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CULTURAL ATTITUDES TOWARDS CONTRACT LAW: JAPAN AND THE UNITED STATES COMPARED

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The Japanese, as well as foreigners who do business with them, commonly have observed that Japanese agreement behavior is strikingly different from that seen in other countries and also diverges from the formal rules of contract law found in Japan's Civil Code. Professor Takeyoshi Kawashima, a leading scholar of the sociology of law, suggests several instances in which these differences are found:

(a) Despite the Civil Code recognition of informal contracts, there is a persistent attitude among Japanese that simple oral agreements concluded without formalities are not binding;

(b) The Code insists that there is either a complete contract comporting a full panoply of rights and obligations, or an unenforceable nullity, whereas in practice the Japanese recognize partial obligations that carry some, but not all, of the binding qualities of contract;

(c) The Code calls for full and detailed statements of the agreement when there is a written contract, while in practice the Japanese rely on incomplete and often cryptic memoranda memorializing the existence of a commitment but not spelling it out completely;

(d) The formal system found in the code implies that in the event of a dispute there will be an adjudication of rights and wrongs leading to the vindication of the correct position, while

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This article is one of the products of our intense discussions while we team taught a course on Japanese Society and Law at the University of California Law School from January through March 1982. We owe thanks to the students who joined our discussions in the classroom. We are also grateful to the Meiji University-UCLA joint research project that supported our efforts.

Japanese practice seems to prefer compromise and mediation resulting in the accommodation of conflicting claims;

(e) The Code tends to see each contract between two parties as a distinct and isolated transaction, while in practice the Japanese tend to behave as if each contract transaction is merely an integral segment of an ongoing relationship that has duration and significance beyond the life of any particular transaction.¹

Kawashima understands these differences between norm and behavior in cultural terms. He sees them as specific to Japan and conceives of them developmentally. He expects them to diminish over time as the process of "modernization" produces a convergence between Japanese legal consciousness and the Western values embodied in Japanese law codes.

This paper outlines our attempts to understand these aspects of Japanese behavior and the explanations Kawashima and others have provided. We have struggled together to understand these matters from the different perspectives provided by our separate national cultures and our distinct professional disciplines, in an effort to explain them to our students. As a result, this essay is in part a groping for a hypothesis and in part a working agenda for further research. Perhaps most significantly, it may provide the reader with some sense of the substantial rewards and frustrations of extended interaction between an American law professor and a Japanese psychologist-anthropologist.

We have encountered difficulties in finding reliable observational data on commercial practice in Japan, the U.S., or other Western countries. Professor Kawashima's observation on commercial practices in Japan appears to be at least a generation old. In the United States, the heuristic investigations of Professor Stewart Macaulay of the contracting practices of Wisconsin businessmen date from the 1950s.² These crucial deficiencies in the observation of commercial behavior leave us with a number of questions we are unable to answer with certainty and which inspire modesty in our factual assertions. For instance, are the reported attitudes representative of the contemporary generation of Japanese and do they represent the practices of all major sections

1. Kawashima, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, in *THE JAPANESE MIND* 262 (C. Moore ed. 1967); T. KAWASHIMA, *NIHONJIN NO HŌ ISHIKI* (The Legal Consciousness of the Japanese) (1967); Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN: AN ANNUAL* 1 [hereinafter cited as Kawashima] (1974).

2. Kawashima, *supra* note 2; Macaulay, *Non Contractual Relations in Business: A Preliminary Study*, 28 *AMER. SOC. REV.* 55 (1963) [hereinafter cited as Macaulay, *Non-Contractual Relations*]; Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 *LAW & SOCIETY REV.* 507 (1977).

of the commercial community?³ Most of the literature contrasts attitudes and practices of "the Japanese" with those of "Westerners" or "Americans." More detailed study might find that the attitudes, expectations, and practices of members of the Tokyo international trading community and those of export merchants in Los Angeles have more in common with each other than either does with the ways of doing business of a local distributor of goods in Kumagaya, Gumma Prefecture, or Sioux Falls, South Dakota. Moreover, Japan and its industrial trading partners have experienced a generation of unparalleled business activity which, it seems safe to say, has changed practices and attitudes in substantial ways.

We are forced to leave these questions for future study, but proceed on the reasonable hypothesis that the differences summarized by Kawashima, but also reported by a variety of other experienced observers, are at least generally accurate and provide an adequate basis for our discussion.

DISPARITY BETWEEN NORMS AND PRACTICES

It seems ironic to us that neither lawyers nor anthropologists are very strong on the facts of commercial contract behavior. The literature of anthropological observation is richer on the practices of so-called "simple cultures" than it is on the practices observable closer to home. Both disciplines insist that social behavior must be compared, tested and reconciled with stated legal norms. Yet lawyers have little concrete information on the extent to which the law's rules and processes actually shape the behavior they are sup-

3. In 1979 a group of Japanese scholars used a survey questionnaire to study attitudes toward various legal concepts and institutions. A little more than one thousand individuals, randomly chosen, answered the questions, among which were the three questions relating to contract. Faced with the choice between two statements, (1) "contract is important and a formal document should be prepared and exchanged," and (2) "what is important is mutual trust and not a document," a majority of the respondents (88.7%) agreed to the first statement and only 9% chose the second opinion. Of the second pair of opinions, (1) "in a contract, details should be accurately and concretely spelled out in the document," and (2) "a contract is only for the formality and can therefore be simple in content," the first opinion was favored by the majority (89.5%) and only 8.5% supported the second opinion.

Most respondents agreed with the opinion that a contract should be embodied in a document with detailed provisions concretely defined, the opinion that is in total compliance with what the Civil Code would demand. Faced with the choice between two opinions, (1) "once a contract is made, it has to be performed no matter what may happen," and (2) "when circumstances change so that a contract cannot be kept, one will ask the other party to change the contract," as many as 64.3% of the respondents agreed to the second opinion and only a third (31.6%) chose the first opinion. This probably indicates that many Japanese consider a contract as something flexible. N.B. KAIGI, *NIHONJIN NI TOTTE HŌ TOWA NANIKA* (What is Law for the Japanese?) (1979).

posed to influence.⁴ For over two centuries Anglo-American lawyers have honored, but rarely emulated, the example of Lord Mansfield, who sought guidance from the merchants of London regarding practices to help him decide problems of commercial law.⁵

In the United States and Europe there is a sizable gap between lawyers and clients; lawyers too often are seen as technicians with little experience in the commercial or professional practices of their clients. A generation of legal scholars and social scientists has done little to build on the work of Professors Macaulay in the United States and Kawashima in Japan to examine in a systematic way how businesspersons use the tools of contract law.

