). Mediation was initially more popular, but from 1986 the situation reversed and more people availed themselves of litigation.

Japan's traffic accident compensation system was established in its present form in the mid-1970s (and both mediation and litigation rates fell substantially). The system absorbed the litigious elements of automobile accident claims so that parties could resolve their disputes and secure compensation without legal representation or filing suit. However, the balance again shifted when lawyers became increasingly involved in mediation, leading to more failed mediations and a move towards litigation. Data only runs until 1998, but if insurance companies take a stricter approach following Japan's subsequent liberalisation of insurance markets, this will pave the way for even greater litigiousness. It is unclear whether heightened litigiousness is due to more proactive lawyering – certainly the numbers of lawyers have increased, albeit slowly, over time – or greater willingness on the part of citizens to assert their rights and embrace litigiousness. But it is clear that something has changed.

So far, I have highlighted the relevance of credit provision disputes to explain the comparable longitudinal trends in *tokusoku* and ordinary contested cases. If we exclude credit-related disputes, then contested litigation levels have remained steady over the post-war period. Thus, Japan retains its general reluctance to engage the law, even though it has developed into the world's second largest industrialised economy. This ostensible stability, however, cloaks the fact that Japan has faced real pressure for change and has responded by creating new systems to absorb such pressures. Compensation for traffic accidents is an excellent example. Traffic accidents increased sharply following the spread of automobiles, and accident compensation claims boosted the total number of cases filed in Japanese courts. Yet Japan mobilised its political resources and social infrastructure to create a unique compensation system. The system incorporated compulsory insurance, standardisation of liability and relief, free post-accident advisory services, administrative guidance directed at insurance companies, police inspections of accident sites, and the symbolic apology by tortfeasors.

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[6] The key issue in most automobile accident cases is quantifying the compensation, so they are easily settled. The settlement rate in automobile accident cases is as high as 52 per cent whereas the settlement rate in general district court cases (excluding automobile accident cases and credit provision cases) is 33 per cent. When the traffic accident compensation system was introduced in 1980, the settlement rate of automobile accident cases peaked at 61 per cent from a base of 49 per cent in 1965. It has since settled to the current rate of 52 per cent. This is consistent with this chapter's thesis that the Japanese are gradually becoming more willing to have their day in court.

Within a decade, the system successfully absorbed and routinised the tide of new claims (Tanase, 1981; 1990c). However, by the 1980s, lawyers played a greater role in this system and re-kindled a litigious approach to resolving traffic accident cases. Thus, in a history of traffic accident compensation claims spanning just over 30 years, we can see how Japan has encountered new social problems that has challenged its existing systems (the rise in automobile accidents) as well as crafted new structures and organisations to meet such challenges (the traffic accident compensation system) (Hamano, 1999–2000, p. 145).

3. SHORT-TERM AND LONG-TERM CHANGES

Let us return now to the second possible explanation for longitudinal changes in litigation: might common independent causal factors affect litigation use and account for similar movements in both *tokusoku* and contested cases? One factor that instantly comes to mind is economic change. Since breakdown in contractual relationships usually leads to litigation by both consumers and firms, it seems likely that there will be more cases when the economy is in decline. To test this, Figure 8.3 compares longitudinal changes in ordinary contested cases with the rate of real economic growth.

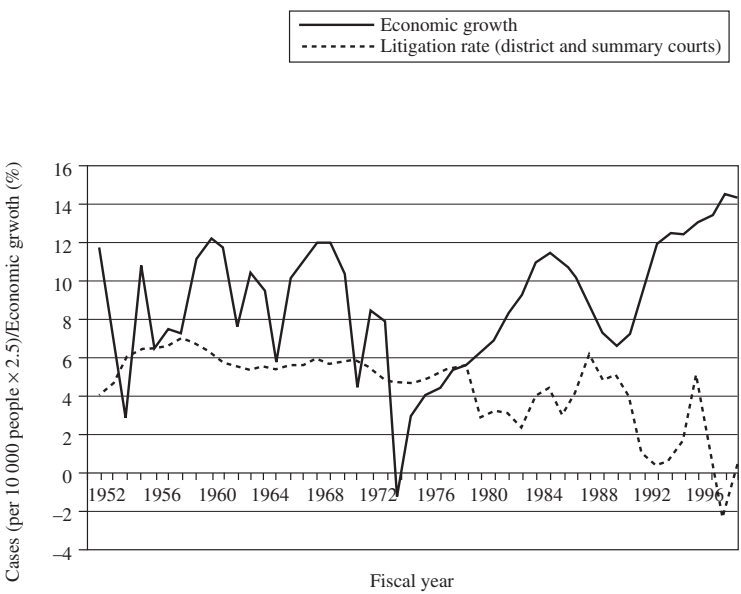

Figure 8.3 Litigation rates and economic growth

At first, it appears there is no direct correlation between short-term economic cycles and the resort to litigation. Waves of litigation seem to occur in larger cycles. However, we cannot completely dismiss the possibility of any relationship at all. If we calculate year-by-year changes in litigation rates and correlate them to economic growth rates, we achieve a statistically significant correlation with a coefficient of r = –.40. If we apply the same calculations to contested cases, however, we get r = .09, which is not significant. Accordingly, we can infer that the relationship between litigation and economic shifts is probably driven by credit provision cases. When the economy is in decline, more creditors default and more litigation ensues.[7]

However, longer-term economic growth may explain the large shifts in litigation rates. Although Kawashima's modernisation hypothesis predicted that modern rights consciousness would eventually take hold in Japan, along with the eventual consolidation of a market-based economy, his thesis was undermined by data showing a *decrease* in litigation since 1959. Apart from some fluctuations, litigation gently fell from 17.6 cases per 10,000 people in 1958 (combining summary and district court cases) to a post-war low of 11.5 cases in 1975. The rate then began to increase but, after reaching a peak in 1985, it suddenly declined again. After reaching another low in 1990, the rate then grew quickly again through to the present day. Even if we limit our analysis to contested cases, the basic pattern is the same. There is a stable period of low-level activity from 1960 until the early 1970s, followed by rising rates over the next ten years, a decline bottoming out in 1990, and finally an upward trend.

These broad cycles demonstrate the close connection between litigation rates and economic activity. First, consider the period from 1959 until 1973, when Japan's economy underwent a period of high economic expansion and recorded double-digit growth despite some short-term fluctuations. The mood was ebullient, with talk of 'the Izanagi boom' or 'the divine boom' (Sumiya, 2000). People felt that they would be better off moving forward, writing off losses rather than wasting time trying to collect bad debts. They had little patience for pursuing their strict legal rights. But attitudes changed in the wake of the sharp recession following the 1974 oil shock. Although Japan quickly rebounded, the economy was now so large that it could not grow independently of global economic constraints in terms of imports of raw materials and exports of manufactured goods. People realised that they were being drawn into a lower growth era. When the period of stable growth gave way to the 'bubble economy', attitudes slowly shifted again. Litigation levels, including both credit and contested cases, fell, just as they did during the high-growth

[7] The correlation between annual incremental shifts in economic growth and annual incremental changes in *tokusoku* cases is r = –.28. This is a weaker correlation than that for economic growth and contested cases.

period of the 1960s. This changed again after the bubble collapsed in the early 1990s; litigation increased sharply as Japan's economy stagnated once more. Thus, litigation reflects the general mood of the times, strongly framed by medium- to long-term economic activity but relatively independent of short-term economic fluctuations. When the Japanese economy fully regains its vitality, growth in litigation will probably reverse.

However, might structural reasons, rather than economic cyclical shifts, account for these post-war twists and turns in litigation rates? In the previous part, we saw long-term change in the litigiousness of traffic accident compensation claims and the consistently increasing concentration of lawyers per capita (although it is unclear whether this is cause or effect). The remainder of this part looks at tort litigation – thought to most strongly embody popular attitudes towards lawsuits – for evidence of any long-term enduring changes.

Since 1963, the *Judicial Statistics Yearbooks* have classified tort cases as 'monetary claims' and divided them into traffic accident compensation cases and other compensation cases ('general torts'). Here, we will analyse general torts. Because Japan created a streamlined system for traffic accident compensation claims, we need to exclude such cases to get to the heart of tort litigation in Japan. Figure 8.4 depicts the overall change.

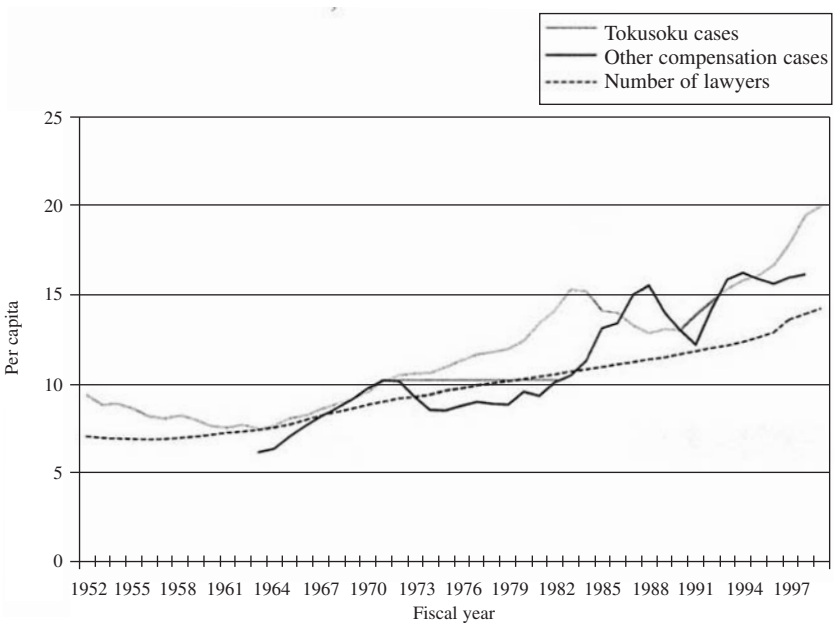

Figure 8.4 Torts litigation

At first glance, we can detect a broad upward trend. The rate has increased 2.7 times from six cases per 100,000 people in 1963 to 16 cases in 1998. This general increase, however, also evinces some distinct patterns that reflect different moods at different times. For example, just before the high-growth era and the bubble economy came to an end, people were less inclined to pursue their rights. This was reflected in plunges in litigation rates during 1971–75 and 1988–91.

On the other hand, economic prosperity did encourage some litigation. Tort cases continued to grow, while general litigation rates remained stable at low levels over the 1960s. This was partly due to the strains accompanying high-powered economic growth, epitomised by a spate of environmental pollution litigation (Gresser et al., 1981). Increasing affluence may have also afforded people the opportunity to critically examine certain unjust aspects in their everyday lives. In addition, televisions, automobiles, electrical appliances and other consumer goods may have prompted people to focus on family life and slowly withdraw from local and kinship relationships. Thus, economic prosperity may have created the conditions for more tort suits.

