

*Fairness and Corrective Justice in the
United States and Japan*

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My main purpose in this essay is to convince the reader that although the Japanese value winning, and also value excellence, they do not expect the two to be as closely connected as Americans do. Americans tend to believe that excellence and winning justify each other. For Americans, the principal reason to be excellent is that it enables one to win, and, conversely, winning is valued as evidence of excellence. Since the strength of the causal connection between excellence and winning is a function of the fairness of the competition, fairness is essential to ensuring that excellence is rewarded with winning, and that winning is evidence of excellence. Thus for Americans, unfairness undermines the pursuit of excellence and diminishes the value of winning.

In contrast, the Japanese tend to believe that both excellence and winning are their own rewards. Caring too much about winning when pursuing excellence is seen by the Japanese as detracting from the pursuit of excellence. If one wants to win, one should concentrate on that alone. The pursuit of excellence may be one way to win, but influential friends may be just as important. The Japanese do not value winning as much as Americans do because they do not regard winning as very good evidence of excellence. Thus the Japanese are generally not as outraged by the lack of connection between excellence and winning as Americans are. In other words, the Japanese are generally not as outraged by unfairness.

My argument will be that because the Japanese are not so outraged by unfairness in the limited sense that excellence and winning are not closely correlated, they are also not so concerned with corrective justice of the sort provided in the United States by the civil lawsuit in tort because the felt need

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for corrective justice is, I will argue, essentially a felt need for a certain kind of fairness in social institutions and in life. From the American point of view, personal injury caused by a stranger's misdeeds sets a person back in life through no fault of his own. Corrective justice restores that person to the place he or she had achieved. A measure of fairness is restored because that person's winning or losing is once more determined as much as possible by that person's excellence or virtues, not by factors beyond his control such as the misconduct of the defendant. The Japanese, I argue, are less concerned than Americans about this sort of unfairness and thus not so concerned that corrective justice be done. At the end of this essay I will discuss briefly the relative merits of the Japanese and American views concerning corrective justice, and the impact of those views on legal institutions in both countries.

As the reader will have realized by now, I propose to venture into the unexplored area where law, philosophy, and cultural psychology meet. It is an area made disreputable by the excesses of *nihonjinron* and the mythmaking that John Haley so acutely analyzes and rightly deplores. (Haley 1991, especially pp. 108-119 on the myth of the non-litigiousness of the Japanese.) Yet a complete description and evaluation of the similarities, differences, and relative merits of Japanese and American legal institutions must include both cultural comparisons and normative ethics.

There is a second major purpose to this essay. Much of the best work on the Japanese legal system by scholars writing in English is haunted by the question of whether cultural comparisons are a necessary or even an important part of comparative law. Resort to cultural comparisons to explain the differences in American and Japanese legal institutions has been made suspect by the problems of *nihonjinron* and the obvious success of many of the best scholars in saying true and interesting things about the Japanese legal system without much help from cultural comparisons. (See for example: Upham 1987; Ramseyer 1988; Ramseyer and Nakazato 1989; Tanase 1990). I hope to use the example of Japanese and American attitudes towards fairness to rehabilitate to some degree the practice of using generalizations about the psychology of those abstract entities, "the Japanese" and "the Americans" to explain why Japan and the United States have the legal institutions they do. Before beginning the main work of this essay—convincing the reader of the

plausibility of the suggestion that the Japanese and the Americans have different attitudes to fairness—I want to prepare the reader and protect myself with a short digression on the general limitations and possibilities of very general cultural comparisons between "the Japanese" and "the Americans."

Part I: On Making Cultural Comparisons

In order to make this discussion of method easier to follow, I will choose a simpler example than attitudes toward fairness or corrective justice. My example is: the Japanese eat octopus while the Americans eat hamburger.

As this example makes clear, one limitation on broad cultural comparisons is that they can be at best only statistically true or generally true. Thus although it is generally true that Japanese eat octopus while Americans eat hamburger, there are many Japanese who eat hamburger at the hundreds of MacDonald's hamburger stands in Japan and many Americans who eat octopus at the hundreds of Greek and Italian and Japanese restaurants in the United States.

Yet even though only statistically or generally true, such comparisons can be useful for predicting the preferences of specific individuals under conditions of uncertainty. If, for example, I am having as guests to my home a Japanese family with small children whom I do not know well, and I want to serve something that the children will like, I will do better to serve octopus rather than hamburger.

The broad cultural comparison, although only statistically true, can also be useful in understanding a foreign environment. Suppose, for example, I am walking along the waterfront in a small Japanese village by the Inland Sea. On the small fishing boats drawn up on the shore are hung hundreds of clay pots about twelve inches long and five inches in diameter strung together at even intervals on long ropes. They seem to be part of the fishing equipment, but there are no hooks in evidence and no lids to the pots. The pots seem too heavy to be buoys. Because I know that octopus is a staple of the Japanese diet, I correctly infer that the strings of pots are used to catch octopus.

When we first go to live in a foreign country, we use such statistically true

broad cultural comparisons many times a day to make inferences about what the people around us are doing, thinking, or feeling. But gradually, the usefulness of such comparisons seems to diminish. Once I know the actual preferences of the children of my Japanese friends and the details of the octopus fishery, the usefulness of the general statement that Americans eat hamburger while Japanese eat octopus is lessened. Perhaps one reason for the poor reputation of broad cultural comparisons among scholars is that more factual detail often renders them useless in the contexts where they were, at first, very useful. In so far as published scholarship should be finished work, we expect the scholar to have filled in the detail and not include the rough approximations that may have been necessary at the beginning of his inquiry. The rough and ready general comparisons that Americans or Japanese always make when first visiting the other country may be necessary for beginners, but are not interesting to those who already know more about Japan or the United States. People raised in a bicultural setting who have absorbed the detail of both cultures from childhood have almost no patience with broad cultural comparisons because they find them of so little use. Japanese or Americans venturing into the other culture for the first time as adults find broad cultural comparisons essential for initial orientation.