The existence of a disparity between norms and practices is not of itself a surprise or the diagnosis of a problem. There almost always seems to be a gap in this world between what people do and what they say they do. This is a phenomenon quite generally observable and explainable in terms of (1) deviance; i.e., it is always to be expected that some people will not obey the rules, (2) legal and social growth; i.e., there is a time gap between the law as stated in the books and the law that is being formed through experience; (3) subcultural variation; i.e., the rule-making lawyers have different values and perceptions from those of rule-applying businesspersons; (4) cultural disparity; i.e., Japanese commercial law is a European import imposed on a subsisting indigenous culture.

All of these overlapping explanations are undoubtedly part of the picture, as can be seen if we put the Japanese phenomenon aside for a moment and look at the development of Western, particularly American, commercial law. Comparable disparities between norms and practices have been observed empirically and are recorded historically.

4. Forty years have passed since Judge Jerome Frank noted "We know virtually nothing of the extent to which men do, in fact rely on past judicial utterances." *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 298 (2d Cir. 1942). Judge Frank cited in support of this observation the views of John Chipman Gray: "Practically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or engages in any other transaction, he has the vaguest possible idea of the law governing the situation, and with our complicated system of jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist." J. C. GRAY, *THE NATURE & SOURCES OF LAW* 100 (1921).

5. C.H.S. FIFOOT, *LORD MANSFIELD* 118 (1936); E. HEWARD, *LORD MANSFIELD* 104 (1979).

The history of the Anglo-American law of commercial transactions amply illustrates the gap between law and business practice. The common law, in the sense of the law applied by judges in the central royal courts of England, absorbed commercial law quite late. Although some disputes that could be described as contractual were heard centuries earlier, the royal courts became heavily concerned with these matters only as the institutions of a feudal society degenerated and the new mercantile interests of the nation became a central aspect of political and economic power.

It was only after the flowering of the special form of the writ of trespass known as *assumpsit* in the seventeenth century that there was a convenient form of action through which common law courts could adjudicate most contract disputes.⁶ Before that time, the common law largely left the development of what was then known as the law merchant to special courts of boroughs, towns, fairs, and guilds. These courts applied a jurisprudence of their own in which merchants' disputes were primarily decided by merchants, not by professional lawyers.⁷

When the common lawyers arrived in force during the eighteenth century, they developed new rules and doctrines that were imposed on the decision of commercial disputes, but which reflected the attitudes and social background of the lawyers and judges, rather than of merchants. It is in this setting that Lord Mansfield attempted, around the time of the American Revolution, to bring the merchants back into the court as advisers on business practices to the judge. But Mansfield's efforts, consistent with his other attempts to avoid the imposition of lawyers' conceptualizations on commercial realities, did not long survive his death.

In the nineteenth century commercial law firmly became lawyers' law built on logical analysis, the deduction of specific and eventually rigid rules from concepts, and the imposition of those rules on merchants' expectations. Classical nineteenth century contract law was a crystalline structure beautiful to behold. This admirable construction has formed a centerpiece of American legal education for over a century precisely because it is the quintessential example of lawyers' thinking.

The point is that the growth of this law is less a sign of the emergence of a capitalist commercial class than of the emergence and dominance of a distinct lawyer subculture with professional

6. A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACTS (1975); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW, TORT, AND CONTRACT chs. 14 & 15 (1949).

7. G. MALYNES, LEX MERCATORIA 309 (3d ed. 1686); W. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 72-78 (1904); 1 SELDEN SOCIETY, SELECTED LAWS CONCERNING THE LAW MERCHANT 1270-1638 xxii-xxiv (1908).

interests and intellectual commitments separate from those of the businesspersons to whom the lawyers sold their services.

This is not the place to describe all the crenellated towers, spacious apartments, winding corridors and dark dungeons of that crystal palace of classical contract law, except to note in passing that a number of its major features were never comfortably accepted by the business community that was subject to its doctrines and rules. More than a century of exposure to the lawyer's concept does not appear to have led businesspersons fully to accept the rules of contract formation, consideration (particularly as it applies to blanket orders and the termination of franchises), the completeness of contract terms, cancellation and modification, and excusing conditions. Businesspersons have continued to do things in their own way, although they must have recognized that if a dispute ended up in court the lawyers' rules would be applied.

Parenthetically, the Japanese experience is roughly parallel to the Anglo-American in the sense that the codes adopted during the nineteenth-century Meiji Revolution were not derived from subsisting Japanese business practice. Instead they were imposed from outside in an effort to meet the perceived demands of the new economic and political order. Japanese contract law as stated in the Civil Code is an import, borrowed from the German Code and phrased in a synthetic language that had to be invented to convey alien concepts in symbols largely incomprehensible to an ordinary literate Japanese. Introduction of the codes was not aimed primarily at the internal audience of businesspersons who would engage in these transactions, but at an external audience of foreigners who had to be persuaded that the Japanese were "civilized." The twin aims of transplanting this strange legal system to Japanese soil were to support "modernization" and the growth of commercial and industrial interests on the one hand, and to avoid the fate of extraterritoriality and dismembering colonization that befell China with the encroachments of Western imperialism. Both legal cultures therefore found themselves by the early twentieth century in a state of tension between their formal normative statements of contract law and the practices of their business communities. Moderation and resolution of this tension has been a major task for both systems.