Figure 8.4 also shows that the divorce rate and lawyer numbers exhibited similarly steady increases. After reaching a peak in 1983, the divorce rate drops a little in the second half of the 1980s, but suddenly rises again after 1990. There is no reason to suspect a direct causal link between divorce and torts, but there may be common causal factors at play. We cannot divine what those factors are from this Figure. However, we might point to weakening customary norms, growing interest in individual self-realisation and a greater willingness to pursue one's rights, including against one's spouse.

Thus, changing legal consciousness in Japan seems to coincide with a steady rise in tort suits other than traffic accident compensation claims. But we need to engage in a deeper level of analysis to investigate how consciousness has changed and what impact this has had on litigation rates. Note that the number of lawyers (depicted in Figure 8.4) rises consistently after World War II. Lawyer numbers are strongly related ($r = +.92^{**}$) to the increase in general tort cases. The significance of this relationship will be explored when we interpret the prefecture-level data in the next section (see also Tanase, 1977; 1987). Specifically, this data will help us answer the question of whether more cases means more lawyers, or whether lawyers and litigation levels are causally unconnected.

4. LITIGATION RATES BY PREFECTURE

To determine the causal relationship, if any, between lawyer numbers and litigation levels, we turn now to examine prefecture-level data concerning

contested cases reported in the *Judicial Statistics Yearbooks*. The selected independent variables are population, employment in tertiary industries (indicating the extent of urbanisation), the divorce rate, number of lawyers, and the results of House of Representative elections (that is, LDP vote ratios). Further, in 1978 Japan's public broadcaster, NHK, undertook a large-scale values survey and published this data by prefecture (NHK, 1979). I incorporated all this information in a data set with prefectures as the unit of analysis and carried out a cross-regional analysis for 1978. 1978 provides an important starting point for analysing whether there were any changes that led to greater use of law in Japanese society. Japan witnessed the end of high economic growth enjoyed in the 1960s through to the early 1970s – and, with it, the low and stable litigation levels. At the same time, like the late 1980s when there was a drop-off in the litigation rate, Japan's economic growth was still steady and there was no widespread dissatisfaction with Japanese-style society.

The analysis explores what factors determined two completely contrasting types of litigation: *tokusoku* cases and general torts. Table 8.1 summarises the results.

First, Part A records summaries of the correlation coefficients of litigation rates for each of *tokusoku* cases and general tort cases vis-à-vis tertiary industry sector ratios, divorce rates, LDP vote ratios, and numbers of lawyers. Part B records summaries for the litigation rates vis-à-vis ten items selected from the NHK survey. Statistically significant relationships are marked with asterisks (two for significance at the 1 per cent confidence level; and one at the 5 per cent level).

In the relevant tort cases, there is a statistically significant inverse relationship between litigation and certain cultural attitudes. For example, there is more litigation in prefectures where fewer people have contact with their neighbours (–.50**) or their relatives (–.34*). Though not statistically significant, more tort suits are filed in prefectures where fewer people affirm the proposition that they 'want to conform with the majority view even if it goes against personal views' (–0.25) or that 'it is better to go along with what the government and bureaucrats say to do' (–0.25). It is not difficult to understand why tort cases increase as local and kinship links weaken and as more people are prepared to assert themselves against those in their community and against governmental authority.

The correlations of *tokusoku* cases are a little more difficult to fathom. None of the four attitudes relevant to the tort cases produces statistically significant results. Instead, the following four items are significant for *tokusoku* cases: 'one should respect long-established ways' (.53**), 'it is better to follow what elders say, even if it means compromising' (.29*), 'people should value family name or status' (.27), and (although inversely correlated) 'national politics is largely irrelevant to personal life'. Arguably, respect for

Table 8.1 Correlation between litigation rate and other variables

A. Urbanization variables

	General torts	Tokusoku cases	Tertiary industry ratio	Divorce rate	LDP voter ratio	Number of lawyers
General torts	–	.34*	.49**	.54**	–.29	.74**
Tokusoku cases	.34*	–	.37*	.65**	.08	–.04
Tertiary industry ratio	–.49**	.37*	–	.69**	.53**	.59**
Divorce rate	.54**	.65**	.69**	–	–.36*	.36*
LDP voter ratio	–.29	–.08	–.53**	–.36*	–	–.38**
Number of lawyers	.74**	.04	.59**	.36*	–.38**	–

B. Prefectural values survey

	Accommodate others	Respect tradition	Respect authority figures	Value family ties	Frequent contact with relatives	Frequent contact with neighbours	Avoid contact with neighbours	Every person for themselves	No interest in politics	Defer to local authorities
General torts	–.25	.25	.02	–.18	–.34*	–.50**	–.02	.19	–.03	–.25
Tokusoku cases	.06	.53**	.29*	.27	.12	–.12	–.14	.04	–.37**	.01
Tertiary industry ratio	–.33**	.09	–.16	–.37	–.40**	–.70**	–.28	.11	–.25	–.41**
Divorce rate	–.22	.28	.10	–.08	–.22	–.55**	–.34**	.08	–.18	–.19
LDP voter ratio	.47**	.11	.32*	.50**	.55**	.58**	.30**	–.07	.17	.63**
Number of lawyers	–.23	.05	–.10	–.28	–.39**	–.55**	–.16	.05	.04	–.32*

Notes: * Statistically significant at the 95% confidence level.
** Statistically significant at the 99% confidence level.

customs, seniority, family ancestry and national politics discloses deference to authority. The question is why this should be related to *tokusoku* cases. Before we investigate this further, let us briefly consider the other statistically significant relationships.

Among the other factors in Table 8.1, Part A, there are strong positive correlations between tort litigation rates and the tertiary industry ratio, divorce rates, and number of lawyers. The tertiary industry ratio is a measure of urbanisation. As urbanisation increases, so to do divorces and the number of lawyers – and tort lawsuits. The negative correlation with the LDP vote ratio likely reflects the LDP's dominance in rural areas. For *tokusoku* cases, the tertiary industry ratio (.37*) and divorce rate (.65**) both have positive correlations. The causality seems to be that urbanisation brings about higher levels of credit provision. But the divorce rate is more strongly correlated than that for the torts cases, and the *tokusoku* case rate is unrelated to the LDP voter ratio and numbers of lawyers, so urbanisation does not explain all the variance in litigation.

To clear up this uncertainty, let us calculate the partial correlation coefficient by controlling for the tertiary industry ratio (and thereby changing the mix of relevant variables) and then conduct a regression analysis (Table 8.2).

The relevant raw data is in the top two rows of Table 8.2, Part A (rates for *tokusoku* and general tort cases) and is reproduced from Table 8.1. (The data obtained from the consciousness survey are the eight variables most significantly related to the *tokusoku* or general tort cases respectively). The third row reproduces the strength of the correlations with urbanisation. Except for the variable 'respect for customs', each coefficient displays a strong correlative relationship with the urbanisation index.

What relationship, then, do the variables have on litigation rates once we control for the influence of the tertiary industry ratio? The partial correlation coefficients are shown in Table 8.2, Part B. First, general tort cases (the top row) still show significant relationships for the divorce rate (.32*) and neighbourly contact (–.25*) (or, more accurately, *lack* of neighbourly relations since it is an inverse correlation). Both correlations are a little weaker when we control for urbanisation. This suggests that general urbanisation has a scattered effect on general tort litigation. Conversely, the data shows a strong correlation between general torts cases and numbers of lawyers. Because lawyer numbers are largely unaffected by the effects of urbanisation, the data suggests that the higher density of lawyers in urban regions is because urban dwellers are more proactive about bringing suit and therefore need greater access to legal actors.

A puzzle still remains regarding *tokusoku* cases (the second row of Table 8.2, Part B). Even controlling for the tertiary industry ratio, the correlations hardly change. The figures, however, do show that the effects of urbanisation

Table 8.2 Litigation factors (partial correlations/regression analysis)

A. Pearson coefficients

	Tertiary industry ratio	Divorce rate	LDP voter ratio	Respect for tradition	Frequent contact with neighbours	Number of lawyers
General torts	.49**	.54**	–.29	.25	–.50**	.74**
Tokusoku cases	.37*	.65**	–.08	.53**	–.12	.04
Tertiary industry ratio	–	.69**	–.53**	.09	–.70**	.59**

B. Partial coefficients (controlling for tertiary industry ratio)

	Tertiary industry ratio	Divorce rate	LDP voter ratio	Respect for tradition	Frequent contact with neighbours	Number of lawyers
General torts	–	.32*	–.03	.24	–.25*	.64**
Tokusoku cases	–	.59**	.15	.54**	.21	–.23

C. Regression analysis (B values)

	Tertiary industry ratio	Divorce rate	LDP voter ratio	Respect for tradition	Frequent contact with neighbours	Number of lawyers	
General torts	.08	.29	.01	.16	–.28	–	R = .38
Tokusoku cases	.12	.66**	–.02	.26**	.36	–	R = .62
General torts	–	.33*	–	.15	–.32*	–	R = .37
Tokusoku cases	–	.71**	–	.35**	.29	–	R = .62
General torts	–	.27*	–	.15	.00	.64**	R = .66
Tokusoku cases	–	.72**	–	.25**	.24	–.11	R = .63

Notes: * Statistically significant at the 95% confidence level.
** Statistically significant at the 99% confidence level.

are somewhat diluted; that the variables of neighbourly contact and LDP voter ratios change into positive correlations; and that the variable of lawyer numbers becomes an inverse correlation. The divorce rate (.59**) and respect for customs (.54**), however, remain both strongly and positively correlated. The data suggests that overall urbanisation certainly increases *tokusoku* cases, but also that divorce rates and deference to authority exert more powerful influences.

The regression analyses in Table 8.2, Part C confirm this. First, a regression analysis controlling for the independent variables of tertiary industry rate, the LDP voter ratio and the number of lawyers, and leaving just three independent variables (divorce rate, respect for customs and neighbourly contact), makes little difference to the overall explanatory power (r^2) in both *tokusoku* cases and general tort cases. (For example, the r^2 drops only slightly from .38 to .37 for general tort cases). In other words, the three variables of divorce rates, neighbourly contact and respect for customs seem to absorb most of the influence from urbanisation (the tertiary industry ratio). However, if number of lawyers is added as a fourth independent variable, the explanatory power of this regression rises considerably (to $r^2 = .66$) for general torts cases. Since it makes almost no difference to *tokusoku* cases (r^2 only increases from .62 to .63), we can infer that numbers of lawyers is an important influence independent of urbanisation for tort litigation only. What, then, accounts for the strong impact of deference to authority and the divorce rate on *tokusoku* cases?