Perhaps my generalizations about Japanese and American attitudes concerning fairness have just this defect. But the subsequent uselessness of my generalizations should not count against their current usefulness. Do these particular generalizations in fact help orient us at our current level of ignorance? Even crude but statistically true stereotypes such as—the Japanese value politeness more than Americans—can be useful to Americans encountering Japanese for the first time. My generalizations about fairness may be seen later as crude stereotypes, but if they can help us now, that is all one can ask. Even statistically true stereotypes can, of course, be very harmful if their inherent tentativeness and replaceability with more detail is not kept in mind. But even the crudest stereotype, like the crudest map, if roughly true, can be useful for initial orientation.

A second and more important reason for the suspicion in which general cultural comparisons are held is that the properties compared are often incorrectly assumed to be causes of behavior when in fact they are usually just

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statistical summaries of what is usually the case. Returning to the octopus example, suppose we wanted to know why the Japanese eat octopus.

Some people might answer this question by saying, they eat octopus because it is a part of Japanese culture to eat octopus. The confusion is to think of culture as a fundamental motivation for human behavior. In fact the answer most likely to be true to the question—why do the Japanese eat octopus?—is, they get hungry. The actual cause of their eating octopus is likely to be hunger, a motivation for action that is the same for all human beings anywhere in the world.

It is true of course that in many particular cases, for example, the Japanese children who are eating octopus as guests in one's living room, hunger might not be the right answer. The children may in fact not be hungry at all, but may be eating the octopus in order to please the American host and hostess whom they realize have gone to special trouble to provide the octopus. The motivation for their behavior—wanting to please the host and hostess—is also a motivation for action in virtually any human society. Perhaps the children are eating octopus in order to please their parents whom they know want them to eat octopus rather than the less nutritious potato chips which are also on the table. Hunger, wanting to please the host and hostess, or wanting to please one's parents are three of the hundreds of motivations for eating octopus that we can imagine; and most of these hundreds of motivations are the same for all human beings in every society on earth. My point here is that most motivations for action, if described in suitably general terms, are not unique to a culture; the same motivations explain human behavior anywhere in the world, on both the individual and the statistical level. This is why the explanation of Professors Ramseyer and Nakazato of how the predictability of Japanese court decisions reduces the need for Japanese to go to court (Ramseyer 1988; Ramseyer and Nakazato 1989) or Professor Tanase's demonstration that the effective management of the costs and benefits of going to court can discourage resort by the Japanese to the courts (Tanase 1990) can be true without positing some peculiarly Japanese motivations for action.

We may agree that most human behavior is caused by motivations which are the same for all human beings in every human society. Nevertheless, culture does in some way seem to shape the particular forms that behavior takes, even

when it is not the major motivation for that behavior. It may be true that culture does not cause us to eat something rather than nothing, but perhaps the octopus question should be reformulated as: why do the Japanese eat octopus rather than hamburger?

At the general statistical level at which we talk about the class of all Japanese, the answer to this question is very complex and largely historical. One might begin by noting that Japan is a group of islands with a rich marine environment. Humans beings are omnivorous and will eat the most readily available non-poisonous nutritious food. They also believe that eating the most readily available nutritious food is the sensible thing to do. People living next to a rich sea will resort to fishing, and octopus abound in Japanese waters. Japan is also mountainous and, given that the Japanese used the little flat land they had for growing rice, there was very little pasturage available, so animals were not raised for meat. Buddhist religious traditions probably reinforced these tendencies not to eat meat. I do not deny that culture plays a part in shaping the forms that a human activity such as obtaining and eating food can take. What is important is that the anthropologist, historian, legal scholar or moral philosopher can assume that the Japanese have the same motivations as people anywhere, and can still explain why the Japanese eat octopus rather than hamburger without taking a point of view unique to any culture.

I intend no large philosophical point here, except perhaps that all human beings have much more in common than some cultural relativists commonly acknowledge. Physiological and environmental factors, and basic motivations, when described in reasonably abstract terms, are pretty much the same no matter which human society we are describing. There may be some kinds of behavior, dances or rituals for example, which are unintelligible from any point of view other than that of the participants, but such behavior is atypical. The question of why the Japanese eat octopus rather than hamburger can be answered without taking an internal point of view.

Part of my case for the plausibility of my assertions about the different American and Japanese attitudes toward fairness is that such differences in attitudes are, like octopus versus hamburger, not so important compared to the wide range of more basic values on which Japanese and Americans do

agree such as that winning is better than losing and that excellence is better than mediocrity. These are values held by both Japanese and Americans, and virtually all other human beings. By "more basic," I mean only that agreement on those values is necessary before we can articulate our differences with regard to fairness. Because we can agree on values such as that winning is better than losing and that excellence is better than mediocrity, and we can also agree on what constitutes winning and excellence, we can articulate our differences with the Japanese concerning fairness. That difference is only that the Japanese do not expect winning to be as closely connected with excellence as Americans do, and thus do not put as much of a premium on fairness as Americans do.

One problem with making my assertions concerning the differing attitudes to fairness plausible is that as I describe the difference, it may loom larger than it should, just as initially the octopus versus hamburger difference may loom larger than it should. In order to guard against this distorting magnification, which we might call "the octopus effect," I would like to return again to the octopus example. This account is largely autobiographical.