A continuing desire to apply business common sense and practice rather than legal rules has been one strong motivation for the growing popularity of commercial arbitration in the past two generations. Similar sentiments have left their mark in the United States on the Uniform Commercial Code, which was drafted about a generation ago and is now the statutory repository of commercial law in virtually every American state. The new Code elevates the importance of course of dealings, trade usage and

commercial practice. It broadens the definition of contract to include the entire range of tacit understandings that grow out of the relations and dealings of the parties. (UCC § 1-201(11)) It softens the impact of lawyers' rules by granting primary legal force in most situations to businesspersons' agreements to ignore those rules. (UCC § 1-102) It reasserts the importance of commercial usage, course of dealing, and standards of good faith and fair dealings as supplements to the specific lawyer-drafted conditions of contracts. (UCC §§ 1-203, 1-205) It restates many of the rules of classical contract law in ways substantially more tolerant of business practice, including those dealing with open price terms (UCC § 2-305), crossed orders (UCC § 2-207), and other incomplete contracts (UCC §§ 2-204, 2-308, 2-309, 2-310, 2-311), the statute of frauds (§ 2-201), parol evidence rule (UCC § 2-202), modifications (UCC § 2-209), repudiations (UCC §§ 2-610, 2-611), and excuse because of supervening events (UCC § 2-615). Despite these reforms, however, the gap between lawyers' perspectives and businesspersons' perceptions of commercial transactions undoubtedly persists; the narrowing of the gap has come more from greater legal appreciation of commercial realities than from commercial acceptance of lawyers' rules.

An empirical research result supports this suggestion of continuing tension between contract law norms and contract business practice. Professor Macaulay studied a large manufacturer of packaging materials in Milwaukee, Wisconsin, during the 1950s by auditing its records to determine how often it had failed to agree on terms and conditions with its customers or had failed during sales transactions to create legally binding contracts.

In 1953, seventy-five percent of the orders received during the five day period studied were accepted without completing a binding contract. In similar periods studied during the following three years, the figures were 69.4%, 71.5%, and 59.5% respectively. This practice was more or less commonly observable in the majority of the large companies in the city. Businessmen often preferred to rely on "a man's word" in a brief letter, a handshake, or "common sense honesty and decency," even when the transaction involved exposure to serious risks. The lawyers interviewed for the study thought that businessmen often entered contracts with only a minimal degree of advance planning. They desired to keep the deal simple and avoid red tape even where large amounts of money and significant risks were involved. Disputes frequently were settled without reference to the contract, or to potential or actual legal sanctions. The parties were hesitant to speak of legal rights or to threaten to sue in the course of negotiations. Businessmen were quoted as saying, "You don't read legalistic contract clauses at each other if you ever want to do business again," "One does not

run to lawyers if he wants to stay in business because one must behave decently," "You can settle any dispute if you keep the lawyers and accountants out of it."⁸

In many Japanese contracts there are clauses such as, "if in the future a dispute arises between the parties with regard to the rights and duties provided in this contract, the parties will confer in good faith," (*sei-i o motte kyōgi suru*), or in a similar situation, ". . . will settle the dispute harmoniously by consultation" (*kyōgi ni yori enman ni kaiketsu suru*). These "confer-in-good-faith" and "harmonious-settlement" clauses reveal the basic nature of the Japanese contract. Kawashima's interpretation of the meaning of such clauses is accurate. He says, "in Japanese contract the parties not only do not stipulate in a detailed manner the rights and duties under the contract, but also think that even the rights and duties provided for in the written agreement are tentative rather than definite. Accordingly, when a dispute arises, they think it desirable at that time to fix such rights and duties by means of *ad hoc* consultation. Therefore, even something such as the due date of a debt is not thought of as something strictly defined but as fixed "give or take a few days." The creditor who demands payment of the penalty for delay when payment is only a day or two overdue is thought of as a shylock or an inflexible person. Therefore, it is possible to state that a confer-in-good-faith clause, even if it is not written in a contract document, is, so to speak, tacitly implied in all contracts."⁹

A typical Japanese response to the description of the Officers' and Directors' Errors and Omissions Liability Insurance in the U.S. is the comment, "I could not possibly place myself in the position of a newly employed executive who discusses with the representatives of his new company and of an insurance company as well as with a lawyer the content of the insurance policy that is to protect the company financially in case he is to defalcate with the company's money, or the company is held liable for some damages caused by his fault. How could I feel loyal to the company that needs to protect itself by an insurance from the misdeeds I will never commit? Why couldn't the company *trust* me?" Many Japanese consider liability insurance as deriving from a basic mistrust of humanity (*ningen fushin*).¹⁰

8. Macaulay, *Non-Contractual Relations*, *supra* note 3.

9. T. KAWASHIMA, *NIHONJIN NO HŌ ISHIKI* (The Legal Consciousness of the Japanese) (1967); Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN: AN ANNUAL* 1 (1974).

10. K. HISAEDA, *KEIYAKU NO SHAKAI, MOKUYAKU NO SHAKAI* (Society of Contract and Society of Implicit Promise) (1976) [hereinafter cited as K. HISAEDA].

HEALTH, ILLNESS, GOOD FAITH AND CONTRACT

Anglo-American commercial law is primarily the result of common law judicial rulings, not statutory code analysis. These rules arose through a lawyer-dominated process of case decision in relationships that had gone wrong and therefore demanded court intervention. They are not modeled on how things are supposed to work among cooperative businesspersons with healthy ongoing relationships. They emphasize the competitive and antagonistic dimensions of such reality rather than the cooperative and supportive aspects. Looked at the way described above, commercial law can be seen as a kind of medicine for pathological situations, for failed agreements, in which smooth commercial relations have broken down and cooperative transactions have turned sour and ended in conflict. The rules that have emerged over the last century and a half are framed from the perspective of the "doctor" called in to minister to the sick transaction and to resolve the dispute.

Returning to the Japanese situation, it should be clear by now that the so-called traditional Japanese attitude toward contract is not essentially different from that prevalent among American businesspersons. The difference is that in the West contract is used to define rights and duties of the parties by detailed provisions when good-will and trust between the parties have broken down, while the Japanese tend to insist upon the continuing effectiveness of good-will and trust in every situation.