An empirical study from the US that examined litigiousness in a small town in Illinois provides some useful pointers (Engel, 1983). The study analysed local court records, but also reconstructed some of those cases into hypotheticals that were then evaluated by local residents to assess their attitudes toward litigation. The residents' normative consciousness based on an appraisal of their motives also helps us to understand litigation patterns in the Japanese context. First, the Illinois farmers, especially long-time residents, generally did not conceive torts as involving legal rights. They were even more negative about bringing lawsuits. They asserted that accidents were a fact of life and viewed lawsuits as morally dubious attempts to get money by blaming others.

This survey was carried out in the mid-1970s at the height of America's 'liability explosion', a dramatic expansion of tort liability. Indeed, there was some evidence that the residents in the Illinois study had read newspaper articles about high-profile litigation. However, they still distanced themselves from such events 'in New York and Chicago' and tried to preserve their own traditional norms. Residents who had lived at a time when there were not thorough safety measures in place either at the workplace or home had become used to taking their own precautions to deal with the many risks encountered in daily life. It would have been a denial of their very identity to make others responsible and turn accidents into questions about rights. In the interviews,

the residents responded that litigation was due to recent arrivals and repeatedly distanced themselves from 'those others' who brought their complaints to court (see further Sato, 1994, pp. 871–2). Here, the picture is one of a disoriented people caught at the crossroads between two eras. The survey results also reveal that the issue of rights is strongly connected to individual identity and that there is more to 'rights' than simply asserting them as a modern, autonomous individual.

Residents took a different view of credit disputes compared to torts, responding that it was obvious that borrowed money should be returned and that creditors should be allowed to take strong measures to collect loans. There were even indications that residents felt moral indignation towards those who failed to repay their debts and that they might even bring suit themselves even if it were not cost-effective. Japan, of course, is not the same as this traditional American community and these attitudes have no direct applicability to the Japanese context. Nevertheless, the correlation between *tokusoku* cases and deference to authority in Japan may be attributed to an underlying belief in an orderly world where people take proper responsibility for their actions, including repaying all debts. Of course, the primary concern of creditor firms that take *tokusoku* cases to court is to preserve profitability through efficient debt collection. Yet an implicit understanding among creditor firms, debtors and wider society influences the decision when to proceed to mandatory debt collection.

Nonetheless, it is unsafe to presume that credit defaults will be rare when such views prevail about the social order. People default on their loans because of unstable employment and financial hardship rather than broader normative causes. The strong correlation between the divorce rate and *tokusoku* cases, therefore, seems more closely linked to economic factors such as unstable employment – factors to which lower and middle-class groups are particularly vulnerable – and quite independent of any evidence of deference to authority, such as popular respect for customs.

Likewise, it is difficult to make generalisations about the factors influencing the divorce rate. The data at hand suggests that divorce rates go up when urbanisation induces changes in lifestyle. Thus, the strong correlation between the tertiary industry ratio and the consistent increase in the divorce rate from around 1965 provides compelling evidence for this conclusion. On the other hand, regional variation in the divorce rate (summarised in Table 8.3) tends to indicate that divorce may not be correlated with urbanisation. This is because Hokkaido, Okinawa, Fukuoka, Aomori and Kochi – regional prefectures that do not have a high concentration of Japan's urban hubs – exhibit high divorce rates as well as a large numbers of *tokusoku* cases. Even before today's steadily increasing divorce rate, divorce was on the rise during the social turmoil of the immediate post-war period until it settled in the 1960s when

Table 8.3 Prefecture-level litigation and other variables (1978)

	General torts (per 10 000 people)	Tokusoku cases (per 10 000 people)	Tertiary industry ratio (%)	Divorce rate (per 10 000 people)	LDP voter ratio (%)	Number of lawyers (per 10 000 people)
Hokkaido	10.0	42.7	59.8	17.4	37.4	4.1
Aomori	7.3	23.8	48.1	14.7	47.8	2.3
Iwate	5.3	19.2	44.1	8.9	52.3	2.4
Miyagi	9.1	25.4	54.2	10.0	47.9	6.5
Akita	7.5	27.9	46.9	9.4	48.1	2.3
Yamagata	4.4	15.9	43.6	8.0	58.0	2.6
Fukushima	5.0	23.0	43.5	9.1	59.0	3.3
Ibaraki	6.9	15.8	43.1	8.6	44.8	3.1
Tochigi	5.5	14.6	44.3	9.5	48.9	3.7
Gunma	5.8	16.6	45.6	9.8	63.4	4.7
Saitama	4.8	12.2	52.4	10.5	36.2	2.5
Chiba	6.5	13.3	54.1	10.8	43.2	2.9
Tokyo	19.0	18.2	63.8	13.5	29.9	46.5
Kanagawa	7.0	14.8	56.1	12.4	15.4	5.6
Niigata	7.0	11.4	46.0	7.2	38.9	4.1
Toyama	6.5	11.9	48.9	9.3	60.4	3.9
Ishikawa	8.4	15.9	51.9	10.5	67.3	5.8
Fukui	6.0	15.0	46.7	10.6	36.1	3.4
Yamanashi	8.0	12.5	46.8	9.6	55.3	5.5
Nagano	5.0	11.7	42.7	7.7	44.1	3.3
Gifu	5.5	9.2	46.9	8.7	62.9	3.1
Shizuoka	6.1	16.5	48.6	11.6	46.7	4.3
Aichi	9.8	9.7	49.9	10.1	40.5	8.0
Mie	4.9	11.8	49.0	8.7	59.8	2.8

Table 8.3 (continued)

	General torts (per 10 000 people)	Tokusoku cases (per 10 000 people)	Tertiary industry ratio (%)	Divorce rate (per 10 000 people)	LDP voter ratio (%)	Number of lawyers (per 10 000 people)
Shiga	4.8	14.1	46.9	7.3	41.8	2.1
Kyoto	8.2	14.3	56.9	10.5	26.2	8.5
Osaka	11.3	20.8	57.1	13.8	25.7	18.3
Hyogo	6.5	29.3	55.0	11.0	32.8	5.8
Nara	4.2	13.1	54.8	9.8	43.6	2.6
Wakayama	6.4	21.0	52.7	11.9	52.1	4.1
Tottori	8.7	26.5	48.6	9.9	56.2	3.7
Shimane	3.3	16.5	48.5	7.4	54.8	2.4
Okayama	6.6	27.7	47.0	10.6	40.4	5.8
Hiroshima	10.3	26.9	51.2	11.2	48.4	6.3
Yamaguchi	8.7	30.8	52.9	12.0	57.0	3.1
Tokushima	8.1	17.8	48.0	10.9	61.3	3.3
Kagawa	7.6	20.1	51.5	11.0	64.9	5.8
Ehime	7.2	24.4	48.2	13.7	61.6	4.4
Kochi	11.9	36.6	50.0	14.6	44.9	6.2
Fukuoka	8.8	36.0	61.0	15.0	32.3	8.2
Saga	5.7	25.2	48.9	8.1	58.6	3.4
Nagasaki	6.3	33.7	54.1	12.0	41.2	3.5
Kumamoto	5.5	36.4	48.4	10.0	60.6	3.7
Oite	12.7	42.5	50.7	12.4	50.6	4.6
Miyazaki	9.2	41.5	48.6	12.8	39.3	3.0
Kagoshima	5.5	27.9	46.3	10.8	60.7	2.1
Okinawa	6.6	43.9	64.5	16.1	39.6	14.3
Japan	8.7	21.3	47.2	11.6	41.8	8.5

people regained some control over their lives and the nuclear family was established in society. However, the evidence shows that where the local economic conditions remained unstable in regional Japan, both the divorce rate and *tokusoku* cases remained high.

5. FUTURE PROSPECTS

This chapter has investigated the factors responsible for litigiousness in post-war Japan, combining longitudinal time-series analysis with horizontal, prefecture-level analysis. The first conclusion was that there were two large waves in post-war civil litigation, the bulk of which comprised expedited debt recovery cases which required little involvement by either courts or lawyers. If we exclude such cases and focus on genuinely contested cases, there has been little change in the half-century since the war. This is probably due to basic stability in judicial institutions and the numbers of judges and lawyers over this period.

However, there have been mid- to long-term shifts. In particular, people took different attitudes to litigation depending on economic conditions and the corresponding mood at the time. Once the bubble burst in the early 1990s, there was a distinct rise in contested cases. The evidence also shows that traffic accident compensation claims have become more keenly contested since the late 1970s, despite the establishment of an ADR system designed so that parties could settle their claims without resort to courts and lawyers. Prefecture-level analysis shows a clear upward trend in litigation involving general torts linked to increased urbanisation and, more especially, the dilution of neighbourly relations. Regional litigation is also strongly correlated with the number of lawyers in that prefecture. By contrast, the data on *tokusoku* cases shows that litigiousness turns on economic factors, such as employment instability, as well as deference to authority.

How should we evaluate the modernisation thesis in Kawashima's theory of legal consciousness in light of these results? Is there really a shift towards a society where 'law becomes the lifeblood of society', as suggested in Japan's contemporary judicial reforms? First, broadly speaking, contested litigation has been stable for the 50-year period since World War II. In light of the remarkable economic development and social change over that period, we must revise Kawashima's forecast that marketisation would bring about a modernisation of legal consciousness. At the very least, we should revisit his prediction that modernisation would result in more litigiousness. However, this is not to say that we should entirely reject Kawashima's hypothesis. In particular, his theme of personal de-contextualisation – the idea that commodity exchange requires a modern legal consciousness because marketisation

requires people to be reified as property owners – transcends the site of economic production and infiltrates consumer life, the family and personal relationships. This theme of de-contextualisation is observable in the data insofar as greater litigiousness in both traffic accident cases and general torts is due to the loss of personal context in mutual relationships. This part of Kawashima's thesis also has empirical support in that the rise in litigation rates and rights assertion coincides with the economy enjoying great prosperity.

From this perspective, contemporary developments reflect the growing importance of market forces. All economic transactions – such as inter-firm dealings, employment relationships and consumer purchasing – are ridding themselves of personal relationships, status and emotional support leaving only market-based regulation. If these social changes also lie behind the emergence of neo-liberalism, the distinctive consciousness combining individualism and liberalism, then Japan is certainly witnessing the spread of what Kawashima regarded as a modern consciousness. The data concretely demonstrates some increases in contested cases and general torts.

Therefore, there is some clear data supporting the modernisation hypothesis. Over the last half-century of marketisation in the post-war period (or, indeed, the last century of modern law adopted from the West since the Meiji period), a modern legal consciousness is taking hold in Japan. At the same time, we cannot discount the structuration hypothesis, namely that structures specific to Japanese society are continuously regenerating despite the overlay of modernisation. For example, even though medical malpractice litigation has grown dramatically in Japan, this comes off a low base to a level still very much lower than in the US. In 1998, for example, there were still fewer than 800 cases, or 0.3 cases for every 100 doctors.[8] By contrast, in California, there were 26 medical professional liability suits per 100 doctors brought every year (Litan and Winston, 1988, drawing on data for 1984). That is 90 times the rate in Japan. Increasing numbers of lawyers and judges and rising levels of litigation will probably push malpractice suits higher in Japan. They might even reach levels not all that different from those in the United States – we cannot be sure until we have an opportunity to review the figures in ten or 20 years time. But it is more likely that they will remain more or less at the same rate as they are today. The relevant operating function here is structuration, reconstituting existing structures in line with the blueprint of society.