Imagine a provincial American confronted for the first time with someone eating octopus—tentacles, suckers and all. He is shocked, and magnifies in his own mind the importance of what he is seeing. This magnification which we have named "the octopus effect" produces "the colonial syndrome," a psychological state characterized by one or more of the following denials. First, denial that the agent eating the octopus is human. Second, a denial that the octopus is really fit for human consumption. Third, and a bit more sophisticated, a denial that the agent's desire is genuine and undistorted, that is, if the agent had been truly free to choose, what the agent would have chosen is a hamburger. The root of the colonial syndrome is that the provincial takes himself as the model of the standard human being.

Through education and experience, the provincial finally shakes off the colonial syndrome and accepts that (a) the octopus eater really is a human being (b) octopus really is food and (c) the octopus eater really likes octopus. But although the colonial syndrome is gone, the octopus effect remains; an exaggerated importance is still placed on the difference between eating octopus and eating hamburger. Having shaken off the colonial syndrome, but still

subject to the octopus effect, the formerly provincial American swings to the opposite extreme and becomes a cultural relativist, someone who denies not only that he is the standard human being but also denies that there exist any standards common to virtually all human beings. It is at this stage that the importance of culture as a motivator of behavior is likely to be exaggerated.

The cure is to shake off not only the colonial syndrome, but also the octopus effect. Once we see that octopus eating is not so different from hamburger eating, we are able to realize that more basic values such as pleasing the host and hostess or eating nutritious and easily obtainable food are the same the world over. There is a standard human being after all, but octopus or hamburger eating is not part of the standard. There are differences in what we eat, but there is also so much shared agreement world-wide on basic values that most of the cultural differences such as octopus eating versus hamburger eating can be evaluated according to values shared by all human beings. If octopus (or hamburger) were demonstrably easier to obtain or more nutritious, Japanese or Americans would have good reasons acceptable to members of the other society for the conclusion that octopus (or hamburger) was a superior food.

As we realize that we can criticize virtually all cultural differences in terms of these shared values, it becomes clear that the structure of values appealed to is pretty much the same for all cultures. Basic necessities of life such as food, water, shelter, and physical health are given priority. The prizes competed for in any society after the basic necessities have been secured are also pretty much the same. They include status, power, sensual or aesthetic pleasure, and knowledge. These four headings cover most of what human beings want, both for ourselves and those we care about, which tend to be our parents, our spouses and our children. (The numbers of spouses and children we consider normal is a cultural difference in the octopus versus hamburger class.) Because our needs for companionship and cooperation are the same the world over, the evaluation of character traits is also pretty much the same world-wide. A kind, honest, generous, warm person is recognized in virtually any human society, as is a mean, deceitful, selfish, cold person. Except in extraordinary circumstances (and the reasons why these situations are extraordinary can be given in universal terms) the kind, honest, generous, warm

person is preferred to the mean, deceitful, selfish, cold person.

As we turn to comparing Japanese and American attitudes on fairness, it is important to avoid the octopus effect. Americans tend to be especially prone to the octopus effect when it comes to moral issues. It is also important to realize that Americans and Japanese share sufficient values so that we can sensibly argue with each other concerning whose attitudes toward fairness are the most sound, and we should be able to give agreed upon historical explanations for why we have these different attitudes. My major purpose in this essay is to make plausible the suggestion that Japanese and Americans have different attitudes concerning fairness, and therefore different attitudes concerning corrective justice. Although such differences can have a major effect on social institutions such as the existence or not of an American-style system of tort law, they are in the hamburger-octopus class. Whose attitudes are best I will discuss briefly at the end of this essay as it is immediately relevant to the desirability of the American tort system.

Part II: American and Japanese Attitudes Towards Fairness

Part of the demonstration that Japanese and Americans have different attitudes has been done for me in the classic study of Japanese heroes by Ivan Morris entitled, *The Nobility of Failure: Tragic Heroes in the History of Japan* (Morris 1975). Morris tells the story of each of nine figures in the Japanese pantheon: *Yamato Takeru*, a legendary hero of the 4th century who as a fierce warrior conquered alien tribes in Kyushu and in the east of Honshu but later became a more romantic figure who died alone and isolated on the wild Plain of Nobe; *Yorozu*, a warrior for the losing Mononobe clan in the struggle in 6th-century Nara between the Mononobes and the Sogas, who killed himself rather than be captured after having killed many in battle; *Arima no Miko*, a young innocent prince of the 7th century judicially murdered by his powerful cousin to secure that cousin's claim to the throne; *Sugawara no Michizane*, the 10th-century courtier now deified as the god of poetry and scholarship who opposed the Fujiwaras and died in lonely exile in Kyushu; *Minamoto no Yoshitsune*, the hero of the 12th-century Heike War, who committed suicide rather than be taken prisoner by the forces of his brother Yoritomo, founder of

the Kamakura Bakufu; *Kusunoki Masashige*, the 14th-century samurai who killed himself after defeat in a hopeless battle which he undertook only out of loyalty to the feckless emperor, Godaigo; *Amakusa Shiro*, the martyred hero of the Christian uprising against the Tokugawas in 1638; *Oshio Heihachiro*, a former police official who in 1837 led an insurrection against the Tokugawa Bakufu in protest of famine conditions and killed himself to avoid capture as the insurrection was crushed; *Saigo Takamori*, who, after having been one of major leaders in the successful overthrow of the Tokugawa Bakufu in the Meiji Restoration in 1868, then led the unsuccessful Satsuma Rebellion in 1877 on behalf of the displaced samurai class against the government he had been instrumental in establishing. He committed suicide in 1877 during the last hopeless battle of the rebellion. Finally, Morris tells the story of *the kamikaze pilots of World War II*.