To repeat the medical metaphor, Westerners use contract as a medical device to save a sick relationship in case a relationship loses its original healthy trust, while Japanese social norms demand that the relationship always be healthy. People are forced to behave as if their relationship were continuously healthy even when the bond based upon mutual trust has been damaged. It is as though people are afraid of taking medicine lest they should become really ill because taking a medicine is admitting that one is actually sick.¹¹ While in the American mind the function of contract is to anticipate possible future strife and trouble as well as to pre-define disputes and enunciate rights, contract in the Japanese mind is a symbolic expression or reflection of mutual trust that is expected to work favorably for both parties in case of future trouble and never to break down.

Our hypothesis is that Japanese and American perceptions of

11. An assumption about reality becomes an illusion when it drastically diverges from the reality and yet is accepted by an individual in order to deny the reality. Needless to say, a norm is not necessarily an illusion but an assumption about how reality should be. It becomes an illusion when it is adhered to in spite of the fact that the reality is not what is expected to be.

contract relationships are distinguished by an assumption of healthy trust on the part of the Japanese and a fear of pathology on the part of Americans. To make this hypothesis more convincing let us now discuss three major aspects of Japanese interpersonal relations in general—*tatemae* and *honne*, in-group versus outsider, and the norm of harmony (*wa*).

Stated reasons versus felt reasons for interpersonal behavior—simultaneous conformance to group and personal needs. Two concepts are used by Japanese to describe the tensions between a person's stated reasons or opinion (*tatemae*) and his real intention or motive or feeling (*honne*). These terms describe two sides of a single reality; just as there can be no *omote* (front) without a *ura* (back), there can be no *tatemae* or public character to behavior without its distinct but linked *honne* or private connotation.¹² *Tatemae* is that which one can show or tell others, while *honne* is that which one should not or had better not show or tell others. *Tatemae* is adopted, accepted, stated or asserted as the means of continuing one's social life smoothly, while *honne* is that which one experiences in one's efforts to continue smooth social relationships, and is admitted to one's awareness. At the conversational level, *tatemae* may be an indirection in discourse, while *honne* is a true message underneath. In American society, one may answer one's mother's request to drop by on the next Sunday, "Yes, mother, I'd love to come" which is *tatemae*, while one's *honne* may very well be a feeling of reluctance. Japanese frequently use a greater variety of indirections in discourse or polite evasiveness than one may encounter among Americans. Yet, *tatemae* is more than conversational indirection or evasiveness. It can be the expression of one's commitment or compliance to the demands of social norms, while *honne* may be the expression of one's sense of frustration, unwillingness, or feeling that the demands of the norms are unreasonable or impractical.

Traditional Japanese social norms emphasize harmonious interpersonal relations and group solidarity. Self-assertion independent of the group is strongly discouraged and the individual often finds that he must sacrifice personal needs and emotions to avoid confrontation with the group. The harmonious relationship among people (*wa*), as we discuss later, is usually given a top priority and everything else must be subordinated to actualize this value. When they comply with group demands, people may feel unbearably frustrated, or become aware that they are unfairly or

12. Doi, *Omote and Ura—Concepts Derived from the Japanese 2-Fold Structure of Consciousness*, 157 J. NERVOUS & MENTAL DISEASE 258 (1973); T. Doi, *Amae Zakko* (Miscellaneous Articles on Dependence) 68-70, 98-99 (1975).

unreasonably treated. The Japanese accept such feelings as the natural consequences of social life, although they may not openly announce them. They admit that there is a normative way of doing certain things and they also say they do these things in the normative way. This is the expression of *tatemae*. At the same time they know and may confide to a close friend that it is nearly impossible, highly impractical, unreasonable or unrealistic to do the things in such a way. This admission of impossibility or impracticality is *honne*.

It is not simply that *honne* is truth and *tatemae* is a lie; both *tatemae* and *honne* are the truth for an individual—*tatemae* is true when an individual is expressing his commitment to the norms, and *honne* is true when he is expressing (or admitting to himself) how he feels about them. Whether the things are done actually in the *tatemae* way or *honne* way depends upon the individual and circumstance.

Disparity between operating by rules (*tatemae*) and operating by *ad hoc* judgment (*honne*) may be experienced by Americans also. For example, the criminal statutes state that every person who has committed a crime shall be punished as provided in the law after guilt is proven at a trial (*tatemae*), but the great majority of criminal cases are disposed of without trial at a level of punishment substantially less than that fixed by the statutes. This occurs through application of the discretion of the police, the prosecutor and the judge, and frequently by a process known as plea bargaining (*honne*).¹³ Many Americans, however, consider such an implicit and practical system of handling the realities of the criminal courthouse as deviance from norms and judge it "bad."

One factor that makes it difficult for many Americans to understand the Japanese attitude toward *tatemae* and *honne* is the American emphasis upon internal emotional consistency. When they feel positively and negatively toward the same object, they tend to *repress* either their positive or negative feeling so as to establish internal consonance in their minds.¹⁴ Americans find it difficult to live with the cognitive dissonance of ambivalent emotions. They tend not to admit their ambivalence and to avoid it by repression. One might say that Americans become conscious of either *tatemae* or *honne* only, while Japanese tend to remain consciously ambivalent about many things, so that they remain aware of both *tatemae* and *honne* without suffering from the sense of internal inconsistency. Professor Doi, a psychoanalyst known for his analysis of dependence among Japanese, states that Japanese

13. A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINING IN THE AMERICAN COURTHOUSE* (1976).

14. L. A. FESTINGER, *THEORY OF COGNITIVE DISSONANCE* (1957).

do not seem to have a very strong urge to overcome ambivalence and to establish the integrity of personality.¹⁵ In this sense the Japanese have a greater tolerance of ambiguity and ambivalence.