This does not imply that Japanese society will resist the new global market economy nor seek to suppress consequent changes in consciousness. Rather,

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[8] This is calculated on the assumption that one doctor is the defendant in a medical negligence case. The number of doctors is taken from Asahi Shimbun's *Minryoku 2000*. At the end of 1998, the number of doctors was 248,611; and the number of professional liability cases was 767 in 2000.

my argument is that every society has a wide variety of means available for dealing with similar problems. Japanese citizens can nonetheless still enjoy the benefits that law brings even if there is no rise in litigation levels. If judgments are highly predictable in certain types of disputes, parties will find little advantage in filing suit but will instead settle extra-judicially.[9] Government and business will develop more wide-ranging policy solutions and organisational reform in response to the influence of litigation and especially the new norms developed in rights-oriented cases. The mediating mechanism is 'Japanese legal consciousness', which will determine the specific shape of such institutional responses.

Another important qualifier must be added to the modernisation hypothesis. Kawashima may have idealised the rights consciousness of autonomous individuals, but this is not the only form of consciousness that may promote rights assertion and resort to litigation. The modernity ideal is realised where autonomous individuals are aware of their rights, recognise the equality of personhood and create a society premised on the universal validity of law. The transparent and homogenous society that such autonomous individuals create is civil society. Kawashima's narrative favoring rights assertion and litigation is premised on the existence of such civil society.

However, the reality of growth in rights-based litigation does not always accord with this ideal picture. In traditional communities in the US, people who brought tort cases to courts were seen as morally suspect for attributing responsibility to others for their own inadvertence or pure bad luck. The narrative about Japanese rights consciousness is different. Japanese people are taught to fear friction with others and to defer to authority, so the story goes, and therefore they concede their rights and bear their plight with a stiff upper lip. The better view, however, is that Japanese rights consciousness is shaped by the protective arm of the welfare state. It is highly rational to entrust those with greater resources and power, such as the state and companies, with the preservation of a secure living environment. Indeed, tort litigation might be pushing modern-day society in this very direction (Lieberman, 1981; Friedman, 1985). Therefore, it is time to re-fashion Kawashima's modernity ideal into one where rights assertions plays an equally important, but more constitutive role, in contemporary society (see further Chapter 6). We might dub this 'contemporaneity' to distinguish it from Kawashima's modernity.

Of course, the concept of autonomy has two facets: freedom and responsibility. The same residents who see moral decay in tort litigation approve of

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[9] Ramseyer and Nakazato (1999) is one source emphasising this. But we should consider whether this judicial predictability may not itself reflect a structural blueprint for Japanese society, strongly determined by patterns of culture, society and politics. For an analysis along these lines, see Tanase (1990a).

engaging law's enforcement powers for debt collection and stress the moral responsibility to perform one's promises (such as repaying one's debts) in good faith. Therefore, there is a deeply-rooted opposition in society, including Japan's, to asserting the right to freedom without any corresponding concept of responsibility. Politically, this is seen as conservative consciousness, but self-responsibility is also a hallmark of contemporary neo-liberalism. The all-encompassing expression of 'modern legal consciousness' risks obfuscating the dual dynamics of freedom and responsibility.

We can also link this idea to the concept of civil society as a voluntary community formed between independent individuals. Kawashima pointed to a strong morality that underpinned the type of society that strongly rights-oriented, autonomous individuals formed – namely, an ethic that individuals would respect the rights of others just as highly as they value their own (Kawashima, 1982b, pp. 112–72). However, you need to locate responsibility in others before you can become conscious of your own rights. If responsibility is contested in the name of this very same 'good community', then the existential foundations of that moral community are jeopardised. Further, if we look back at what civil society was like in the West (Murakami, 1983), historical evidence of oppression against women and the un-propertied classes show that a one-dimensional, homogenous civil society had a hidden element of violence, insofar as community membership was limited only to those who could secure membership.

A contemporary community must be re-defined as a diverse and inclusive community, one re-constituted by listening to the rights-based petitions brought by marginalised groups. Although modern law abstracts individuals into abstract, free subjects, a contemporary community must restore particularity and contextuality in interpersonal relationships to foster interpersonal engagement among diverse individuals in all their irreducible complexity and essential heterogeneity (Young, 1990; see also Chapters 2 and 6). Kawashima's model of civil society ignores these twin elements of diversity and contextuality. Yet they are indispensible to grasping the implications of the data in the *Judicial Statistics Yearbooks* for contemporary rights and to assessing current rhetorical claims that Japan has yet to modernise – and must do so by reference to global legal standards (Miyazawa, 1996; Hamano, 1998; Hirowatari, 2000; compare Tanase, 2001). In sum, we need to distinguish between the singularity of modern consciousness and the multiplicity of contemporary community.

Bibliography

American Bar Association (ABA), Center for Professional Responsibility (2003), 'Annotated Model Rules of Professional Conduct (5th edn)', Chicago: American Bar Association.

Abe, Masaki and Luke Nottage (2006), 'Japanese Law', in Jan Smits (ed.), *Encyclopedia of Comparative Law*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 357.

Abel, Richard (1979), 'Delegalization', in Erhard Blankenburg, Ekkehard Klausa, Hubert Rottleuthner and Ralf Rogowski (eds), *Alternative Rechtsformen und Alternativen zum Recht*, Wiesbaden: Westdeutscher Verlag, p. 27.

Aihara, Naoto (1969), 'Mensetsu Kosho no Jitsumu Oboegaki', *Case Kenkyu*, **114**, 45.

Aihara, Naoto (1973), 'Mensetsu Kosho no Jittai Chosa', *Choken Kiyo*, **23**, 15.

Allen, Cecelia (1985–6), 'Interference with Visitation as an Independent Tort', *Journal of Family Law*, **24**, 481.

Asano, Chie (1998), 'Konmei Suru Sex Work Ron', *Gendai Shiso*, **26** (8), 117.

Auerbach, Jerold S. (1983), *Justice without Law? Non-Legal Dispute Settlement in American History*, New York: Oxford University Press.

Baba, Kenichi (1994), '1669-nen England "Kodomo no Seigan" no Gakko Taibatsu Yokushi no Gensetsu Senryaku', *Kitakyushu Daigaku Hosei Ronshu*, **21** (4), 819.

Bai, Koichi (1994), 'Informed Consent to Iji Hogaku', *Dai 1 Kai Nihon Igakukai Tokubetsu Symposium 'I to Ho'*, p. 18 (also available at http://cell-bank.nibio.go.jp/information/ethics/documents/ic_bai.htm 25 April 2009).

Baumgartner, M.P. (1988), *The Moral Order of a Suburb*, New York: Oxford University Press.

Bellah, Robert Neelly (1962), *Nihon Kindaika to Shukyo Rinri*, Tokyo: Miraisha.

Benhabib, Seyla (1991), 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory', in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique*, Minneapolis: University of Minnesota Press, p. 77.

Bryant, Taimie (1984), 'Marriage Dissolution in Japan: Legal Obstacles and Their Impact', *Law in Japan*, **17**, 73.

Buckholz, Robert (1979), 'Constitutional Limitations on the Scope of State Child Neglect Statutes', *Columbia Law Review*, **79**, 719.

Bumiller, Kristin (1988), *The Civil Rights Society: The Social Construction of Victims*, Baltimore: Johns Hopkins University Press.
Calabresi, Guido (1970), *The Costs of Accidents: A Legal and Economic Analysis*, New Haven: Yale University Press.
Caney, Simon (1992), 'Liberalism and Communitarism', *Political Studies*, **15**, 273.
Chambers, David (1979), *Making Fathers Pay: The Enforcement of Child Support*, Chicago: University of Chicago Press.
Conley, John M. and William M. O'Barr (1990), *Rules Versus Relationships: The Ethnography of Legal Discourse*, Chicago: University of Chicago Press.
Cook, Anthony (1993), 'Foreword: Towards a Postmodern Ethics of Service', *Georgetown Law Journal*, **81**, 2457.
Cornell, Drucilla (1995), *The Imaginary Domain: Abortion, Pornography & Sexual Harassment*, New York: Routledge.
Cornell, Drucilla (2001), *Jiyu no Heart de*, Tokyo: Jokyo Shuppan.
Cunningham, Clark D. (1992), 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse', *Cornell Law Review*, **77**, 1298.
Department of Health and Welfare (1984), *Zenkoku Boshi Setaito Chosa Kekka no Gaiyo*, Tokyo: Koseisho Jido Kateikyoku.
Donovan, Carol (1982–3), 'The Uniform Motherhood-by-Choice', *Review of Law and Social Change*, **11**, 193.
Dworkin, R.M. (1986), *Law's Empire*, Cambridge, Mass.: Belknap Press of Harvard University Press.
Ehara, Yumiko (1992), 'Sexual Harassment no Ethnomethodology', in Hiroaki Yoshii (ed.), *Ethnomethodology no Genjitsu*, Kyoto: Sekai Shisosha, p. 111.
Ehara, Yumiko (2002), 'Josei no Jiko Ketteiken Saiko – Seishoku Gijutsu Tono Kanren de', *Hoshakaigaku*, **56**, 150.
Engel, David (1983), 'Cases, Conflict and Accommodation: Patterns of Legal Interaction in an American Community', *American Bar Foundation Research Journal*, 803.
Engel, David (1984), 'The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community', *Law and Society Review*, **18**, 551.
Engel, David (1993), 'Law in the Domains of Everyday Life: The Construction of Community and Difference', in Austin Sarat and Thomas Kearns (eds), *Law in Everyday Life*, Ann Arbor: University of Michigan Press, p. 123.
England, Izhak (1980), 'The System Builders: A Critical Appraisal of Modern American Tort Theory', *Journal of Legal Studies*, **9**, 27.

Epstein, Richard (1973), 'A Theory of Strict Liability', *Journal of Legal Studies*, **2**, 151.

Felstiner, William and Austin Sarat (1992), 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions', *Cornell Law Review*, **77**, 1448.

Folberg, Jay (1984–5), 'Joint Custody Law: The Second Wave', *Journal of Family Law*, **23**, 1.

Foote, Daniel H. (1991), 'Noryoku Shogai o Motsu Amerikajin ni Kansuru Horitsu (ADA) to America Ho ni okeru Sabetsu no Gainen', *Nihon Rodo Kenkyu Zasshi*, **385**, 3.

Foucault, Michel (1977), *Kangoku no Tanjo: Kanshi to Shobatsu*, Tokyo: Shinchosha.