What marks each of these heroes is that not only do they fail personally, but their cause fails as well. Morris characterizes what his examples have in common as follows:

There is another type of hero in the complex Japanese tradition, a man whose career ... represents the very antithesis of an ethos of accomplishment. He is the man whose singleminded sincerity will not allow him to make the maneuvers and compromises that are so often needed for mundane success. During the early years his courage and verve may propel him rapidly upwards, but he is wedded to the losing side and will ineluctably be cast down. Flinging himself after his painful destiny, he defies the dictates of convention and common sense, until eventually he is worsted by his enemy, the "successful survivor," who by his ruthlessly realistic policies manages to impose a new, more stable order on the world. Faced with defeat, the hero will typically take his own life in order to avoid the indignity of capture, vindicate his honor, and make a final assertion of his sincerity. His death is no temporary setback which will be redeemed by his followers, but represents an irrevocable collapse of the cause he has championed: in practical terms the struggle has been useless and, in many instances, counter-productive. (Morris 1975, pp. xxi-xxii)¹

1. In discussion of this paper at a seminar at Tohoku University, a participant suggested that perhaps I was wrong to think that the examples chosen by Morris were ↗

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This last point may mark the greatest difference between American and Japanese attitudes towards heroes. Americans also have a tradition of martyrdom for a cause. Abraham Lincoln or the heroes of the Alamo come to mind. But it is important for Americans that the cause have succeeded, that the martyrs not have died in vain. If the Alamo had been the last gasp for an independent Texas, and if what is now Texas was still part of Mexico, would we still remember the Alamo? Lincoln's cause of union and anti-slavery prevailed, and both Lincoln and the heroes of Gettysburg did not "die in vain." But suppose they had. Would they still be heroes? The men killed in Vietnam really did die in vain. Americans have trouble seeing them as heroes, examples to be held up to children as exemplars, just because they and their cause were losers. For Americans, a hero is not someone whose life is wasted in a losing cause. The American hero, if his death is part of his heroism, and most American heroes live to enjoy their success, at least dies in the service of a winning cause. Why do Americans insist that their heroes be winners?

The American insistence on fairness is an insistence that excellence should prevail. American belief in the importance of fairness is part of a much larger and extraordinarily optimistic view of the universe as a place where the truth will out, and goodness will triumph. For Americans, a losing cause thus suggests that goodness and truth may not have been on your side.

On this point the Japanese take the opposite view. Winners are usually the people who stoop to calculate and do the prudent thing, which is often the nasty and treacherous thing. Thus to win implies that your motives were not pure, and your actions not spontaneous. The Japanese disregard for fairness is part of a larger and pessimistic view of the universe which sees true goodness as often fated to lose. The Japanese believe with Leo Durocher²

↘ heroes in the sense that they are exemplars of how to live. He joked that perhaps the Japanese have no heroes, but only famous historical figures whom they envy and whose ruin they enjoy. This seems implausible to me, and is perhaps an interesting form of *nihonjinron*. At Bates College in Maine in the United States, Professor Atsuko Hirai suggested that Morris' examples were "beloved" figures but not really heroes whose example is to be followed. If this is true, then the value of his examples as support for my thesis is reduced.

2. Leo Durocher was a famous baseball player and a long-time manager of the New ↗

that nice guys finish last because their niceness prevents them from doing the nasty but necessary things to win. Thus to not finish last, to in any way prevail, or have your cause prevail, suggests that you were not as nice as you seemed.

Americans may say incredulously to the Japanese, but how can you hold up losers as models to your children? Don't you want your children to succeed?. Japanese can respond, how can you hold up winners as models to your children? Don't you want your children to be good?

The Japanese may have a point. If Leo Durocher and Machiavelli³ are right that a nice guy cannot win, and an effective prince cannot be a true Christian, why do we Americans urge our children to strive to win, and to be princes. Our only escape from this dilemma is to limit artificially the ways one can win and to limit artificially the ways princes can rule. In sum, we must insure that winning be done fairly, and the exercise of political power be just. The Japanese view of things does not require them to undertake this monumental task. It may also help to explain the lack of interest the Japanese have in traditional American and European puzzles of political philosophy concerning the legitimacy of government. For the Japanese, an unfair prince is still a prince. For Americans, unfairness undermines a prince's legitimacy—undermines his right to rule.

The traditional Japanese sports of sumo and judo are everyday illustrations of the relative lack of interest in fairness among the Japanese. In sumo, there are no weight classes. Men must regularly fight opponents who are a foot taller and two hundred pounds heavier. Indeed that is part of the fascination of the sport. Through superior skill and technique, the smaller man can win. His winning is all the more exciting because it runs counter to our expectations and is achieved against significant odds. When they first encounter sumo, Americans are often surprised that there are no weight classes. Isn't that

↙ York baseball Giants before they moved to San Francisco. He was known for his competitive and aggressive spirit. A famous line attributed to him is, "Nice guys finish last."

3. Niccolo Machiavelli (1469-1527) was a Florentine statesman and a major political philosopher in the Western European tradition. His most famous book, *The Prince*, deals with the conflict between private goodness (being a good Christian) and being an effective ruler. He generally counsels rulers to be effective rather than to be good.

unfair?—they often ask. It is true, the Japanese respond, that the smaller man, even though he is as good a wrestler as the larger man, has less of a chance to win, but so what? It is more interesting to see unequals pitted against one another. Both large and small men have to develop different techniques to deal with opponents of different heights and weights. Weight classes would diminish the complexity of the sport. There must of course be enough equality to protect against injury (thus weight classes in boxing may be a necessity) and there must be enough equality so that the smaller man does not invariably lose (thus there are minimum size requirements for those entering professional sumo). An inevitable outcome would lessen the interest for both participants and spectators. But beyond these humane and prudential considerations, what does it matter that participants of equal skill have unequal chances to win? What does it matter if the conflict is unfair in this way?