This tolerance of ambivalence, which at times may become even a preference for ambiguity, is not limited to feelings and emotions but often extends to cognition as well. To reach a cognitive judgment that *x* is both *A* and not-*A* (for instance, that an oral agreement both is and is not a contract), one may need to repress or reject the possibility that *A* and not-*A* are incompatible. That *x* is both *A* and not-*A* appears to be inconsistent. However, Japanese may recognize that *x* is *A* (that an agreement is a contract), while leaving some room for the possibility that *x* is not-*A* (that the same agreement is not a contract). Especially when they express their own individual opinions or perspective on a certain issue, Japanese often make subtle, indirect, or vague statements, giving an impression that they are stating that *x* is *A* (a particular agreement is a contract) while leaving it open, if necessary, that *x* is not-*A* (the same agreement is not a contract). Such preference for ambiguity is both a device for avoiding confrontation that may be disturbing to group harmony and a means to leave room for accommodating the group's demands. Japanese often express an opinion that life is full of problems to which no clear-cut solution can be given, and of situations for which there is no logically coherent explanation.¹⁶ Tolerance for ambiguity in social relations is valued as a sign of one's maturity and character development.

Inner circle versus strangers. Japanese tend to make a sharp distinction between in-group and out-group, or between those they know very well and those they do not know at all. Within a group, maintenance of harmonious and smooth interpersonal relations, interdependence, and mutual trust is of utmost importance for Japanese. While inner harmony and solidarity characterize each social group, it follows that there will exist vague animosity, competition, suspicion, or at least indifference between groups. Generally speaking, in-group solidarity and out-group enmity are two sides of the same psychodynamic coin. Aggressive and destructive tendencies that are generated but not allowed to be expressed inside a social group are often directed outward in the form either of hatred focused upon a specific scapegoat or of a diffuse sense of suspicion or indifference toward outsiders. When aggressive self-assertion and confrontation are

15. T. DOI, *AMAE NO KŌZŌ* (The Anatomy of Dependence) 95-100 (J. Bester trans. 1973); Doi, *Omote and Ura Concepts Derived from the Japanese 2-Fold Structure of Consciousness*, 157 *J. NERVOUS & MENTAL DISEASE* 258, 259-60 (1973).

16. Y. AIDA, *NIHONJIN NO ISHIKI KŌZŌ* (The Structure of the Japanese Consciousness) 140 (1972).

avoided among the members of a social group they are deprived of opportunities to "air" their pent-up tensions. Consequently, it seems logical to assume that the stronger the emphasis upon in-group harmony and solidarity the more intense the out-group enmity can be.

Japanese like to be among *kigokoro no shireta nakama*, (those whose dispositions are well known to each other). Among the *kigokoro no shireta* friends and colleagues, Japanese can be relaxed, informal, frank and trusting. Group pressure on each individual member is expected to be very strong but many Japanese often feel that they need no extra efforts to make themselves "fit into" such a congenial group. In such a situation one feels that one is understood by others without verbally expressing and explaining oneself. Very often what is really important for an individual's sense of security and belonging is not so much the actual fact of mutual understanding as the shared assumption of mutual understanding and acceptance.

One may even venture to suggest that while many Americans tend to live with an illusion of complete self-reliance, self-sufficiency and autonomy, many Japanese tend to live with an illusion of total harmony, mutual understanding and consensus among them.¹⁷ A Japan Airlines television advertisement (in Japanese)

17. The following anecdotes illustrate the Japanese preference for doing business only with those *kigokoro no shireta* partners. A young salesman of a sporting goods store began dropping by at the Department of Physical Education at a private college in Tokyo. Once in a while, he would come to the physical education teachers common room, have a conversation with the teachers about the weather or health and leave without mentioning his sales business. About six months passed and the teachers thought the young man was a somewhat unusual, yet very pleasant person. They began ordering from his store some inexpensive commodities such as percussion caps for starting guns. When they needed something quickly, the young man would deliver it within a day, while it would have taken larger stores at least a week. The teachers continued to buy more expensive items from other larger stores but bought less expensive items, like lime, from the young salesman's store, who always delivered the merchandise promptly. The salesman and teachers became closer friends and talked with each other about more intimate matters such as their family life. He began playing chess with some teachers at lunch time. Three years later, his store was selling the department all the sporting goods it needed. Ten years later, the young salesman became independent of the store he had worked for and opened his own store. The physical education department was buying all its sporting goods from his store. When members of other departments needed commodities his store did not deal in, he would buy them elsewhere and deliver them free of charge as his "service to the customers." When a teacher bought something from his store for personal use, he would never ask for payment. The teachers had to ask him to give them bills. He would submit bills reluctantly and would tell the teachers to pay only when they had some "extra money to spend." Twenty years passed since he had first dropped by at the college. One day, he came to one of the elder teachers and said, "Mr. So-and-so, I would like to buy a house. Would you be kind enough to be a guarantor for me when I make a loan from a bank?" The teacher immediately agreed to do so.

A textile manufacturer in Niigata City on the Japan Sea Coast wanted to expand its market and deal with one of the largest wholesale dealers in Osaka. The firm sent

in Southern California encourages the viewers (supposedly Japanese businessmen and their families stationed in the U.S.) to invite their aged parents and relatives to the U.S. Then it declares, "*Kigokoro no shireta nikkōki nara anshin desu*" (you can be sure of their safe trip on *kigokoro no shireta* JAL planes) as though an intimate relationship could safeguard against highjacking or a mechanical failure!

When a single person whose *kigokoro* is not well known to others—somebody belonging to another company, a person from another village or prefecture, an alumnus of another school—enters the scene, the atmosphere of the circle somehow becomes stiffened or chilled (*za ga shirakeru*), or all present feel strained. Japanese dislike to deal with *doko no uma no hone to mo wakaranu mono* (a horse bone whose origin nobody knows), a stranger with

one of the top managers to Osaka but the president of the wholesale company would not even meet him. Undaunted, the manager began dropping by occasionally at the company's office. He would not insist upon seeing the president but would chat with the secretaries and clerks for a while and leave. He continued this for about six months and in time the president of the wholesale company became impressed with the manager's zeal and agreed to meet him. The president saw the manager several times after this but refused to have business dealings with the manufacturer. Another six months passed and finally the manager of the textile factory succeeded in selling products to the wholesale dealer. Once the business began, it continued; currently the dealer places orders by telephone and the manufacturer immediately ships the merchandise. Payment always is made on time.