Foucault, Michel (1981), *Chi no Kokogaku*, Tokyo: Kawade Shobo Shinsha.

Fournie, Judith (1977), 'Post-Divorce Visitation: A Study in the Deprivation of Rights', *Depaul Law Review*, **27**, 113.

Fraser, Nancy (1997) *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition*, New York: Routledge.

Feldman, Eric (2006), 'The culture of legal change: A case study of tobacco control in twenty-first century Japan', *Michigan Journal of International Law*, **27**, 713.

Feldman, Eric (2007), 'Law, Culture, and Conflict: Dispute Resolution in Postwar Japan' in Daniel H. Foote (ed.), *Law in Japan: A Turning Point*, Seattle: University of Washington Press, p. 50.

Freedman, Monroe (1980), 'The Lawyer as a Hired Gun', in Allan Gerson (ed.), *Lawyers' Ethics: Contemporary Dilemmas*, New Brunswick, NJ: Transaction Books, p. 63.

Friedman, Lawrence Meir (1985), *Total Justice*, New York: Russell Sage Foundation.

Fukuyama, Francis (1992), *The End of History and the Last Man*, New York: Free Press.

Fuller, Lon (1958), 'Positivism and Fidelity to Law: A Reply to Professor Hart', *Harvard Law Review*, **630**, 661.

Furstenberg Jr, Frank, Christine Winquist Nord, James L. Peterson and Nicholas Zill (1983), 'The Life Course of Children of Divorce: Marital Disruption and Parental Contact', *American Sociological Review*, **48** (5), 656.

Galanter, Marc (1976), 'The Duty not to Deliver Legal Services', *University of Miami Law Review*, **30**, 929.

Galanter, Mark (1983), 'Reading the Landscape of Disputes', *University of California, Los Angeles (UCLA) Law Review*, **31**, 4.

Gardbaum, Stephen (1992), 'Law, Politics and the Claims of Community', *Michigan Law Review*, **90**, 685.

Garrison, Marsha (1987), 'Child Welfare Decision-Making: In Search of the Least Drastic Alternative', *Georgetown Law Journal*, **75**, 1745.
Garth, Bryant and Austin Sarat (eds) (1998), *How Does Law Matter?*, Evanston, Illinois: Northwestern University Press.
Geertz, Clifford (1973), *The Interpretation of Cultures; Selected Essays*, New York: Basic Books.
Gilligan, Carol (1982), *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Mass.: Harvard University Press. (Also in Japanese: Gilligan, Carol (1986), *Mo Hitotsu no Koe: Danjo no Dotokukan no Chigai to Josei no Identity*, Tokyo: Kawashima Shoten.
Ginsburg, Tom and Glenn Hoetker (2006), 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation', *Journal of Legal Studies*, **35**, 1.
Glendon, Mary Ann (1986), 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law', *Tulane Law Review*, **60**, 1165.
Glendon, Mary Ann (1991), *Rights Talk: The Impoverishment of Political Discourse*, New York: Free Press.
Goldstein, Joseph, Anna Freud and Albert J. Solnit (1973), *Beyond the Best Interests of the Child*, New York: Free Press.
Green, Leslie (1985), 'Legality and Community', *Oxford Journal of Legal Studies*, **5**, 463.
Gresser, Julian, Koichiro Fujikura and Akio Morishima (1981), *Environmental Law in Japan*, Cambridge, Mass.: MIT Press.
Grief, Judith (1979), 'Fathers, Children, and Joint Custody', *American Journal of Orthopsychiatry*, **49**, 311.
Habermas, Jurgen (1984a), 'Communication Noryoku no Tameno Yobiteki Kosatsu', in Jurgen Habermas and Niklas Luhmann (eds), *Hihan Riron to Shakai System Riron (Jo)*, Tokyo: Bokutakusha, p. 125.
Habermas, Jurgen (1984b), *The Theory of Communicative Action*, London: Heinemann Educational.
Hagiwara, Kanami (1974), 'Minji Chotei no Kihon Mondai', *Hanrei Taimuzu*, **25** (4/5/7), 2/13/20.
Haley, John Owen (1978), 'The Myth of the Reluctant Litigant' *Journal of Japanese Studies*, **4**, 359.
Hamano, Ryo (1998), 'Nihon Keizaishakai to Hoka', *Rikkyo Hogaku*, **48**, 53.
Hamano, Ryo (1999/2000), 'Shiho Kaikaku no Teii', *Rikkyo Hogaku*, **53/55**, 101/177.
Hasebe, Yasuo (2000), *Hikaku Funo na Kachi no Meiro: Liberal Democracy no Kenpo Riron*, Tokyo: Tokyo Daigaku Shuppankai.
Henszey, Benjamin (1976–7), 'Visitation by a Non-Custodial Parent: What is the Best-Interest Doctrine', *Journal of Family Law*, **15**, 213.
Herman, Judith Lewis (1992), *Trauma and Recovery*, New York: Basic Books.

Higuchi, Norio (1988), *Oyako to Ho: Nichibei Hikaku no Kokoromi*, Tokyo: Kobundo.

Higuchi, Norio (1992), 'Kodomo no Kenri Shicho no Tenkai', in Takeshi Kawai et al. (eds), *Koza Gendai Kazokuho Vol. 3*, Tokyo: Nihon Hyoronsha, p. 67.

Higuchi, Norio (1998), 'Kanja no Jiko Ketteiken', Masahiko Iwamura et al. (eds), *Iwanami Koza Gendai no Ho (Vol. 14): Jiko Ketteken to Ho*, Tokyo: Iwanami Shoten, p. 63.

Higuchi, Norio (2000), '"Ehoba no Shonin" Saikosai Hanketsu', *Hogaku Kyoshitsu*, **239**, 41.

Hirota, Naohisa (1993), *Funso Kaiketsugaku*, Tokyo: Shinzansha.

Hirowatari, Seigo (2000), '"Shimin/Shimin Shakai" to "Kokumin/Kokumin Kokka"', in Shimizu Makoto Sensei Koki Kinen Ronshu (eds), *Shimin Hougaku no Kadai to Tenbou*, Tokyo: Nihon Hyoronsha, p. 3.

Holmes, Oliver Wendell (1881), *The Common Law*, Boston: Little Brown.

Hori, Masatsugu (1994), *Shogaiji Kyoiku no Paradigm Tenkan*: Tsuge Shobo.

Ida, Hiroe (1996), 'Shogaiji to Kazoku o Meguru Sabetsu to Kyosei no Shikaku', in Akira Kurihara (ed.), *Koza Sabetsu no Shakaigaku Vol. 2: Nihon Shakai no Sabetsu Kozo*, Tokyo: Kobundo, p. 80.

Inoue, Harunori (1993a), *Minji Tetsuzukiron*, Tokyo: Yuhikaku.

Inoue, Tatsuo (1993b), 'The Poverty of Rights-Blind Communality: Tensions and Accommodations', *Brigham Young University Law Review*, 517.

Inoue, Tatsuo (2001), 'Nan no Tameno Shiho Kaikaku ka: Nihon no Kozo Kaikaku ni okeru Shiho no Ichi', in Tatsuo Inoue and Mikio Kawai (eds), *Taisei Kaikaku to shite no Shiho Kaikaku*, Tokyo: Shinzansha, p. 285.

Inoue, Yasuko (1999), 'Tokushu Gakkyu Nyukyu Shobun to Shogaiji: Ryoshin no Gakkyu Sentakuken (Shakaiho Hanrei Kenkyu Dai 17 Kai)', *Kyushu Daigaku Hosei Gakkai*, **65** (3–4), 1017.

Ishida, Toshiaki (1988), 'Mensetsu Koshoken to Kenpo 13 Jo', *Jurisuto Bessatsu (Kazokuho Hanrei Hyakusen)*, **99**, 112.

Ishii, Michiko (1983–5), 'Datai Mondai no Kazokuhoteki Bunseki', *Tokyo Daigaku Shakaikagaku Kenkyu*, 35–6.

Ishikawa, Minoru (1988), 'Ko no Kango Yoiku o Meguru Rikon no Saino Torikime to Rikongo no Fushi no Sesshoku/Koryu', *Kodomo to Katei*, **24** (11), 43.

Ishimae, Tadayuki (1989), 'Monogatari to shite no Ho', *Shiso*, **777**, 64.

Ishimura, Kumiko (2002), 'Seishoku o Meguru Jiko Ketteiken – Hansenbyo to Sentakuteki Chuzetsu o Tegakarinishite', in Masaru Takeshita and Takeshi Tsunoda (eds), *Multi Legal Culture*, Kyoto: Koyo Shobo, p. 88.

Ito, Yasuhiko (2000), 'Gendai Liberalism', in Makoto Ariga, Yasuhiko Ito and Satoshi Matsui (eds), *Post Liberalism*, Kyoto: Nakanishiya Shuppan, p. 3.

The Justice System Reform Council (2001), 'Recommendations of the Justice

System Reform Council: For a Justice System to Support Japan in the 21st Century', www.kantei.go.jp/foreign/judiciary/2001/0612report.html at 6 April 2009.
Kaiser, Denise (1987–8), 'Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients', *Journal of Family Law*, **26**, 793.
Kajimura, Taichi (1976), 'Ko no Tameno Mensetsu Kosho', *Case Kenkyu*, **153**, 88.
Karatani, Kojin (1986), *Tankyu*, Tokyo: Kodansha.
Karatani, Kojin (1997), 'Akar no Saiban o Bocho Shite', *Gendai Shiso*, **25** (6), 84.
Kashimura, Shiro (1992), 'Horitsuteki Tankyu no Shakai Soshiki', in Hiroaki Yoshii (ed.), *Ethnomethodology no Genjitsu*, Kyoto: Sekai Shisosha, p. 88.
Kashimura, Shiro (1994), 'Kenri Ishiki to Hokoi', in Takao Tanase (ed.), *Gendai Hoshakaigaku Nyumon*, Kyoto: Horitsu Bunkasha, p. 239.
Kato, Masanobu (1989), *Songai Baisho Kara Shakai Hosho e*, Tokyo: Sanseido.
Kawakami, Shoji (1988), 'Keiyaku no Seiritsu o Megutte', *Hanrei Taimuzu*, **39** (6/8), 11/14.
Kawamoto, Takashi (1999), 'Ningen no Kenri no Saiteigi', in Keiichi Noe (ed.), *Shin Tetsugaku Kogi Bekkan*, Tokyo: Iwanami Shoten, p. 151.
Kawamoto, Takashi (2000), 'Jiko Ketteiken to Naihatsuteki Gimu', *Shiso*, **908**, 15.
Kawashima, Takeyoshi (1949), *Shoyuken Ho no Riron* [*A Theory of the Law of Ownership*], Tokyo: Iwanami Shoten.
Kawashima, Takeyoshi (1950), *Doken Ukeoi Keiyakuron*, Tokyo: Nihon Hyoronsha.
Kawashima, Takeyoshi (1960), *Shakai Kozo to Saiban* [*Social Structure and the Courts*], Essay.
Kawashima, Takeyoshi (1963), 'Dispute resolution in contemporary Japan' in Arthur Taylor von Mehren (ed.), *Law in Japan: the Legal Order in a Changing Society*, Cambridge, Mass.: Harvard University Press, p. 41.
Kawashima, Takeyoshi (1981), *Kawashima Takeyoshi Chosakushu: Shoyuken (Vol. 7)*, Tokyo: Iwanami Shoten.
Kawashima, Takeyoshi (1982a), *Kawashima Takeyoshi Chosakushu: Hoshakaigaku (Vol. 1)*, Tokyo: Iwanami Shoten.
Kawashima, Takeyoshi (1982b), 'Junpo Seishin', in *Kawashima Takeyoshi Chosakushu: Hoshakaigaku (Vol. 4)*, Tokyo: Iwanami Shoten, p. 112.
Kawashima, Takeyoshi (1982c), 'Shimin Shakai ni okeru Ho to Rinri', in *Kawashima Takeyoshi Chosakushu: Hoshakaigaku (Vol. 4)*, Tokyo: Iwanami Shoten, p. 42.
Kawashima, Takeyoshi (1982d), *Kawashima Takeyoshi Chosakushu: Hoshakaigaku (Vol. 3)*, Tokyo: Iwanami Shoten.