Furthermore, the Japanese would argue, given the American emphasis on winning, why would Americans favor weight classes? Such division of the participants into separate classes who never compete with each other will always diminish the significance of winning for those in any but the top class. If sumo wrestlers were graded by weight, the small man would never be given the opportunity to beat the large man. When the lighter man "won" his weight class against people his own size, he would only "win" in some diminished sense. Why should the sumo authorities try to make equal what nature has made unequal, when it means ruining the quality of the sport and denying the smaller man even a slim chance of glory?. Why this quixotic striving for fairness or for an "equal opportunity" to win?

When judo became an international Olympic sport, the Japanese were forced to train in weight classes in order to compete internationally. From the point of view of many Japanese, the introduction of weight classes changed judo for the worse, especially since many of the traditional techniques in the sport are designed to allow a small man to beat a large man by using the large man's weight against him. Some of the major judo tournaments held in Japan do not make use of weight classes for just these reasons.

Japanese raise the same questions when confronted by the American phenomenon of demands for equal opportunity for women or minorities. A person's race or gender is given by nature. Prejudice and favoritism are facts

of life. Why do we Americans want to change the rules of the game of life to give everyone of equal excellence an equal chance to win. Why do Americans insist that women or minorities with skills equal to other Americans have an "equal opportunity" to win.

Japanese do understand the prudential point that all citizens must be protected from serious social and economic injury. This point by itself requires a social safety net. There must also be some opportunity for anyone to win so that everyone will play the game. This would by itself require a drastic revision of the distribution of opportunity in the United States. But these are only either prudential considerations designed to ensure that everyone is committed to the game, or in the case of protection against serious social and economic injury, the protection of rights much more fundamental than rights to be treated fairly in the narrow sense that one's chance to win is a function of one's excellence.

I think the major reason for the American insistence on an equal opportunity to win over and above what is required by prudence and more fundamental rights is that Americans see winning as worth more than just the prizes to be won. Winning is valued by Americans as a personal vindication, as an important part of our self-esteem. But should Americans care so much about winning? The American emphasis on winning makes losing much more painful. Willy Loman is an archetypal American.⁴ Perhaps he cares too much about winning and losing. If we Americans accepted the fact that life is unfair, that excellence and winning are not closely connected, and could learn to value excellence for itself rather than as a means to winning, then winning would be less of a thrill and losing would involve less pain. There are obvious problems with giving everyone an "equal opportunity" and then nothing if he fails because he does not "deserve" anything. The situation in the United States is even worse when we just *say* we give everyone an equal opportunity without really doing so, and then ignore the losers. This situation is the worst of both worlds—no equal opportunity and no sympathy for life's losers. Given the

4. Willy Loman is the name of the main character in Arthur Miller's play, *Death of a Salesman*. His anxiety about being a loser rather than a winner and his lack of emotional connection with his wife and sons makes him a vivid illustration of the consequences of placing too much importance on winning or losing.

difficulty and expense of really giving everyone an equal opportunity, it might be best to frankly acknowledge that we don't, and then help the less fortunate out of sympathy rather than apply notions of just desert.

The Japanese system of university entrance examinations provides an illustration almost as interesting as sumo. At first glance, that system, which in Japan determines a person's life prospects, seems strictly meritocratic, a striking counterexample to my claim that the Japanese do not worry much about fairness. It is true that the examinations are fair in the limited sense that there are rigorous safeguards against cheating, the grading is strictly anonymous, and the results of the examinations are the only basis on which admission to the university is offered. Deviations from these standards is considered scandalous and is widely condemned when uncovered. Yet when the process is seen up close, the poor ability of the examinations to rank-order the students accurately, the somewhat casual way the anonymous answers are graded, and the failure to use such obviously relevant considerations as high school grade point averages in the admissions procedure turns the examination process into something of a lottery. The Japanese are remarkably casual and fatalistic about who succeeds and who fails. A Japanese faculty just draws a line through the list of applicants arranged in order of their scores on the entrance examination. There is just enough of a correlation between excellence and winning to ensure everyone's participation and acceptance of the results. As a way of hierarchically arranging a population quickly, permanently, and cheaply, the Japanese university entrance examinations are a marvel of efficiency. If a society is not too worried about fairness, about a close correlation between excellence and winning, the examination system is a cheap and effective way of handing out most of society's major prizes.

Compare American university entrance procedures where individual universities routinely spend over a million dollars a year gathering and processing long application forms, interviewing prospective students, and reading personal essays, to try to ensure that the successful applicants are the best applicants. In a society such as Japan, where one's university determines one's life prospects, Americans would regard the requirement for such elaborate procedures to ensure fairness as even greater than it is in the United States. For Americans, the only possible justification for the major advantages enjoyed by

the University of Tokyo graduate is that he or she really is the best. Otherwise the system is monstrously unfair. The Japanese are more willing to accept the fact that some people are just lucky, or unlucky, and that excellence and winning are only loosely connected.

Part III: Implications For The Study of Japanese Legal Institutions

The realization that Americans and Japanese have different attitudes to fairness may help to explain three interesting features of the Japanese legal system: (1) the reluctance of the Japanese to bring civil lawsuits to settle disputes (2) the small numbers of lawyers in Japan and (3) the low level of compensation awarded for personal injury in civil suits. In the literature comparing the role of law in Japan and in the United States, one of the major issues has been the role of culture in explaining these three features. At one extreme has been those who focused on feature (1), the reluctance of the Japanese to bring suit, and have maintained that the Japanese love harmony and compromise more than Americans and are thus less litigious. (See Miyazawa 1987 for a review of this literature.) This view seems to distinguish between Americans and Japanese by saying that their motivations for action are different. We have pointed out above that under not very general descriptions, all human beings have the same motivations for action. It seems implausible that anything so fundamental as love of harmony could vary much from society to society. It is like saying that Americans are generally not as hungry or as kind as Japanese.