A saleswoman for a life insurance company chose one block of office district in Northern Osaka as her target area. Day after day, she dropped by at every office of every company in the high-rise building in the block and chatted with office workers. As she became acquainted with office workers, she would tell them where bargain sales of food items or clothing were going on. When she found a worker's wife was making handicrafts at home she would volunteer to find customers for her products. In the course of five years, she became a close acquaintance of many workers and even arranged marriages. Now she has a large clientele within her block, has received citations for her successful sales activities from her insurance company and finally bought her own house. R. IWATA, *NIHONTEKI SENSU O KEIEI GAKU* (Management Science in Japanese Style) (1980).

The Japanese extend their preference for personal acquaintanceship to foreign business partners. According to a Japanese American lawyer familiar with many U.S.-Japan business transactions, the Japanese businessman devotes a great deal of his negotiating energies to acquainting himself with the attitudes, personalities, and thinking of the individuals representing the other party to the contemplated contract. There may even be a tendency on the part of the Japanese businessmen to try to forge a relatively durable and enduring commercial relationship with the other party, tying their companies together with informal understanding and agreements on commercial principles even when the other party is American. The result may be to form a commercial loyalty between the Japanese and American companies, so that "the parties, by virtue of their understanding of and commitment to one another, can be counted upon to work together to achieve a mutually satisfactory solution to the problems." Mori, *A Practitioner's Perspective on Negotiations and Communication with Japanese Businessmen*, in *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA* 47-51 (J. Haley ed. 1978).

no proper introduction or a reliable sponsor-guarantor who is considered less than fully human!

Those Japanese who are strongly tied to their small groups—family, neighborhood, work, or school groups—do not easily relate to strangers, nor do they find casual acquaintances emotionally rewarding. Individuals A and B, friends of many years, are walking along the street when along comes a third person C, who is an intimate acquaintance of A but who does not know B at all. When this happens in American society, one can expect A to introduce B to C. If A begins to talk with C without introducing B to C, B would feel slighted, ignored and offended. However, when these three individuals are Japanese (or Germans), it often happens that A and C begin talking while B turns around as if socially disappearing from the A-C dyad. When the conversation ends and C walks away, A turns to B and apologizes for impoliteness (“*domo shitsurei itashimashita*”) not for not having introduced B to C, but for having kept B waiting.

That a casual acquaintance means very little to many Japanese has been demonstrated by the “Asch experiment of conformity,” conducted with Japanese subjects. Two separate experiments indicated that Japanese subjects were less inclined than American subjects to go along with the false judgment of the laboratory group by giving up their own accurate judgment.¹⁸ Compared with the individualistic Americans, Japanese may show a greater degree of conformity to certain group pressures. However, the “group” cannot be just any group. It has to be the group of significant others. The results may be interpreted in the following way: American subjects demonstrated a tendency to relate themselves to a group of “strangers” in the laboratory sufficiently so that the group exerted upon them the pressure to conform, while for the Japanese subjects, people who happen to be sitting together in a psychological laboratory do not constitute a group that is significant enough to elicit conformity.

The same Japanese individuals, compliant, considerate or courteous to insiders, may act in a drastically different, i.e., negative, way toward strangers. Japanese rarely casually relate themselves to strangers. They do not like to do so, nor do they know how to do so. After an appropriate introduction by a third party or through a sustained period of acquaintance, once a Japanese feels at ease with a stranger, that person is no longer an outsider

18. Frager, *Conformity and Anti-Conformity in Japan*, 15 J. PERSONALITY & SOCIAL PSYCHOLOGY 203 (1970); S. SAKO, *DŌCHŌ KŌDŌ NO JIKKEN BUNKA SHINRI-GAKUTEKI KENKYŪ* (An Experimental, Cultural and Psychological Study of Conformity Behavior) (1975) (unpublished thesis, Dept. of Human Science, University of Osaka).

but becomes more or less a member of the inner circle where the norms of harmony, interdependence, and mutual trust dictate.¹⁹ Before dealing with somebody, the Japanese want to become well acquainted with that person so that he or she becomes a *kigokoro no shireta* insider with whom the relationship of unconditional trust is, at least in principle, possible. Such an emphasis on building a business relation upon personal acquaintance may at times override the competitive market motivations based upon price and other terms of trade.²⁰

In a relation-based economy, stability of relations, long-term associations, and personal contact are priority values, while in a competitive market economy, stability of relationships must give way to allow for potential shifts in suppliers, customers, and employees to take advantage of changes in competitive conditions.

Wa or Group Harmony. The Japanese are known among Westerners as "group oriented". However, the nature of their group orientation is not always accurately understood. Western social sciences have long looked at the individual and society as two distinct, if not opposing, factors. In order to maintain one's individual identity, highly valued by Western individualism, one must become independent of one's group and assert oneself, if necessary, in defiance of or in rebellion against society. If society becomes oppressive, one must fight for one's freedom, independence and autonomy. In the Western view of group and individual, when priority is given to a group over and above the interest of the individual, the individual is seen as subdued, oppressed, or buried without autonomy. In such a situation, the group may be described as totalitarian. Under normal circumstances, when an individual participates in a group, he does so of his own accord,

19. In Japan many gasoline stations give a discount to customers with a charge account but they do not do so to those customers who pay in cash. The reason behind it is that the credit customers are long-time patrons who deserve special service while those who pay in cash are "chance comers." The practice is the opposite in the United States, where cash customers are given a discount over those who buy on credit.

20. A Japanese individual may feel somewhat unsure of the future of his business transaction with another person and wish to exchange a contract document but will refrain from insisting upon such an exchange, lest his insistence should be interpreted as an expression of lack of trust in the other party. He is likely to be afraid of inviting the criticism, "Why can't you trust my good will? If you do not trust me completely, why do you want to deal with me anyway?" thus the traditional norm of everlasting trust may override the practical necessity of a documented contract. Conversely, however, in many instances the Japanese appear to comply with the transnational norms of commercialism and to accept the need for contract. They exchange contracting documents, with detailed provisions spelled out, but they do so as *tatemae*, and in actuality they continue their business transactions without paying much attention to the document. Orders may be placed orally and should disputes occur they are settled through an *ad hoc* consultation. K. HISAEDA, *supra* note 11.

on a contractual basis, and always retains his ultimate right to withdraw from and become independent of the group. Seen through dualistic Western eyes, Japanese society looks very stifling. In the American mind, a group-oriented individual who gives priority to his group over himself may look like an automaton with no self-identity.