Kawashima, Takeyoshi (1982e), *Kawashima Takeyoshi Chosakushu: Hoshakaigaku (Vol. 4)*, Tokyo: Iwanami Shoten.

Kawashima, Takeyoshi (1986), 'Rikon to Shakai Tosei', in *Kawashima Takeyoshi Chosakushu: Kazoku oyobi Kazoku Ho (Vol. 10)*, Tokyo: Iwanami Shoten, p. 145.

Kazama, Takashi (2001), 'Doseiai/Iseiai, Sono Kankeisei no Saikochiku: Fuchu no Ie Saiban o Jirei ni', in Keio Gijuku Daigaku Keizai Gakubu (eds), *Kazoku e no Manazashi*, Tokyo: Kobundo, p. 123.

Kelemen, R. Daniel and Eric C. Sibbitt (2002), 'The Americanization of Japanese law'. *University of Pennsylvania Journal of International Economic Law*, **23**, 269.

Kitada, Akihiro (2001), 'Seiji to/no Tetsugaku, Soshite Seigi', in Yasuo Baba (ed.), *Han-Riron no Actuality*, Kyoto: Nakanishiya Shuppan, p. 39.

Kitamura, Takanori (1991), 'Hoshakaigaku to Monogatari no Gainen', *Tokai Hogaku*, **7**, 71.

Kitamura, Takanori (1993), 'Monogatari Kigoron to Hoshakaigaku no Kaimen', *Tokai Hogaku*, **11**, 217.

Kohata, Fumitoku (1986), 'America ni okeru Ko no Kangoken', *Senshu Hogaku Ronshu*, **44**, 29.

Kohata, Fumitoku (1987), 'Mensetsu Koshoken no Genjo to Kadai (1)', *Senshu Hogaku Ronshu*, **46**, 67.

Koizumi, Yoshiyuki (1994), 'Community no Kaishaku to Sono Kenpokaishakuronjo no Gani', *Hogaku*, **58** (2/3/5), 249/528/930.

Kunifu, Tsuyoshi (1971), 'Mensetsu Koshoken no Seigen to Kenpo 13 Jo', in Jun Nakagawa (ed.), *Kazokuho Shinpanrei no Kenkyu*, Tokyo: Nihon Hyoronsha, p. 144.

Kurihara, Akira (1996), 'Sabetsu no Shakai Riron no tame-ni', in Akira Kurihara (ed.), *Sabetsu no Shakai Riron 1*, Tokyo: Kobundo, p. 11.

Kyogoku, Junichi (1983), *Nihon no Seiji*, Tokyo: Tokyo Daigaku Shuppankai.

Laclau, Ernesto and Chantal Mouffe (2000), *Post Marx-shugi to Seiji: Kongenteki Minshushugi no tame-ni*, Tokyo: Omura Shoten.

Liberal Democratic Party (LDP) Legal System Investigatory Council (1997), *Shiho Seido Kaikaku no Kihonteki na Hoshin*, Tokyo: LDP Legal System Investigatory Council.

Lewinski, Michael (1984), 'Visitation Beyond the Traditional Limitations', *Indiana Law Review*, **60**, 191.

Lieberman, Jethro Koller (1981), *The Litigious Society*, New York: Basic Books.

Litan, Robert E. and Clifford Winston (eds) (1988), *Liability: Perspectives and Policy*, Washington, DC: Brookings Institution.

Logie, James (1989), 'Affirmative Action in the Law of Tort: The Case of the Duty to Warn', *Cambridge Law Journal*, **48**, 115.

Luban, David (1986), 'The Lysistratian Prerogative: A Response to Stephen Pepper', *American Bar Foundation Research Journal*, **637**.
Luban, David (1988), *Lawyers and Justice: An Ethical Study*, Princeton, NJ: Princeton University Press.
Macaulay, Stewart (1963), 'Non-Contractual Relations in Business', *American Sociological Review*, **28**, 55.
Madoka, Yoriko (1987), 'Shinkensha ni Naranakatta Oya no Mensetsu Koshoken', *Jiyu to Seigi*, **38** (9), 12.
Maeda, Tatsuaki (1985), *Ai to Katei To: Futei Koi ni Motozuku Songai Baisho Seikyu*, Tokyo: Seibundo.
Maezawa, Chieko (1988), 'Kaji Jiken ni okeru Shinriteki Chosei', *Kasai Geppo*, **40** (1), 282.
Maruyama, Masao (1961), *Nihon no Shiso*, Tokyo: Iwanami Shinsho.
Maruyama, Eiji (1992), 'Yuketsu Kyohi', *Hogaku Kyoshitsu*, **136**, 48.
Maruyama, Shigeru (2001), 'Kazoku no Henyo to Kokka', in Keio Gijuku Daigaku Keizaigakubu (ed.), *Kazoku e no Manazashi*, Tokyo: Kobundo, p. 199.
Matsuda, Motoji (1989), 'Katari no Imi Kara Ayatsuri no Chikara e', in Shigeharu Tanabe (ed.), *Jinruigakuteki Ninshiki no Boken*, Tokyo: Dobunkan, p. 357.
Matsuda, Mari J. (1993), 'Public Response to Racist Speech: Considering the Victim's Story', in Mari Matsuda and Charles R. III Lawrence (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Boulder, CO: Westview Press, p. 17.
Matsui, Shigenori (1988), 'Privacy no Kenri ni Tsuite', *Horitsu no Hiroba*, **41** (3), 27.
Matsui, Shigenori (1991), *Shiho Shinsa to Minshushugi*, Tokyo: Yuhikaku.
Matsukura, Kosaku (1985), 'Mensetsu Kosho o Zenmenteki ni Hitei Dekiru ka', *Hanrei Taimuzu*, **551**, 277.
Matsuura, Yoshiharu (1983), 'Hoteki Suiron: Mohanrei ni Yoru Hoshiko', in Ryuichi Nagao and Nariaki Tanaka (eds), *Gendai Hotetsugaku*, Tokyo: Tokyo Daigaku Shuppankai, p. 167.
Meiners, Valerie (1986), 'The Child with Two Fathers: Updating the Wisdom of Solomon', *Louisiana Law Review*, **46**, 1211.
Menkel-Meadow, Carrie (1984), 'Toward Another View of Legal Negotiation: The Structure of Problem Solving', *University of California, Los Angeles (UCLA) Law Review*, 754.
Michelman, Frank (1986), 'The Supreme Court 1985 Term Foreword: Traces of Self-Government', *Harvard Law Review*, **100**, 4.
Michelman, Frank (1988), 'Law's Republic', *Yale Law Journal*, **97**, 1493.
Mies, Maria (Hiroko Goto trans.) (1998), 'Jiko Kettei: Utopia no Shuen?', *Gendai Shiso*, **26** (6), 141.

Milhaupt, Curtis J. (2002), 'On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions', *Law and Social Inquiry*, **27**, 425.

Minow, Martha (1986), 'Rights for the Next Generation: A Feminist Approach to Children's Rights', *Harvard Women's Law Journal*, **9**, 1.

Miyazawa, Setsuo (1996), 'Kenri: Ho Bunka Henyo no Liberal Vision to Kenri Hihanron', in Setsuo Miyazawa and Yuriko Kaminaga (eds), *Ho Shakaigaku Colloquium: Ishimura Zensuke Sensei Koki Kinen Ronbunshu*, Tokyo: Nihon Hyoronsha, p. 395.

Mizubayashi, Takeshi (1983), 'Kindaiteki Chitsujo to Kihan Ishiki', in Toru Sagara et al. (eds), *Nihon Shiso*, Tokyo: Tokyo Daigaku Shuppankai, p. 109.

Mizuno, Noriko (1981), 'Otto to Dosei shita Josei ni taishite Tsuma matawa Ko kara Isharyo Seikyu ga dekiruka (Saihan Showa 54.3.30)', *Journal of the Jurisprudence Association*, **98** (2), 291.

Mnookin, Robert (1975), 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy', *Law and Contemporary Problems*, **39**, 226.

Mochizuki, Reijiro (1990), 'Negligence no Kozo: Sairon', *Shakai Kagaku Kenkyu*, **42** (1), 1.

Morgan, Thomas and Ronald Rotunda (1984), 'Model Code of Professional Responsibility, Canon 7', in Thomas Morgan and Ronald Rotunda (eds), *1985 Selected Standards on Professional Responsibility*, New York: Foundation Press.

Morita, Osamu (1998), 'Minpoten to Kobetsu Seisaku Rippo: "Shien Sareta Jiritsu" no Gainen ni Yoru Esquisses', in Masahiko Iwamura et al. (eds), *Iwanami Koza Gendai no Ho (Vol. 4): Seisaku to Ho*, Tokyo: Iwanami Shoten, p. 111.

Moriyama, Akio (1989), *Marugari Kosoku Tatta Hitori no Hanran*, Nagoya: Fubosha.

Mouff, Chantal (1996), 'Democracy, Power and the "Political"', in Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, NJ: Princeton University Press, p. 245.

Murakami, Junichi (1983), *'Kenri no Tameno Toso' o Yomu*, Tokyo: Iwanami Shoten.

Murakami, Junichi (1985), *Doitsu Shiminhoshi*, Tokyo: Tokyo Daigaku Shuppankai.

Murayama, Masayuki and Shintaro Kato (2001), 'Japan' (paper presented at the International Symposium: The Role of the Judiciary in Changing Societies, Gakushuin University, 9–10 June 2001).