This implausible reliance on differences in motivation as a explanation for features of the legal system led to a reaction that cultural differences between Americans and Japanese have nothing at all to do with features (1), (2), and (3). Under this analysis, the key difference between America and Japan is feature (2), the low number of lawyers and judges in Japan. According to this second view, this number is kept artificially low by those in power in order to preserve economic and political advantages (Haley 1978). People are reluctant to sue because there are so few lawyers and judges that it is difficult to sue.

This second view is clearly an improvement over the first view and has itself

stimulated interesting responses such as a return to feature (1) as crucial, but now the reluctance to sue is not ascribed to some cultural trait such as a love of harmony, but instead the courts in Japan are seen as so predictable that it does not pay to sue (Ramseyer 1988). This third view also has the advantage of being true and not appealing to basic motivations that are supposedly unique to the Japanese.

Both the second and third views are, I am sure, an important part of the truth. There are too few lawyers in Japan because it advantages those in power in Japan; and the predictability of the courts discourages suit. Those views leave unexplained feature (3), the low level of compensation for personal injury. I would like to supplement the second and third views with an appeal to the distinct Japanese attitudes to fairness which can explain feature (3) and also provide a supplemental explanation for features (1) and (2).

I have found in conversation with them that Japanese critics of the American legal system do not regard levels of compensation as excessive if it is taken for granted that the law should award full compensation for the injury. In other words, Japanese critics agree that being paralyzed for life is worth a million dollars. What is challenged by the Japanese is the idea that the law should award full compensation for the injury—that the purpose of the law is to make the plaintiff completely whole.

It is important to note that the Japanese are just as sympathetic as the Americans. Sympathy requires that the plaintiff's injuries be cared for. What the Japanese do not understand is the American insistence that, if at all possible, the plaintiff be made whole, be restored to his pre-injury position.

An American is liable to answer that fairness requires that the plaintiff be made whole. Through no fault of his own, the plaintiff has lost all or a large part of his ability to compete in life. His subsequent failure will not be due to his lack of excellence. His injury makes it likely that his life will be diminished out of proportion to his lack of excellence. Quite apart from the defendant, the plaintiff has a claim against the universe to be made whole, although the defendant may be the most appropriate source of funds. If the defendant cannot pay, or even if there is no defendant, the claim still stands. Captain Ahab, the main character in Herman Melville's *Moby Dick*, is peculiarly American in his refusal to accept the loss of his leg as just bad luck.

Part IV: American Tort Law and Corrective Justice

In recent years, rather than treat tort law as an autonomous field of study, American legal scholars increasingly study the interrelations of tort law with other social institutions such as public and private systems of health insurance, workers' compensation insurance, public and private life and disability insurance, public welfare assistance, and governmental regulation of industry. Traditional tort law is increasingly seen as just one of the many ways American society deals with the general problem of the prevention of personal injury and the management of the costs of personal injury. An outstanding example of this tendency is the American Law Institute's massive *Reporters' Study: Enterprise Responsibility for Personal Injury* (Weiler 1991). (Harvard Law School Professor Paul Weiler was the Chief Reporter.) From this wider perspective, the tort system does not loom as large as it does when studied in isolation. Scholars can more easily imagine its total absence and therefore can more easily ask why Americans have the tort system they do, whether they should use it as much as they do, or whether they should use it at all (Sugarman 1985 and 1989).

Seeing tort law as just one of many ways of dealing with a set of large social problems also makes much more relevant to torts scholars the comparison of American responses and Japanese responses to those problems. When the problems are described in general terms, they are the same for both Japan and the United States. Japanese and Americans suffer the same sorts of physical injuries from the same sorts of manufactured products on the some sort of professional malpractice. The medical treatments and care needed are roughly the same, as are the costs. Both Japan and the United States have the same problems of preventing future injuries.

Because the problems are the same, most of the goals of the institutional systems which Japanese and the Americans use to deal with those problems are also the same. Both societies use their institutional systems to identify and deter the behavior that causes personal injury, and both societies recognize the need for mechanisms for shifting most of the cost of medical treatment and long-term care away from the individual victim.

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Even in their attempts to solve those problems, the similarities between Japanese institutional design and American institutional design are greater than the differences. Both Japan and the United States use systems of public and private insurance as the primary means of achieving the second goal of shifting out-of-pocket costs of medical treatment and care away from the individual victim. Even in the United States, less than 10% of the shifting of the costs of personal injuries away from people injured is accomplished by the tort system. Various systems of insurance do most of the work (O'Connell and Guinivan 1988).

Both Japan and the United States use government regulation and the criminal justice system to do the main work of deterrence and prevention of the behavior which causes injury.

There is however, even at this level of generality, one major difference in the way Japan and the United States deal with the problems of prevention and the shifting of the costs of personal injury. The Americans insist on retaining their tort system. Most American tort scholars agree that the two goals of prevention and loss shifting are not enough to justify the retention of the present tort system in anything like its present form. The substitution of combinations of insurance, government regulation, and the criminal law for what is presently done by the tort system towards achieving those goals would be more economical and more effective.