For the Japanese, however, society in essence is not basically opposed to individuals. In contrast to the Western view, an individual is not seen as totally separate and distinct from the group. It is not that an individual, as an entirely distinct entity, asserts himself or herself against, or voluntarily participates in, the group. An individual is, from the beginning, conceived of as a member of the group. In the Japanese conception of individual and group, no group can exist without its individual members and no individual can exist without being a member of his group. Group and individual are conceived of as harmonious with rather than in opposition to each other. What the members of the group share is not limited to work and support; they share goals, so that the goals of the group become those of its members.

Japanese group orientation is based upon the notion that the members of a group cooperate with one another in their collective efforts to define ends, and by so doing each member simultaneously satisfies his individual needs and secures his individual welfare.²¹ Such a notion may be called "corporatism."²² According to this Japanese concept of corporatism, an individual maintains his autonomy through his group efforts. In contrast to the sense of autonomy found in Western individualism, the autonomy of the Japanese may be termed "joint autonomy."²³

Roughly speaking, Western individualism emphasizes: (1) the establishment of individual ego-identity, its assertion and respect; (2) self-reliance, self-help and self-sufficiency; and (3) a tendency to view interpersonal relations basically as the means for individual, not joint gain.

In contrast with Western individualism, Japanese corporatism emphasizes: (1) interdependence, the notion that social life is based upon mutual help and interdependence among the people; (2) mutual trust, the expectation and conviction that one's trust in others is reciprocated; and (3) a tendency to view interpersonal relationships as an end itself or valuable in its own right, deserv-

21. E. HAMAGUCHI, *GAISETSU: NIHONJIN NI TOTTE NO SHŪDAN SHŪGI* (General Discussion on the Group Orientation of the Japanese) 5-21 (1980).

22. R. P. Dore, *BRITISH FACTORY, JAPANESE FACTORY* (1973).

23. E. HAMAGUCHI, *NIHONJIN NO RENTAITEKI JIRITSUSEI: KANJIN SHUGI TO KOJIN SHUGI* (Joint Autonomy of the Japanese: Corporatism vs. Individualism) 127-140 (1980).

ing of people's efforts to maintain it.²⁴

For the self-concept of a Japanese individual, his or her position in the network of social relations—kinship, marital, age and occupational roles—is much more important than it is for American self-identity. When asked about his occupation an American will mention what he is (an engineer, a sociologist, a secretary), while a Japanese will mention who he works for (“I work for SONY,” “I teach at UCLA”).²⁵ Group membership gives the Japanese individual a sense of self-identity and security. It is within this all-important group that the norms demand harmony among the members. Everybody must act according to the conviction that people can trust each other completely. No honest and sincere act may be left unreciprocated, at least as *tatema*, although this is not realistically possible.

Even in individualistic Western society, trust among people is seen as the healthy state of interpersonal relationship. It should not be difficult, therefore, to appreciate the importance of trust in group oriented Japanese society.

Within a group the recognition of *wa* (group harmony) serves as a limit on the power of any member of the group to act in ways contradictory to the interests of others. A group that recognizes the value of *wa* is led to a system of mutual dependence and decision making by consensus. Power exists and colors relations in Japanese society, but it is moderated by the powerful person's recognition that he must maintain positive relations with those who are weaker.

ILLUSIONS OF AUTONOMY AND HARMONY

Earlier in this essay we suggested that reliance on legal processes in the West often is a therapeutic response to the breakdown of social harmony. In the Western experience, the forces of law are mobilized in response to the breakdown of trust and relation, and are looked to as a corrective of this disharmony. The law claims to protect the weak by asserting the overriding legitimacy of legal rights against the imposition of power. This claim rests conceptually on the autonomy and importance of the individual. It is because each individual is important that the weak have legitimate claims on the powerful. It is because each individual is autonomous and can bind himself or herself by choice and will that promises have moral authority. In this framework, it is not only equals who can bind one another by their promises; the promise of the strong to the weak becomes the basis for claims by

24. Hsu, *Rugged Individualism Reconsidered*, 9 THE COLORADO QUARTERLY 143 (1960).

25. C. NAKANE, *JAPANESE SOCIETY* (1970).

the less powerful to limit the actions of the more powerful. Through the binding force of promises the ordinary person gains claim to control over those forces in life that are outside ordinary human influence.

To take a rather extreme example from the Hebrew tradition, God and humans are both bound by covenants. People gain claims against the Almighty because God too is bound by law by His promises. Similarly, in English constitutional history the King is understood to be under "God and the Law," and his power is limited in part because he promised in his coronation oath to obey the law.²⁶ This way of thinking about power, promises and the law had a profoundly revolutionary impact on how the Judaic and later the Christian traditions came to see individuals.

From the time of the Psalmist on, the whole world was understood to be filled and ordered by law. This law is immediately accessible to all and can be discerned in nature, either by studying the grand order of the stars or by looking inward to the order perceived in each human heart.²⁷ These notions do not play a

26. F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 97-102 (1908); 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 458-63 (5th ed. 1942); G. POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT* chs. III & IX (1964).

27. Psalm 19, in its first part celebrates the cosmic order; this is connected in the central section to Divine law and in the final verses to the internal human sense of moral order.

The heavens tell out the glory of God, the vault of heaven reveals his handiwork.

One day speaks to another,
night with night shares its knowledge, and this without speech or language or sound of any voice.

Their music goes out through all the earth, their words reach to the end of the world.

In them a tent is fixed for the sun, who comes out like a bridegroom from his wedding canopy, rejoicing like a strong man to run his race.

His rising is at one end of the heavens, his circuit touches their farthest ends; and nothing is hidden from his heat.

The law of the LORD is perfect and revives the soul.

The LORD's instruction never fails, and makes the simple wise.

The precepts of the LORD are right and rejoice the heart.