Nakagawa, Jun (1969), 'Rikongo Shinken o Okonawanai Fubo no Ippo no Mensetsu Koshoken', *Horitsu Jiho*, **41** (9), 140.

Nakamura, Satoshi (2000), 'Ishi no Handan (Sairyo) to Kanja no Jiko Ketteiken ni Tsuite (Jo)', *Hanrei Taimuzu*, **1018**, 83.

Nakamura, Satoshi (2000), 'Ishi no Shindan (Sairyo) to Kanja no Jiko Ketteiken ni Tsuite (Ge)', *Hanrei Taimuzu*, 1019, 43.
Nakane, Chie (1970), *Japanese Society*, Berkeley: University of California Press.
Nakayama, Shigeki (2000), 'Taiji Wa Kenpojo no Kenri o Motsuno ka: Kankeisei o Meguru Seimei Rinri to Kenpogaku', *Ho no Riron*, **19**, 13.
Nedelsky, Jennifer (1991), 'Law, Boundaries, and the Bounded Self', in Robert Post (ed.), *Law and the Order of Culture*, Berkeley: University of California Press, p. 162.
Nelson, Robert and David Trubek (1992), 'Introduction: New Problems and Paradigms in Studies of the Legal Profession', in Robert L. Nelson, David M. Trubek and Rayman L. Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*, Ithaca, NY: Cornell University Press, p. 1.
NHK (NHK Hoso Yoron Chosajo, 1979), *Zenkoku Kenmin Ishiki Chosa*, Tokyo: Nihon Hoso Shuppan Kyokai.
NHK (Hoso Bunka Kenkyujo, 2000), *Gendai Nihonjin no Ishiki Kozo*, Tokyo: Nihon Hoso Shuppan Kyokai.
Nishizaka, Aogu (1988), 'Fuhengo Yoron no Shuen', in Yasunobu Fujiwara et al. (eds), *Habermas to Gendai*, Tokyo: Shinhyoron, p. 161.
Nishizaka, Aogu (1992), 'Ethnomethodologist wa, Doiu Wake de Kaiwa Bunseki o Okonau Yoni Natta ka', in Hiroaki Yoshii (ed.), *Ethnomethodology no Genjitsu*, Kyoto: Sekai Shisosha, p. 23.
Nitta, Hisashi (1980), 'Katei Saibansho ni okeru Counselling no Ichizuke to Koyo', *Bessatsu Hanrei Taimuzu*, **8**, 83.
Nitta, Yoshihiro (1988), 'Kaishakugaku no Ronri to Sono Tenkai', in Genshogaku/Kaishakugaku Kenkyukai (ed.), *Genshogaku to Kaishakugaku (Jo)*, Tokyo: Sekai Shoin, p. 3.
Noda, Aiko (1981), 'Rikon Genin to Kaji Jiken', Chuichi Suzuki and Akira Mikazuki (eds), *Shin – Jitsumu Minji Sosho Koza 8*, Tokyo: Nihon Hyoronsha, p. 467.
Noda, Yoshiyuki (1976), *Introduction to Japanese Law*, Tokyo: University of Tokyo Press.
Note (1980), 'Developments in the Law: The Constitution and the Family', *Harvard Law Review*, **93**, 1156.
Nottage, Luke (2006), 'Translating Tanase: Challenging Paradigms of Japanese Law and Society', Sydney Law School Research Papers, 07–17, http://ssrn.com/abstract=921932.
Nottage, Luke and Leon Wolff (2005), 'Corporate Governance and Law Reform in Japan: From the Lost Decade to the End of History?', in Rene Haak and Markus Pudelko (eds), *Japanese Management: In Search of a New Balance between Continuity and Change*, New York: Palgrave Macmillan, p. 133.

Novinson, Steven L. (1983), 'Post-Divorce Visitation: Untying the Triangular Knot', *University of Illinois Law Review*, 121.

Numabe, Aiichi (1981), 'Ko no Kango, Hikiwatashi Oyobi Mensetsu Kosho ni Kansuru Kasai no Shinpanken', Chuichi Suzuki and Akira Mikazuki (eds), *Shin Jitsumu Minjisosho Koza*, Tokyo: Nihon Hyoronsha, p. 133.

O'Connell, Jeffrey (1971), *The Injury Industry and the Remedy of no-Fault Insurance*, Urbana: University of Illinois Press.

Ochiai, Toshiro et al. (1996), 'Zadankai: Kyosei/Kyogaku wa Dokomade Susunda ka', *Kyoiku Hyoron*, **584**, 10.

Okuda, Masamichi (1974), 'Keiyakuho to Fuhokoiho no Setten', Tetsu Isomura et al. (eds), *Minpogaku no Kisoteki Kadai (Chu)*, Tokyo: Yuhikaku, p. 209.

Omura, Atsushi (2002), 'Minpo To ni okeru Seimei/Shintai', *Hoshakaigaku*, **56**, 181.

Ono, Noriaki (1994), *Genshogaku to Seiji: Nijisseiki Doitsu Seishinshi Kenkyu*, Tokyo: Kojinsha.

Onuma, Yasuaki (1998), *Jinken, Kokka, Bunmei*, Tokyo: Chikuma Shobo.

Parsons, Talcott and Edward Albert Shils (1951), *Toward a General Theory of Action*, Cambridge: Harvard University Press.

Pepper, Stephen (1986), 'The Lawyer's Amoral Ethical Role', *American Bar Foundation Research Journal*, 613.

Polkinghorne, Donald (1988), *Narrative Knowing and the Human Sciences*, Albany: State University of New York Press.

Ramseyer, J. Mark and Minoru Nakazato (1999), *Japanese Law: An Economic Approach*, London; Chicago: University of Chicago Press.

Rhode, Deborah (1981), 'Why the ABA Bothers: A Functional Perspective on Professional Codes', *Texas Law Review*, **59**, 689.

Rorty, Richard (1991), 'Inquiry as Recontextualization: An Anti-Dualist Account of Interpretation', in David R. Hiley, James Bohman and Richard Shusterman (eds), *The Interpretive Turn: Philosophy, Science, Culture*, Ithaca, NY: Cornell University Press, p. 59.

Rorty, Richard (1993), 'Human Rights, Rationality, and Sentimentality', in Stephen Shute and S.L. Hurley (eds), *On Human Rights*, New York: Basic Books, p. 111.

Rubenfeld, Jed (1989), 'The Right of Privacy', *Harvard Law Review*, **102**, 737.

Ryuzaki, Kisuke (1988), *Saiban to Giri Ninjo*, Tokyo: Chikuma Shobo.

Saito, Junichi (1997), 'Hyosho no Seij/Araware no Seiji', *Gendai Shiso*, **25** (8), p. 158.

Sakaguchi, Midori (1999), 'Shimin Kyoiku to shite no Shogai Kyoiku: Communitarialism no Torikumi', *Nihon Shogai Kyoiku Gakkai Ronshu*, **20**, 13.

Sakamoto, Masanari (1982), *Privacy no Kenri*, Tokyo: Seibundo.
Sakiyama, Kyoichi (2001), *Taiwa no Rinri: Heterotopia no Seiji ni Mukete*, Kyoto: Nakanishiya Shuppan.
Sandel, Michael J. (1982), *Liberalism and the Limits of Justice*, Cambridge; New York: Cambridge University Press.
Sandel, Michael J. (1999), *Jiyushugi to Seigi no Genkai*, Tokyo: Sanrei Shobo.
Sarat, Austin (1994), 'Speaking of Death: Narratives of Violence in Capital Trials', in Austin Sarat and Thomas R. Kearns (eds), *The Rhetoric of Law*, Michigan: Michigan University Press, p. 135.
Sasaki, Kenichi (1998), 'Okuretekita Kindai: Sakuhin/Sakusha/Dokusha', Masahiko Iwamura et al. (eds), *Iwanami Koza Gendai Shiso (Vol. 14): Jiko Ketteiken to Ho*, Tokyo: Iwanami Shoten, p. 179.
Sasaki, Yoshio (1967), *Minji Chotei no Kenkyu*, Kyoto: Horitsu Bunkasha.
Sato, Koji (1972), 'Gendai Shakai to Privacy', Yoshihiro Nitta (ed.), *Gendai Songai Baishoho Koza*, Tokyo: Nihon Hyoronsha, p. 53.
Sato, Kenichi (2001), 'Kenpo no Gensetsu Bunseki: *Bowers* v. *Hardwick* o Sozai to shite', in Takao Tanase (ed.), *Ho no Gensetsu Bunseki*, Kyoto: Minerva Shobo, p. 163.
Sato, Shigeko (1983a), 'Bekkyooya to Ko no Mensetsu Kosho ni okeru Kadai', *Case Kenkyu*, **195**, 30.
Sato, Takeo (1979), 'Shohiseikatsuyoseihin Anzenho ni Yoru Higaisha Kyusai Seido', *Jurisuto*, **691**, 84.
Sato, Takao (1983b), 'Shinken no Honshitsu (Rikongo no Kyodo Shinken)', *Hanrei Jiho*, **1078**, 13.
Sato, Toshiki (1994), 'Nihon Shakai to Sono Funso Kaiketsu System', in Takao Tanase (ed.), *Gendai no Fuhokoiho: Ho no Rinen to Seikatsu Sekai*, Tokyo: Yuhikaku, p. 71.
Scheiber, Harry (2005), 'Introduction', *Proceedings from the 2005 Sho Sato Conference in Honor of Takao Tanase*, University of California, Berkeley, www.law.berkeley.edu/centers/ilr/pub_sho_sato_2005/scheiber_introduction.pdf.
Scheppele, Kim (1989), 'Foreword: Telling Stories', *Michigan Law Review*, **87**, 2073.
Schneider, Carl E. (1998), *The Practice of Autonomy: Patients, Doctors, and Medical Decisions*, New York: Oxford University Press.
Schneyer, Ted (1984), 'Moral Philosophy's Standard Misconception of Legal Ethics', *Wisconsin Law Review*, 1529.
Schwab, Dieter (1985), 'Nishi Doitsu Rikonho no Kadai', *Jurisuto*, **836**, 98.
Sechiyama, Kaku (2001), *Owarai Gender Ron*, Tokyo: Keiso Shobo.
Sechiyama, Kaku and Yukiko Tsunoda (1998), 'Taidan: Baibaishun wa Mitomerareru ka', *Asahi Shinbun*, 4 July 1998.
Selznick, Philip (1987), 'The Idea of a Communitarian Morality', *California Law Review*, **75**, 445.

Selznick, Philip (1989), 'Dworkin's Unfinished Task', *California Law Review*, **77**, 505.

Shapiro, E. Donald and Lisa Schulz (1985–6), 'Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions', *Journal of Family Law*, **24**, 271.

Sheehan, Katherine (1986), 'Post-Divorce Child Custody and Family Relocation', *Harvard Women's Law Journal*, **9**, 135.

Shernow, Nancy (1988), 'Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modifications Proceedings', *UCLA Law Review*, **35**, 677.