Defenders of the American system of tort law give other goals to justify the existence of the system they defend. The other goal most commonly given is the goal of corrective justice. This goal is described early in the American Law Institute's *Reporters' Study on Enterprise Responsibility For Personal Injury*:

The simplest and most venerable justification for tort liability is that it secures the value of *corrective justice*. In this account, a lawsuit is pictured as a contest between two individuals, a reflection of their bipolar relationship in the real world in which the defendant caused the plaintiff to suffer an injury. Assume that the defendant's actions evidenced an unreasonable preference for his own interests and insufficient regard for the risk the actions created to the plaintiff's rights. If the risk then materializes, under this theory it is only fair to require that the defendant

make the plaintiff whole for the injuries suffered, so that the defendant will shoulder the burden of the losses produced by his own misconduct.

From the corrective justice perspective, the fact that victims are provided with compensation for past losses [loss shifting] and defendants supplied with incentives for future care is a fortuitous byproduct, not the central rationale, for tort liability. The crucial defining features of this liability regime—extending compensation only to victims harmed by someone else's fault, and determining the size of the damage award by the victim's losses, not the degree of defendant culpability—are the legal implications of the community's effort to restore the pre-existing relationship between the two parties, a relationship that was unjustly disturbed by one party's misconduct and the resulting injury to the other (Weiler 1991 at 24).

I want to extract from this description the two key elements in corrective justice. They are, in order of their importance:

1. The wrongly injured plaintiff must be made whole, put back in the position he or she was in before the damage was done, thus restoring a balance between the plaintiff and the universe.
2. The defendant must not gain an advantage, especially over the plaintiff, as result of his misconduct.

Corrective justice much be distinguished from retributive justice which requires as its first priority that the wrongdoer be punished. Retributive justice also involves correcting an imbalance in which one party has done the other an injury and a balance needs to be restored between the two. But revenge or retribution, an eye for an eye, or at least a punishment that fits the crime, is not corrective justice because the first priority of corrective justice may not be realized. When retributive justice is achieved, the plaintiff may still not have been made whole.

The plaintiff—the wrongly injured party—is the focus of corrective justice. The defendant—the injurer—is the focus of retributive justice. The first priority of corrective justice is that the plaintiff be made whole, that he or she be restored to his or her situation before the loss was suffered. Ideally the restoration is made by the party causing the injury so that no other third party

is taxed with the cost of restoration, and the defendant gains no advantage from his misconduct, but the first priority of corrective justice is restoration of the plaintiff not only vis-a-vis the defendant, but vis-a-vis the entire world.⁵ If the defendant who causes an automobile accident is himself as badly injured as the plaintiff, that may satisfy our sense of retributive justice (he got what he deserved) but not our sense of corrective justice which requires that the plaintiff be made whole regardless of what happens to the defendant.

As the above quotation from Professor Weiler's American Law Institute report notes, the measure of damages is the victim's losses, not the degree of defendant's culpability. It is sufficient that the defendant have done something wrong that caused the plaintiff's loss.⁶ In the world of corrective justice, the main thing is that the plaintiff be made whole, be restored to his former place in the world.

(This description of corrective justice is neutral with respect to what constitutes misconduct. In modern tort law, concepts of negligence are often used to excuse the "non-negligent" defendant whose "reasonable" action injures the plaintiff. Some scholars such as Professor Richard Epstein argue that causing injury is itself the misconduct that demands corrective justice. (Epstein 1973 is the first in a series of articles taking this position.) Arguments for and against strict liability in tort are also arguments over what should constitute misconduct demanding corrective justice. My discussion of corrective justice is neutral with regard to these questions.)

5. The critic of the American tort system may correctly observe here that making the plaintiff whole does not require causally linking the plaintiff's injury to the defendant's misconduct (Schwartz 1979). Establishing this causal connection has traditionally been one of the major justifications for retaining the tort system. Nor does the goal of prevention of misconduct require that the misconduct be shown to be causally connected to a particular plaintiff's injury (Schroeder 1990). See Weinrib 1983 for an interesting argument that identification of who should be awarded corrective justice may require establishing a causal connection with someone's misconduct as the cause of injury.

6. One reason for the requirement that a plaintiff's injury be causally connected to a defendant's misconduct is to identify the plaintiff as someone entitled to corrective justice (Weinrib 1983). The injury by itself cannot do this unless we view anyone suffering misfortune as entitled to corrective justice. This position is implausible unless, like Captain Ahab, we treat the entire universe as a defendant.

One reason for distinguishing retributive and corrective justice so sharply is that I do not think that Americans and Japanese differ in their concern that retributive justice be done. Notions of revenge for injuries suffered and retribution on the inflictor of suffering are indigenous to both American and Japanese societies, and indeed indigenous to most human societies. In both Japan and the United States, retributive justice is handled largely by the criminal law. (Even Americans feel uncomfortable with punitive damages in tort, and ask why the money should go to the plaintiff and not to the state.)⁷

The importance of corrective justice for the comparative study of Japanese and American responses to the problem of personal injury is that I think that Americans care much more than Japanese do about achieving corrective justice, and I think that this difference has affected the way the two societies respond to the problem of personal injury, most notably in the Americans' retention of their tort system.

Part V: Implications for the American System of Tort Law

Should we Americans care about corrective justice as much as we do? John Rawls says at the beginning of his book, *A Theory of Justice*, that, "Justice is the first virtue of social institutions as truth is of thought. A theory however elegant and economical must be rejected and revised if it is untrue: likewise laws and institutions must be reformed or abolished if they are unjust." (Rawls 1971 at 3.)⁸ As a result of living in Japan for more than six years, I am less self-righteous than I was about the absolute requirement that justice be

7. See Weiler 1991 at Volume II, pp. 221-265 and the cases and articles cited therein for an account of the problems with punitive damages. For an analysis of a recent major United States Supreme Court decision in which the Justices were deciding whether or not to treat an award of punitive damages as a violation of the Due Process Clause of the 14th Amendment, see Parker 1992.