The commandment of the LORD shines clear and gives light to the eyes.

The fear of the LORD is pure and abides for ever.

The LORD's decrees are true and righteous every one, more to be desired than gold, pure gold in plenty, sweeter than syrup or honey from the comb.

It is these that give thy servant warning, and he who keeps them wins a great reward.

Who is aware of his unwitting sins?

Cleanse me of any secret fault.

Hold back thy servant also from sins of self-will, lest they get the better of me.

comparably important role in Oriental traditions. While some echoes and cognates can be found in notions of a universally binding order, there is no comparable idea that the weak can bind and limit the powerful. Confucian political philosophy, for example, does emphasize the importance of the virtue of the Emperor so that when an Emperor abuses his power, thus ceasing to be virtuous and benevolent, the Heaven no longer legitimates his rule. But the idea that this constraint on the Emperor gives an individual a right to demand virtuous rule from the Imperial Authority did not develop in Chinese thought. Confucian ideas adopted in Japan were modified; the notion of the Heaven became more remote and removed from human affairs and the power of the strong knew few external limits. Instead, the expressive aspects of subordinate-superordinate relations were emphasized in terms of mutual dependence of inferiors and superiors on each other, the mutual dependence, *amae*, that binds the two together.²⁸

Western insistence on the rights of the weak against the powerful is based on the illusion of individual autonomy and choice, just as the Japanese perspective is based on the *tatema* of *wa*, the illusion of harmony among disparate parts. When social harmony and mutual trust break down, Western thought is led to resolve the matter in terms of legal rights, while Japanese thought seeks to restore illusory harmony. This is one way to understand the legalization of social and political relations that marks recent periods of American life; the disorder and breakdown of cooperative social structures is seen as the occasion to assert a violation of right, a claim that individual autonomy has been breached. However effective this strategy may be as a means to end a ruptured relationship, assertion of legal rights are not likely to restore harmony to the damaged relationship.

The healthy normal state of social relationships is trust and harmony; these are accepted values of all social systems. Looked at this way, the relative infrequency with which legal rights are asserted is an indication that social coherence continues strong in Japanese society. In Japan the crime rate is the lowest among the highly industrialized nations, family life appears comparatively cohesive and stable, essentially cooperative efforts continue among the workers and management, and the national political structure remains relatively stable.

In contrast, American legalism and litigiousness may simply

Then I shall be blameless and innocent of any great transgression.
 May all that I say and think be acceptable to thee,
 O LORD, my rock and my redeemer!
 NEW ENGLISH BIBLE, translation (1974).

28. T. DOI, *AMAE NO KÖZŌ* (The Anatomy of Dependence) (J. Bester trans. 1973).

be a short-term phenomenon, reflecting the social dislocation of a rapidly changing society seeking a new stability. Again, if we have a progressive faith in the underlying health of the social body these distortions should be ameliorated in time by restoration of harmony. There is certainly a widespread recognition that American litigiousness is counter-productive, and that this litigiousness is a reflection of the special interests of the lawyer subculture as opposed to the broader interests of society and the special interests of business clients. This can be seen in increased awareness in the United States of the need to reform litigation practice as well as the Uniform Commercial Code's emphasis on relationship and willingness to let businesspersons set their own rules.

Japanese norms demand that harmony be asserted even when it is not a reality. Japanese are forced to act, even when there is a dispute, as though there is no basic problem between them. This may be *tatemae*, not *honne*, but it shows the social power to create a reality by insisting on an illusion.²⁹ The Japanese live by the illusion of harmony, while Americans live by the illusion of autonomy and self-sufficiency.

CONCLUSION

We began this essay with the observation that Japanese agreement behavior is strikingly different from that seen in other countries and that it also diverges from the formal rules of contract law found in the Japanese Civil Code. Yet we have gone on to suggest that this behavior is not very different from that found among American businesspersons. It turns out that attitudes of the Japanese toward business transactions and contract which are regarded as uniquely Japanese by Professor Kawashima are also found in American society, although the significance of that behavior may be defined differently by each culture.

Our analysis has been unashamedly speculative and value-laden, but so are the analyses of many Japanese and American legal scholars. The analysis is justified if it is accurate and useful in suggesting where scholars and lawmakers should look next. Three of our speculations may suggest useful directions for more systematic analysis. One follows from our ironic recognition that there appears to be an inevitable gap between stated norms and observable practice, between *honne* and *tatemae*, yet there are differential opportunities for choice regarding the two. That is, cultural and legal systems are not given much choice regarding the harsh realities of the world within which they must operate, but there do appear to be genuine choices of our illusions in this

29. See *supra* note 10.

world. Such choices seem to have important consequences for the society that makes them. Putting it another way, one may not get to choose one's *honne* in this world, but there are genuine choices of *tatemaie* to live by, although it is usually a culture rather than its individual members that has the greatest opportunities to choose *tatemaie*. Nevertheless, the choice of *tatemaie* influences perceptions in important ways and thereby ultimately changes the reality of the situation.

A second speculation that may deserve further analysis is that when studying legal rules and processes it is critically important to separate the interests of the social groups involved in the transaction (the businesspersons, consumers, bankers, and salespersons, for example) from the distinct and potentially antithetical interests of the members of the lawyer subculture. Modern legal thought in most societies sees law in instrumental terms as a means to effectuate sound social policies. Too often legal analysis ignores the degree to which social policy objectives have been distorted and transformed by the specific interests of the lawyer group, which may confuse its interests with those of the larger society or of its component subcultures. This confusion can be seen in legal contract behavior; it also has been observed by one of us in the operation of the criminal courts.³⁰

Finally, we have speculatively suggested that the apparent disparity between legal rules and business practice in the United States may in part be the result of the tendency to emphasize the pathological situation, the transaction gone wrong. After all, those are predominantly the situations that come to the attention of lawyers, and particularly of rule-making appellate courts. The coincidence of legal rules and business practices might be greater if both social scientists and lawyers placed greater emphasis on the empirical study of healthy relationships, where relational dealings work effectively among persons who see themselves as sharing common interests and communal membership.

30. See *supra* note 14.