Shimazu, Ichiro (1973), 'Ko no Rieki Towa Nanika: Jinshin Hogoho ni Yoru Ko no Hikiwatashi Seikyu', *Hanrei Hyoron*, 175/177.

Shimazu, Itaru (1991), 'Hirogatta Chitsujo to Dotoku', *Asia University Law Review*, **25** (2), 61.

Shklar, Judith (1966), 'In Defense of Legalism', *Journal of Legal Education*, **19**, 51.

Simon, William (1978), 'The Ideology of Advocacy: Procedural Justice and Professional Ethics', *Wisconsin Law Review*, **29**.

Stiles, Julie (1984), 'Nineteenth-Century Child Custody Reform: Maternal Authority and the Development of the Best Interest of the Child Standard', *Probate Law Journal*, **6**, 5.

Sugarman, Stephen (1985), 'Doing Away with Tort Law', *California Law Review*, **73**, 558.

Sumiya, Mikio (ed.) (2000), *A History of Japanese Trade and Industry Policy*, Oxford; New York: Oxford University Press.

Takahashi, Kazuyuki (1997), 'Pornography to Sei Shihai', Masahiko Iwamura et al. (eds), *Iwanami Koza Gendai no Ho (Vol. 11): Gender to Ho*, Tokyo: Iwanami Shoten, p. 221.

Takahashi, Yoshihito (1998), 'Kettei/Jiko/Shinpan', *Gendai Shiso*, **26** (8), 170.

Takai, Hiroyuki (1988a), 'Iryo ni okeru Jiko Ketteiken no Kenporonteki Ichikosatsu', *Hogaku Ronso*, **123** (1/4), 61/97.

Takai, Hiroyuki (1988b), 'Kankeisei Shiko no Kenriron: Josetsu', *Minshoho Zasshi*, **99** (3/4/5), 338/459/623.

Takai, Hiroyuki (1998), 'Handicap ni Yoru Sabetsu Kara no Jiyu', Masahiko Iwamura et al. (eds), *Iwanami Koza Gendai no Ho (Vol. 14): Jiko Ketteken to Ho*, Tokyo: Iwanami Shoten, p. 203.

Tama, Yasuko (2001), *Boseiai Toiu Seido: Kogoroshi to Chuzetsu no Politics*, Tokyo: Keiso Shobo.

Tamahana, Brian Z. (2001), *A General Jurisprudence of Law and Society*, Oxford; New York: Oxford University Press.

Tanaka, Minoru (1980), 'Mensetsu Koshoken', in Koji Abe (ed.), *Gendai Kazokuho Taikei*, Tokyo: Yuhikaku, p. 248.

Tanaka, Mineko (1987), 'Yoikuhi no Shiharai Yakusoku to Sono Riko Kakuho ni Tsuite', *Jiyu to Seigi*, **38** (9), 38.
Tanase, Takao (1977), 'Bengoshi no Chiiki Bunpu to Honnin Soshoritsu', *Jurisuto*, **635/636**, 80/120.
Tanase, Takao (1981), 'Bengoshi Juyo no Keisei: Jidosha Jiko Baisho o Sozai to shite', *Horitsu Jiho*, **53** (2), 23.
Tanase, Takao (1987), *Gendai Shakai to Bengoshi*, Tokyo: Nihon Hyoronsha.
Tanase, Takao (1988), *Honnin Sosho no Shinri Kozo: Shiteki Jichi no Saiban Model*, Tokyo: Kobundo.
Tanase, Takao (1990a), 'Hoka Shakai no Chotei Model', *Hogaku Ronso*, **126** (4–6), 122.
Tanase, Takao (1990b), 'Rikon Go no Mensetsu Kosho to Oya no Kenri', *Hanrei Taimuzu*, **41** (2/3), 4/4.
Tanase, Takao (1990c), 'The Management of Disputes: Automobile Accident Compensation in Japan', *Law and Society Review*, **24**, 651.
Tanase, Takao (1991), 'Junpo Seishin to Kenri Ishiki', in Tomio Kinoshita and Takao Tanase (eds), *Oyo Shinrigaku Koza 5: Ho no Kodokagaku*, Tokyo: Fukumura Shuppan, p. 130.
Tanase, Takao (1992), *Funso to Saiban no Hoshakaigaku*, Kyoto: Horitsu Bunkasha.
Tanase, Takao (1993), 'Kindai no Rinen to Yuragi: Kawashima Hoshakaigaku no Riron to Jissen', *Horitsu Jiho*, **65** (1), 26.
Tanase, Takao (1994), 'Ho no Imi Ryokai to Community', in Takao Tanase (ed.), *Gendai no Fuhokoiho: Ho no Rinen to Seikatsu Sekai*, Tokyo: Yuhikaku, p. 291.
Tanase, Takao (2001), 'The Empty Space of the Modern in Japanese Law Discourse', in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures*, Oxford: Hart.
Tanase, Takao (2002), *Kenri no Gensetsu: Kyodotai ni Ikiru Jiyu no Ho*, Tokyo: Keiso Shobo.
Tanase, Takao (2003), *Sosho Doin to Shiho Sanka: Shimin no Ho Shutaisei to Shiho no Seitosei*, Tokyo: Iwanami Shoten.
Tanase, Takao (2004), 'The Japanese Attitude toward Judicial Reform', *Kyoto Journal of Law and Politics*, **1**, 27.
Tanase, Takao (2006), 'Global Markets and the Evolution of Law in China and Japan', *Michigan Journal of International Law*, **27** (3), 873.
Tanase, Takao (2008), 'Rikon Bekkyo-go no Oyako Koryu to Ko no Saizen no Rieki' (paper presented at the Symposium on the Best Interests of the Child, Japan Federation of Bar Associations, Tokyo, Japan, 15 November 2008).
Tanikawa, Katsu and Chieko Maezawa (1986), 'Rikon no Nakano Kodomo', *Jurisuto*, **858**, 39.

Taylor, Charles (Tomohiko Tanaka, trans.) (1994), 'Atomism', *Gendai Shiso*, **22** (5), 183.
Terado, Yukiko and Takane Imura (1988), 'Saikin no Mensetsu Kosho no Jittai to Chotei Oyobi Chosakan Katsudo', *Case Kenkyu*, **218**, 152.
Teubner, Gunther (Hideki Kashizawa, trans.) (1990), 'Hoka', *Kyudai Hogaku*, **59**, 235.
Toshitani, Nobuyoshi et al. (eds) (1988), *Rikon no Hoshakaigaku*, Tokyo: Tokyo Daigaku Shuppankai.
Tribe, Laurence (1980), 'Too Much Law, Too Little Justice', *New York State Bar Journal*, **52**, 544.
Tunc, Andre (1988), 'Kashitsu Sekinin no Shorai', *Handai Hogaku*, **148**, 261.
Uchino, Masayuki (1999), 'Jinken to Shakai Joshiki no Aida: Toshin o Yonde', *Jurisuto*, **1167**, 33.
Ueki, Tomiko (1986), 'Wagakuni no Rikon no Jitsujo to Mondaiten', *Jurisuto*, **858**, 25.
Unger, Roberto Mangabeira (1975), *Knowledge and Politics*, New York: Free Press.
Uramoto, Hiroo (1982/1985/1987), 'Hatanshugi Rikonho to Haigusha Hogo no Hori', *Kumamoto Hogaku*, **32/45/51**, 71/1/1.
Visher, Emily and John Visher (1981), 'Legal Action Is No Substitute for Genuine Relationships', *Family Advocate*, **4**, 35.
von Jhering, Rudolf (1915 [1872]) (J.J. Lalor trans.), *Der Kampf ums Recht* [*The Fight for Law*], Chicago: Callaghan and Company.
Wada, Yoshitaka (1991), *Minji Funso Kosho Kateiron*, Tokyo: Shinzansha.
Wagatsuma, Sakae (1961), *Shinzokuho*, Tokyo: Yuhikaku.
Wallerstein, Judith (1989), 'Children after Divorce: Wounds That Don't Heal', *New York Times Magazine*, 19.
Wallerstein, Judith S. and Joan Berlin Kelly (1980), *Surviving the Breakup: How Children and Parents Cope with Divorce*, New York: Basic Books.
Weber, Max (Yoshio Atoji and Kanji Naito trans.) (1953), *Shakaigaku no Kiso Gainen*, Tokyo: Kadokawa Shoten.
Weber, Max (1959), *Hoshakaigaku*, Tokyo: Nihon Hyoronsha.
Weitzman, Lenore and Ruth Dixon (1979), 'Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation after Divorce', *UC Davis Law Review*, **12**, 473.
West, Robin (1993), 'Disciplines, Subjectivity and Law', in Robin West (ed.), *Narrative, Authority and Law*, Michigan: University of Michigan Press, p. 265.
West, Mark D. (2006), *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes*, London; Chicago: University of Chicago Press.
Westervelt, Saundra Davis (1999), *Shifting the Blame: How Victimization Became a Criminal Defense*, New Brunswick, N.J.: Rutgers University Press.

Williams, Patricia (1987), 'Alchemical notes: Reconstructing Idea from Deconstructed Rights', *Harvard Civil Right-Civil Liberties Law Review*, **22**, 401.

Winn, Jane K. (1994), 'Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Business in Taiwan', *Law and Society Review*, **28**, 193.

Wolff, Jonathan (1994), *Nozick: Shoyu/Seigi/Saisho Kokka*, Tokyo: Keiso Shobo.

Yamada, Takao (1987), *Shiji to Jiko Kettei*, Tokyo: Nihon Hyoronsha.

Yamamori, Ryo (2000), 'Fukushi Riron: Amartya Sen no Hitsuyo Gainen o Chushin ni', in Makoto Ariga, Yasuhiko Ito and Satoshi Matsui (eds), *Post Liberalism*, Kyoto: Nakanishiya Shuppan, p. 163.

Yasune, Junji (2000), 'Seiji Bunka to shite no Rikkenshugi', in Masako Kamiya (ed.), *Nihonkoku Kenpo o Yominaosu*, Tokyo: Nihon Keizai Shinbunsha, p. 30.

Yokota, Morihiro (2000), 'Annotations ("Kenpo Hanrei Hyakusen (2) (Dai 4 Han)")', *Bessatsu Jurisuto*, **36** (3), 246.

Yonekura, Akira (1982), *America no Kazoku*, Tokyo: Yuhikaku.

Yonekura, Akira (1987), 'Sekkyokuteki Hatanshugi de Naze Ikenai ka', *Jurisuto*, **893**, 38.

Yoshida, Kunihiko (2000), *Minpo Kaishaku to Yureugoku Shoyuron*, Tokyo: Yuhikaku.

Young, Iris Marion (1990), *Justice and the Politics of Difference*, Princeton, NJ: Princeton University Press.

Young, Michael (1984), 'Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan', *Columbia Law Review*, **84**, 923.

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