8. Rawls generates a powerful set of principles for ordering a just society out of the simple idea that it is only *fair* that those designing those principles not know what their place in society will be. Rawls' book is arguably the most important work of political philosophy written by an American in this century, not least because it may articulate many of the fundamental ethical premises of the United States Constitution. For a little more on this, see Parker 1978.

done no matter what. The Japanese value neither truth nor justice as much as Americans and yet Japan is a very humane society. An old European maxim is *fiat justitia ruat coelum*—let justice be done though the heavens fall. Perhaps as a result of living too long in Japan, it seems to me better that we first make sure that the heavens aren't falling and then work to achieve justice.

In fairness to Rawls, his two principles of justice include basic liberties and distributive justice as well as corrective justice. For Rawls, the demand for fairness in the sense of equal opportunity that seems to be at the heart of the requirement that the plaintiff be made whole can be satisfied *only* after the right of each (representative) person to the most extensive liberty compatible with a similar liberty for others has been satisfied.⁹

If our enthusiasm for corrective justice wanes, does that mean that we should follow Professor Sugarman and abandon the tort system?

I do think that defenders of the tort system need to come up with some major goals other than the prevention of injury, the shifting of the loss of injury, and corrective justice to justify the preservation of the American tort system. The tort system is clearly not the best way to achieve an economical and efficient solution to the problems of the prevention of personal injury or the shifting of losses from personal injury, nor is corrective justice an important enough goal to justify the tort system.

The best justification of the tort system may be that it is a crucial component of American democracy. A full discussion is beyond the scope of this essay,

9. The initial statement by Rawls of his two principles of justice is as follows:

First: each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (Rawls 1971 at 60).

Arguably, corrective justice is not required by either of these principles, but if it is, then part (b) of the second principle is the basis for claims of corrective justice. I do not think that the value of autonomy that underlies the first principle can be stretched to include corrective justice (although retributive justice might be required by the first principle). Social institutions for making the plaintiff whole after he suffers from the misdeeds of another person are most plausibly seen as institutions designed to provide equal opportunity to all and, if required at all by Rawls' principles, are required by the opportunity second principle.

but an illustration from Japan may serve to introduce the topic.

In a recent issue of *The Japan Times*, Elaine Kurtenback of the Associated Press writes about problems in the Japanese system of medical care including inadequately trained surgeons, overuse of antibiotics to pad medical income, and poor standards of sanitation and hygiene (Kurtenback 1993). She goes on to say that reformers among Japanese medical practitioners seek laws "that would give patients the right to get second opinions, see their medical charts, and demand clear explanations from doctors." The story closes by noting that Health and Welfare Ministry officials plan to urge hospitals to improve sanitary conditions and to reduce antibiotics use, but that the Ministry does not plan to draft laws giving patients the right to see their own records.

That would amount to meddling in the doctor-patient relationship and would encourage the kind of costly malpractice suits found in the United States, said Ichiro Okubo of the ministry's health policy division.

"I think it would be a pity to undermine relations between doctors and patients," he said. "If Japan's system became like America's, it would be terrible." (Kurtenback 1993).

Japan's legal and political system does not contain the institutions and mechanisms by which this sort of paternalism and protection of special interests can be challenged. Citizen groups in Japan have used lawsuits to attract media attention and to try to put such matters as medical malpractice on the government's agenda. (See Upham 1987 for several illustrations of this use of the judicial process. See Haley 1991 at 188 for discussion of the point that the political impact of court cases in Japan is usually more important than the actual court judgement.) Japanese courts do not have the political and social authority to actually solve such a problem by, for example, ruling that patients' records are the property of patients. Nor could a legislator independently introduce such a bill in the Diet with any hope of success without the prior approval of the Health and Welfare Ministry. Japanese citizens are essentially dependent on the benevolence and professionalism of government bureaucrats for the sort of reform for which Americans have often resorted to

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their tort system.¹⁰

The American tort system, with its unique combination of features (the jury, contingent fees, no requirement that the loser pay the winner's legal fees, and wide-open discovery), allows the poorest plaintiff with a good case to challenge the largest corporation or the government itself. Professor Weiler characterizes this feature of the tort system as "social grievance redress" and dismisses it as a justification for the tort system in two pages (Weiler 1991 at pp. 26-27). However, in the same way that the American tort system can be attacked by showing how much better the Japanese handle the problems of loss shifting of the costs of injury away from the victim without resort to a tort system, the American tort system can be defended by showing its essential role in the process by which citizens can successfully challenge authority in situations where both Japanese and Americans agree that authority should be challenged.

There is also a larger argument that can be made that the tort system is an essential part of American-style democracy. An outline is as follows. Americans are unique in the world in believing law and the courts to be their best protection against the government rather than just the tools of government. This belief is essential for the unique political authority of American courts compared to those of any other country. The belief of Americans that the law and the courts are their best protection against the government has as a necessary condition the existence of the civil jury system of which the tort system is the main component. The unique authority which the American courts enjoy is, given the diversity of the United States and its federal system, essential to the existence of American democracy. Therefore, the existence of American democracy may have as a necessary condition the existence of the tort system. Americans may be able to tinker with the tort system by, for example, using some of the mechanisms used by the Japanese for handling routine automobile cases (Tanase 1990), but Americans cannot abandon their tort system without risking American democracy. It may be hard to make, but there is the germ of an argument here.

10. Why the courts and the law itself have so little political authority in Japan is a problem beyond the scope of this essay. See Parker 1986 and especially Haley 1991 for more detail.

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